



Ludwig Boltzmann Institute  
Human Rights



**Wuppertal Institute**  
for Climate, Environment  
and Energy

# Human Rights Performance in EU Climate Policy

**The Role of European States in Climate Measures, and Access to Justice for  
Affected Populations**

**Synthesis Report**

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ClimAccount – Human Rights Accountability of the EU and Austria for Climate Policies in Third Countries  
and their possible Effects on Migration

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## Executive Summary

Measures to address climate change can result in human rights violations when the rights of affected populations are not taken into consideration. Climate change projects in so-called ‘developing’ countries are often financed and/or also implemented by industrialised countries. The research project **ClimAccount Human Rights Accountability of the EU and Austria for Climate Policies in Third Countries and their possible Effects on Migration** focused on the accountability of the EU and its Member States with regard to negative impacts of climate change measures they are involved in on human rights in third countries – especially those associated with ‘migration effects’. Based on three case studies - projects registered under the Kyoto Protocol’s Clean Development Mechanism – the human rights dimension of climate change action was discussed, areas of human rights concerns that were discernible in all three case study projects were identified, the issue of extraterritorial human rights obligations was analysed and the subject of access to justice was scrutinized. The following key insights can be summarized:

**Human rights are inadequately incorporated into the global climate change policy and legal framework which leaves project affected communities vulnerable to violations of their human rights.** The case studies indicate that there are three common areas of concern with regard to ensuring the human rights of the project affected population:

**Participation:** In all three case studies there were shortcomings with regard ensuring the adequate participation and consultation of project affected persons. Especially the inclusion of vulnerable groups such as indigenous peoples was a particular challenge.

**Migration/resettlement/relocation:** Resettlement and relocation issues are a very sensitive issue. Problematic fields in this regard are the failure of providing an accurate initial data set or census for the planning or carrying out of resettlement processes, the lack of a structured planning of compensation measures, problems concerning the selection of sites for resettlement or the absence of drawing up and agreeing on a resettlement plan.

**Due diligence:** Issues of concern relate to the problematic quality with regard to the content and the process of conducted environmental and social impact assessment as well as inadequate monitoring activities by the financing institutions.

The case studies revealed that it is crucial to ensure the participation of project affected people in all phases of the project, to carry out resettlement activities in accordance with human rights obligations and to guarantee a thorough and adequate environmental and social impact assessment that takes into account the impact of the project on the human rights of the affected communities.

The question of **holding the EU and its member states accountable for human rights violations** in this context is a **particularly challenging** one. Although the case for extraterritorial human rights obligations in this context is very hard to make, they play an important role in determining the expected conduct by states at the international level, *i.e.* in particular the obligation to refrain from conduct which impairs the enjoyment of human rights outside of their territory. With regard to **access to justice**, project affected people are very often left to **non-judicial grievance mechanisms of multi- and bilateral financing institutions**, which are important for ensuring their rights but also show some shortcomings (*e.g.* accessibility, independence).

## List of abbreviations

ACD	Alianza para la Conservacion y el Desarrollo
AENOR	Spanish Association for Standardisation and Certification
AESNP	AES Nile Power
AfDB	African Development Bank
AfDB CRMU	AfDB's Compliance Review and Mediation Unit
ANAM	Panama's Environment Authority
APRAP	Assessment of Past Resettlement Activities and Action Plan
ASEP	National Public Service Authority (Panama)
BEL	Bujagali Energy Limited
BFI	Bilateral Financial Institutions
BHP	Bujagali Hydroelectric Power Plant
CAO	Compliance Advisor Ombudsman (accountability mechanism for the World Bank Group's private sector institutions)
CABEI	Central American Bank for Economic Integration
CDM	Clean Development Mechanism
CDM EB	Clean Development Mechanism Executive Board
CEDAW	Convention on the Elimination of all Forms of Discrimination against Women (UN)
CESCR	Committee on Economic, Social and Cultural Rights
CERs	Certified Emission Reductions
CFR	Charter of Fundamental Rights of the European Union
CJEU	Court of Justice of the European Union
CM	Complaints mechanism (EIB)
CMP	Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol
CoE	Council of Europe
COP	Conference of the Parties
CRC	Convention on the Rights of the Child (UN)
CRMU	Compliance Review and Mediation Unit
CRPD	Convention on the Rights of Persons with Disabilities (UN)
DEG	Deutsche Investitions- und Entwicklungsgesellschaft GmbH
DOE	Designated Operational Entity
EBRD	European Bank for Reconstruction and Development
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EIA	Environmental Impact Assessment
EIB	European Investment Bank
EIB-CM	European Investment Bank Complaint Mechanism
EO	European Ombudsman
E(S)IA	Environmental (and Social) Impact Assessment
ESPS	EIB's Statement on Environmental and Social Principles and Standards
ETOs	Extraterritorial Human Rights Obligations
ETS	Emission Trading Systems
EU	European Union
EU ETS	European Union Emissions Trading Scheme
EU MS	Member State of the European Union
FMO	Netherlands Development Finance Company

FN	Footnote
FPIC	Free, prior and informed consent
GCHM	Grievance and Complaint Handling Mechanism (operational-level grievance mechanism in the Olkaria case study)
GENISA	Generadora del Istmo, S.A.
GHG	Greenhouse Gas
GPBHR	Guiding Principles on Business and Human Rights
HR	Human rights
HRBA	Human rights based approach
HRC	Human Rights Committee
IBRD	International Bank for Reconstruction and Development (part of World Bank group)
ICERD	International Convention on the Elimination of all Forms of Racial Discrimination (UN)
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICCPR	International Covenant on Civil and Political Rights
ICJ	International Court of Justice
ICP	Informed Consultation and Participation
IDA	International Development Agency
IFC	International Finance Corporation
IFI	International financial institution
ILC	International Law Commission
ILO	International Labour Organisation
INAC	National Institute of Culture (Panama)
IPCC	Intergovernmental Panel on Climate Change
JI	Joint Implementation
KEEP	Kenya Electricity Expansion Project
KenGen	Kenya Electricity Generating Company
KfW	Kreditanstalt für Wiederaufbau
KP	Kyoto Protocol
MA	Marrakesh Accords
MDR	Migration/Displacement/Resettlement
MIGA	Multilateral Investment Guarantee Agency
MoU	Memorandum of Understanding
MS	Member states
MRI	Mutual Reliance Initiative
n/a	Not applicable
NAPE	National Association of Professional Environmentalists
NEMA	National Environmental Management Authority
NGO	Non-Governmental Organization
OHCHR	Office of the United Nations High Commissioner for Human Rights
OP	Operational Policy
PAPs	Project Affected Persons
PDD	Project Design Document
PS	Performance Standard
RAP	Resettlement Action Plan
RAPIC	Resettlement Action Plan Implementation Committee
SEA	Social and Environmental Assessment
TFEU	Treaty on the Functioning of the European Union
UN	United Nations

UNDP	United Nations Development Programme
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNFCCC	United Nations Framework Convention on Climate Change
WB	World Bank
WB-IP	World Bank Inspection Panel
WCD	World Commission on Dams

## 1 Introduction<sup>1</sup>

The research project **ClimAccount Human Rights Accountability of the EU and Austria for Climate Policies in Third Countries and their possible Effects on Migration** started from the premise that not only climate change but also climate action can impact negatively on human rights. In 1992, the United Nations Framework Convention on Climate Change (UNFCCC) was adopted, which is the key instrument in setting up an international legal framework and paving the way for a political process to address the challenges of climate change. The objective was not only to mitigate the advancement of climate change, but also to initiate measures to adapt to a changing environment. Human rights principles were not taken into consideration in the UNFCCC and in its follow-up treaties for a long time. Only the 2015 Paris Agreement included a passage on human rights in its preamble, by calling on state parties to respect, promote and consider their obligations on human rights when taking action to address climate change.

Climate protecting activities by states, in particular mitigation and adaptation measures, can result in human rights violations where the rights of affected populations are not taken into account. While this can affect a number of different human rights (*e.g.* right to food, right to health, etc.), the emphasis of this report is laid on human rights associated with ‘migration effects’. ‘Migration effects’ *inter alia* comprise **preventive relocation** (government-planned movement of settlements from high risk zone to safer zones; either temporary or permanent, either voluntary or forced), **development-based evictions and resettlement** (involuntary resettlement of persons and communities by large-scale infrastructure and other projects); and **forced displacement** (forced development-based eviction without designation of a new settlement). As a consequence to climate change policies, the category can also be termed ‘**climate-policy induced migration**’.

Based on the principle of ‘common but differentiated responsibilities and respective capabilities’, which was introduced by the UNFCCC, the issue of financing climate change projects in so-called ‘developing’ countries became a key component of the climate regime. As a consequence, adaptation and mitigation actions in developing countries are often financed by industrialized countries and, in addition, sometimes also implemented by actors from these countries. The project, thus, **focuses on the issue of human rights accountability of the EU and its member states**<sup>2</sup> **climate policies in third countries**. On the basis of three case studies, the project analysed the international dimension of adverse human rights impacts, with an emphasis on ‘migration effects’, and the involvement of European actors (institutions and corporations) in the implementation of climate measures. The case studies chosen – the Bujagali Hydroelectric Power Plant in Uganda, the Barro Blanco Hydropower Plant in Panama and the Olkaria IV Geothermal Project in

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<sup>1</sup> The project ‘ClimAccount - Human Rights Accountability of the EU and Austria for Climate Policies in Third Countries and Their Possible Effects on Migration’ was conducted under the lead of the Ludwig Boltzmann Institute of Human Rights, located in Vienna, Austria, between March 2014 and June 2016. The study was carried out in cooperation with Bielefeld University and the Wuppertal Institute for Climate, Environment and Energy, both located in Germany. It was funded by the Austrian Climate and Energy Fund, ACRP 6th Call.

<sup>2</sup> Research showed that Austria is only ‘indirectly’ involved in these measures, first and foremost by its membership in the EU but also by providing funds to other development banks, such as the Central American Bank for Economic Integration. Thus, the research focus was laid on the EU as well as its member states in general.

Kenya – are registered under the Clean Development Mechanism, a carbon-trading system defined by the Kyoto Protocol.

The present report summarizes the most important findings of ClimAccount, starting with a short **description of the projects selected for the case studies** (Chapter 2). Chapter 3 discusses the issue of **human rights in the context of climate policies** with the example of the **Clean Development Mechanism** (CDM). It, firstly, introduces the UNFCCC and the Kyoto Protocol and – as all three case study projects are CDM projects – elaborates on the CDM decision-making institutions, procedures and standards. In doing so, it argues how the CDM institutional set-up and mandate have so far been inadequately designed to accommodate the human rights implications of a project. In designing a new market-based mechanism, as foreseen in the 2015 Paris Agreement, a number of changes to the current system should therefore be taken into consideration.

Chapter 4 on Human Rights Violations/Threats to Human Rights presents the most important areas of concern with regard to human rights implications in the context of the implementation of the three CDM projects analysed in the course of the case studies. The first problematic area concerns the issue of **participation** and refers to the failure of the project operator, governmental authorities and international partners to obtain the consent of the affected communities or ensure their adequate participation/consultation in the course of the project's approval. The second field of concern comprises the issues of **migration, displacement and resettlement**. The section analyses whether or to which extent resettlement, relocation or impending displacement have been carried out in compliance with human rights obligations. The issue of **due diligence** is identified as a third area of concern which relates to the extent to which the involved parties have complied with their due diligence obligations to prevent or minimize potential damage/harm from occurring. The chapter discusses each of these areas in detail by specifying the institutional standards of the involved European actors and by scrutinizing the identified challenges to the full enjoyment of human rights on a case-by-case basis.

Chapter 5 advances to the primary focus of the project, the questions of accountability and responsibility for negative human rights outcomes of climate action projects. The first part of the chapter is dedicated to elaborating on potential **extraterritorial human rights obligations** (ETOs) in the context of climate measures and the second part examines the question of **access to justice** for project affected persons (PAPs). The involvement of European actors in climate projects implemented in development countries raises the question of the accountability of these actors in case human rights infringements are reported. The chapter therefore discusses to what extent European states which have financed climate protecting measures in third states can be held accountable for human rights violations in third states under international human rights law. The section concludes that although European actors have a political responsibility to ensure that their conduct is in compliance with the human rights of persons affected by the projects they are involved in, the determination of justiciable rights which can be claimed in a judicial forum is hard to make. However, access to justice constitutes a fundamental dimension in ensuring the human rights of PAPs, and, as will be discussed in the second part of this chapter, was particularly challenging for the persons being affected by the projects analysed in the case studies. The second part of the chapter starts with offering definitions of access to justice and continues with presenting accountability mechanism against states, against international financial institutions as well as operational

level grievance mechanisms. A focus is laid on the two-tier accountability system of the EIB. In addition, strengths and weaknesses of grievance mechanisms of IFIs are analysed, in particular with regard to the accountability system of the EIB, by referring also to the results of the case studies.

In a final chapter, the report will present the most important conclusions.

## 2 Presentation of Case Studies

The global climate change regime provides for a broad range of different action and measures. The literature review carried out at the beginning of the research project singled out two fields where European actors are extensively involved: the regulation of carbon markets and the financing of climate projects. These two dimensions are significant factors in the three projects which were chosen for in-depth case studies: the Barro Blanco Hydropower Plant in Panama, the Bujagali Hydropower Plant in Uganda and the Olkaria IV Geothermal Project in Kenya. A further criterion for the selection of these case studies was alleged human rights infringements in the context of relocation, resettlement or forced displacement reported by NGOs, media and others. In the following, each of the three case study projects will be presented shortly, including a brief overview of the chronology of the project.

### 2.1 Barro Blanco Hydropower Plant

Barro Blanco is a hydro power plant in Western Panama (Province of Chiriquí, district of Tolé). It is located at the Tabasará River in immediate proximity to an Annex area to the *comarca*<sup>3</sup> Ngäbe-Buglé (as created by Law 10 of 1997). Once finished and in operation<sup>4</sup>, it is intended to have an installed capacity of 28.84 MW. (Barro Blanco PDD, 2010) Barro Blanco was constructed and will be operated by Generadora del Istmo, S.A. (GENISA), a company created under Panamanian law in 2006 especially for the purpose of developing, building and operating the Barro Blanco power plant. (GENISA, 2011, p. 9)

The estimated project costs of Barro Blanco amounting to 78,316,800 USD were financed by the Deutsche Investitions- und Entwicklungsgesellschaft GmbH (DEG), the Netherlands Development Finance Company (FMO), and the Central American Bank for Economic Integration (CABEI) (each approximately 25 million USD). (FMO/DEG Barro Blanco Complaint, 2014) The latter replaced funding originally sought through the European Investment Bank (EIB), this loan application, however, was withdrawn by GENISA in 2010 after learning that the EIB planned to visit the affected area after a complaint registered with the EIB-CM (Complaint Mechanism). (EIB Barton, 2013; EIB-CM, n.d.)

In June 2011, Barro Blanco was approved as a CDM project by the CDM Executive Board under the Kyoto Protocol (CDM EB, 2011). The Designated Operational Entity (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 1,405,622 t CO<sub>2</sub> will be achieved. (Barro Blanco PDD, 2010, p. 8)

The exact number of people affected by the dam varies in different sources. The Environmental and Social Summary Report by the construction company GENISA states, that four indigenous communities are

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<sup>3</sup> In Panama, *Comarcas* are demarcated indigenous regions introduced already in 1928. Since then, the *Comarcas* have evolved into bodies of autonomous administration. Annex areas to a *Comarca* are areas located outside of an indigenous territory, however, they are subjected to the same law as the *Comarca*. At the moment there are five *Comarcas* in Panama.

<sup>4</sup> As of May 2016, test flooding of the dam has commenced. Currently, however, there is no information available when it will go into operation.

located in the project impact area: Cogle, Quebrada Caña, Quiabda (Kiad) and Nuevo Polamar. The latter three will lose land/riverbank areas to the project. Based on the census of 2000, estimations by the Comarca and own estimations, GENISA claims that 419 people live in these three villages. The fact that some parts of the affected community would have to be resettled was not acknowledged until later on. In the said report, GENISA explicitly states that the Barro Blanco project 'will not displace any people from their homes' (GENISA, 2011, p. 39). The results of the Diagnóstico Rural Participativo (Castro de la Mata, 2013), the report presenting the results of an UNDP missions in September 2013 in order to verify the impacts of the project, claim that three communities appear to be much larger than indicated by the 2010 census and that six extended families would be displaced (Castro de la Mata, 2013, p. 5).

From the outset, the project was met with fierce opposition by the affected communities as well as by NGOs. The main controversial points of the projects are the fact that although the project is built outside of the indigenous territory it affects an annexed territory of the Comarca and will flood indigenous land; the procedure and quality of the Environmental Impact Assessment; the process of involving indigenous communities; the social, ecological and human rights impacts of the project; and the fact that several indigenous communities will be evicted as the area where their houses are located will be flooded.

#### **Barro Blanco – Overview over the chronology**

2006	GENISA participates in the tender and wins the concession to develop the Barro Blanco Hydro-Plant
14 Jan 2008	GENISA submits EIA to ANAM
8 Feb 2008	Public forum is held at the school in Tolé
9 May 2008	ANAM approves the EIA
16 Feb 2011	Construction of the dam begins
Spring 2011	M10 occupies the entrance to the Barro Blanco project & organises roadblock of the Panamerican highway
Jun 2011	Barro Blanco is approved as a CDM project under the Kyoto Protocol
5 Feb 2012	Ngäbe indigenous communities blocks the Panamerican highway
9 Sep 2013	Publication of UN verification mission reports
28 Apr 2014	The traditional authority of the Comarca and the General President of M20 file a complaint with the independent complaints mechanism of the FMO and DEG
Oct 2014	Fact-finding mission to Panama by the FMO/DEG CM
9 Feb 2015	Project temporarily suspended by ANAM due to failures of the EIA
29 May 2015	The independent Expert Panel of the FMO/DEG CM issues their report on Barro Blanco
28 Jul 2015	Supreme Court overrules the temporary suspension, allowing the project to continue
24 May 2016	Online newspaper report that the flooding of the reservoir started

## **2.2 Bujagali Hydropower Plant**

The Bujagali Hydroelectric Power Plant (BHP) is located on the Victoria Nile River in the Buikwe District in the Central Region of Uganda and was registered as a run-of river CDM project in October 2011. In 1999, the Government of Uganda commissioned US-based AES Nile Power (AESNP) to build and operate the Bujagali hydropower plant as well as the corresponding transmission line. However, AESNP withdrew from the project in 2003 before construction started, due to a variety of reasons including lowered expected

economic returns, local and international environmentalist campaigning against the project, corruption investigations and financing gaps (World Bank, 2005a; McCully, 2010). The company had, however, already completed economic, social and environmental assessments, and had begun resettlement earlier in 2003. Approximately 8,700 people were resettled or lost assets, not all of which had been compensated when the project was cancelled (AfDB, 2008, p. 135).

In 2005, the project was taken up again under a new consortium formed by Sithe Global Power (US-based) and The Aga Khan Fund for Economic Development (AKFED)'s Industrial Promotional Services Division. Together, they formed Bujagali Energy Limited (BEL), which owns and runs the hydropower dam. This project now only covers the construction of the hydropower dam itself. The transmission line was separated into a different project, the Bujagali Interconnection Project.

In 2006, R.J. Burnside International Limited carried out the Environmental and Social Impact Assessment (ESIA) that included stakeholder consultations.<sup>5</sup> The project's starting date was 21 December 2007, when the full notice to proceed was issued and the Italian construction company Salini was tasked as the lead contractor (Nampungu, 2011; CDM, 2014). The implementation agreement with the Government of Uganda obliged BEL to develop an Emission Reduction Project, which included a Project Design Document (PDD) and the commercialisation of emission reduction credits. The Government of Uganda received 60% and BEL 40% of the CERs. The final version of the CDM PDD was completed on March 5, 2014 (CDM, 2014).

On 22 June 2011, the Ugandan Designated National Authority confirmed the voluntary participation of Uganda in the Bujagali CDM project with a Letter of Approval. The Letter confirms that Uganda has acceded to the Kyoto Protocol in 2002 and that the project contributes to the sustainable development of Uganda.

The project received loans of approximately USD 630 million from a portfolio of lenders, including IFC and the European Investment Bank (EIB) (both USD 130 million), the African Development Bank (USD 110 million), a number of European development finance institutions (the German DEG and KfW, as well as the Dutch FMO collectively providing USD 142 million), as well as loans by commercial banks Absa Capital (South Africa) and Standard Chartered Bank (UK) (USD 115 million) (World Bank, 2007). The World Bank Group also provided high-risk guarantees through its International Development Agency (IDA) and Multilateral Investment Guarantee Agency (MIGA). The project lenders and guarantors approved the financing package of the project from April to December in 2007 (CDM, 2014).

Right from the preparatory phase of the project, the BHP was accompanied by opposition from traditional communities and local as well as international Environmental Justice Organisations such as the National

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<sup>5</sup> The ESIA included a comprehensive Public Consultation and Disclosure Program (PCDP), which provided notices in national newspapers, meetings with government agencies, the circulation of ESIA documentation, discussions with NGOs, consultations with local communities, public meetings with affected communities and conducted surveys with affected persons. According to the ESIA, interaction with the local communities and affected persons was inclusive towards women. The PCDP, in consultation with World Bank Group specialists, determined that the project area was not home to recognised Indigenous Peoples. This meant that the project did not require the application of safeguards related to Indigenous Peoples (R.J. Burnside 2006). According to the PDD, which was updated in late 2007, the consultation process continued during the construction and operation of the dam (CDM 2014).

Association of Professional Environmentalists (NAPE), the Uganda Wildlife Society, International Rivers and Save Bujagali Crusade. Complaints centred on the alleged inadequacy of the resettlement and the compensation of the affected people and claimed that they had lost their livelihoods. Furthermore, public consultation on the BHP was claimed to have been inadequate (EJAtlas, 2014). NGO actions included the publication of alternative reports and letters of complaint and petitions. In 2006, a request was made for the conduction of a compliance review of BHP and BIP at the AfDB's Compliance Review and Mediation Unit (CRMU). Complaints were also filed again with the World Bank's Inspection Panel by the same civil society organisations in 2007, claiming that in the course of the project, the World Bank failed to comply with its own operational policies and procedures, and raising environmental, hydrological, social, cultural, economic, and financial concerns against the project. In late 2009, NAPE together with European NGOs Counter Balance, CLAI, and Sherpa together with legal representatives of affected local people also filed a complaint with the complaints mechanism of the European Investment Bank, claiming that the project failed to meet European development objectives, to assess the economic and environmental soundness of the project, to guarantee fair compensation to affected communities, and to ensure the implementation of the mitigation measures (EIB Complaints Mechanism, 2012). The European Investment Bank Complaints Mechanism conclusion report was released on 30 August 2012.

Construction of the Bujagali hydropower dam was finished in late 2012, and the facility is now fully operational. This also means that BEL retains only a small staff of technical engineers on site for operating the dam.

#### **Bujagali – Overview over the chronology**

1994	BHP was first initiated
1997	EIA was conducted
1999	Government of Uganda commissions US-based AESNP to build and operate the BHP
1 Nov 2000	NAPE files complaint at the CAO
2001	Civil society organisations file a request at the World Bank's Inspection Panel (IP)
2003	Resettlement and/or compensation of approximately 8,7000 people
2003	AESNP withdraws from the project before construction starts
2005	Project is taken up again by BEL
2006	RJ Burnside International Limited carries out Social and Environmental Impact Assessment
2007	Request to IP, approval to conduct investigation, IP Visit to Uganda
16 May 2007	Request for Inspection received by Compliance Review and Mediation Unit (CRMU) of the AfDB
21 Dec 2007	Construction of the dam begins
2007-2008	AfDB Review Panel starts and issues Compliance Review, Boards of Directors of AfDB discuss the findings, ADB Management Action Plan
Dec 2008	World Bank Board endorses an Action Plan
2 Dec 2009	NAPE, CLAI and Association Sherpa submit complaint to EIB-CM
2010	EIB-CM Missions to Uganda
Oct 2011	BHP is approved as a CDM project under the Kyoto Protocol
30 Aug 2012	EIB-CM Conclusions Report
2012	Construction of the dam is finished

## 2.3 Olkaria IV Geothermal Project

Olkaria IV (together with the extension of Olkaria I, units 4 & 5) is the most recently commissioned geothermal power plant of the so-called Olkaria Block. The project is located in Rift Valles, close to Lake Naivasha. Under colonial rule this area in Western Kenya belonged to the 'White Highlands' and until present has been a region of historical and ethnic land conflicts, in particular between Maasai who regard it their ancestral lands and official land owners, mainly Kikuyu. Today it is home to about 20,000 pastoralists, semi-nomadic, Maasai of various Maasai clans. The development area of Olkaria IV is situated within privately owned Kedong Ranch and is adjacent to the Hell's Gate National Park.

Olkaria IV is registered as a CDM project under the Kyoto Protocol (CDM Project No. 8646). The application for Olkaria IV to be registered as a CDM project was submitted to the CDM board by the Kenyan Designated National Authority, NEMA, on 28 December 2012 and the registration was enacted on 17 June 2013. Also all other existing Olkaria plants underwent (smaller) extensions that are registered as CDM projects. Except Olkaria III which belongs to a foreign investor, all Olkaria power plants are operated by the parastatal Kenya Electricity Generating Company (KenGen). The Olkaria I extension and Olkaria IV are the government's most prestigious geothermal CDM projects as they symbolise Kenya's geothermal kick-off. Both were officially commissioned by Kenya's former President Mwai Kibaki in July 2012 (Kamadi, 2012).

Olkaria IV, together with the Olkaria I extension, are part of the larger Kenya Electricity Expansion Project (KEEP) of the World Bank (component A). The component is funded by five main lending institutions and amounts to roughly 1.4 billion USD or 1 billion EUR in total (World Bank, 2010). Of these, the European Investment Bank (EIB) finances a credit of 119 million EUR plus an interest rate subsidy grant of 29 million EUR, and the French Development Agency (AFD) provides a loan of even 150 million EUR plus 34 million EUR interest rate subsidy (EIB, 2010); KfW provides a loan of 60 million EUR (Ad-Hoc-News, 2011; EIB, 2010a); and IDA provides a loan of 120 million USD (World Bank, 2015, p. 2). As regards the European financiers, they cooperate under the Mutual Reliance Initiative, aiming to create synergies between lenders in project management in line with the Paris Declaration on Aid Effectiveness (2005).

Olkaria IV necessitated involuntary resettlement. Three villages had to be resettled to vacate the land for Olkaria IV. A fourth one, partly located on neighbouring Maiella Ranch, had to be resettled because of the projected air pollution (Mwangi-Gachau, 2011a). KenGen contracted a consultant firm, GIBB Africa, to elaborate a Resettlement Action Plan (RAP). All four villages are inhabited by Maasai, which have been recognized by the African Commission as indigenous peoples. (ACHPR-WG, 2006, p. 10). The four villages are:

- Cultural Centre (main source of livelihood tourism)
- OloNongot (main source of livelihood pastoralism)
- OloSinyat (main source of livelihood pastoralism)
- OloMayana Ndogo (thereof one hamlet is situated on Maiella Ranch; mainly pastoralism)

The community members of the four villages have been resettled as one group. The settlement site was agreed to provide for modern houses, modern infrastructure (roads, electricity and water pipes), social services (school and health centre), and additional land for pasturing of the cattle at the new settlement

site. The total area for compensation of land was agreed upon as 1,700 acres over which the so-called project affected persons (PAPs) are supposed to get own title deeds. The Cultural Centre was both a business centre as well as permanent village. The main source of livelihood of the other villages is pastoralism and livestock trading. Additional sources of livelihood in all villages include employment (of men) with one of the various companies operating in Olkaria (e.g. KenGen, flower farms, KenGen contractors, geothermal prospecting companies), selling of pumice stones and petty trading by women (Ombai, 2012, p. 16). Charcoal burning is another activity pursued by women but is done without the required license (GIBB Africa, 2012, p. 5-6).

The first power plant in Olkaria dates back to the 1980s. The Maasai since then repeatedly complained that they neither profit from the generation of local jobs nor from the generated electricity or from investments into community infrastructure such as water pipes, schools or hospitals. They have increasingly suffered from health problems, in particular skin, respiratory and gastric diseases and reproductive ailments. Inexplicable death and premature birthing of livestock has equally been reported (BwObuya, 2002; CEMIRIDE, n.d.; Njoroge, 2003, pp. 22, 31–34). Other main controversial points of the Olkaria IV project are related to the resettlement process including problems concerning the participation in the decision-making process, the handling of complaints (including allegations of intimidation), spiritual issues, the carrying out of the census, the lack of acknowledgment of the Maasai as an indigenous people, the quality of the land they have been resettled, delays in transferring title deeds to them, shortcomings in re-establishing the livelihoods of the PAPs, shortcomings of infrastructure and partly the cultural inadequacy of the settlement, etc. It should be noted that different PAPs profit/suffer to different degrees from the relocation and that there exists inter-community divisions depending on type of and distance to former sources of livelihood and power imbalances.

#### **Olkaria IV – Overview over the chronology**

End 2008	Organisation of stakeholder engagement meetings to decide on resettlement
End 2008	Financiers decide that the World Bank takes the lead in the resettlement process and that the World Bank's Operational Policies (in particular 4.12) are applied
16 Sep 2009	Cut-off date for eligibility to compensation and start of the census
1 Dec 2009	Publication of the first Resettlement Action Plan (RAP), including first proposals for a RAP Implementation Committee (RAPIC) and an operational-level complaint mechanism. Subsequently elections are held to identify participating village chairmen
27 May 2010	Approval of the Kenya Electricity Expansion Project (KEEP) project by the World Bank Board. 'RAPIC' meetings with selected village chairmen take place since then.
12 Dec 2010	Finance contract between Government of Kenya and EIB on Olkaria I (Units 4 and 5) and Olkaria IV
End of 2011	Field visits by lender delegations take place, including meeting PAPs and visit of the Suswa Triangle, which is rejected. Lenders emphasise need for a complaint mechanism.
16 Dec 2011	Public meeting where PAPs agree to the acquisition of the (current) site by KenGen
Apr/May 2012	Elected members of the RAPIC are presented to the County Deputy and PAPs
May/Jun 2012	Operational-level grievance mechanism of the RAP is disclosed to the PAPs, the RAPIC is formally launched, a census-update increases the number of required houses to at least 164, and the second RAP document is published
22 Sep 2012	KenGen agrees with Kedong Ranch Ltd. on the purchase of land for the RAPland

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Oct 2012	AFD commissions Tacitus Ltd. to assess and assist in the RAP implementation process. Tacitus is the company of the social safeguard consultant hired by World Bank Nairobi
End of 2012	Monitoring visits of lender delegations. Main concern: road quality and transfer of titles
21 Dec 2012	PAPs sign acceptance form on the selected land (RAPland on Kedong Ranch). There is, however, a pending court case on the entire Kedong Ranch
14 May 2013	Final validation exercise of the census reducing again the number of houses to 150
17 Jun 2013	2013 Olkaria IV is approved as a CDM project under the Kyoto Protocol
01 Jul 2013	Legal Memorandum of Understanding (MoU) between KenGen and PAPs signed
Aug-Sept 2014	Relocation of PAPs
2 July 2015	Publication of WB-IP Investigation Report

### 3 Human Rights and Climate Policies – The Example of the Clean Development Mechanism

Climate change has been called the defining crisis of our age and as a global challenge affects every country on every continent. The legal framework in place for combatting climate change is multi-layered and addresses a number of actors, *inter alia* states, international organizations and the corporate world. As a key instrument, the United Nations Framework Convention on Climate Change (UNFCCC) formulates the overall objective of the climate regime in its Article 2:

to achieve, in accordance with the relevant provisions of the Convention, stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system. Such a level should be achieved within a time frame sufficient to allow ecosystems to adapt naturally to climate change, to ensure that food production is not threatened and to enable economic development to proceed in a sustainable manner.

In order to achieve this objective, states *inter alia* resort to mitigation and adaptation policies. These policies intersect with other societal goals, and – dependent on the manner of their implementation – can create additional co-benefits or result in adverse side-effects (IPCC WG III, 2014, p. 5). In line with this, the realization that (mismanaged) climate policies can have a negative impact on human rights (OHCHR, 2009, p. 23) has led to an understanding that a stronger linkage between climate policies and human rights considerations is warranted.

Yet, the current climate regime **fails to translate the concerns how climate change impacts humans into human rights obligations/standards** (OHCHR, 2014). This is still the case, as even though the Paris Agreement 2015 calls on state parties to respect, promote and consider their obligations on human rights when taking action to address climate change;<sup>6</sup> this is contained in its preamble and lacks further specifications. At the same time, the Paris Agreement reemphasizes the importance of providing financial resources to developing countries in order to support the implementation of climate change policies. In the past, projects financed in such context, in particular the implementation of certain projects of the Clean Development Mechanism (CDM), have repeatedly been associated with negative human rights impacts in the Global South, for example resulting in forced evictions, displacements, and involuntary resettlements. Hence, though anchoring human rights in the preamble of the Paris Agreement is a major achievement, further steps will be necessary to operationalize human rights and human rights responsibilities in practice.

In light of this, this section of the synthesis report therefore exemplifies by resort to the CDM how institutional design and mandate have so far been ill-equipped to consider the human rights implications

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<sup>6</sup> The Paris Agreement states in its preamble: ‘Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.’

of a project. In designing a new market-based mechanism, a number of changes/adaptions to the current system should therefore be made.

### 3.1 UNFCCC and the Kyoto Protocol

The **UNFCCC** is the key international instrument for dealing with climate change at the international level. Adopted in 1992, and entering into force in 1994, it constitutes the ‘framework’ for the efforts of the international community to ‘achieve (...) stabilization of greenhouse gas concentrations in the atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system’ (UNFCCC, 1992, Art. 2). Following the rationale of ‘common but differentiated responsibilities and respective capabilities’ the Convention differentiates between developed states, listed in Annex I of the Convention, and developing states (‘non-Annex I’ states), and requires the former to take the lead in combating climate change. Developed states agreed to a non-binding target of reducing their emissions to 1990 levels by the year 2000.

The supreme decision-making body of the UNFCCC is the Conference of the Parties (COP). All state parties to the UNFCCC – today 195, including the EU – are represented at the COP, which meets annually to review and foster the implementation of the Convention towards achieving its ultimate goal. At the first COP in Berlin in 1995, Parties agreed to initiate a process to adopt a ‘protocol or another legal instrument’ to specify legally binding mitigation commitments for developed states (Decision 1/CP.1). This so-called ‘Berlin Mandate’ resulted in the adoption of the **Kyoto Protocol (KP)** two years later. The KP entered into force in 2005, after a lengthy and complex ratification process. In that same year, the first meeting of the supreme decision-making body of the KP took place, the so-called Conference of the Parties serving as the meeting of the Parties to the Kyoto Protocol (CMP). The KP commits the states listed in its Annex B, which mostly matches Annex I of the Convention (developed states), to limit their greenhouse gas (GHG) emissions by setting Quantified Emission Limitation or Reduction Objectives (Kyoto Protocol, 1997, Art. 3(1)). The first commitment period (2008-2012) ended in 2012, with a second commitment period (2013-2020) included in the Doha Amendment (2012), which however has not entered into force.<sup>7</sup> In December 2015, a new agreement was signed in Paris (Paris Agreement, UN Doc. FCCC/CP/2015/L.9, 2015), which will however not enter into force until 2020.

As political opposition has blocked the adoption of explicit rules of procedure, decisions under the UNFCCC and the KP are taken by consensus as default rule. Consensus decision making has been criticised as a key reason for the lack of progress in the climate negotiations. Since the Convention does not explicitly define what consensus means, different interpretations have been applied in the past climate negotiations (Kemp, 2014). While there is a lack of clear policy-making rules at the level of the supreme decision-making bodies COP and CMP, explicit decision-making procedures have been established at the subordinate bodies for implementing institutions of the UNFCCC. These rules are of key relevance in the context of the approval of activities (projects, programmes) on the ground. In the following, a special focus

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<sup>7</sup> The Doha Amendment will only enter into force once 144 parties have ratified it. As of December 2015, only 59 states had done so. During the second commitment period, only EU member states, other European countries and Australia would have commitments.

will be laid on the decision-making rules in the course of the CDM, as the selected case studies all were registered as a CDM project.

## 3.2 CDM – Decision-Making and Standards

### 3.2.1 Introduction

The CDM has been established as one of the so-called flexible mechanisms under the KP with the goal to assist developing states (non-Annex I states) in achieving sustainable development and to contribute to climate change mitigation. In addition, the CDM supports developed states (Annex I states) in meeting their GHG emission targets under the KP.<sup>8</sup>

The CDM is based on Article 12 of the KP. Article 12.2 sets out two equally weighted objectives: to assist developing states in achieving sustainable development and to assist industrialised states in achieving compliance with their emission reduction commitments. Once a CDM project has completed a pre-determined project cycle, the project participants receive emission reduction credits, so-called Certified Emission Reductions (CERs), which industrialised states can purchase and count towards their Kyoto commitments. Industrialised country governments may be directly involved in projects, but the usual model is the purchase of CERs from projects operated by private businesses. Some jurisdictions such as the EU have also established domestic emission trading systems (ETS) where companies may use CERs to comply with domestic obligations.

Since the first CDM project was registered in 2004, the mechanism has developed very dynamically. By January 2016, more than 8,000 CDM activities were registered.<sup>9</sup> The CDM pipeline of projects and programmes includes very diverse activities, ranging from the installation of large-scale wind farms to small-scale programmes that aim at increasing energy efficiency at the household level. Most of these activities are implemented by private companies. The dynamic development of the CDM has to a large extent been triggered by demand for CERs from Europe, mainly by companies covered by the European Union Emissions Trading Scheme (EU ETS). However, with the EU ETS currently suffering from a large oversupply of emission allowances, demand for CDM credits was significantly reduced, which has also resulted in record low CER prices. With the current crisis of the CDM, the number of new CDM projects was significantly reduced and the future of the mechanism and its role in the new global agreement concluded in Paris in 2015 is still somewhat insecure. Article 6 of the Paris Agreement mentions the establishment of a ‘mechanism to contribute to the mitigation of greenhouse gas emissions and support sustainable development’ (Paris Agreement, UN Doc. FCCC/CP/2015/L.9, 2015, Article 6.4). The rules and procedures thereto still need to be adopted. However, Section III, para. 38(f) of the Decision on the Adoption of the Paris Agreement recommends to the COP that these should be based *inter alia* on the ‘[e]xperience gained with and lessons learned from existing mechanisms and approaches adopted under

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<sup>8</sup> The main idea behind this structure is that emission reductions in developing states are often cheaper than in developed states. Hence, CDM activities (projects and programmes) in developing states generate credits (so called Certified Emission Reductions – CERs) which can be used by developed states (or by companies in these states) to fulfil part of their GHG emissions targets abroad.

<sup>9</sup> Currently registered projects can be found under <https://cdm.unfccc.int/Projects/projsearch.html>.

the Convention and its related legal instruments'. Thus, in practice, this might mean that the CDM procedural rules will be imported into the new mechanism.

### 3.2.2 Decision-Making – The CDM Executive Board

The CDM is supervised by the CDM Executive Board (CDM EB), which meets at least three times per year. It consists of ten members, one from each UN Regional Group, one from Small Island Developing States, two from Annex I parties and two from non-Annex I parties. As outlined in the CDM Modalities and Procedures, decisions by the CDM EB shall be taken by consensus, whenever possible. However, if no consensus is reached, decisions can also be taken by a three-fourth majority vote (Decision 3/CMP.1). UNFCCC-accredited observer organisations are allowed to attend the CDM EB meetings. However, they are not allowed to enter the meeting room but have to stay at an adjoining room where they are provided with a video broadcast of the meeting. At the end of each meeting, observers can interact with the Board in a question and answer session.

In order to be implemented as a CDM activity, each project or programme needs to adhere to the CDM requirements for measurement, reporting and verification and undergo a multi-step registration and monitoring process, which, *inter alia*, includes the approval of the activity by the national authority of the host country and its validation/verification by an external auditor. The CDM EB is the key authority in this process, being responsible for the registration of the activity and the issuance of the emission certificates. The CDM EB can either directly register the activity seeking CDM approval or undertake a review if one of the states involved or at least three of the CDM EB members demand it. Based on the review, the CDM EB then decides whether to register the activity, to request corrections or to reject it. With regard to an activity's request for issuance of emission credits, there is a similar process in place requiring the CDM EB to take a final decision on the issuance of the certificates (Decision 3/CMP.1).

### 3.2.3 Standards in the Clean Development Mechanism

The CDM 'modalities and procedures', adopted as part of the Marrakesh Accords (MA)<sup>10</sup> in 2001, set out the detailed rules for the implementation of projects (Decision 3/CMP.1). As mentioned above, governance of the CDM lies with the CDM Executive Board. Project proponents need to prepare a Project Design Document (PDD) according to a prescribed format developed by the Board. The PDD needs to be validated, *i.e.* examined as to whether it meets all CDM requirements, by an independent certification company accredited with the Board, called Designated Operational Entity (DOE). The project needs to be approved by the states involved, that is, the host country and the buyer country or states. If all requirements are met, the project is formally registered by the Board and may subsequently be issued CERs, subject to adequate monitoring of the achieved reductions by the project participants and verification by another DOE.

The CDM modalities and procedures (Decision 3/CMP.1) deal almost exclusively with questions of how to quantify emission reductions. They contain **no explicit reference to human rights and no respective**

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<sup>10</sup> The Marrakesh Accords contain detailed implementation rules for the Kyoto Protocol, particularly regarding emissions accounting and the functioning of (the) flexible mechanisms.

**safeguards.** Hence, the only possibility for addressing human rights in the context of the CDM is the mechanism's **goal of contributing to sustainable development and a requirement to invite and duly take account of stakeholder comments.** These items are addressed as part of the PDD. However, **no uniform definition of what sustainable development is** and how it is best achieved was agreed on at international level. Instead, Parties decided that it is up to the host states of CDM activities to define sustainable development and to establish respective criteria.

There are also **no internationally agreed procedures under the CDM procedure for conducting local stakeholder consultations.** While the EU suggested including such standards and procedures when the MA were negotiated, developing states rejected these proposals as being incompatible with their national sovereignty (Yamin & Depledge, 2004). The MA therefore do not go beyond requiring confirmation by the host country that the project assists it in achieving sustainable development, without giving further specification (Decision 3/CMP.1, para. 40a).

The **stakeholder consultation procedure has two levels**, local stakeholder consultation and global stakeholder consultation. Regarding local stakeholder consultations, the MA merely state that comments shall be invited and that the project participants need to provide a summary of the comments received and a report of how any comments received were duly taken into account specification (Decision 3/CMP.1, para. 37b). There is no specification of who exactly to consult and how to consult them. Rules for the global stakeholder consultation are somewhat more specified. The DOE needs to make the PDD publicly available for 30 days for comments from Parties, stakeholders and UNFCCC accredited non-governmental organizations and needs to make the comments received publicly available as well specification (Decision 3/CMP.1, para. 40c).

It is therefore up to host states to define sustainable development criteria and procedures for local stakeholder consultations. Research (*e.g.* Olsen, 2007; Schneider, 2007; Sterk et al., 2009) has concluded that most host states have rather general lists of non-binding guidelines instead of clear criteria. This makes it easy to comply with requirements: PDD sections on sustainable development as well as validation reports tend to have vague wording avoiding concrete and verifiable statements. Similarly, stakeholder consultation is often rudimentary, unregulated and badly documented. Most host states do not thoroughly investigate projects. **Furthermore, all these processes take place before project implementation. The CDM rules contain no mechanisms for addressing problems that may not have been visible in the project design and approval phase.**

Due to public criticism, there have recently been new discussions on how to strengthen sustainable development assessments and stakeholder consultations. Based on a mandate from the Kyoto parties, the UNFCCC Secretariat in early 2012 developed a comprehensive draft for a voluntary tool to assess sustainable development impacts, including a human rights-based 'do no harm' assessment, and also suggested to adopt detailed requirements for stakeholder consultations. However, mainly due to sovereignty concerns from developing states' CDM EB members, the CDM EB decided to substantially modify the draft, deleting the sections on safeguards and possible negative impacts. With these modifications, the CDM Sustainable Development Tool serves exclusively to indicate positive impacts of CDM activities and is applied on a voluntary basis by the project proponents (Sterk, Schade, Kreibich, & Beiermann, 2014).

The 2013 United Nations Climate Change Conference in Warsaw requested the Board to work with national CDM authorities on collecting and making publicly available information on existing practices for local stakeholder consultations, and to provide technical assistance for developing stakeholder consultation guidelines to national authorities, upon their request (Decision 3/CMP.1, para. 20).

### 3.2.4 Rules Pertaining to the Clean Development Mechanism in EU Member States

All CDM projects need to be approved by the host country and at least one buyer country. The regulations of CDM buyer states are mostly silent on the question of sustainable development impacts. One exception is the EU Linking Directive (Directive 2004/101/EC (Linking Directive), 2004) which stipulates in the context of admitting emission credits obtained through hydroelectric CDM/Joint Implementation (JI) projects in Art. 11b (6) that

In the case of hydroelectric power production project activities with a generating capacity exceeding 20 MW, Member States shall, when approving such project activities, ensure that relevant international criteria and guidelines, including those contained in the World Commission on Dams November 2000 Report 'Dams and Development — A New Framework for Decision-Making', will be respected during the development of such project activities.

The World Commission on Dams (WCD) criteria consist of seven strategic priorities,<sup>11</sup> which are expressed in the form of achieved outcomes. The criteria are based on the notion that most dam projects have negative effects on society and environment. Because of this, the criteria aim to support the principles of equality, participation and accountability. In order to ensure consistency throughout the EU, the EU passed Guidelines on a common understanding of above-cited Article 11b (6) of Directive 2003/87/EC and amended by Directive 2004/101/EC. These also include a questionnaire template for member states in order to determine whether the WCD's standards have been adhered to. One aspect in this regard relates to whether a **Mitigation, Resettlement and Development Action Plan** is in place to ensure the recognition of entitlements. It shall be pointed out, however, that in practice this is often underrun by that fact that these requirements are verified by the same experts verifying the CDM requirements in the first place

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<sup>11</sup> 1. Gaining public acceptance –relates to the issue of how many people are affected by the project, the identification, informing and participation of stakeholders, compensation of those affected and the level of transparency.

2. Comprehensive options assessment – relates to the issues of hydropower as part of a national development policy, the existence of potential alternatives to the project and the reasons for project choice and site selection.

3. Addressing existing dams/hydroelectric projects – questions relate to the national standards for social and environmental issues.

4. Sustaining rivers and livelihoods – relates to issues about impact assessment and cumulative impacts.

5. Recognizing entitlements and sharing benefits – questions on mitigation, resettlement and development action plans.

6. Ensuring compliance – includes questions on compliance measures, monitoring and evaluating during the crediting period.

7. Sharing rivers for peace, development and security – question about trans-boundary effects.

(Roht-Arriaza, 2010, p. 598). Moreover, the limitation to hydropower projects leaves the vast majority of CDM projects unregulated.

### 3.3 Conclusion

The CDM's two objectives of assisting developing states in achieving sustainable development and assisting industrialised states in attaining compliance with their emission reduction commitments are operationalized through the implementation of projects that reduce emissions in developing state which are co-financed by industrialised partner states. Within this system, the 'modalities and procedures' spell out the rules of the mechanism, almost exclusively dealing with questions of how to quantify emission reductions. There is no mention of human rights. The only entry point for human rights concerns is the requirement that projects contribute to sustainable development and an obligation to invite and duly take account of stakeholder comments. **However, there are no internationally agreed criteria or procedures for assessing CDM projects' contributions to sustainable development, nor are there internationally agreed procedures for conducting local stakeholder consultations.**

Under the current system, it is therefore up to host countries to define sustainable development criteria and procedures for local stakeholder consultations. Most host countries have rather general lists of non-binding guidelines instead of clear criteria. This makes it easy to comply with the requirements. The CDM rules contain no mechanisms for addressing problems that may not have been visible in the project design and approval phase. While there is a possibility for host states to reject projects and to withdraw approvals of non-satisfactory projects, most host countries do not thoroughly investigate projects from a human rights perspective.

Attempts to reform the CDM in order to give its second objective of sustainability more weight have been met with resistance on the grounds that a stronger integration on sustainability concerns would impinge on national sovereignty of host countries. However, **the Paris Agreement has opened up space for a better integration of human rights concerns within a future market based mechanism.** The acknowledgement of human rights as an integral part of decisions on climate action provides a strong opportunity to better integrate measures safeguarding against human rights violations into a future mechanism.

## 4 Human Rights Violations/Threats to Human Rights

### 4.1 Introduction

The analysis of the three selected case studies (Chapter 2) evidenced certain common patterns of threats to human rights occurring in the context of the implementation of CDM projects. While it must be noted that these threats to human rights are oftentimes inherent in the nature of (large-scale) development projects, the registration process at the CDM Executive Board increases the particular vulnerability of affected populations by an additional level of authorization without adequate consideration of the human rights impacts of the registered projects. Thus, particularly the stakeholder participation process envisioned under the CDM procedure constitutes an area of major concern and contributes to difficulties ensuring the protection from human rights violations.

In order to exemplify this, this section focuses, first, on describing the international standards of the selected human rights issues. Largely, these can be grouped together into three categories: firstly, the right to participation in the decision-making process concerning the approval of projects affecting the livelihood of the respective communities; secondly, rights in the context of (forced) resettlement/displacement; and thirdly, due diligence obligations in the context of planning, implementing and monitoring a project's implementation. Moreover, the institutional standards of the involved European actors are discussed on a case-specific basis. Finally, the identified challenges to the full enjoyment of human rights are discussed on a case-by-case basis, with a specific focus on highlighting commonalities in the context of the implementation of climate projects.

### 4.2 Participation

One core concern of all three cases relates to the **failure** of the project operator, governmental authorities and international partners **to obtain the consent of the affected communities or ensure their adequate participation/consultation in the course of the project's approval.**

#### 4.2.1 International Standard

The past decades have increasingly witnessed the **inclusion of participatory measures in development projects as a means of ensuring legitimacy and providing safeguards** against social harm, which links them to human rights. Not only do participatory procedures lead to greater acceptance among the affected communities but shall ensure the possibility to address potential areas of conflict at an early planning stage (Barutciski, 2005, p. 79). Though the right to participate in development projects is not explicitly spelled out in international human rights treaties, the UN Declaration on the Right to Development, the Guiding Principles on Internal Displacement, the Basic Principles and Guidelines on Development-Based Evictions and Displacement, resettlement guidelines by lending agencies, and case law by regional human rights monitoring bodies, in particular the Inter-American and the African system,<sup>12</sup>

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<sup>12</sup> See, *inter alia*, World Bank OP 4.12, 2013; Art. 2(3) Declaration on the Right to Development, UN Doc. A/RES/41/128, 1986; Principles 7(3)(b),(c),(e) Guiding Principles on Internal Displacement, 1998; Basic Principles (Development-based Displacement), 2007, *inter alia*, para. 38, 55(i); *Centre for Minority Rights Development*

evidence the firm recognition that affected communities must be consulted throughout the course of the project's approval and implementation. The right to participate and the duty to consult in international law has also been tied to the full enjoyment of rights accorded under common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) (right to self-determination) as well as Article 27 ICCPR (protection of the rights of minorities). (Lenzerini, 2014, p. 147 ff) Thus, the Human Rights Committee has repeatedly held that the 'the enjoyment of the right to one's own culture may require positive legal measures of protection by a State party and measures to ensure the effective participation of members of minority communities in decisions which affect them.' (see, *inter alia*, *Apirana Mahuika et al. v. New Zealand*, 2000, para. 9.5; HRC, UN Doc. CCPR/C/21/Rev.1/Add.5, 1994)

**Particular guidance can also be drawn from instruments protecting the rights of indigenous peoples.**

Hence, where indigenous communities are concerned, the standard against which participatory measures will be measured is the principle of free, prior and informed consent (FPIC), increasingly recognised at the international level since the early 1990s. And even though FPIC largely remains a right of indigenous peoples, a number of its aspects are **of relevance also to non-indigenous communities** affected by extractive industry projects (see, *e.g.*, CESCR, UN Doc. E/C.12/GC/21, 2009, para. 55(e)) and are of relevance at minimum as a *best practice* in order to achieve meaningful consultation with affected communities. (Emily Greenspan, 2013; International Institute for Environment and Development Briefing, 2013)

A key issue regarding FPIC relates to its content and particularly to the understanding of the meaning of 'consent'. Thus, as one of the first bodies to incorporate specific participatory safeguards for indigenous peoples, the World Bank (WB) resorted to a soft formulation in 1991 termed 'informed participation'. It was stated that such 'participation' served the purpose of '[i]dentifying local preferences through direct consultation, incorporation of indigenous knowledge into project approaches, and appropriate early use of experienced specialists are core activities for any project that affects indigenous peoples and their rights to natural and economic resources.' (World Bank OD 4.20, 1991, para. 8) In contrast, **ILO Convention No. 169** (ILO Convention No. 169, 1989), drafted during the same period, explicitly employs the term 'free and informed consent' in the context of forced relocation (Article 16). While this remained the only provision reaching this threshold in the Convention,<sup>13</sup> FPIC has consistently gained traction over the past decades. Thus, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP, 2007), non-binding but widely accepted as a minimum standard concerning the rights of indigenous peoples (Hofbauer, 2015, p. 35), contains several provisions explicitly referring to FPIC, ranging from the prohibition of relocation (Article 10), to factual thresholds (Article 11), the implementation of legislative and administrative measures that may affect indigenous peoples (Article 19), the storage or disposal of hazardous materials in the lands or territories of indigenous peoples (Article 29), and, in the context of

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(*Kenya*) and *Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, 2009; *Saramaka v. Suriname*, 2006.

<sup>13</sup> Other provisions demand that 'consultations [...] shall be undertaken, in good faith and in a form appropriate to the circumstances, with the objective of achieving agreement or consent to the proposed measures' (Article 6 ILO Convention No. 169, 1989).

determining their authority over their lands **most importantly, in connection with ‘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.’** (Article 32)

Lending agencies have responded to this development and gradually and continuously incorporated FPIC into their safeguard policies. (Gilbert, 2014, p. 206) As a notable example,<sup>14</sup> the International Finance Corporation (IFC) (the commercial lending institution of the World Bank), in its most recent revision of its performance standards,<sup>15</sup> includes a progressive understanding of FPIC:

There is no universally accepted definition of FPIC. For the purposes of Performance Standards 1, 7, and 8, ‘FPIC’ has the meaning described in this paragraph. FPIC builds on and expands the process of ICP<sup>16</sup> described in Performance Standard 1 and will be established through good faith negotiation<sup>17</sup> between the client and the affected Communities of Indigenous Peoples. The client will document: (i) the mutually accepted process between the client and affected Communities of Indigenous Peoples, and (ii) evidence of agreement between the parties as the outcome of the negotiations. FPIC does not necessarily require unanimity and may be achieved even when individuals or groups within the community explicitly disagree. (IFC, 2012, para. 12)

**FPIC serves to fill the substantive elements of the participatory process.** It creates ‘safe spaces’ for where indigenous identity can enjoy authentic indigenous sovereignty. (Wiessner, 2008, p. 1174) The following exemplary content is assigned to free, prior and informed consent in training manuals and guidelines on its implementation. According to an International Workshop on Methodologies regarding Free, Prior and Informed Consent and Indigenous Peoples, consent is to be obtained **freely**, *i.e.* absent of ‘coercion, intimidation or manipulation.’ (Permanent Forum on Indigenous Issues, UN Doc. E/C/19/2005/3, 2005, para. 46(i)) The element ‘**prior**’ entails that consent ‘has been sought sufficiently in advance of any authorization or commencement of activities and that respect is shown for time requirements of indigenous consultation/consensus processes’. (Permanent Forum on Indigenous Issues, UN Doc. E/C/19/2005/3, 2005, para. 46(i)) And ‘**informed**’ relates to a sum of factors to be taken into consideration when information is provided to the affected indigenous community, *inter alia* covering following aspects: nature, size, pace, reversibility and scope of project/activity; reason for or purpose of the project/activity; duration; affected areas; preliminary assessment of likely economic, social, cultural and environmental

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<sup>14</sup> The IFC’s Performance Standards form the basis of policies of 75 financial institutional adhering to the Equator Principles.

<sup>15</sup> Note, however, that the selected case studies were approved during the validity of the previous performance standards by the IFC (IFC 2006), still using ‘free, prior and informed consultation’.

<sup>16</sup> ICP stands for Informed Consultation and Participation.

<sup>17</sup> As explained by the International Court of Justice, **good faith negotiations** are understood to entail the obligation to ‘not only [...] enter into negotiations, but also to pursue them as far as possible, with a view to concluding agreements’. This does not mean that there is ‘an obligation to reach an agreement’ but the parties ‘must conduct themselves so that the “negotiations are meaningful”’. ‘This requirement is not satisfied, for example, where either of the parties “insists upon its own position without contemplating any modification of it” [...] or where they obstruct negotiations, for example, by interrupting communications or causing delays in an unjustified manner or disregarding the procedures agreed upon [...]’ (*Interim Accord*, 2011, p. 685, para. 132).

impacts and potential risks (in respect of the precautionary principle); fair and equitable benefit-sharing; involved personnel; procedures that the project may entail. (Permanent Forum on Indigenous Issues, UN Doc. E/C/19/2005/3, 2005, para. 46(i)) Information delivered shall *inter alia* be accessible, clear, consistent, accurate, transparent, objective, complete, delivered in the appropriate language and manner. (UN-REDD Programme, 2013, p. 18)

As mentioned above, the core question concerns the meaning of ‘consent’ and whether this arises to a *de facto* veto power. The drafting process of Article 19 UNDRIP (originally Article 20) reflects this fine balance. Originally formulated as ‘States shall obtain the free and informed consent of the peoples concerned before adopting and implementing such measures [legislative or administrative measures that may affect them]’ (Commission on Human Rights, UN Doc. E/CN.4/2006/79, 2006, p. 46; see for state criticism of the broadness of the original formulation UNGA, UN Doc. A/61/PV.107, 2007), the final version adopted reads: ‘States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.’ (Art. 19, UNDRIP, 2007) In comparison, with regard to forced relocation, Article 10 UNDRIP expressly states that ‘[n]o relocation shall take place without the free, prior and informed consent of the indigenous peoples concerned’.<sup>18</sup>

With regard to the formulation adopted in the final version of Article 19 UNDRIP (thus, not including those situations which would result in forced relocations), former Special Rapporteur James Anaya points out that it ‘should not be regarded as according indigenous peoples a general ‘veto power’ but rather as establishing consent as the objective of consultations with indigenous peoples’, requiring a (continuous) negotiation process ‘towards mutually acceptable arrangements’. (Human Rights Council, UN Doc. A/HRC/12/34, 2009, para. 46) He contrasts this to mere consultation obligations which often constitute ‘mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process’. (Human Rights Council, UN Doc. A/HRC/12/34, 2009, para. 46) This corresponds to widespread practice and scholarly opinion (see for references Hofbauer, 2015, p. 231ff), even if the adopted text tempts some bodies to go further.

Case law by the Inter-American Commission and Court of Human Rights has confirmed the importance of FPIC for the protection of indigenous rights.<sup>19</sup> Notably, the Commission found in *Twelve Saramaka Clans* that ‘in light of the way international human rights legislation has evolved with respect to the rights of indigenous peoples, that the indigenous people’s consent to natural resource exploitation activities on

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<sup>18</sup> The same formulation is used with regard to the storage and disposal of hazardous materials on indigenous territories: Article 29(2) States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.

<sup>19</sup> The African Commission on Human and Peoples’ Rights has also confirmed the validity of FPIC in the African context, especially in the *Endorois* decision (*Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, 2009), extensively referring to the case law by the Inter-American system.

their traditional territories is always required by law.’ (*Saramaka v. Suriname*, 2006, para. 154). This was confirmed by the Court, which also embarked on an analysis of the limits of the right to property as contained in Article 21 of the American Convention on Human Rights (see also below Section 4.3 in more detail). *Inter alia* it held that ‘effective participation’ of affected indigenous communities was necessary in order for possible limitations to the right to property to be permissible.

Hence, it found that the duty to actively consult requires the state to both accept and disseminate information; entails constant communication; must be undertaken in good faith, through culturally appropriate procedures; must have the objective of reaching an agreement; must be undertaken at the early stages of development to provide time for internal discussion and proper feedback to the state; the communities must have been made aware of possible risks to ensure acceptance which is knowingly and voluntarily. (*Saramaka v. Suriname* (Ct), 2007, para. 133)

Finally, as confirmed in *Kichwa Indigenous Peoples of Sarayaku v. Ecuador*, ‘the **obligation to consult is the responsibility of the State; therefore the planning and executing of the consultation process is not an obligation that can be avoided by delegating it to a private company or to third parties [...].**’ (*Sarayaku v. Ecuador*, 2012, para. 187) In light of the common practice that the consultation process is in fact conducted by the project operators, it is therefore crucial to highlight that states must at minimum ensure that ‘indigenous peoples be consulted on any matters that might affect them’ and that ‘the purpose of such consultations should be to obtain their free and informed consent.’ (*Kaliña and Lokono Peoples*, 2013, para. 127)

#### 4.2.2 Applicable Institutional Policies

The connection between development projects or alternative land use policies and displacement/relocation/resettlement has been part of the agenda of development actors, in particular development financing institutions, for many years. (de Sherbinin et al., 2011; Ferris, 2012, p. 4;<sup>20</sup> Mathur, 2015) Despite a long-time disregard for the issue, over time the formulation of a number of policies, guidelines and instruments guiding their operations has been prompted. Even though home states carry the primary obligation for ensuring that projects implemented on their territory and within their jurisdiction adhere to the state’s human rights obligation, their economic dependence on international financing has put development actors in a position to have become **instrumental in developing safeguards** to prevent or minimize the negative effects of large-scale development projects on often vulnerable communities.

As a preliminary remark, it can be stated that all institutional policies as applied by European actors in the three studied cases envision that **meaningful consultation** should be integral to the process of achieving development with minimal negative impacts on the local population.

In particular, the following policies were relevant for the implementation of the cases investigated:

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<sup>20</sup> See also the report by the World Commission on Dams in 2000 which recognised that ‘in too many cases an unacceptable and often unnecessary price has been paid to secure benefits, especially in social and environmental terms, by peoples displaced, by communities downstream, by taxpayers and by the natural environment.’ (World Commission on Dams, 2000, Executive Summary, p. xxviii).

**Barro Blanco**

- Approved by FMO and DEG in **August 2011**
- Both apply the IFC Performance Standards (**version 2006**) (as they subscribe to the Equator Principles)
  - Particular relevance PS 1 (Social and Environmental Assessment and Management System), PS 7 (Indigenous Peoples)
- Other involved (non-European) financing institutions: CABI

**Bujagali**

- Approved by EIB, FMO, EIB, KfW/DEG and AFD btw. **April and Dec. 2007**
- FMO subscribes to the Equator Principles and applies the IFC Performance Standards (**version 2006**)
  - Particular relevance PS 1 (Social and Environmental Assessment and Management System), PS 7 (Indigenous Peoples)
- KfW uses the WB safeguard policies as a point of reference
- EIB relies on the relevant IFC Performance Standards, in line with pertinent regulations for co-financed projects
- Other involved (non-European) financing institutions: World Bank Group (IDA, IFC, MIGA), AfDB

**Olkaria**

- Approved by EIB, AFD, KfW (Mutual Reliance Initiative<sup>21</sup>) in **2010**
- Project operates under WB policies<sup>22</sup>

<sup>21</sup> The European engagement in this case takes place under the Mutual Reliance Initiative (MRI) of EIB, AfD, and KfW. The MRI is 'a mechanism to broaden and deepen their co-operation and coordination, particularly focusing on the co-financing of development projects' (OECD, 2011), which started in 2009 to develop an effective division of labour in the context of commitments under the Paris Declaration on Aid Effectiveness and the pertinent Accra Agenda for Action. Olkaria has been one of 14 projects under the pilot phase of the MRI (*ibid.*).

The MRI implies the delegation of tasks and responsibilities, thus 'most of the tasks during the project cycle are given to one of the three institutions as a lead financier, from appraisal to preparing lending decisions and implementation. The lead financier is appointed because they will have particular expertise in a given economic sector, or a significant presence in the project country. Close cooperation between the lead and the two co-financiers is integral in maximising the full benefits.' (EIB, 2016b).

The lead for Olkaria IV is with AfD (EIB, 2010).

<sup>22</sup> Due to lack of more information on AfD safeguard policies it is assumed for the purpose of this report that AfD simply applied the World Bank OPs for two reasons: firstly, the World Bank had actually the lead amongst the lending institution in accompanying and supervising the resettlement process; and secondly, because AfD in its general overview on relevant international standards mentions inter alia the Bank's safeguard policies.

- Particular relevance OP/BP 4.12 (Involuntary Resettlement, **version 2001**), OP/BP 4.10 (Indigenous Peoples, **version 2005**) was not applied (main critique of the banks' investigation)
- Other involved (non-European) financing institutions: WB, Japan International Cooperation Agency (JICA)

Hence, of particular relevance to the three cases are the **IFC Performance Standards (PS)** as well as the **World Bank Operational Policies (OP)**. The relevant parts with regard to participatory standards will consequently be highlighted in the following.

With regard to the **IFC Performance Standards**, the 2006 versions – since then updated and amended – are applicable in the context of the Barro Blanco dam as well as the Bujagali dam. Particularly relevant in the context of community participation in the context of project approval are PS 1 (Social and Environmental Assessment and Management System), and in the case of the Barro Blanco project, PS 7 (Indigenous Peoples). (IFC, 2006) As will be discussed in more detail below in Section 4.3, the original project conception did not include any resettlement activities. Hence, PS 5 (Land Acquisition and Involuntary Resettlement) was not of immediate relevance in this context.

**PS 1** provides the wider framework for the required environmental and social impact assessment, which shall 'identify and assess social and environmental impacts, both adverse and beneficial, [...] [and] avoid, or where avoidance is not possible, minimize, mitigate, or compensate for adverse impacts on workers, affected communities, and the environment.' (IFC, 2006, p. 1) Moreover, the assessment should 'ensure that **affected communities are appropriately engaged on issues that could potentially affect them**' (IFC, 2006, p. 1). This is further detailed by stating that this engagement should include a **process of consultation and 'be free of external manipulation, interference, or coercion, and intimidation, and conducted on the basis of timely, relevant, understandable and accessible information.'** (IFC, 2006, p. 4, para. 19) Where affected communities are subject to risks or adverse impacts from a project, and no alternatives are feasible (IFC, 2006, p. 2, para. 9),

the client will undertake a process of consultation in a manner that provides the affected communities with opportunities to express their views on project risks, impacts, and mitigation measures, and allows the client to consider and respond to them. Effective consultation: (i) should be based on the prior disclosure of relevant and adequate information, including draft documents and plans; (ii) should begin early in the Social and Environmental Assessment process; (iii) will focus on the social and environmental risks and adverse impacts, and the proposed measures and actions to address these; and (iv) will be carried out on an ongoing basis as risks and impacts arise. The consultation process will be undertaken in a manner that is inclusive and culturally appropriate. The client will tailor its consultation process to the language preferences of the affected communities, their decision-making process, and the needs of disadvantaged or vulnerable groups. For projects with significant adverse impacts on affected communities, the consultation process will ensure their *free, prior and informed consultation* and facilitate their informed participation. Informed participation involves organized and iterative consultation,

leading to the client's incorporating into their decision-making process the views of the affected communities on matters that affect them directly, such as proposed mitigation measures, the sharing of development benefits and opportunities, and implementation issues. The client will document the process, in particular the measures taken to avoid or minimize risks to and adverse impacts on the affected communities. (IFC, 2006, p. 5, paras. 21-22, emphasis added)

**PS 7** (Indigenous Peoples) emphasizes that particular attention should be paid to the potential impacts of a project on indigenous peoples. It recalls that the free, prior and informed consultation must be sought from the affected indigenous communities, through involvement of their representative bodies. (IFC, 2006, p. 29, para. 9) In addition, it refers to a number of special requirements which apply in the context of indigenous peoples, including having a qualified and external expert involved to assist in conducting the prior assessment. (IFC, 2006, p. 30, para. 11)

With regard to the **WB's OP**, particularly relevant in the Olkaria case, OP 4.12. on Involuntary Resettlement and OP 4.10. on Indigenous Peoples are of relevance in the context of the planned relocation of the population affected. The primary policy objective of the OP 4.12 is stated in para. 2:

2. Involuntary resettlement may cause severe long-term hardship, impoverishment, and environmental damage unless appropriate measures are carefully planned and carried out. For these reasons, the overall objectives of the Bank's policy on involuntary resettlement are the following:

- (a) Involuntary resettlement should be avoided where feasible, or minimized, exploring all viable alternative project designs.
- (b) Where it is not feasible to avoid resettlement, resettlement activities should be conceived and executed as sustainable development programs, providing sufficient investment resources to enable the persons displaced by the project to share in project benefits. Displaced persons should be meaningfully consulted and should have opportunities to participate in planning and implementing resettlement programs.
- (c) Displaced persons should be assisted in their efforts to improve their livelihoods and standards of living or at least to restore them, in real terms, to pre-displacement levels or to levels prevailing prior to the beginning of project implementation, whichever is higher. (World Bank OP 4.12, 2013)

Amongst others OP 4.12 further demands:

- Provision of 'measures to ensure that the displaced persons are (i) informed about their options and rights pertaining to resettlement; (ii) consulted on, offered choices among, and provided with technically and economically feasible resettlement alternatives; and (iii) provided prompt and effective compensation at full replacement cost for losses of assets [...]' (OP 4.12 (6(a))).
- Provision of 'development assistance in addition to compensation measures [...] such as land preparation, credit facilities, training, or job opportunities' (OP 4.12 (6(c))).

- Timely and relevant information, consultation, and opportunities to participate in planning, implementation, and monitoring for displaced communities and any host communities, (OP 4.12 (13(a))).

In addition to OP 4.12, special guidelines for indigenous peoples are contained in OP 4.10 (World Bank OP 4.10, 2005). In addition to an Indigenous Peoples Planning Framework (paras. 12-14), OP 4.10 requires firstly, on a broad level, that any project proposed for Bank financing that affects Indigenous Peoples requires:

- (c) a process of free, prior, and informed consultation with the affected Indigenous Peoples' communities at each stage of the project, and particularly during project preparation, to fully identify their views and ascertain their broad community support for the project. (OP 4.10 (6(c)))

This is explained in more detail in para. 10, which states that

10. *Consultation and Participation.* Where the project affects Indigenous Peoples, the borrower engages in free, prior, and informed consultation with them. To ensure such consultation, the borrower:

[...]

- (b) uses consultation methods appropriate to the social and cultural values of the affected Indigenous Peoples' communities and their local conditions and, in designing these methods, gives special attention to the concerns of Indigenous women, youth, and children and their access to development opportunities and benefits; and

- (c) provides the affected Indigenous Peoples' communities with all relevant information about the project (including an assessment of potential adverse effects of the project on the affected Indigenous Peoples' communities) in a culturally appropriate manner at each stage of project preparation and implementation.

Moreover, with respect to resettlement measures OP 4.10 requires that (World Bank, 2005):

- [...] the borrower will not carry out such relocation without obtaining broad support for it from the affected Indigenous Peoples' communities as part of the free, prior, and informed consultation process. In such cases, the borrower prepares a resettlement plan in accordance with the requirements of OP 4.12, [...] (OP 4.10 (20)).

### 4.2.3 Common Concerns

The analysis of the selected case studies has revealed a number of common concerns with regard to the right to participation and to be consulted in the course of project approval and implementation. The participation process of the affected (indigenous) communities shows a number of flaws if assessed against international standards as well as the IFC's Performance Standards or the WB's Operational Policies. These relate to the overall procedure of the consultation process, in particular to be undertaken in good faith, but also to each individual element of a standard which is essential in guaranteeing respect for the rights of the local population and indigenous sovereignty.

- In two of the three cases, the project's implementation affected indigenous communities. Thus, in both instances, the governments were obligated under international law to enter into good faith negotiations with the affected communities to obtain their free, prior and informed consent. While the applicable institutional policies merely speak of 'free, prior and informed consultation', 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**. This entails **respecting indigenous representative structures and indigenous traditions in the consultation process**.
  - In the Barro Blanco case, even though it was realized that part of an indigenous people would be affected by the project, the project operator failed to identify the legitimate indigenous authority to consent to the project in the first place. This failure weighs particularly heavy as the *Carta Orgánica* – a publically available legislative act – lists the representative authorities who are authorized to conclude agreements. However, **good faith** requires the parties interested in economic exploitation of an area which will affect indigenous lands to enquire in detail through **external experts** into the indigenous societal structure and ensure that the proper indigenous authorities are party to any agreement. From the outset, there were parts of the *comarca* not only rejecting Barro Blanco but resource development in the *comarca* in general. Nevertheless, before ensuring that the agreement obtained with the authorities had the legitimate authority under the laws of the *comarca* and without entering into any meaningful consultation with the affected communities, the project continued.
  - In the Olkaria case, the WB, and also the other international lenders, failed to apply OP 4.10. (Indigenous Peoples) to the Maasai living in or around Olkaria. As the Inspection Panel report concluded, this 'gave rise to significant shortcomings regarding consultation, the cultural compatibility of the resettlement, benefit sharing, and the use of Maasai-specific expertise' (WB Inspection Panel, 2015, p. vi) One direct consequence was the departure from traditional indigenous representative structures. Within the RAPIC (Resettlement Action Plan Implementation Committee) PAPs have been represented by chairmen (Kenyan system of liaising with communities) instead of Council of Elders (Maasai system), supplemented by representatives of vulnerable groups (including one Council of Elders representative). This **externally introduced new structure of representation** has been subject to allegations of manipulation in the context of the (s)election of community representatives, and the consultation and negotiation process and the appointment of
 

The Inspection Panel (2015) determined that many of the harms could have been avoided, and the most vulnerable segments would have benefitted more from the project, had the protections of the Indigenous People's Policy been provided.

In particular, OP. 4.10 could have resulted in a higher standard of consultations, cultural compatibility of the resettlement approach, discussion on generation and sharing of additional benefits, and contribution of Maasai-specific expertise.

the members of the committee occurred in a manner which deviated from long-lasting cultural traditions.

Hence, the **recognition and protection of particularly vulnerable groups** such as indigenous peoples as well as their **traditional representative structures** remains an essential element in the context of project approval and implementation.

- The necessity of recognition and protection of particularly vulnerable groups is directly related to the next aspect, *i.e.* **difficulties in determining the manner in which the consultation and participation process should be conducted**. Thus, all three cases have numerous issues which have given rise to concern.
  - Where indigenous peoples are concerned, the participatory process should meet the principle of FPIC (whether understood as requiring consent or consultations aimed at achieving consent). In this context, it is important to recall that the requirement to obtain FPIC is a **state obligation** which cannot be delegated to third parties. As it will be most often the project operator which will enter into direct contact with the affected communities, states at minimum must therefore ensure that the participatory process adheres to the elements of FPIC in this process before granting concessions or approving permits.
    - In the Barro Blanco case, the project operator was tasked to conduct the public forum, albeit in coordination with the state's environmental authority. Nevertheless, especially in light of the **long-lasting dispute regarding resource exploitation in comarca areas in Panama** and in consideration of the parallel **legislative policy change regarding resource exploitations in indigenous territories**, the government missed the opportunity to directly engage in a meaningful consultation process from the start on its own and ensure the respect for the elements contained in FPIC.
  - Another crucial aspect of FPIC is to allow for a meaningful participation **at each stage of project preparation and implementation**. As the former Special Rapporteur on Indigenous Peoples, James Anaya, has emphasized, consultations should be 'in the nature of negotiations towards mutually acceptable arrangements, prior to the decisions on proposed measures, rather than consultations that are more in the nature of mechanisms for providing indigenous peoples with information about decisions already made or in the making, without allowing them genuinely to influence the decision-making process.' (Human Rights Council, UN Doc. A/HRC/12/34, 2009, para. 46) **Thus, the spirit of FPIC stands contrary to processes which are used for top-down information processes.**
    - Particularly evident are the facts in the Olkaria case: Here, the RAPIC functioning/structural set-up and consultation mechanisms, even though allowing for representation of groups which are not directly represented in the

traditional system of the Council of Elders, seemingly have been used by the project operator in several instances to work into the direction of informing about or 'selling' decisions already made, **without allowing for a genuine process to influence the decision-making**. This particularly concerned such fundamental issues as the establishment of RAPIC itself, the complaint mechanism, the selection of the resettlement site, and the structure of self-organisation at the RAP village.

- In addition, in neither of the analysed cases was the participation or the consultation of the affected community done in a **culturally appropriate manner**. Hence, **informed** participation entails not only that the consultation process should be transparent, consistent, complete etc., but, most importantly, it means that it should be **culturally appropriate**.
  - In the Barro Blanco case, neither the public forum nor the further process adhered to these standards. Hence, the manner in which the public forum was advertised,<sup>23</sup> where it was located (outside of indigenous territory) and the information presented<sup>24</sup> contributed to the negative attitude of the affected communities towards the project. The information presented to the communities was also incomplete, as it *inter alia* did not indicate that any houses would be flooded (this was only confirmed afterwards). Also, the *peritaje* missions<sup>25</sup> carried out in 2013 confirmed that the direct and indirect impacts had not been clearly explained to or understood by the affected communities.
  - In the Olkaria case, the formal establishment of RAPIC along the lines of the RAP only occurred in June 2012. This was after a prolonged process full of tensions to accept a proposed resettlement site. This complicated genuine participation of the affected communities, in particular with regard to the objective of obtaining prior consent. Additionally, the externally introduced RAPIC structure did not ensure effective communication with the community. Consultations were not conducted in the Maa language or facilitated by independent translators, documents were not always disclosed to the entire community in an accessible form, manner and language understandable to them, and therefore the community did not have the opportunity to express their genuine consent in favour or objection to the project.
  - Also in the Bujagali case, the dialogue with the affected communities was not culturally appropriate as there was only a brief feedback form in English, which was not translated into local languages, and distributed to a largely illiterate population. Also the updated information on the website by the project operator is useless to a community without access to the internet.

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<sup>23</sup> The advertisement occurred in Spanish in different media forums, however no direct contact was sought or invitation extended to the affected indigenous communities.

<sup>24</sup> In particular, it has been maintained by the affected communities that the information dispatched (entirely in Spanish) did not fulfil minimum standards in light of indigenous consultation procedures, *e.g.*, the timeframe to receive comments was extremely short, the information was presented in form of a finished project proposal, only few were allowed to attend in the first place and were only allowed to listen and not engage in consultations.

<sup>25</sup> The *peritaje* missions were independent expert assessment reports under the guidance of UNDP.

The failure of the project operator, governmental authorities and international partners to obtain the consent of the affected communities or ensure their adequate participation/consultation in the course of the project's approval and implementation **weighs particularly heavy as the stakeholder participation process envisioned under the CDM procedure remained less than effective.**

- Thus, generally, the CDM approval of a project appears to be of secondary importance to the operating partners, and little attention has been paid to ensure adequate information of the affected populations of the significance thereof. The therefrom following lack of stakeholder knowledge of the process is reflective of the general approach by the Designated Operational Entities as well as the Executive Board in the course of the assessments of objections, perceiving the process more as an item on a list than an earnest procedure to discern potential objections. **The lack of remedies against the approval of a project by the Executive Board, which moreover does not possess the mandate to consider human rights allegations, constitutes a significant obstacle to the effectiveness of the participatory process under the CDM framework.**
  - In the Barro Blanco case, the DOE AENOR (Spanish Association for Standardisation and Certification) mentions in its validation report that they verified during their visit that the '[l]ocal communities (Veladero, Cerro Viejo, Palacios and Bellavista) have been consulted and have demonstrated their support for the development of the Barro Blanco Hydroelectric power plant Project by signing the corresponding minutes of the meetings.' (AENOR, 2011, p. 24) These, however, were not the communities who are affected by the project and also not the proper indigenous authorities. As to comments by stakeholders, the report refers to one comment submitted by Mr. Osvaldo Jordan during the first period for commenting, on behalf of the NGO Alianza para la Conservacion y el Desarrollo (ACD), which was received during this period. AENOR then stated that after speaking to the DNA of Panama and the 'main communities involved in the area', these had 'agreed that the project will bring work and development to the area, and all of them supported the development of the project. No negative feedback was received.' (AENOR, 2011, p. 24) No further response was given to the received comment. Due to a change in methodology, there then was another period for comments regarding a new version of the PDD, and during that period, no comments were received. (AENOR, 2011, p. 24) Thus, AENOR concluded that it could recommend the Barro Blanco project for registration. A number of NGO reports indicate, however, that comments had been sent also during the second period, and their receipt had been confirmed. Yet, no response was given on these comments by AENOR and the comments do not appear on the UNFCCC's website. (Jordan, Sogandares & Arjona, 2011)
  - In the Oikaria case, the entire relocation process (including the issues with participation and consultation) played a minor role throughout the CDM registration process. Thus, these issues seem to have not been brought to the attention of the CDM Board. The PDD

for Olkaria IV mentions as key aspects of concern the land dispute between the Maasai and Kedong Ranch Lth, the claim of the Maasai to be considered in job offerings, and claims for compensation. The stakeholder consultation revealed that the project activity was supported by the local stakeholders and no additional comments were received by the Executive Board. However, when interviewed on the issue, it seems that the PAPs were not aware what the CDM is about and the political meaning of their participation in the consultation process. It was one meeting amongst many. As the DOE received, in his view, no major objections against the project, the consultation process thus meant no obstacle to the CDM project registration.

- In the Bujagali case, the validation report for the CDM states that ‘several rounds of local stakeholder consultation and engagement have been carried out...’ (ERM CVS, 2011, p. 97), but clearly refers to the PDD publication process, which took place well after the relocation of the PAPs.<sup>26</sup>
- Additionally, the CDM process fails to provide any significant safeguards after the registration process. Even though the CDM Executive Board adopted a procedure in 2013 allowing for the DNA to withdraw approval/authorization of the CDM project (CDM-EB76-A12, 2013), this leaves the decision up to host parties.
  - Thus, in the Barro Blanco case, after the project had been suspended by the national environmental authority in February 2015 in light of failures to comply with its mandatory rules on EIAs, local NGOs contacted the CDM Executive Board on this issue. While the Board responded, and passed on the information to the Panamenian DNA, it merely referred to abovementioned procedure, did not engage in any separate investigation and pointed out that the forwarded communication ‘shall in no case constitute an endorsement by the Board of the content of the communication’. (Letter from CDM EB Secretariat to Mr. Emilio Sempris (ANAM), 2015)

The failure of the CDM process to meaningfully engage with the affected communities and the lack of mandate of the Executive Board to demand more significant consultations prior to authorizing the registration of a project constitute additional obstacles to a genuine participation process of affected (indigenous) communities.

### 4.3 Migration/Displacement/Resettlement (MDR)

A further key human rights concern relates directly to the primary focus of the project’s research questions, namely **to which extent resettlement/relocation/impending displacement have been undertaken in accordance with human rights obligations.**

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<sup>26</sup> As explained in the introduction, the resettlement process was undertaken in the course of the first project under AESNP who then withdrew, however not until after the resettlement had been undertaken (see Chapter 2).

In two of the three cases, resettlement plans have been implemented by the operator supervised by the lending institutions. In the Barro Blanco case, however, no such resettlement plan has been drawn up, even though it has been confirmed by numerous sources that the flooding of the reservoir site will result in the displacement of several members of the affected communities. Thus, not only are the obligations of states in the context of resettlement and relocation (prior, during and after) relevant for this report, but also the obligation of states to prevent forced displacement from occurring.

#### 4.3.1 International Standard

Forced displacement/eviction can violate a number of civil and political as well as economic, social and cultural rights (e.g. Arts. 6, 7, 9, 17, 25, 26, 27 ICCPR, Arts. 6, 11, 12, 13 ICESCR). The indivisibility of human rights is particularly evident in this regard. (OHCHR, 2014, pp. 5–7) In particular the recognition of the right to property is an essential element in ensuring protection from displacement. (Basic Principles (Development-based Displacement), 2007, para. 50; Guiding Principles on Internal Displacement, 1998, Principle 21) The **right to property** (protected in regional human rights treaties and recognised and the Universal Declaration of Human Rights) also includes the recognition of traditional land tenure and collective ownership systems. This was also emphasized by the Special Rapporteur on Adequate Housing in 2013 when stating that states ‘have an immediate obligation to ensure that all persons possess a degree of security of tenure that guarantees legal protection against forced eviction, harassment and other threats’ (with reference to General Comment No. 4 of the CESCR). (Special Rapporteur on Adequate Housing, 2013, para. 6)

Hence, every person has the right to be **protected against arbitrary displacement/forced evictions**. (Basic Principles (Development-based Displacement), 2007, para. 11; Guiding Principles on Internal Displacement, 1998, Principle 6) The primary duty-bearer is the state where the displacement/eviction is at risk of occurring. However, as Principle 11 of the Basic Principles emphasizes, this ‘does not [...] absolve other parties, including project managers and personnel, international financial and other institutions or organizations, transnational and other corporations, and individual parties, including private landlords and landowners, of all responsibility’ (see also Commission on Human Rights, UN Doc. E/CN.4/Sub.2/1997/7, 1997, para. 5).

Moreover, Principle 12 of the Basic Principles stresses that states shall ‘refrain from violating human rights domestically and extraterritorially; ensure that other parties within the State’s jurisdiction and effective control do not violate the human rights of others; and take preventive and remedial steps to uphold human rights and provide assistance to those whose rights have been violated.’

The use of the qualifier ‘**arbitrary**’ indicates conduct occurring without a legal basis, in disregard to procedural rules, containing ‘elements of injustice, unpredictability and unreasonableness’. (Nowak, 2005, Article 17, para. 12) This includes displacement *inter alia* in cases of large-scale **development projects that are not justified by compelling and overriding public interests**. Hence, in line with general human rights law (in particular the right to property), displacement/evictions are allowed in certain circumstances, but this must be interpreted strictly, leave no other alternatives, and constitute an *ultima ratio*. (Guiding Principles on Internal Displacement, 1998, Principle 7; Kälin, 2000, p. 15) This process is detailed by the UN Basic Principles and Guidelines on Development-based Evictions and Displacement,

stipulating that ‘any eviction must be (a) authorized by law; (b) carried out in accordance with international human rights law; (c) undertaken solely for the purpose of promoting the general welfare; (d) reasonable and proportional; (e) regulated so as to ensure full and fair compensation and rehabilitation; and (f) carried out in accordance with the present guidelines.’ (Basic Principles (Development-based Displacement), 2007, para. 21) Where displacement is found to be unavoidable, measures must be taken to minimize it and its negative consequences. (Guiding Principles on Internal Displacement, 1998, Principle 7)

To determine when there is an **overriding public interest, not only must all feasible alternatives have been explored** (see *inter alia* Art. 10, Kampala Convention, 2009, but also World Bank OP 4.12, 2013), but a **balance of interests** between the overall economic interests in the project and the protected rights of the affected communities must be struck (Hofbauer, 2015, p. 249ff).

In this regard, the **interests of indigenous peoples** deserve special attention. The importance of land for indigenous communities has been confirmed already early by the Inter-American Court in *Awas Tingni*, where it stated that for indigenous peoples ‘relations to the land are not merely a matter of possession and production but a material and spiritual element which they must fully enjoy, even to preserve their cultural legacy and transmit it to future generations.’ (*The Mayagna (Sumo) Indigenous Community of Awas Tingni v. Nicaragua*, 2001, p. 75, para. 149) Both the Inter-American Commission on Human Rights and the Inter-American Court of Human Rights have deduced special protection rights for indigenous peoples *inter alia* from the provisions regarding the rights to life, liberty and personal security, residence and movement, the preservation of health and well-being, culture, judicial well-being, as well as the Convention’s protection of property.<sup>27</sup>

Furthermore, as emphasized by the Inter-American Court in *Saramaka*, even though Article 21 of the ACHR (right to property) is not absolute, when concerned with property rights of indigenous and tribal peoples an additional factor is whether the ‘restriction amounts to a denial of their traditions and customs in way that endangers the very survival of the group and of its members.’ (*Saramaka v. Suriname* (Ct), 2007, para. 128)

In order to safeguard their rights, the whole process, in particular the identification of possible alternatives, shall occur **in consultation** with the affected communities (see, *inter alia*, Commission on Human Rights, UN Doc. E/CN.4/Sub.2/1997/7, 1997, para. 16; *Saramaka v. Suriname* (Ct), 2007, para. 129). In this vein, the special value of lands and territories for indigenous peoples has also been recognised in Article 10 of the United Nations Declaration on the Rights of Indigenous Peoples:

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 and, where possible, with the option of return.

Where the public interest outweighs the interests of the affected communities, **resettlement ‘must occur in a just and equitable manner’ and must include ‘the right to alternative land or housing which is safe, secure, accessible, affordable and habitable.’** (Commission on Human Rights, UN Doc.

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<sup>27</sup> *Inter alia*, Arts. 4, 7, 21, 22, 25, American Convention on Human Rights, 21 November 1969, 1144 UNTS 123.

E/CN.4/Sub.2/1997/7, 1997, paras. 26-27) This shall take place only once a **resettlement plan** has been put in place, and should *inter alia* ensure that

(c) The actor proposing and/or carrying out the resettlement shall be required by law to pay any costs associated therewith, including all resettlement costs;

[...]

(e) The affected persons, groups and communities must provide their full and informed consent as regards the relocation site. [...]

(f) Sufficient information shall be provided to affected persons, groups and communities concerning all State projects as well as the planning and implementation processes relating to the resettlement concerned, including information concerning the purpose to which the eviction dwelling or site is to be put and the persons, groups or communities who will benefit from the evicted site. Particular attention must be given to ensure that indigenous peoples, ethnic minorities, the landless, women and children are represented and included in this process;

(g) The entire resettlement process should be carried out in full consultation with and participation of the affected persons, groups and communities. States should take into account in particular all alternative plans proposed by the affected persons, groups and communities; (Commission on Human Rights, UN Doc. E/CN.4/Sub.2/1997/7, 1997, para. 28)

Finally, in the context of forced evictions, the right to a remedy and to judicial or other accountability mechanisms is of key importance. (OHCHR, 2014, pp. 2, 31)

#### 4.3.2 Applicable Institutional Policies

The aim of the applicable institutional policies in this regard is to avoid involuntary resettlement where feasible or to **at least minimize the negative impact** of resettlement on local populations.

In particular, the following policies were relevant for the implementation of the cases investigated:

##### Barro Blanco

- Particular relevance PS 5 (Land Acquisition and Involuntary Resettlement), PS 7 (Indigenous Peoples)

##### Bujagali

- Particular relevance IFC PS 5 (Land Acquisition and Involuntary Resettlement), WB OP 4.12 (Involuntary Resettlement, **version 2001**)

##### Olkaria

- Particular relevance OP/BP 4.12 (Involuntary Resettlement, **version 2001**); OP/BP 4.10 (Indigenous Peoples, **version 2005**) was not applied (main critique of the banks' investigation bodies)

As above, of particular relevance to the three cases are the **IFC Performance Standards** as well as the **World Bank Operational Policies**. The relevant parts with regard to MDR will consequently be highlighted in the following.

**IFC PS 5** is applicable to 'physical displacement (relocation or loss of shelter) and to economic displacement (loss of assets or access to assets that leads to loss of income sources or means of livelihood) as a result of project-related land acquisition. Resettlement is considered involuntary when affected individuals or communities do not have the right to refuse land acquisition that results in displacement. This occurs in cases of: (i) lawful expropriation or restrictions on land use based on eminent domain; and ii) negotiated settlements in which the buyer can resort to expropriation or impose legal restrictions on land use if negotiations with the seller fail.' (IFC, 2006, p. 18, para. 1)

The primary objectives are, *inter alia*, to avoid or at least minimize involuntary resettlements wherever feasible; mitigate adverse social and economic impacts by providing compensation and ensure that resettlement is implemented with appropriate disclosure of information, consultation and the informed participation of those affected.

Whether or not a project will result in resettlement should be discovered already in the course of the Social and Environmental Impact Assessment, and the necessary measures should be implemented into the Social and Environmental Management system. For the resettlement planning, 'the client will carry out a census with appropriate socio-economic baseline data'. (IFC, 2006, p. 20, para. 11) This will include a cut-off date for eligibility.

As emphasized in several passages of PS 5, consultation is a key prerequisite and should continue at all stages of implementation. Where indigenous peoples are concerned, PS 7 is of particular relevance. Para. 14 of **PS 7** states in this regard that

The client will consider feasible alternative project designs to avoid the relocation of Indigenous Peoples from their communally held traditional or customary lands under use. If such relocation is unavoidable, the client will not proceed with the project unless it enters into a *good faith negotiation with the affected communities of Indigenous Peoples, and documents their informed participation and the successful outcome of the negotiation*. Any relocation of Indigenous Peoples will be consistent with the Resettlement Planning and Implementation requirements of Performance Standard 5. Where feasible, the relocated Indigenous Peoples should be able to return to their traditional or customary lands, should the reason for their relocation cease to exist. (emphasis added)

With regard to the **WB's Operational Policies**, relevant in the Olkaria case, **OP 4.12** requires that the borrower prepares a resettlement plan or a resettlement policy framework which *inter alia* addresses the impacts and consequences of physical relocation, including measures to ensure that the displaced persons are provided with residential housing, or housing or agricultural sites which are at least equivalent to the advantages of the old site. Para. 15 of the policy details with respect to land and compensation that all those are entitled

(a) [...] who have formal legal rights to land (including customary and traditional rights recognized under the laws of the country), (b) [...] who do not have formal legal rights to land at the time the

census begins but have a claim to such land or assets [...], (c) [...] who have no recognizable legal right or claim to the land they are occupying (OP 4.12 (15)).

The safeguards further provide for '[...] prompt and effective compensation at full replacement cost for losses of assets [...]' (OP 4.12 (6(a)(iii))). To ensure that, in case of land for land compensation affected persons have the best choices, annex A, para. 15(c) to OP 4.12 further requests

a review of the resettlement alternatives presented and the choices made by displaced persons regarding options available to them, including choices related to forms of compensation and resettlement assistance, [...] and to retaining access to cultural property (e.g. places of worship, pilgrimage centers, cemeteries).

**OP 4.10** safeguard policy for projects affecting indigenous peoples elaborates extensively on *Lands and Related Natural Resources* (paras. 16 and 17). The Bank acknowledges that

Indigenous Peoples are closely tied to land, forests, water, wildlife, and other natural resources, and therefore special considerations apply. [...] [W]hen carrying out the social assessment and preparing the IPP/IPPF, the borrower pays particular attention to [...] [*inter alia*] the customary rights of the Indigenous Peoples, both individual and collective, pertaining to lands or territories that they traditionally owned, or customarily used or occupied, and where access to natural resources is vital to the sustainability of their cultures and livelihoods (para. 16(a)).

'Customary rights' to lands and resources is here defined as referring 'to patterns of long-standing community land and resource usage in accordance with Indigenous Peoples' customary laws, values, customs, and traditions, including seasonal or cyclical use, rather than formal legal title to land and resources issued by the State' (*ibid.* FN 17). The Bank safeguards further promote the legal recognition of such customary rights which 'may take the following forms: (a) full legal recognition of existing customary land tenure systems of Indigenous Peoples; or (b) conversion of customary usage rights to communal and/or individual ownership rights' (para. 17).

### 4.3.3 Common Concerns

The analysis of the three case studies reveals the difficulties associated with the implementation of large-scale development projects and also evidences that existing mechanisms to ensure the adherence to the applicable safeguard policies are not effective.

- In all three cases, a major issue regarding the resettlement process concerned the initial data set/census which formed the basis for the planning and carrying out of the resettlement process and which is required especially under the applicable institutional policies.
  - In the Barro Blanco case, the project operator's omission of identifying persons affected by the project who would be displaced formed the starting point of the subsequent failure to draft a RAP. There is also no valid agreement with the affected communities to purchase or lease their land (owned collectively) against adequate compensation. The lack of a resettlement plan also means that **no precise data** exists on the full range of people affected by the project and that therefore **no structured planning of compensation measures** has occurred.

- Also in the Olkaria case, a number of complaints can be traced back to the **initial census** conducted by GIBB Africa in 2009, forming the cut-off date for those to be considered for compensation. The census was not properly announced to the affected communities, and took place during drought when many move away with their cattle to drought fall back zones. Further, there have been shortcomings in the categorization of PAPs determining the type of compensation they were eligible to (*e.g.* a house on RAPland or not). Data on sources of income (*e.g.* livestock census, Cultural Centre income) are disputed as well. As a consequence, there is a **lack of clarity about the number of eligible PAPs and what they are entitled to**. Updates were either not communicated or remained without significant effect. Thus the increase in the number of houses from 150 to 164 after the 2012 update was basically withdrawn again in 2013 thereby producing new lists that may have changed distribution patterns amongst PAPs. Moreover, the initial census as well as later census-related exercises 'were methodologically flawed and culturally incompatible, resulting in inconsistencies and contradictions.' (WB Inspection Panel, 2015, para. 63)
 

The Inspection Panel (2015) noted in several passages how it was not possible to ensure the restoration of livelihood in light of the insufficient baseline data:

Thus, it found that the socio-economic baseline data was of poor quality and that due to the lack of a comprehensive baseline and systematic monitoring, precise information on livelihood restoration was unavailable.

The EIB-CM pointed out in this regard that its initial assessment 'has also found contradicting information on some issues related to the socio-economic and political configuration of the affected communities that have a direct impact on the resettlement, like the land-titling and the identification of PAPs' (para. 9.3)
- In the Bujagali case, it was confirmed already in 2008 that neither the initial RAP nor APRAP included a sound socio-economic survey that could have aided in a better consideration of a people's living circumstances and could have been used to determine whether livelihood restoration was effective. The MAP update reports indicate that socio-economic surveys have been conducted since, but the original documents could not be obtained from the public domain. Interviewees
 

The Panel objected to the approach taken by the Management as regards resettlement, namely to develop an 'Assessment of Past Resettlement Activities and Action Plan (APRAP)' instead of a new Resettlement Action Plan (RAP).

The APRAP fundamentally relied on the information from the previous, cancelled project, did not include a full census of affected people, and did not provide the necessary consultation process. The Inspection Panel report (2008) stressed that the public consultation process was truncated, and the APRAP failed adequately to assess and update the previous RAP to ensure compliance with Bank standards. This was particularly problematic as the Panel found that the effects on the people of the original displacement, and of the ensuing delay, were not fully reflected in the APRAP.

repeatedly pointed out that a sound assessment of eligibility of claims, as well as livelihood circumstances were hard to assess without sound surveying, and that livelihoods and populace within the Naminya area have changed significantly since the original resettlement in 2001.

The **initial process of evaluating and assessing the risks** with the proposed project is **crucial for ensuring the adequate protection of the right to property/tenure** and consequently, for the determination of those entitled to receive compensation as well as for beneficial conditions for livelihood restoration and thus the **right to an adequate standard of living**.

- Particularly vulnerable groups, such as indigenous peoples, require additional protection as the importance of land for them is more than a matter of possession, but includes a material and spiritual element.
  - For example, in the Barro Blanco case, and in light of the spiritual importance of not only the river Tabasará for their religion ('Mama Tata') but also of the land for the affected indigenous communities, a **prior agreement** regarding land and resource rights between the involved parties can be seen as indispensable. This was not reached, and there are serious doubts whether it was attempted to engage in **good faith** negotiations with the affected communities in a **transparent and consistent** manner.
 

With regard to resettlement process, the Inspection Panel (2015) found that people were resettled to land which was less suitable for them than their older habitats and they moved in time for the start-up of the new geothermal plants, even before all amenities such as reliable water supplies and a completed road system were in place at the resettlement site.

    - Also in the Olkaria case, there are a number of indications that the resettlement was not **culturally appropriate** and did not ensure the communities' respective **traditional lifestyles**. First, four distinct communities with different traditional lifestyles (pastoralist versus a community focused on tourism) were grouped together into one new village. Whereas one community practiced the circular settlement layout and close way of living, the majority were used to more or less widespread settlement patterns. The new community is very widespread with fenced parcels per household. Moreover, the new resettlement site poses not only questions with regard to its size, but also with regard to its appropriateness for a pastoralist way of life (the land is fraught with steep valleys) and is prone to landslides which may affect housing facilities in the future.
- The involvement of the affected communities in the **site selection** for resettlement is crucial in order to achieve a **culturally appropriate and sustainable outcome** of the resettlement process. In none of the three case studies, however, were alternatives discussed sufficiently with the affected communities.

- Hence, in the Barro Blanco case, even though the project operator argued in their Environmental and Social Report that alternative land would be available if requested, **potential resettlement sites** and **alternatives** were not discussed in respect of **the free, prior and informed consent** with the affected communities prior to authorization of the project.
- In the Olkaria case, a large part of the community, even some officially representing their communities in the RAPIC, were not even aware of the **number of alternative resettlement sites** mentioned in previous reports by GIBB Africa and the project operator. They were only aware of the one rejected and the current one as well as of discussed alternatives to re-establish the Cultural Centre business place (not the village) elsewhere.
- Similar was the case in Bujagali, where the communities were informed that they would be resettled, that they would be compensated in land, but where they had **no saying choosing a preferred resettlement site**. This ultimately resulted in their resettlement site being quite far from the river, despite the fact that their former occupation was strongly based on fishing. Thus, according to the RAP, the affected persons and their representatives were 'informed' about the identification of a suitable site, but not included in actual consultations (ESG International, 2001, p. iii).
- The issue of full and fair compensation for (communal) property/land has proven challenging in all three cases.
  - In the Barro Blanco case, despite the fact that the *comarca* has been recognised as communal property, offers of compensation were only extended to one member of the community (valuing the land at approx. 4000 USD). Moreover, as resettlement had not been envisioned at the time of project approval, no further agreement has been reached on compensatory measures at this point.
  - In the Olkaria case, a major point of concern relates to the adequacy of the resettled site, in particular in relation to the **size of the land**. Issues such as the question of carrying capacity and the adequacy of land for land compensation were dealt with inadequately. Land for land compensation has to be grounded in a **proper assessment of land-use**. The argument that the Maasai can (most likely) use in future the same grazing grounds (on the same insecure legal basis as before the resettlement) seems odd in light of the geothermal boom in the region which triggers alienation of land in the near and wider vicinity. For the purpose of livelihood reconstruction and maintenance a **comprehensive assessment of community resources including grazing land** would have been due. In light of the failure to conduct these prior assessments properly, the long-term rehabilitation of the livelihood is impaired and their enjoyment of the right to an adequate standard of living is threatened. Additional points of complaint concern the **quality of the land, the location near a site which received a drilling concession, and the lack of title deed to be transferred in an appropriate time**.

- Also the Bujagali case evidences concerns with regard to adequacy of compensation, in particular in light of the **quality of houses** and **sufficiency and quality of land** to provide for adequate nutrition. Services which were promised such as access to electricity, a school etc., were only put into effect after the new developer took control of the project and thus, took a considerable amount of time.

The clear failure of the project to live up to the 'mandate of Bank policy to improve or at least restore, in real terms, the livelihoods and standards of living' was confirmed by the Inspection Panel's report (2008, p. xiv).

Indicators such as whether title to land where the CDM project is to be developed has been secured, whether existing property rights/customary land rights have been respected, and whether resettlement – if necessary – has been conducted according to international standards **are important preliminary questions to be asked in advance, before project approval and registration**. However, the CDM Rules are silent on the **adequate protection of the right to property/tenure** and leave the determination of property rights largely within the discretion of host states. As these issues are essential for the successful implementation of CDM projects, the failure to address these aspects at an early stage of project implementation creates not only risks for the project participants but can also seriously endanger the effective enjoyment of rights of affected populations.

## 4.4 Due Diligence

A further identified crucial point relates to the adequacy of the conducted environmental impact assessment (EIA) as well as the monitoring activities by the financing partners. More broadly, this can be summarized as an **analysis of the extent to which the involved parties have complied with their due diligence obligations to prevent or minimize potential damage/harm from occurring**.

### 4.4.1 International Standard

The **due diligence obligation** of the involved parties stems both from human rights law (see, e.g., CESCR, UN Doc. E/1991/23, 1991; HRC, UN Doc. CCPR/C/21/Rev.1/Add.13, 2004) and from international environmental law. In particular, it requires **states** to regulate the conduct of private parties in order to protect individuals from harmful activities and ensure that appropriate remedies are available. Hence, prior to authorizing activities which potentially could cause harm to the environment, states are under the obligation to ensure that their decision is based on an assessment of the risks involved with the project activity. (ILC Articles on Prevention (with Commentaries), 2001, Art. 7) This obligation of states to conduct an environmental impact assessment (EIA) to fulfil their due diligence obligation under international law has been recognised as customary international law *inter alia* by the International Court of Justice in *Pulp Mills*. (*Pulp Mills*, 2010, pp. 82–83, para. 204) EIAs have to 'address the potential effects' of the proposed

activities (*Pulp Mills*, 2010, pp. 82–83, para. 204), thus not excluding issues which would deprive it of its purpose. While the scope and content of EIAs remains for each state ‘to determine in its domestic legislation or in the authorization process’ (*Pulp Mills*, 2010, p. 83, para. 205), the Court was clear in finding that ‘an environmental impact assessment must be conducted prior to the implementation of a project. Moreover, once operations have started and, where necessary, throughout the life of the project, continuous monitoring of its effects on the environment shall be undertaken.’

As to the involvement of the affected communities in EIAs, the issue is closely linked to Section 4.2 (see also Art. 19, UNDRIP, 2007) and the objective to ensure adequate participation of affected communities in projects affecting them. Thus, jurisprudence by regional human rights bodies has consistently confirmed that the obligation to conduct a prior EIA through independent and technically capable entities constitutes an essential safeguard for the protection of property rights of traditional communities. (*Saramaka v. Suriname* (Ct), 2007, para. 129; *Social and Economic Rights Action Centre & the Centre for Economic and Social Rights v. Nigeria*, 2001, para. 53)

By inference of environmental matters into a number of human rights – reaffirming especially procedural obligations such as access to information and the obligation to conduct a prior EIA (Sands & Peel, 2012, p. 787ff), some cases have even gone so far to explicitly extend the obligation of prior EIAs to environmental and social impact assessments (ESIAs). (*Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya*, 2009, paras 266-268; *Saramaka v. Suriname* (Ct), 2007)

As a number of instruments have confirmed, EIAs should also extend to an assessment of the impacts on cultural heritage. (CBD Guidelines, 2002; Espoo Convention, 1997)

Additionally, the due diligence obligation also extends to **corporate entities** involved in the project. Exemplary are the Guiding Principles on Business and Human Rights (GPBHR, 2011), stipulating in Principle 15 that:

In order to meet their responsibility to respect human rights, business enterprises should have in place policies and processes appropriate to their size and circumstances, including:

- (a) A policy commitment to meet their responsibility to respect human rights;
- (b) A human rights due diligence process to identify, prevent, mitigate and account for how they address their impacts on human rights;
- (c) Processes to enable the remediation of any adverse human rights impacts they cause or to which they contribute.

As emphasized by the interpretative guide to the Guiding Principles, due diligence in this context refers to ‘such a measure of prudence, activity, or assiduity, as is properly to be expected from, and ordinarily exercised by, a reasonable and prudent [person] under the particular circumstances; not measured by any absolute standard, but depending on the relative facts of the special case’. (OHCHR, 2012, p. 4) This also comprises an ongoing management process, according to the circumstances at hand, to meet their responsibility to respect human rights.

#### 4.4.2 Applicable Institutional Policies

Through their safeguard policies, international financial institutions include a number of procedures and tools to uphold environmental and social due diligence. Prior risk assessment and review of the project's compliance with applicable national and institutional environmental and social regulations are key elements to be considered in the decision-making process.

In particular, the following institutional policies were relevant for determining the scope of due diligence expected in the respective circumstances:

##### Barro Blanco

- Particular relevance PS 5 (Land Acquisition and Involuntary Resettlement), PS 7 (Indigenous Peoples) and PS 8 (Cultural Heritage)

##### Bujagali

- Particular relevance IFC PS 5 (Land Acquisition and Involuntary Resettlement), WB OP 4.12 (Involuntary Resettlement, **version 2001**)

##### Olkaria

- Particular relevance OP/BP 4.12 (Involuntary Resettlement, **version 2001**) (including **Annex A on Involuntary Resettlement Instruments**) and OP/BP 4.01 (Environmental Assessment, **version 1999**; OP 4.10 (Indigenous Peoples, **version 2005**) was not applied (main critique of the banks' investigation bodies).

Resort will be made to similar standards as above (**IFC Performance Standards** as well as the **World Bank Operational Policies**), however, with a focus on the expected standard of due diligence of the respective project finance participants.

With regard to the IFC's PS, **PS 1** provides the wider framework for the required environmental and social impact assessment, which shall 'identify and assess social and environmental impacts, both adverse and beneficial, [...] [and] avoid, or where avoidance is not possible, minimize, mitigate, or compensate for adverse impacts on workers, affected communities, and the environment.' (IFC, 2006, p. 1) Moreover, 'all relevant social and environmental risks and impacts of the project [will be considered], including the issues identified in Performance Standards 2 through 8, and those who will be affected by such risks and impacts.' (IFC, 2006, p. 1, para. 4)

As to the standards of assessment, these are drawn from national legislation as well as from a state's obligations under international law if implemented into national law.

The social and environmental management system should be a **continuous process** throughout the project's life cycle, *i.e.* in the early stages of the project development and on an ongoing basis. This management system shall also be monitored throughout the process:

In addition to recording information to track performance and establishing relevant operational controls, the client should use dynamic mechanisms, such as inspections and audits, where relevant, to verify compliance and progress toward the desired outcomes. For projects with significant impacts that are diverse, irreversible, or unprecedented, the client will retain qualified

and experienced external experts to verify its monitoring information. The extent of monitoring should be commensurate with the project's risks and impacts and with the project's compliance requirements. Monitoring should be adjusted according to performance experience and feedback. The client will document monitoring results, and identify and reflect the necessary corrective and preventive actions in the amended management program. The client will implement these corrective and preventive actions, and follow up on these actions to ensure their effectiveness. (IFC, 2006, p. 5, para. 24)

Special requirements for the required ESIA can *inter alia* also be deducted from **PS 7** (Indigenous Peoples) and **PS 8** (cultural heritage), both of particular relevance in the Barro Blanco case.

Firstly, aside from the obligation to ensure the informed participation of affected indigenous communities (see above), the assessment should pay special regard to pay attention to the impacts of the project on traditional or customary lands under use. This entails entering into good faith negotiations (with successful outcome) with the affected communities, in particular in cases where relocation will not be able to be avoided (after examining all feasible alternatives). (IFC, 2006, p. 31, paras. 13-14)

Secondly, **PS 8** aims at 'protecting cultural heritage from the adverse impacts of project activities'. (IFC, 2006, p. 32) Cultural heritage 'refers to tangible forms of cultural heritage, such as tangible property and sites having archaeological (prehistoric), paleontological, historical, cultural, artistic, and religious values, as well as unique natural environmental features that embody cultural values, such as sacred groves. However, for the purpose of paragraph 11 below, intangible forms of culture, such as cultural knowledge, innovations and practices of communities embodying traditional lifestyles, are also included. The requirements of this Performance Standard apply to cultural heritage regardless of whether or not it has been legally protected or previously disturbed.' (IFC, 2006, p. 32, para. 3)

Where a project may affect cultural heritage, not only are consultations with affected communities to be entered into, but the process should also include the relevant national or local regulatory agencies that are entrusted with the protection of cultural heritage.

The removal of cultural heritage should be avoided unless the overall benefits of the project outweigh the anticipated cultural heritage loss and there are no other feasible alternatives.

The **World Bank's Operational Policy on Involuntary Resettlement (4.12)** requires the Borrower to monitor and evaluate adequately activities set forth in the RAP, and that the Bank 'regularly supervises resettlement implementation to determine compliance with the resettlement instrument.' (para. 24)

Throughout project implementation the Bank is required to supervise the implementation of the resettlement instrument ensuring that the requisite social and technical expertise is included in supervision missions. The Policy further requires that, for highly risky or contentious projects involving significant and complex resettlement activities, an 'advisory panel of independent, internationally recognized resettlement specialists' (para. 19, fn 23) be engaged to advise on all resettlement aspects, from the design to the monitoring of implementation.

**Annex A** to the World Bank's OP 4.12 (December 2001) detailing the Resettlement Plan also states that as part of the required socio-economic studies the census survey should be conducted to cover, *inter alia*

a description of the displaced households' production systems, the magnitude of expected losses, the extent of physical or economic displacement, and information on vulnerable groups or persons. This should be supplemented with means to update information on the displaced people's livelihoods and standards of living at regular intervals so the latest information is available at the time of their displacement.

**OP 4.01** stipulates *inter alia* that

The borrower is responsible for carrying out the EA. For Category A projects,<sup>6</sup> the borrower retains independent EA experts not affiliated with the project to carry out the EA.<sup>7</sup> For Category A projects that are highly risky or contentious or that involve serious and multidimensional environmental concerns, the borrower should normally also engage an advisory panel of independent, internationally recognized environmental specialists to advise on all aspects of the project relevant to the EA. The role of the advisory panel depends on the degree to which project preparation has progressed, and on the extent and quality of any EA work completed, at the time the Bank begins to consider the project.

Additionally, for projects with major social components, special requirements for the required EIA can be deduced from further bank policies, in particular from OP 4.10 and OP 4.12.

#### 4.4.3 Common Concerns

Closely related to the lack of meaningful participation of the affected communities is the question to which extent the involved parties have undertaken appropriate assessments to evaluate, prevent or minimize harm from occurring in line with their due diligence obligations. Thus, have the involved parties undertaken all reasonable efforts to inform themselves of 'factual or legal components that relate foreseeably' (ILC Articles on Prevention (with Commentaries), 2001, Art. 3, para. 10) to the implementation of the project in order for them 'to take appropriate measures in timely fashion, to address them'? (ILC Articles on Prevention (with Commentaries), 2001, Art. 3, para. 10)

- In practice, a number of concerns arise from an incomplete or insufficient **ESIA**.
  - Particularly evident in this context is the Barro Blanco case, where the granting of a concession to construct a hydropower dam on the Tabasará river to GENISA in 2006 followed decades of resistance by indigenous communities residing in the area and year-long law suits against previous plans to exploit the river. In such circumstances, a **heightened level of due diligence is expected** by the involved parties. However, the EIA which was approved by Panama's environmental authority in 2008 **lacked completeness**. It failed:
    - to indicate that any members of the affected communities would have to be resettled,
    - to recognise the spiritual importance of the affected river and lands for parts of the community,
    - and neglected to adequately consult with the communities on the value of the affected area.

- **These flaws were accepted by the authorities and project financiers**, with both instances approving the project despite realizing that additional information was required. Thus, in late realization, Panama's environmental authority suspended the project temporarily on 9 February 2015, more than seven years later, *inter alia* due to the failure to reach a proper agreement with the communities and those affected, to develop an adequate negotiation process, the absence of an archaeological management plan approved by the National Institute of Culture (INAC) to protect the petroglyphs and other archaeological findings. (ANAM, 2015) Also, as the Panel Report of the FMO/DEG complaint mechanism points out, the lenders had determined at the time of credit approval that *inter alia* the indigenous peoples report was insufficient, requiring more information (FMO/DEG IEP, 2015, para. 8), as had the question of cultural heritage not been fully assessed (FMO/DEG IEP, 2015, para. 19).
- Also in the Olkaria case, a major concern regarding the socio-economic impacts of the project relates to the **failure of the ESIA to address adequately the suitability of the selected site and solutions to the challenge of carrying capacity**. A first survey of the resettlement site, the RAPland, was done by GIBB Africa in October 2011 and a scoping report by KenGen in February 2012. The topography of the land is partly characterized by 'steep hills and mountains' and the RAP of June 2012 confirms that there is evidence of soil run-off which is likely to increase if less or non-permeable surfaces are erected such as houses and streets and the vegetation cover is reduced. It concludes that 'impact on soil and percolation would need specialized hydrological studies' and emphasizes the need for further studies and consultations. Though ESIA for the resettlement submitted by KenGen in November 2012 does not include or refer to such extended study and just proposes tree planting as a mitigation measure the lenders accepted the ESIA without insisting in carrying it out. First instances of larger mudslides and trees falling on houses have been witnessed during the rains in May 2015.
 

The EIB-CM (2015) recalls in the context of the impacts of the project that '[i]nvoluntary resettlement is [...] a complex task that requires keeping the balance between (i) the national interests to secure access to reliable and affordable energy; (ii) a deep understanding of the issues that will affect all and each of the members of the affected community and (iii) a careful management of expectations of the parties involved.' (para. 9.1)
- Also, **pre-existing disputes** and land conflicts increase the level of due diligence as 'foreseeable' difficulties are more likely to occur.
  - In the Barro Blanco case, the project approval – both the state of Panama as well as by the project lenders, occurred against the background of a decade-lasting conflict regarding the construction of a hydropower plant in the affected region. Prior to the project's approval by the lenders, there was already a domestic lawsuit pending regarding the legitimacy of the conducted EIA. 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.<sup>28</sup> It was also known to the lenders that the legitimacy of the agreement reached with the (former) Cacique had been challenged.

- Land conflicts in the Olkaria region, including violent outbreaks, go back to colonial times. Tensions between formal land ownership and customary tenure according to African customary law are prevailing, and since the acknowledgement of historical land injustice in the constitution are increasingly brought to court. The practice of evictions without any or only marginal compensation have contributed to the vulnerability of the affected Maasai communities in the past. These land ownership disputes were already mentioned in the ESIA of Olkaria IV (on Kedong Ranch) and the RAP (on Maiella Ranch) of 2009, and are one reason why lenders agreed to not applying OP 4.10 to avoid fueling ethnic conflicts. According to the RAP 2012, a due diligence investigation by the operator revealed no pending court case affecting the RAPland despite it in fact existing (civil case 21 of 2010). This is also the reason for the delays in title transfer. While the lenders were keen to have the transfer of land title to the affected communities quickly completed, they could have been expected not to accept the timing of the physical relocation before such title transfer had happened. The status of the case is still not clear. A court decree in February 2015 decided the case in favour of the legal land owner.

As the **due diligence obligation is fact-dependent**, historical conflicts or long-lasting resistance to the project's approval, in connection with the absence of a mutually acceptable agreement with the affected communities, weighs particularly heavy.

- At the same time, due diligence as a continuous obligation also relates to the **subsequent (project) monitoring process**.
  - In the Barro Blanco case, the known incompleteness of the EIA should have triggered a strong and continuous **monitoring process**, proportionate and adequate to the project's risks and impacts. Even though the lenders hired expert consultants to undertake this task, the involvement of stakeholders could have been beneficial in overcoming mutual trust issues and establishing a functioning dialogue.

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<sup>28</sup> However, as GENISA withdrew the loan application prior to the scheduled visit, the case with the complaint procedure with the EIB was closed. (EIB Barton, 2013; EIB-CM, n.d.)

- In Olkaria, the lenders failed to comply with their due diligence to properly monitor the mechanisms for participation by accepting the first RAP of 2009 that did not detail on any structures for participation. Though the RAP 2009 proposed a RAP implementation committee and some elections of community chairmen seemingly took place the RAPIC, as proposed in the RAP

With regard to the monitoring process, the Inspection Panel (2015) came to the conclusion that ‘the guidance from the World Bank was inadequate and deficient due to capacity constraint.’

Noteworthy was in particular the absence of guidance by the WB’s ‘rich, global experience with practical application of its safeguard policies.’ This had ‘far-ranging implications [...]. Relevant advice throughout the process would likely have yielded positive results as the Panel found KenGen highly responsive [...].’

2012, was only established in summer 2012. Though investigation bodies of the banks emphasize that RAPIC was well intentioned, in sum, there are serious shortcomings: initiatives to discuss the quality of RAPland are rejected, general lack of communication between RAPIC and communities, unfamiliarity to Maasai Culture and bypassing of their traditional system of Council of Elders, intimidation/retaliation and side-lining of outspoken community representatives, power-imbalances and undue influence of selected chairmen, distrust between groups of PAPs and community chairmen. At least some of these concerns have been voiced as early as December 2012 in the presence of World Bank representatives. The World Bank’s and other lenders’ strategy was however, to redirect complaints to the RAPIC to solve problems on the project level and maintain ‘project ownership’ of the operator. Early concern for structural problems (Council of Elders v. chairmen system) and signs of distrust into the mechanism in contrast may have avoided many of the emerging problems. Moreover, a number of other problematic aspects were noted already at this stage, *e.g.*, livelihood restoration and support measures for vulnerable PAPs, which were partly never followed up during the project’s implementation, also due to insufficient capacity among World Bank staff members. (WB Inspection Panel, 2015, paras. 156-157) Also, known risks and proposed risk mitigation measures were not systematically monitored through the implementation process. (WB Inspection Panel, 2015, paras. 158-160)

The CDM Rules leave the assessment of socio-economic impacts to the host states to regulate. While this is in accordance with customary international law, practice evidences considerable difficulties arising on the basis of a lack of an adequate ESIA and the lack of continuous monitoring. Here, **additional safeguards and insurances** by an impartial body are highly desirable.

## 4.5 Conclusion

The lack of the CDM's regime to incorporate clear indicators within the CDM project cycle to determine whether the impacts will have a positive effect on human rights, thus leaving it to host states to freely decide whether a particular project will contribute to sustainable development, leaves local populations particularly vulnerable. As identified on the basis of the respective case studies, a number of common concerns have arisen in the context of such projects.

Three core issues have been selected to highlight the human rights situation of affected communities aggravated by the implementation of climate projects without adequate human rights safeguards: the failure to obtain the consent of the affected communities or ensure their adequate participation/consultation in the course of the project's approval; resettlement/displacement in disregard of human rights obligations; and a lack of due diligence exercised by involved parties both prior to project approval as well as throughout the project's implementation.

Difficulties and gaps identified in each these aspects were exacerbated by the failure at the international level (in particular within the CDM procedure) to ensure adherence to the applicable institutional and international standard. Thus, while the recognition and protection of particularly vulnerable groups is essential in order to design and conduct the consultation/participation process appropriately, this aspect plays little to no effective role under the CDM framework. The lack of a human rights mandate or remedies against the approval of a project by the CDM Executive Board are just the most evident of the additional obstacles posed to a genuine participation process of local communities.

Additionally, in the context of the implementation of climate projects which affect land and property rights, the failure to respect and protect these rights has particularly grave consequences for the affected communities and violates a number of additional civil and political as well as economic, social and cultural rights. As has been studied for a long time in the development context, existing safeguard mechanisms in practice are not sufficient in ensuring adequate protection against arbitrary displacement or forced evictions and leave affected communities with unsustainable outcomes which puts them in a worse position than prior to the project's implementation.

These risks are or ought to be known to the parties financing and approving such projects. Thus, prior ESIA's must constitute the point of departure to any course of action with regard to climate project implementation. As part of a state's due diligence obligation, the extent of conduct called for must be evaluated on a case-by-case basis. Also, growing concerns regarding the impacts of CDM projects in general call for heightened vigilance on behalf of those entities approving the project, in particular in light of the CDM's lack to ensure adequate protection/participation of affected communities. As an obligation of conduct and not result, this demands continuous action, proportionate and adequate to the project's risks and impacts.

Moreover, these three aspects – participation/MDR/due diligence – must not only be regarded individually but also jointly. Thus, it is important to bear in mind that where natural resource development and the rights of indigenous peoples interact, a primary objective is to balance these often-times competing interests by reaching a mutually acceptable agreement on issues of land and resource use and development, land and resource ownership, potential resettlement plans, and aspects of compensation

and benefit-sharing. The current cases exemplify how a lack of due diligence exercised at the initial stages of a large-scale development project and a failure to undertake culturally appropriate consultations can exacerbate existing conflicts and prevent such agreements from being reached at a later stage.

Finally, as will be discussed in more detail in Chapter 5, identifying actors accountable and obtaining justice is another difficult issue.

## 5 Accountability/Responsibility

One of ClimAccount's main objectives was to analyse the issue of the human rights accountability of the EU and its member states (including Austria) for the effects of climate policies in third countries and to clarify the respective human rights obligations of the EU and its member states. Thus, the first part of this chapter is dedicated to analysing **extraterritorial human rights obligations** (ETOs) of the EU and its member states by firstly, discussing the territorial scope of applicable human rights treaties by means of interpreting their jurisdictional clauses and, secondly, transferring this discussion into the context of financed climate projects. However, the case studies also revealed that a major issue of concern related to the topic of accountability and responsibility is the question of access to justice. Thus, the second part of this chapter concentrates on the various juridical and non-juridical fora and mechanisms PAPs sought **access to justice** in particular against European actors in the case studies analysed during the project. Especially grievance mechanisms of international financial institutions (IFIs) and bilateral development banks proved to be of specific importance.

### 5.1 Extraterritorial Human Rights Obligations

#### 5.1.1 Introduction

Human rights have traditionally been owed by states to their nationals and to persons residing on their territory. Though human rights treaties are entered into at the international and regional level, implementation occurs domestically, in a vertical relationship between state and individual.

However, the conduct of states impacts the lives of individuals and communities far beyond their own sovereign territory. This has led to the debate in the past years shifting to focus not only on the implementation of human rights obligations but also on the determination of the scope of application of human rights treaties. To date, controversies remain regarding extent of and conditions for affirming extraterritorial obligations, and questions arise as to in which circumstances states in practice owe human rights beyond their national territory. Thus, the issue is inextricably linked with an analysis of the territorial reach of human rights treaties, the interpretation of jurisdictional clauses and an assessment of the role states play in the 21<sup>st</sup> century.

Hence, the answer to the question of whether states incur responsibility for human rights violations occurring abroad in the context of the implementation of climate policies – or more specifically, in the case of climate project financing – depends on two factors:

- First, whether the relevant human rights treaty is applicable by virtue of a situation falling under its jurisdictional scope.
- Second, whether the situation causing a human rights violation is attributable to a state and constitutes a breach of its international obligation.

These two aspects will be addressed in turn.

### 5.1.2 ETOs – Determination of Scope of Application *de lege lata*

The territorial scope of application of human rights treaties relates to the interpretation of their so-called jurisdictional clauses.<sup>29</sup> **The ICCPR<sup>30</sup> and ECHR<sup>31</sup> both contain such jurisdictional clauses**, limiting the applicability of the Convention to persons ‘within the jurisdiction’ or ‘within its territory and subject to [...] [the] jurisdiction’ of state parties. These clauses relate to ‘a particular kind of factual power, authority, or control that a state has over a territory, and consequently over persons in that territory’ (De Schutter et al., 2012, p. 1102; Milanovic, 2011, p. 32). The precise standard of control, power or authority, however, varies.

**Not all human rights treaties contain such explicit jurisdictional clauses**, with the ICESCR<sup>32</sup> constituting the most notable example. In the absence of a clear treaty norm, there is no default rule on the reach of such treaty obligations, *i.e.* ‘there is no presumption against extraterritoriality [...] [and] there is also no presumption in *favour* of extraterritoriality.’ (Milanovic, 2011, p. 11 [emphasis in original])<sup>33</sup>

In light of abovementioned (Chapter 4) identified human rights violations relating to civil and political rights and economic, social and cultural rights, the applicational scope of both types of human rights treaties will be discussed in the following, particularly focusing on examples of the extraterritorial extension of human rights treaties through control or authority exercised by a state. Only later will the report address whether ETOs can also arise by virtue of ‘international obligations’ (Section 5.1.4).

#### 5.1.2.1 Civil and Political Rights

Both the Human Rights Committee (HRC) and the European Court of Human Rights (ECtHR) have extensive jurisprudence on the reach of the ICCPR and ECHR, respectively. The majority of cases originate from

<sup>29</sup> M. Gondek calls these ‘umbrella clauses’ as they are applicable to all the rights set out in a given treaty. (Gondek, 2009, p. 12) As the use of that term is, however, strongly pre-occupied by international investment law, the term jurisdictional clause is to be preferred.

<sup>30</sup> Article 2(1) ICCPR defines the ICCPR’s scope of application in the following manner:

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

<sup>31</sup> Article 1 ECHR states:

The High Contracting Parties shall secure to everyone within their jurisdiction the rights and freedoms defined in Section I of this Convention.

<sup>32</sup> Article 2 ICESCR states:

(1) Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.

<sup>33</sup> Note, however, that **certain jurisdictional links (under general international law) or other effective ties** might serve as additional indications to evaluate when a person is within the jurisdiction of a state for the purpose of applying the human rights treaty.

situations where one state exercises territorial control over parts of another state, *e.g.*, in the context of military occupation. The following will provide a brief overview of the evolvement in order to identify the necessary relationship between the respective state and the individual located outside a state's territory. As will be seen, it can be broadly distinguished into two categories: a **spatial model of jurisdiction** and a **personal model of jurisdiction**. (This distinction has been made by a number of scholars, *inter alia*, Milanovic, 2011; Wilde, 2005)

The underlying reasoning for extending the scope of human rights treaties beyond a state's territorial reach was stated early on by the HRC:

it would be unconscionable to so interpret the responsibility under article of the Covenant as to permit a State party to perpetrate violations of the Covenant on the territory of another State, which violations it could not perpetrate on its own territory. (*López Burgos*, 1981, para. 12.3)

Thus, where an individual is under the direct authority of state security, police or military forces, it is understood that he is 'subject to [a state's] jurisdiction' (*López Burgos*, 1981, para. 12.2) Furthermore, as interpreted by the HRC in its **General Comment 31** (HRC, UN Doc. CCPR/C/21/Rev.1/Add.13, 2004), Article 2(1) of the ICCPR ('within its territory and subject to its jurisdiction') entails that state parties 'must respect and ensure the rights laid down in the Covenant to anyone within the *power or effective control* of that State Party, even if not situated within the territory of the State Party.' (para. 10, emphasis added)<sup>34</sup>

The standard of effective control has been explained in more detail in the case law of the ECtHR, in particular in *Loizidou v. Turkey* (*Loizidou*, 1995). The case concerned Mrs. Loizidou, a Cypriot Greek who lived in Nikosia. She owned several pieces of land in Northern Cyprus, however due to the continued occupation and control of the northern party of Cyprus by Turkish armed forces, she had been prevented on several occasions from gaining access to her home and other properties there. With regard to the discussion on whether the alleged conduct could be capable of falling within the 'jurisdiction' of Turkey even though they occurred outside its territory, the Court stated that

[b]earing in mind the object and purpose of the Convention, the responsibility of a Contracting Party may also arise when as a consequence of military action – whether lawful or unlawful – it exercises *effective control of an area* outside its national territory. The obligation to secure, in such an area, the rights and freedoms set out in the Convention derives from the fact of such

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<sup>34</sup> This is also in line with the case law of the **International Court of Justice** which has had the opportunity to address the issue of extraterritorial application of human rights treaties at several occasions. Firstly, in its *Wall* Advisory Opinion (*Legal Consequences of the Construction of the Wall*, 2004), the International Court of Justice was concerned with the question of applicability of the ICCPR and ICESCR in connection with **Israel's occupation of Palestinian territory** and the construction of the wall. It confirmed by referral to prior practice of the Human Rights Committee that the ICCPR 'is applicable in respect of acts done by a State in the exercise of its jurisdiction outside its own territory.' (para. 111). This was later reiterated and generalized in the context of military action taken by Uganda in the territory of the Democratic Republic of the Congo in *Armed Activities on the Territory of the Congo* where the Court did not refer to a specific treaty but broadly stated that 'international human rights instruments are applicable "in respect of acts done by a state in the exercise of its jurisdiction outside its own territory"' (*Armed Activities on the Territory of the Congo*, 2005, para. 216).

control whether it be exercised directly, through its armed forces, or through a subordinate local administration. [para. 62, emphasis added]

This **standard of effective control of an area** has since been confirmed in numerous cases (see, *inter alia*, *Cyprus v. Turkey*, 2001). In *Issa and Others v. Turkey* (*Issa v. Turkey*, 2004) it was even stated that temporal effective overall control could be sufficient (para. 74). At the same time, a number of cases evidence the strictness of the standard of effective control and that this does not arise in every situation where a state is in a situation to exert considerable influence over a situation (a so-called ‘cause-and-effect’ notion of jurisdiction). For example, in *Banković* (*Banković*, 2001) the ECtHR declined to find a jurisdictional link between the victims and the NATO coalition states with regard to the proceedings brought by six relatives of victims of a NATO air strike on a radio station in the former Federal Republic of Yugoslavia in 1999, and thus rejected that the concerned act fell ‘within the jurisdiction’ of the members of the respondent states. In its discussion, the ECtHR repeatedly emphasized the **exceptional extension of the scope of the ECHR** (paras. 59, 67, 71), referring to **four types of situations** where the extraterritorial application could be applicable, *i.e.* (effective) control over territory,<sup>35</sup> non-refoulement cases (extradition and expulsion), consular or diplomatic cases/flag state jurisdiction cases, and extraterritorial effects (‘acts of authorities [...] which produced effects or were performed outside their own territory’) (referring to *Drozd and Janousek*, 1992, para. 91) (*Banković*, 2001, paras. 68-73). Moreover, as was later also confirmed in *Medvedyev*, dealing with law-enforcement operations at sea, the Court confirmed that ‘the **provisions of Article 1 did not admit of a “cause-and-effect” notion of “jurisdiction”**.’ (*Medvedyev and Others v. France - 3394/03 [2010] ECHR 384*, 2010, para. 64)

However, the ECtHR appears to have somewhat departed from the strict spatial application<sup>36</sup> and understanding of the jurisdictional clause as held in *Banković* in its further case law. (Miller, 2009, p. 1228; Ryngaert, 2012, p. 58) Leading in this regard is *Al-Skeini and others v. United Kingdom* (*Al-Skeini*, 2011). The case concerned allegations against British armed forces operating in southern Iraq (Basrah) which resulted in the deaths of six Iraqi civilians, five of which were killed by British troops, one who died after being mistreated whilst in the custody of the British Army. The ECtHR began its deliberations by stating that

‘Jurisdiction’ under Article 1 is a threshold criterion. The exercise of jurisdiction is a necessary condition for a Contracting State to be able to be held responsible for acts or omissions imputable

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<sup>35</sup> As further defined in *Banković*, this effective control is exercised ‘as a consequence of military occupation or through the consent, invitation or acquiescence of the Government of that territory, exercises **all or some of the public powers** normally to be exercised by that Government.’ (para. 71, emphasis added)

<sup>36</sup> *Ilaşcu and Others v. Moldova and Russia* is a further example which has been resorted to when suggesting that the standard has slightly loosened since *Banković*. The Court applied the threshold for falling within Article 1’s jurisdictional clause to impute responsibility to the Russian Federation in a surprisingly wide manner. In particular, it found that the authorities of the ‘Moldavian Republic of Transdniestria’ remained under ‘the effective authority, or at the very least under the decisive influence of the Russian Federation, and in any event that it survives by virtue of the military, economic, financial and political support given to it by the Russian Federation.’ (*Ilaşcu*, 2004, para. 392) [emphasis added] (confirmed in *Catan and Others*, 2012, paras. 103ff).

to it which give rise to an allegation of the infringement of rights and freedoms set forth in the Convention. (para. 130)

After referring to its previous case law, it found that

in certain circumstances, the use of force by a State's agents operating outside its territory may bring the individual thereby brought under the control of the State's authorities into the State's Article 1 jurisdiction. [referring *inter alia* to **Öcalan v. Turkey**,<sup>37</sup> para. 91 and *Issa and Others v. Turkey*<sup>38</sup>] [...] It is clear that, whenever the State through its agents exercises control and authority over an individual, and thus jurisdiction, the State is under an obligation under Article 1 to secure to that individual the rights and freedoms under Section 1 of the Convention that are relevant to the situation of that individual. In this sense, therefore, the Convention rights can be 'divided and tailored'. (paras. 136-137)

The ECtHR concluded that the United Kingdom had assumed 'some of the **public powers** normally to be exercised by a sovereign government' and that, consequently, it 'exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.'

In conclusion, the threshold of jurisdiction to extend civil and political human rights obligations beyond a state's territory remains a strict one. Most prominently, the standard can be described as one of '**exercise of effective control of an area**' through the '**exercise of public powers**' (**spatial model**). There are limited indications that the scope of jurisdiction is widening throughout the case law of the authoritative bodies, in particular extending to situations where an individual is brought under the **effective control and authority of state agents operating abroad (personal model)**.

<sup>37</sup> In **Öcalan v. Turkey** (*Öcalan*, 2005) the Court found Turkey responsible for acts of Turkish officials exercising authority outside its territory. They had arrested the applicant in Kenya, physically forcing him to return to Turkey. Consequently, he was 'subject to their authority and control following his arrest and return to Turkey' (para. 93).

<sup>38</sup> Where the Court *inter alia* stated that:

A State may also be held accountable for violation of the Convention rights and freedoms of persons who are in the territory of another State but who are found to be under the former State's authority and control through its agents operating – whether lawfully or unlawfully – in the latter State [...]. Accountability in such situations stems from the fact that Article 1 of the Convention cannot be interpreted so as to allow a State party to perpetrate violations of the Convention on the territory of another State, which it could not perpetrate on its own territory.' (para. 71).

### 5.1.2.2 Economic, Social and Cultural Rights

In theory, the lack of a jurisdictional clause in the ICESCR bears greater potential for extending its scope of application to extraterritorial situations. Nevertheless, difficulties arise in particular in light of lacking case law, as the ICESCR has only recently established a complaint mechanism and has so far only issued one decision (not concerned with the reach of the ICESCR, though).<sup>39</sup>

Thus, scholarly opinion and the output of the CESCR have particular relevance in this context. Moreover, in 2011, the well-known *Maastricht Principles on Extra-Territorial Obligations in the Area of Economic, Social and Cultural Rights* (Maastricht Principles on Extra-Territorial Obligations in the Area of Economic, Social and Cultural Rights, 2011) were adopted by a group of international legal experts. They are based on case law, opinions by international institutions as well as scholarly literature, but are non-binding principles and are not open for signature by states. As pointed out by one of their authors (Vandenhoele, 2013, p. 817), the Principles themselves avoid assigning a legal status to the content of the principles, instead referring vaguely to the fact that they are '[d]rawn from international law.' (preambular para. 8) In any event, in an attempt to combine two diametrical positions, *i.e.* the wide application of economic and social rights in an extraterritorial context and the narrow consensus on normative content, the *Maastricht Principles* serve as an important starting point.

While the existence of firm extraterritorial obligations with regard to economic and social rights is naturally already complicated by the fact that the ICESCR and other instruments are formulated in a programmatic manner ('progressive realization'), difficulties in identifying direct links between policies and violations, and scarce state practice and case law are further hurdles to identifying clear obligations in this regard. (Coomans, 2004; Sepúlveda, 2003, pp. 374–378; Gondek, 2009, p. 291 ff)

Nevertheless, in an attempt to clarify the matter, Michał Gondek suggests four typical scenarios where the conduct of a state can affect the economic and social rights of persons situated outside its territory: through acts of state agents (also see the analysis above on 'effective control of an area'); through omissions (*e.g.* failure to regulate the conduct of corporations registered in its territory); through domestic economic policies (*e.g.* by a state subsidizing its domestic agriculture); and indirectly through activities of international organizations in whose decision-making states participate (*e.g.* international financial institutions deciding on development projects the implementation of which may lead to deprivation of economic and social rights). (Gondek, 2009, p. 291 ff)

With regard to the **ICESCR**, the most authoritative statement can be found in abovementioned *Wall Advisory Opinion (Legal Consequences of the Construction of the Wall, 2004)*. But even the few passages in this Opinion remain vague. After pointing out that the ICESCR does not contain any provision on its scope of application, the Court elaborates that this might be because the rights contained in the Convention are 'essentially territorial.' (para. 112) However, at the same time it emphasized with regard to the applicability of the ICESCR that 'it is not to be excluded that it applies both to territories over which

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<sup>39</sup> The Optional Protocol to the ICESCR foreseeing an individual complaints procedure only came into force on 5 May 2013. As of November 2015, six cases are pending, see <http://www.ohchr.org/EN/HRBodies/CESCR/Pages/PendingCases.aspx>. As of November 2015 Austria has neither signed nor ratified the Optional Protocol, see <http://indicators.ohchr.org/>.

a State party has sovereignty and to those over which that State exercises territorial jurisdiction'. (para. 112) Hence, it came to the conclusion that in light of the fact that the concerned (occupied) territories had been subject to Israel's territorial jurisdiction for over 37 years, it was both bound by the provisions of the ICESCR and under the obligation 'not to raise any obstacle to the exercise of such rights in those fields where competence has been transferred to Palestinian authorities.' (para. 112)

Similarly, the Maastricht Commentary cites General Comment No. 8 by the Committee on Economic, Social and Cultural Rights which confirms that:

When an external party takes upon itself even partial responsibility for the situation within a country (whether under Chapter VII of the Charter or otherwise), it also unavoidably assumes a responsibility to do all within its power to protect the economic, social, and cultural rights of the affected population. (CESCR, UN Doc. E/C.12/1997/8, 1997, para. 13)

Hence, in situations where a state is in a position to exercise effective control over territories and populations (cf. CESCR, UN Doc. E/C.12/1/Add.90, 2003, para. 31), it is bound by the provisions contained in the ICESCR in relation thereto. This corresponds largely to the findings above with regard to the scope of the ICCPR.

While it is difficult to measure the normative value thereof in practice, the output of international institutions with regard to other human rights treaties provides some guidance in the determination of the **scope of jurisdiction**. Hence, as also stipulated in Principle 9 of the Maastricht Principles, states have the obligation to **respect, protect and fulfil** economic, social and cultural rights where they **a) exercise authority or effective control** (whether in accordance with international law or not);<sup>40</sup> **b) where their acts and omissions bring about foreseeable effects on the enjoyment of economic, social and cultural rights** (whether within or outside its territory);<sup>41</sup> and **c) where the state, acting separately or jointly, is in a position to exercise decisive influence or to take measures to realize economic, social and cultural rights extraterritorially**, in accordance with international law.

Subpara. c) refers particularly to the obligation of **international cooperation** and assistance under the ICESCR which lends itself to a certain extent of further legally binding obligations. (Gondek, 2009, p. 316 ff) While especially the *obligation* of international assistance is disputed by many, the obligation of **international cooperation is often said to reinforce the obligation to respect and protect**, closely interlinked with state sovereignty (and thus non-interference). (Gondek, 2009, pp. 317–324) Though the concept has much to offer in the development of human rights law, both in regards to the promotion and

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<sup>40</sup> See the discussion above on civil and political rights.

<sup>41</sup> Both examples given in subpara. b) relate to situations where an individual under a state's authority is removed from a state's jurisdiction, *i.e.* through extradition to a non-contracting state which has 'sufficiently proximate repercussions on rights guaranteed by the Convention' (Ilaşcu, 2004, para. 317) or the handing over to another state's authorities (Mohammed Munaf, 2009). As the Human Rights Committee has explained, in such circumstances, a causal chain measured by factors of foreseeability is required ('the risk of an extra-territorial violation must be necessary and foreseeable consequence and must be judged on the knowledge the State party had at the time', para. 14.2.). Moreover, as the Commentary emphasizes, this relates to the respective treaties and does not express the scope of obligations under general international law. (De Schutter et al., 2012, p. 1108)

implementation of human rights, its legal implications are hard to measure. (Skogly, 2006) Nevertheless, it has been emphasized that in particular in light of the global threat climate change poses ‘international cooperation must take the primary, rather than the secondary role’ and that it shall inform the negotiation process required under the UNFCCC to adapt agreements (as a single polity) aimed at ensuring that human rights concerns are not neglected. (Knox, 2009, p. 213)

Thus, despite the lack of binding case law, the **Committee on Economic, Social and Cultural Rights** has been forthcoming in recognising and proclaiming extraterritorial obligations in its General Comments. It has repeatedly emphasized the ‘**international obligations**’ of state parties. For example, **General Comment 12** on the Right to Food (CESCR, UN Doc. E/C.12/1999/5, 1999) calls on states to

take steps to respect the enjoyment of the right to food in other countries, to protect that right, to facilitate access to food and to provide the necessary aid when required. States parties should, in international agreements whenever relevant, ensure that the right to adequate food is given due attention and consider the development of further international legal instruments to that end. States parties should refrain at all times from food embargoes or similar measures which endanger conditions for food production and access to food in other countries. Food should never be used as an instrument of political and economic pressure. (paras. 36-37)

Similar passages can be found also in General Comments relating to the Right to Water<sup>42</sup> and the Right to Health.<sup>43</sup> Such international obligations are complemented and partly effectuated by obligations of international cooperation (Art. 2(1) ICESCR).

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<sup>42</sup> ‘To comply with their international obligations in relation to the right to water, States parties have to respect the enjoyment of the right in other countries. International cooperation requires States parties to refrain from actions that interfere, directly or indirectly, with the enjoyment of the right to water in other countries. Any activities undertaken within the State party’s jurisdiction should not deprive another country of the ability to realize the right to water for persons in its jurisdiction. States parties should refrain at all times from imposing embargoes or similar measures, that prevent the supply of water, as well as goods and services essential for securing the right to water. Water should never be used as an instrument of political and economic pressure. [...] Steps should be taken by States parties to prevent their own citizens and companies from violating the right to water of individuals and communities in other countries. Where States parties can take steps to influence other third parties to respect the right, through legal or political means, such steps should be taken in accordance with the Charter of the United Nations Charter and applicable international law.’ (CESCR, UN Doc. E/C.12/2002/11, 2003 paras. 31ff)

<sup>43</sup> ‘To comply with their international obligations in relation to article 12, States parties have to respect the enjoyment of the right to health in other countries, and to prevent third parties from violating the right in other countries, if they are able to influence these third parties by way of legal or political means, in accordance with the Charter of the United Nations and applicable international law. Depending on the availability of resources, States should facilitate access to essential health facilities, goods and services in other countries, wherever possible and provide the necessary aid when required. [...] Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions.’ (CESCR, UN Doc. E/C.12/2000/4, 2000, para. 39)

With regard to the obligation of ‘international cooperation’, the Maastricht Commentary emphasizes that this is to be understood in broad terms, encompassing the

- development of international rules to establish an enabling environment for the realization of human rights;
- the provisions of financial and technical assistance;
- an obligation to refrain from nullifying or impairing human rights in other states;
- to ensure that non-state actors whose conduct the state is in a position to influence are prohibited from impairing the enjoyment of such rights. (De Schutter et al., 2012, p. 1104)

In essence, this can be translated into a due diligence **obligation to regulate**, as will be explored in Section 5.1.4.

In conclusion, while the ICESCR is conceptualized in a broader sense than the ICCPR and is thus more susceptible to extraterritorial application than the ICCPR, the weak normative content of many of its aspirational provisions make enforcement difficult. Nevertheless, the obligation of **international cooperation** reinforces the further obligations contained in the ICESCR, in particular obliging states to *respect* the enjoyment of economic, cultural and social rights in other states and *prevent* third parties from violating these rights where they are in a position to do so.

### 5.1.3 ETOs in the Context of Financed Climate Projects

The traditional scenario of extending the scope of application of human rights treaties to territories/persons outside a state’s territory relates to situations where a state exercises territorial control over parts of another state by virtue of an exercise of public powers, *e.g.*, through military presence or through acts of a state’s security forces. To date, there is no jurisprudence on human rights violations occurring in the course of a single project, such as a development project, despite numerous instances having raised international concern, accompanied with calls for action to hold the responsible actors responsible.

Also in the present setting, **in neither of the three cases have the affected communities attempted to invoke extraterritorial human rights obligations of the involved European states**. This most probably stems from the fact that the threshold of establishing ‘effective control’ in such context is high, but also from difficulties in determining both clear causal linkages and attributable conduct between European states or the EU and the alleged human rights violations. While the question of causality is a matter of evidence and will therefore not be addressed in detail within the scope of this report, the issue of attribution shall be briefly discussed as a preliminary point.

#### 5.1.3.1 *The Attribution of Bilateral Financial Institutions to States*

The position of Bilateral Financial Institutions (BFIs) versus their state varies on a state by state basis. This is essential in the determination to which extent the conduct of BFIs can be attributed to the state. Thus, as such institutions are commonly established with their own separate legal identity, the question

particularly arises whether they operate as state organs (Art. 4, ILC Articles on State Responsibility, 2001<sup>44</sup>), they are authorized to fulfill a public mandate (are 'empowered by the law of that State to exercise elements of [...] governmental authority', Art. 5, ILC Articles on State Responsibility, 2001) and operate within that mandate in the financing of the case at hand, or whether their actions cannot be directly attributed to the state.

While the ILC Articles on State Responsibility do not define which entities may be classified as state organs, it has been clarified that mere ownership of an entity by the state does not convert that entity into an organ of the state. (Crawford, 2014, p. 118; *Waste Management v. United States of Mexico*, 2004<sup>45</sup>) In light of most BFIs (e.g. DEG, FMO) being authorized to finance projects without any direct interference by state authorities, in any event **it seems more appropriate to assess the question of attribution under Article 5 of the ILC Articles.**

Article 5 of the ILC Articles on State Responsibility deals with the attribution of non-state organs which are empowered to exercise elements of governmental authority. Hereunder, the Commentary to said Articles lists exemplary 'public corporations, semi-public entities, public agencies of various kinds and even, in special cases, private companies, provided that in each case the entity is empowered by the law of the State to exercise functions of a public character normally exercised by state organs, and the conduct of the entity relates to the exercise of the governmental authority concerned.' (Crawford, 2002, Commentary to Art. 5, para. 2) In order to determine BFIs exercise governmental authority, it is helpful to take their **mandate** into consideration. For example, FMO defines as its objective to 'contribute to the advancement of productive enterprises in developing countries, to the benefit of economic and social advancement of those countries, in accordance with the aims pursued by their governments and the policy of the Dutch Government on development cooperation' (FMO Investment Criteria, n.d.). DEG similarly has as its objective 'to promote business initiative in developing and emerging market countries as a contribution to sustainable growth and improved living conditions of the local population' (DEG, 2015). **These mandates are to be considered in light of their context**, i.e. private sector investments in developing states often occur against the background that these entities provide basic services such as access to water, sanitation, energy, or transport, and are therefore essential in the social advancement of the host state's population. (Dalberg, 2010) Moreover, as the positive effects of sustainable investments

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<sup>44</sup> Article 4. Conduct of organs of a State

1. The conduct of any State organ shall be considered an act of that State under international law, whether the organ exercises legislative, executive, judicial or any other functions, whatever position it holds in the organization of the State, and whatever its character as an organ of the central Government or of a territorial unit of the State.

2. An organ includes any person or entity which has that status in accordance with the internal law of the State.

<sup>45</sup> The case concerned the conduct of Banobras, a development bank partly-owned and substantially controlled by Mexican government agencies. The Tribunal stated on the question of attribution that

it is doubtful whether Banobras is an organ of the Mexican State within the meaning of Article 4 of the [Articles]. Shares in Banobras were divided between the public and private sector, with the former holding a minimum of 66%. The mere fact that a separate entity is majority-owned or substantially controlled by the state does not make it *ipso facto* an organ of the state. (para. 75)

often are said to have long-term benefits for the home state of the bilateral financing institutions (Dalberg, 2010), they play a decisive role in the fulfilment of states' development policies.

In this vein, it would seem that if a BFI would qualify as an entity exercising governmental authority its conduct could be attributed to the state if indeed exercising governmental authority in the pertinent case.<sup>46</sup> Thus, for the purposes of this analysis it will be assessed which human rights obligations home states of BFI have with regard to the development banks operating abroad if their conduct is indeed attributable to them.

While the position of BFIs versus their state varies on a state by state basis, their **mandate and purpose** (*inter alia* furtherance of economic development in third states in fulfilment of a state's development policy) constitute essential elements in the evaluation of whether their conduct can be attributed to the state in question.

#### 5.1.3.2 *The Responsibility of States in Connection With the Conduct of Multilateral Financial Institutions*

The attribution of acts of multilateral institutions to their member states in principle follows the same rules of attribution as discussed above. Set up with a limited mandate and clearly defined competences, they enjoy a separate legal personality (*Reparations for Injuries*, 1949, pp. 178-179), but at the same time are dependent on member states regarding the executive enforcement of their acts and decisions (Tomuschat, 2013, p. 9)

At the international level, the ILC has completed its study on the subject in 2011 (Articles on the Responsibility of International Organizations (2011), International Law Commission, UN Doc. A/66/10, 2011). Of particular importance therein is Part V of the Articles on the Responsibility of International Organizations, dealing with the question of responsibility of member states for internationally wrongful acts of an international organization.

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<sup>46</sup> Note, however, also the difficulties the tribunal had in *Waste Management* in this regard:

Nor is it clear that in its dealings with the City and the State in terms of the Line of Credit it was exercising governmental authority within the meaning of Article 5 of those Articles. The Organic Law of 1986 regulating Banobras' activity confers on it a variety of functions, some clearly public, others less so. A further possibility is that Banobras, though not an organ of Mexico, was acting 'under the direction or control of' Guerrero or of the City in refusing to pay Acaverde under the Agreement: again, it is far from clear from the evidence that this was so. For the purposes of the present Award, however, it will be assumed that one way or another the conduct of Banobras was attributable to Mexico for NAFTA purposes. (*Waste Management v. United States of Mexico*, 2004, para. 75)

Therein, Articles 58 (aid or assistance by a state), 59 (direction and control exercised by a state) and 61 (circumvention of international obligations of a state member of an international organization) bear relevance.

A state which **aids and assists** an international organization in the commission of an internationally wrongful act will be internationally responsible for doing so if (a) the state has knowledge of the circumstances of the internationally wrongful act, and (b) the act would be internationally wrongful if done by the state (Article 58). Para. 2 of said provision stipulates that an act by a member state of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of the state. In this regard, Crawford explains that the ‘factual context such as the size of membership and the nature of the involvement will probably be decisive’. (Crawford, 2014, p. 401) According to the ILC *significant* assistance in the commission of the internationally wrongful act will be needed to amount to ‘aid and assistance’ in the sense of this provision. (Crawford, 2014, p. 403) This also excludes ‘omissions’ as a form of aid and assistance (see particularly *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)*, 2007, pp. 222-223<sup>47</sup>). In this regard, it has also been noted that **responsibility will only arise in narrow circumstances, and thus, e.g., not in cases where states cast votes for or against the individual policies of an entity such as the World Bank or the International Finance Corporation.** (Crawford, 2014, p. 412)

Article 59 of the ILC Articles on the Responsibility of International Organization is grounded in the control theory, *i.e.* a state is held responsible through indirect attribution by virtue of compromising the decision-making capacity of an international organization. (Crawford, 2014, p. 398) It reads: ‘A State which directs and control an international organization in the commission of an internationally wrongful act by the latter is internationally responsible for that act if (a) the State does so with the knowledge of the circumstances of the internationally wrongful act; and (b) the act would be internationally wrongful if committed by that State.’ ‘Direction and control’ are separate concepts, requiring either ‘actual direction of the operative kind’ or ‘cases of domination over the commission of wrongful conduct’. (Crawford, 2002, Commentary to Art. 17 para. 7) Both must be given in order for responsibility to arise under this provision. As with regard to Article 58, para. 2 of said provision stipulates that an act by a member state of an international organization done in accordance with the rules of the organization does not as such engage the international responsibility of the state. In this regard, it has also been noted that it is rather exceptional that states would be able to exercise such decisive influence over an international organization. (Sands & Klein, 2009, p. 528)

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<sup>47</sup> ‘Complicity always requires that some positive action has been taken to furnish aid or assistance to the perpetrators of the genocide, while a violation of the obligation to prevent results from mere failure to adopt and implement suitable measures to prevent genocide from being committed. In other words, while complicity results from commission, violation of the obligation to prevent results from omission; this is merely the reflection of the notion that the ban on genocide and the other acts listed in Article III, including complicity, places States under a negative obligation, the obligation not to commit the prohibited acts, while the duty to prevent places States under positive obligations, to do their best to ensure that such acts do not occur.’ (paras. 432).

Article 61 of the ILC Articles on the Responsibility of International Organization provides that '[a] State member of an international organization incurs international responsibility if, by taking advantage of the fact that the organization has competence in relation to the subject-matter of one of the State's international obligations, it circumvents that obligation by causing the organization to commit an act that, if committed by the State, would have constituted a breach of the obligation.' Its drafting history was contentious and rests in the conviction that states cannot avoid their international obligations by shielding themselves through the transfer of competences to an international organization. (Crawford, 2014, p. 430) For example, the ECtHR in *Waite and Kennedy v. Germany* held that

Where States establish international organizations in order to pursue or strengthen their cooperation in certain fields of activities, and where they attribute to these organizations certain competences and accord them immunities, there may be implications as to protection of fundamental rights. It would be incompatible with the purpose and object of the Convention, however, if the Contracting States were thereby absolved from their responsibility under the Convention in relation to the field of activity covered by such attribution. (*Waite and Kennedy v. Germany*, 1999, para. 67)

The second leading case on the matter is *Bosphorus v Ireland* (*Bosphorus*, 2005) which confirmed that

**absolving Contracting States completely from their Convention responsibility in the areas covered by such a transfer would be incompatible with the purpose and object of the Convention;** the guarantees of the Convention could be limited or excluded at will, thereby depriving it of its peremptory character and undermining the practical and effective nature of its safeguards. [emphasis added] (para. 154)

The ECtHR continued to somewhat qualify this statement, introducing the element of '**equivalent human rights protection**' when stating that

State action taken in compliance with such legal obligations is justified as long as the relevant organisation is considered to protect fundamental rights, as regards both the substantive guarantees offered and the mechanisms controlling their observance, in a manner which can be considered at least equivalent to that for which the Convention provides [...]. However, any such finding of equivalence could not be final and would be susceptible to review in the light of any relevant change in fundamental rights protection. If such equivalent protection is considered to be provided by the organisation, the presumption will be that a State has not departed from the requirements of the Convention when it does no more than implement legal obligations flowing from its membership of the organisation. (paras. 155-156)

This presumption can be rebutted in cases where the circumstances lead to the conclusion that the protection of Convention rights was 'manifestly deficient'. (para. 157) This – along with Article 61's formulation – seems to imply a **certain due diligence obligation** of states to screen the actions of the international organization on a regular basis to ensure that equivalent protection is given (note however, that Crawford, 2014, p. 433, points to this being difficult to sustain in practice and that such finding, moreover, might act as a deterrent to international co-operation).

**Thus, where member states of the EU, e.g., vote in Council decisions on the implementation of policies in violation of their human rights obligations, they can incur international responsibility in cases where no equivalent human rights protection is offered in the organization.**<sup>48</sup> The presumption, however, is high that the EU does offer equivalent human rights protection. Nevertheless, specific circumstances of the case may lead to opposite conclusions.

A more strict approach is chosen by the CESCR (De Schutter et al., 2012, p. 1119). For example, in its General Comment on the Right to Highest Attainable Standard of Health, it states that

States parties have an obligation to ensure that their actions as members of international organizations take due account of the right to health. Accordingly, States parties which are members of international financial institutions, notably the International Monetary Fund, the World Bank, and regional development banks, should pay greater attention to the protection of the right to health in influencing the lending policies, credit agreements and international measures of these institutions.

Even though this *per se* does not possess binding normative value, De Schutter (De Schutter, 2014) points to the fact that due to widely recognised decisive influence exerted by international agencies such as international financial institutions this could be perceived a *lex specialis* to the generally more restrictive view.

Hence, member states cannot absolve themselves from their international obligations by transferring competences on a separate legal personality. Although the situations in which they by participation in the decision-process incur responsibility are limited, it is not excluded that by the special influence a member state can exercise within an international organization, it will incur responsibility for internationally wrongful acts of the organization. Furthermore, especially with regard to economic, social and cultural rights, it may be argued that states parties to the ICESCR are under an obligation to ensure that the conduct of international organizations, especially of international financial institutions, does not negatively affect the rights ensured in the Covenant. However, this is *inter alia* dependent on the question to which extent human rights obligations are applicable in the extraterritorial context of project financing.

#### 5.1.3.3 *Extraterritorial Human Rights Obligations in the Context of Project Approval/Financing/Monitoring – Extent of Control and the Exercise of Public Powers*

Due to the nature of (large-scale) resource development projects resulting in resettlement or displacement, it is possible to argue that lenders will exert some power over a certain spatially delimited area through the applicable legal framework and their institutional policies. It is, however, necessary to assess whether this control – assumed through the approval/financing/monitoring of a project – amounts

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<sup>48</sup> Scholars (Nollkaemper, 2011) and the International Law Commission (International Law Commission, UN Doc. A/66/10, 2011, para. 1 to Article 48) have suggested that in the area of shared competences of the EU – as listed in Article 4 TFEU (including the areas of **development cooperation and humanitarian aid [hence, since 2009 the European Investment Bank has been tasked to support these objectives]**, where the Union shall have competence to carry out activities and conduct a common policy; however, the exercise of that competence shall not result in member states being prevented from exercising theirs.) – the concept of **joint responsibility** should apply to the EU and its member states. However, this has so far not been explored in great depth.

to the standard of effective control as developed by case law. Secondly, it must be answered whether some sort of ‘public powers’ are thereby exercised.

In applying the above, it is clear that *de lege lata* the mere financing or approval of a project does not suffice to establish effective control over a spatially-delimited project. In most circumstances, a project will be authorized, mostly even commissioned, by local host governments. The specific requirements which must be met (environmental impact assessment, acquisition of property, obtaining the necessary concessions), all fall within the competence of local authorities.

#### **Project finance and effective control – case examples**

The lack of effective control and decisive influence in project design, approval and implementation becomes particularly apparent in the analysed cases:

For example, in the case of **Barro Blanco**, the bid was awarded by Panama’s National Public Services Authority (ASEP) to the project operator GENISA in 2006, and an EIA was conducted and approved by Panama’s environmental authority ANAM in May 2008. By the time financing had been secured by FMO and DEG, construction had begun, as well as were there legal disputes surrounding the project pending. A series of alleged human rights violations had therefore already been committed at this point in time. Thus, even though the argument might be made that these banks – and as a consequence their respective home state – should have been aware of significant human rights deficiencies occurring in the context of the project’s implementation before they approved financing, it cannot be said that the approval and financing of the project led to the effective control of FMO or DEG over the project.

Similar can be concluded in the **Bujagali** case, where the cause for the largest number of human rights violations can be traced back to the failure of the original project operator, AES Nile Power, which left the affected population ‘in limbo’ when it abandoned the project. The lender organisations seemed to be under the impression that the AES Nile Power had not only relocated the affected population, but had also completed the compensation process (World Bank Inspection Panel, 2008, pp. 137f).

Ultimately, this meant that they felt that did have to develop a completely new Resettlement Action Plan, but rather relied on a so-called Assessment of Past Resettlement Activities and Action Plan (APRAP), which proved insufficient.

Finally, even if it is determined that a state’s development bank exercises sufficient control and authority over a spatially-delimited project in order for it to fall within the jurisdictional scope of the ECHR or ICCPR, this still does not mean that anything occurring within their sphere of influence is sufficient to establish the responsibility of a state.

Hence, in this context it is particularly important to correlate the authority exercised by the project financiers to a type of **public powers**. This relates to those powers ‘normally to be exercised by a sovereign government’ (*Al-Skeini*, 2011, para. 149). *v.* In the context of project financing, this means finding whether **a state exercises such sovereign functions that it can prevent human rights violations from occurring,**

**punish perpetrators and offer justice to the victims of human rights abuses occurring through the project's implementation.**

Indeed, there might be situations where a power vacuum in a state or the clear absence of legislation adhering to international standards shifts the burden of responsibility on the financing entity still willing to invest under such conditions. Despite a lack of a functioning domestic legal framework, the project operator will still have to comply with the financial partner's institutional policies and the project will –

For example, in the *Bujagali* case, once the grievance mechanisms of the MDBs involved (in particular the Inspection Panel of the World Bank) had been alerted, they exerted a **strong monitoring function** over the progress of the project, as has been consistently stated by interviewees.

In such situations, it may be argued that the lender organisations gained a greater level of factual control over the implementation of social and environmental requirements within the project than claimed by the State of Uganda.

– where foreseen by the financing institution – still provide some access to justice through its grievance mechanism.

Where the financing partner – and thereby its state through means of attribution – thus fulfils a public power function or exercises *de facto* regulatory/governmental powers, it can be argued that the state would assume due diligence obligations under the respective human rights treaties with regard to individuals and communities affected in the context of the implementation of a project.

Nevertheless, in light of the case law issued by the ECtHR and the HRC, **the threshold is necessarily a high one.**

Extending the scope of the jurisdictional clause contained in Art. 1 ECHR or Art. 2 of the ICCPR to include situations where a state through its agents exercises effective control over a spatially-limited project fosters the universal protection of human rights. It realizes that states should ensure the protection of human rights of those persons which are within the scope of conduct over which it can exercise considerable influence/effective control and where they assume a public purpose function. This extension should, however, only be applied under strict circumstances.

Hence, while it is important to emphasize that the host state where the project is implemented is never absolved from its human rights obligations, in situations where the financial partner exercises substantial functional control over the project's implementation and operation, especially through the exercise of *de facto* legislative or executive authority, as well as through the administration of justice, the extension of the scope of the ECtHR's or ICCPR's application would be justified. Still lacking any clear case law on the issue, however, at present this is still to be viewed with adequate caution.

#### 5.1.4 (Broader) Extraterritorial Obligations in the Context of (Climate) Policies – Obligation to Regulate

Policy choices made by developed states to mitigate anthropogenic interferences can have a range of effects on third states. Thus, mitigation strategies taken by developed states can involve a plurality of diverse efforts, in particular emissions trading and ‘fuel switching’ (agro-fuels, renewable energy...). (Humphreys, 2010, p. 21) Moreover, developing states play a particular role in this context as developed states (Annex I states) are intended to meet their quantified emission limitation and reduction commitments under the Kyoto Protocol through actions undertaken in developing states, *e.g.*, by investing in CDM projects. (Gordon, 2009; Roht-Arriaza, 2010) Hence, **how human rights inform mitigation policies is crucial as mitigation policies not only influence access to natural resources but development policy options of states in general.** (Humphreys, 2010, pp. 21–25)

Individuals negatively affected by these policy measures are often located in the territory of a state which has no decisive (or singular) role to play in the implementation thereof. Owing to this, it has been suggested that ‘[c]limate change may yet open up new spaces for the consideration’ of extraterritorial obligations. (Humphreys, 2012, p. 44) In particular the scope of the ICESCR has been understood in this context as requiring states to refrain from activities which might infringe economic, social and cultural rights in other states. This is also in line with the principle of common but differentiated responsibility of states as underlying the climate change regime. (Humphreys, 2012, p. 45)

##### 5.1.4.1 International Obligations in the Context of Climate Policies

As explained in Section 5.1.2.2. (economic, social and cultural rights), the concept of **international cooperation** and assistance under the ICESCR should serve as a basis for states to respect human rights of persons in third states and for states to prevent third parties from violating such rights where they are in a position to do so, whether by legal or political means. At the institutional level, this entails *inter alia* that states undertake efforts to ensure that human rights are considered in the formulation of international or institutional policies regarding climate change (Knox, 2009, p. 213). Hence, as one example, the 2015 Paris Agreement has been praised to have included for the first time a direct reference to human rights, albeit merely in its Preamble: ‘Acknowledging that climate change is a common concern of humankind, Parties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights, the right to health, the rights of indigenous peoples, local communities, migrants, children, persons with disabilities and people in vulnerable situations and the right to development, as well as gender equality, empowerment of women and intergenerational equity.’ (Paris Agreement, UN Doc. FCCC/CP/2015/L.9, 2015, preambular para. 11).

One way of putting this into a normative context is understanding this as an articulation of a state’s **obligation to regulate** certain activities and (non-)state actors, as addressed in the following section.

##### 5.1.4.2 Due Diligence Obligation to Regulate

Where there is a certain close relationship between a state and a particular measure, a state is under a due diligence obligation to provide for certain safeguards. From a human rights perspective, this has also been addressed by the ECtHR, explaining that states are under an obligation to protect those within their jurisdiction from the ‘immediate and known risks’ arising from hazardous activities or environmental

dangers (Öneryıldız, 2004, para. 109) to which they are exposed.<sup>49</sup> The due diligence obligation has been deduced from the positive obligations incumbent on states by virtue of *inter alia* Article 2 ECHR (right to life) (Budayeva, 2008) and obliges states to ensure that it has installed a 'legislative and administrative framework designed to provide effective deterrence against threats to the right to life', whatever the source of the threat is (paras. 129-130).<sup>50</sup>

A state's due diligence obligation to regulate also extends to the conduct of corporations headquartered on its territory. While the question when states are in a position to regulate the conduct of transnational corporations (TNCs) or non-state actors has been subject to much debate,<sup>51</sup> the GPBHR (2011) find that a state might be in such a position if some sort of jurisdictional basis exists (territorial, personality,...). Moreover, they stipulate that while there is **no prohibition to regulate the extraterritorial activities of businesses domiciled in a state's territory/jurisdiction, there is also no obligation to do so**. In practice, states sometimes resort to extraterritorial legislation (such as the US Alien Torts Claims Act), sometimes merely requiring parent companies to report on their global operations. (Report of the Special Representative of the SG on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, John Ruggie, 2011, p. 4) However, corporate structures (*e.g.*, the separate legal personality of foreign subsidiaries) further complicate the matter, and hardly lend themselves to more than cases of *indirect* regulatory obligations, *i.e.* by requiring the parent company to impose certain requirements/conditions on its subsidiaries. (McCorquodale & Simons, 2007, p. 616)

<sup>49</sup> For example, In *Öneryıldız v. Turkey*, the ECtHR found that the state officials and authorities had not done everything within their power to avert risks brought to their attention, and that they therefore 'know or ought to have known that there was a real and immediate risk to a number of persons living near the [...] municipal rubbish tip.' (para. 101).

<sup>50</sup> The ECtHR continued detailing this obligation:

132. [S]pecial emphasis must be placed on regulations geared to the special features of the activity in question, particularly with regard to the level of the potential risk to human lives. They must govern the licensing, setting up, operation, security and supervision of the activity and must make it compulsory for all those concerned to take practical measures to ensure the effective protection of citizens whose lives might be endangered by the inherent risks. Among these preventive measures, particular emphasis should be placed on the public's right to information, as established in the case law of the Convention institutions. The relevant regulations must also provide for appropriate procedures, taking into account the technical aspects of the activity in question, for identifying shortcomings in the processes concerned and any errors committed by those responsible at different levels (see *Öneryıldız*, cited above, §§ 89-90).

133. It has been recognised that in the context of dangerous activities the scope of the positive obligations under Article 2 of the Convention largely overlap with those under Article 8 (see *Öneryıldız*, cited above, §§ 90 and 160). Consequently, the principles developed in the Court's case law relating to planning and environmental matters affecting private life and home may also be relied on for the protection of the right to life.

In the end, Russia was found responsible for the 'authorities' omissions in implementation of the land-planning and emergency relief policies in the hazardous area of Tyrnauz regarding the foreseeable exposure of residents, including all applicants, to mortal risk.' (para. 158)

<sup>51</sup> It should be noted that the obligation to protect against human rights abuses is a due diligence standard, *i.e.* an **obligation of conduct and not result**. (McCorquodale & Simons, 2007, p. 615)

Applied in the context of climate protecting measures, this would mean that **states are expected to have an appropriate legislative and administrative framework in place to ensure that, e.g., the climate change mitigation projects they or their corporations are involved in abroad do not endanger the protection of the rights guaranteed under the under the respective human rights instruments.** This sentiment also underscores the OHCHR's 2009 report addressing the human rights implications of climate protecting activities, though remaining mute on how to effectively ensure this in practice. (OHCHR, 2009, paras. 65-68)

Moreover, by virtue of the influence states exert in certain financing institutions, they must ensure that these institutions have adequate safeguard policies in place (Special Rapporteur on Adequate Housing, 2013, para. 9) This is a threefold obligation, requiring firstly the introduction of standards, secondly, monitoring thereof, and lastly, ensuring compliance / consequences in cases of non-compliance. (Sarro, 2012, p. 1532)

*Inter alia*, states shall ensure that projects requiring resettlements are not carried out without a comprehensive **human rights-based resettlement and rehabilitation policy**. The primary responsibility therefor remains with the host governments. Nevertheless, in accordance with the Maastricht Principles, states shall respect and protect economic, social and cultural rights of persons which are affected by their laws and policies. (Maastricht Principles on Extra-Territorial Obligations in the Area of Economic, Social and Cultural Rights, 2011, Principle 24) There are few indications that this requirement is included in the climate change system. Hence, the Kyoto Protocol remains silent on such safeguards. Limited consideration can be found within the EU, however. Thus, in the context of admitting emission credits obtained through hydroelectric CDM/JI projects, the EU has issued the Linking Directive (Directive 2004/101/EC (Linking Directive), 2004) (see also above Section 3.2.4. in more detail)

In any event, as a last consequence, if project operators fail to respect such standards put in place by international lenders/states, there must be some sort of consequence, be it a refusal of approval, a cancellation of the loan, and – as discussed in Section 5.2 – access to justice for affected communities. (Leader & Ong, 2013, p. 114)

### 5.1.5 Conclusion

In conclusion, identifying extraterritorial human rights obligations in the context of climate policies, and in particular in the context of climate project finance, is set within the traditional debate of interpreting the jurisdictional scope of human rights treaties. Thus, as already concluded above, only in limited circumstances these policies which have an external effect result in the sufficient control-relationship between state and affected communities.

However, there are certain aspects which still play an important role, in particular the obligation to refrain from conduct which impairs the enjoyment of human rights outside of their territory and the obligation to ensure appropriate legislative and administrative regulatory frameworks. This is not only expected under the ECHR/ICCPR, but also receives additional dimensions under the ICESCR. Hence, the scope of the ICESCR is said to be broader and lays a particular focus on the 'international obligations' of state parties, including the obligation to regulate.

Nevertheless, the answer to the question which actors carry which human rights obligations in the context of the project's implementation is particularly complex. While European actors undoubtedly have a political responsibility to ensure that their conduct does not infringe the human rights of persons affected thereby, the determination of justiciable rights which can be claimed in a judicial forum is harder to make.

To date, the UNFCCC fails to provide individuals with human rights protection or direct recourse. Also, the CDM Executive Board is not equipped with a human rights mandate. This is particularly problematic in light of greenhouse gas mitigation measures being financed and approved in one state but implemented in another state. Thus, individuals negatively affected by such policy measures are often located in the territory of a state which has no decisive or singular role to play in the implementation thereof.

The inclusion of human rights safeguards at the institutional level would therefore be a significant improvement. At the same time, this is closely related to **access to justice** which constitutes a fundamental aspect in ensuring the effective protection of human rights. Access to justice entails *inter alia* to have an effective forum for victims of human rights violation to obtain justice. In the context of climate project finance, this is an issue of concern at the national, project-level as well as international level.

Overall, the events in the selected cases evidence how judicial and non-judicial means may reinforce one another. Nevertheless, effectiveness of the remedy has been an issue of concern. In particular, the question may be asked what the impact of the outcome of the complaint will be on the further implementation of the projects.

## 5.2 Access to Justice

### 5.2.1 Introduction

The analysis of the case studies revealed that access to justice of persons being affected by specific measures taken by states to address climate change, *i.e.* projects under the CDM, is a particularly challenging issue.

However, access to justice constitutes a fundamental aspect in ensuring the effective protection of human rights and entails *inter alia* to have an **effective forum for persons affected by human rights violations** to obtain justice. In the context of climate project finance, this is an issue of concern at the national, project-level as well as international level.

This chapter is structured as follows: Firstly, definitions of 'access to justice' are offered. Secondly, accountability mechanisms against states, against IFIs as well as operational-level grievance mechanisms are presented. Focus is laid, however, on the two-tier accountability system of the EIB. Strengths and weaknesses of grievance mechanisms of IFIs are analysed, in particular with regard to the accountability system of the EIB, by referring also to the results of the case studies. Finally, conclusions are presented.

## 5.2.2 Access to Justice as Defined by International Law/Instruments

The **right to have access to justice and redress** is enshrined in several human rights treaties, in particular in the provisions on the right to a fair trial and the right to a remedy in Articles 6 and 13 ECHR; Articles 2(3) and 14 ICCPR; and Article 47 EU CFR.<sup>52</sup>

Based on these provisions access to justice contains the following elements:

- the right to effective access to a dispute resolution body;
- the right to fair proceedings;
- the right to timely resolution of disputes;
- the right to adequate redress;<sup>53</sup> and
- the principles of efficiency and effectiveness.

The **Aarhus Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters** (1998) defines ‘access to justice’ as ‘access to a review procedure before a court of law or another independent and impartial body established by law’ (Article 9 (1)).

The UN Convention on the Rights of Persons with Disabilities contains the concept ‘access to justice’ explicitly.

Of particular relevance in the present context, the **UN Basic Principles and Guidelines on Development-based Evictions and Displacement** emphasize that ‘[a]ll persons threatened with or subject to forced evictions have the **right of access to timely remedy**. Appropriate remedies include a fair hearing, access to legal counsel, legal aid, return, restitution, resettlement, rehabilitation and compensation, and should comply, as applicable, with the Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law.’ (Basic Principles (Development-based Displacement), 2007, Principle 59) Where financing institutions are concerned, they ‘should establish or accede to complaint mechanisms for cases of forced evictions that result from their own practices and policies’. (Basic Principles (Development-based Displacement), 2007, Principle 72)

The **Guiding Principles on Business and Human Rights** (GPBHR) do not speak of access to justice but of **access to remedy** which is identified as the third pillar besides the state’s duty to protect human rights

<sup>52</sup> Article 2(3a) ICCPR: ‘effective remedy’ for all the rights in the convention; Article 9(4) ICCPR: right to ‘take proceedings before a court’; Article 14(1) ICCPR: the right to a ‘fair and public hearing’; Article 14(3c) ICCPR: right to be tried without undue delay; Article 47 EU CFR (same legally binding status as the Treaties): ‘right to an effective remedy and to a fair trial’; Art 47(3) CFR: access to justice in the context of legal aid, but the term access to justice also concludes the Article as a whole.

<sup>53</sup> The provision of compensation and remedies are essential as a number of risks pertain particularly to the phase following displacement/resettlement. Achieving durable solutions through ensuring adequate housing, restoration of livelihood, compensation and further remedies is key to any sustainable solution. Here lessons can especially be drawn from resettlement experiences in the field of development. Finally, as at any level of MDR, participation by stakeholders is essential at this stage as well.

and the corporate responsibility to respect human rights. The commentary to Art. 25 of the GPBHR defines access to remedy as follows:

Access to effective remedy has both procedural and substantive aspects. [...]Remedy may include apologies, restitution, rehabilitation, financial or non-financial compensation and punitive sanctions (whether criminal or administrative, such as fines), as well as the prevention of harm through, for example, injunctions or guarantees of non-repetition. Procedures for the provision of remedy should be impartial, protected from corruption and free from political or other attempts to influence the outcome. For the purpose of these Guiding Principles, a grievance is understood to be a perceived injustice evoking an individual's or a group's sense of entitlement, which may be based on law, contract, explicit or implicit promises, customary practice, or general notions of fairness of aggrieved communities. The term grievance mechanism is used to indicate any routinized, State-based or non-State-based, judicial or non-judicial process through which grievances concerning business-related human rights abuse can be raised and remedy can be sought.

As will be discussed in the next chapter, the PAPs sought access to justice through various channels, state-based and non-state-based, as well as judicial and non-judicial mechanisms.

### 5.2.3 Accountability Mechanisms

The case studies revealed that PAPs are largely left to resort to **grievance mechanisms of international financial institutions** (IFIs) in order to enforce their rights: In two of our case studies, Olkaria and Bujagali, PAPs accessed – with regard to the resettlement aspect – both the Inspection Panel of the World Bank as well as the EIB-Complaints Mechanism. With regard to the Barro Blanco case study, the joint complaints mechanism of two bilateral financing institutions, of DEG and FMO, was accessed.

The focus of the obligations installed on IFIs lies with ensuring that **certain safeguards** and regulatory steps are undertaken by host states and implementing project partners **before financing**. Moreover, monitoring and accountability mechanisms should be ensured throughout the respective project's life-cycles. In part, this has been achieved through policies issued by IFIs. Nevertheless, gaps in implementation exist, leaving affected populations often without any access to justice.

The fact that PAPs are largely left with the grievance mechanisms of IFIs has also to do with the abovementioned difficult enforcement of ETOs against third states: While **European actors** have undoubtedly a political responsibility to ensure that their conduct does not infringe the human rights of persons affected thereby, the scope of extraterritorial obligations is contested and the **determination of justiciable rights** which can be claimed in a judicial forum is **difficult** (see section 5.1). Apart from that, to date, the **UNFCCC fails to provide individuals with human rights protection or direct recourse**. As explained in Sections 3.2. and 5.1.5. , the CDM rules are silent on access to remedial actions arising from misconduct of a project and the CDM Executive Board is not equipped with a human rights mandate.<sup>54</sup>

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<sup>54</sup> The only potential requirements are that the project must contribute to sustainable development and take into account the comments made by stakeholders. There were certain complaints made on this issue in the Barro Blanco project.

Following commonalities and particularities of the three case studies could be observed:

- **Courts of home states** played only a marginal role in accessing justice with regard to the resettlement aspect: Courts were accessed only in one case study (Barro Blanco, Panama).<sup>55</sup> Regarding the Bujagali case study, interviewees indicated that it was impractical to make use of Ugandan courts in the Bujagali case, where the Ugandan state was strongly involved (lack of capacity and impartiality of Ugandan courts). In the Olkaria case, the national court system was accessed regarding a land ownership issue, however, not directly by the PAPs but by ‘rivalling’ Maasai communities.
- So far, no complaints have been submitted to the **individual complaints mechanisms of the UN human rights system** (neither against the respective home states nor against any involved third states) or of **regional human rights systems**.
- In all three case studies **grievance mechanisms of multilateral financing institutions** played an important role with regard to access justice of PAPs (see details below).
- In relation to one case study (Panama) **bilateral financing institutions** had a grievance mechanism in place: FMO (Dutch development bank) and DEG (German development bank) established a joint complaint mechanism (‘Independent Complaints Mechanism’) in February 2014, *i.e.* after project approval (the mechanism was accessed by PAPs a few months later). With regard to the Uganda case study, the bilateral financing institutions KfW and FMO had not set up dedicated grievance mechanisms. Following the Equator Principles,<sup>56</sup> at least FMO would have had the obligation to offer an accountability mechanism.<sup>57</sup>
- **Civil society actors** played an important role in supporting PAPs in submitting complaints and accessing justice.
- In one case study (Barro Blanco), the Catholic Church and UNDP supported a **political dialogue and mediation process** between the affected indigenous communities and government and project operator. Interestingly enough, lenders – including European ones – were not represented.<sup>58</sup>

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<sup>55</sup> Civil society has engaged in numerous court proceedings on behalf of affected communities: lawsuit (Contra la Resolución DIEORA IA-332-2008) filed against an EIA process with Supreme Court by CIAM (delays); In autumn 2014, case was decided in favour of ANAM and proceedings closed. A second lawsuit (Contra la Resolución AN. No. 6103-ELEC) filed against decision by ASEP to authorize taking of land for construction on behalf of Mr. Miranda, again by CIAM.

<sup>56</sup> The Equator Principles ‘is a risk management framework, adopted by financial institutions, for determining, assessing and managing environmental and social risk in projects and is primarily intended to provide a minimum standard for due diligence to support responsible risk decision-making’ (The Equator Principles Association, 2011).

<sup>57</sup> The bilateral financial institutions broadly follow the same rules as those of the multilateral development banks. However, KfW did not have any clear rules in place for remedial access. The Dutch FMO, however, adopted the Equator Principles in 2005, which call for the inclusion of a grievance mechanism in high-risk projects (Principle 6).

<sup>58</sup> Two round tables were held at the UN, one focusing on Barro Blanco. This round table agreed to install a verification mission to visit the construction site of the dam and communities. They recommended that an international team of experts should carry out an independent study. After the December 2012 report by the

- **Operational-level grievance mechanisms** should have existed theoretically in all three case studies. However, in at least one case study there are indications that the mechanism did not exist in practice or was not responsible for concerns relating to the resettled communities. With regard to the Olkaria case study, the Grievance and Complaint Handling Mechanism (GCHM) facilitated by the project operator KenGen, existed in practice but had several shortcomings (see below chapter 5.2.6).

In the following, different accountability mechanisms (against states, against IFIs, operational-level grievance mechanisms) and the respective results of the case studies are presented. Given the research questions of this project, the focus lies on **access to justice vis-à-vis the EU and its member states** including international financial institutions, in particular the EIB.

**Overview: Access to Justice, in particular against European actors**

	Mechanisms	Examples
<b>Against states</b>	Individual complaints mechanisms – to the extent that HR are extraterritorially applicable	UN Committee of Civil and Political Rights (if OP-ICCPR ratified); UN Committee of Economic, Social and Cultural Rights (if OP-ICESCR ratified – hardly any EU MS <sup>59</sup> )  CoE: ECtHR (ECHR), European Social Committee (ESC) (but only collective complaints)  CJEU: difficult for individuals to access CJEU
<b>Against international financial institutions</b>	Institution-level grievance mechanisms	WB Inspection Panel (IDA, IBRD)  Compliance Advisor Ombudsman (CAO) (IFC, MIGA)  EIB-Complaints Mechanism (incl. European Ombudsman)  Bilateral development banks: e.g. FMO-DEG Grievance Mechanism
<b>Against project operators</b>	Operational-level grievance mechanisms	

verification mission, the UN conducted a second mission under its leadership in June 2013. Following this, UNDP released three reports and an executive summary. They concluded that project's impacts on environment and Ngäbe communities could be mitigated but that appropriate consultations with indigenous peoples had not been carried out and that impacts had not been clearly explained or understood.

<sup>59</sup> As of 20 June 2016 only the EU member states Belgium, Finland, France, Italy, Luxembourg, Portugal, Slovakia and Spain have ratified the OP.

**Overview: Access to Justice to Project Financiers' Grievance Mechanisms**

	Panama: Barro Blanco	Kenya: Olkaria	Uganda: Bujagali
<b>World Bank Inspection Panel</b>	n/a	<ul style="list-style-type: none"> <li>• Oct. 2014: Complaint</li> <li>• Jan. 2015: joint one-week mission with EIB-CM</li> <li>• Apr. 2015: <i>Memorandum of Understanding with EIB-CM</i></li> <li>• March/Apr. 2015: field visit of WB-IP</li> <li>• Oct. 2015: <b>Investigation Report</b></li> <li>• Management Response</li> </ul>	<ul style="list-style-type: none"> <li>• 2007: Complaint</li> <li>• Joint mission with AfDB's Compliance Review and Mediation Unit (AfDB-CRMU)</li> <li>• 2008: <b>Investigation Report</b> (also of AfDB CRMU)</li> <li>• Management Response + Action Plan</li> </ul>
<b>European Investment Bank (EIB)-Complaints Mechanism</b>	n/a (Originally, financing was sought from EIB. However, after a complaint (Dec. 2009) and EIB-CM initiating an investigation into project, promoter GENISA <b>cancelled request for a loan</b> before announced visit of EIB-CM)	<i>Mutual Reliance Initiative of EIB, AfD, KfW</i> <ul style="list-style-type: none"> <li>• July + Aug. 2014: 2 complaints</li> <li>• Apr. 2015: <i>Memorandum of Understanding with WB-IP</i></li> <li>• Jan. 2015: Joint mission with WB-IP</li> <li>• June 2015: Initial Assessment Report</li> <li>• Aug. 2015 : Mediation started</li> <li>• Nov. 2015: <b>Conclusions Report</b></li> <li>• May 2016 : Mediation Agreement signed</li> <li>• Implementation ongoing</li> </ul>	<ul style="list-style-type: none"> <li>• 2009: Complaint</li> <li>• Aug. 2012: <b>Conclusions Report</b></li> <li>• Complaint with European Ombudsman (because of delay of EIB-CM)</li> </ul>
<b>Grievance Mechanisms of Bilateral Development Banks</b>	<ul style="list-style-type: none"> <li>• Feb. 2014: establishment of FMO/DEG joint 'Independent Complaints Mechanism' (3 years after project approval)</li> <li>• Apr./May 2014: Complaint</li> <li>• Oct. 2014: one week on-site visit of Panel</li> <li>• May 2015: Report of Independent Expert Panel</li> <li>• May 2015: FMO and DEG Management Response</li> <li>• June 2015: Letter by communities and representatives to Dutch and German ambassadors in Panama (since no specific steps taken by banks after Panel's report)</li> </ul>	No institutional grievance mechanisms of AfD or KfW	No institutional grievance mechanisms of KfW/DEG, FMO. Following Equator Principles, at least FMO would have had obligation to offer such a mechanism.

## 5.2.4 Accountability Mechanisms against States, in particular EU Member States

With regard to accountability mechanism against individual states the case studies revealed that PAPs resorted only in one case to courts of their home states. No complaints were submitted to the individual complaints mechanisms of the UN human rights system or of regional human rights systems (neither against the respective home state nor against any involved third state).

### 5.2.4.1 Overview – Mechanisms and International Standards

With regard to instances that give rise to extraterritorial obligations, individuals can access **individual human rights complaint mechanisms**, *i.e.* if established that it falls within the jurisdiction of human rights treaty. However, applying the regime of **extraterritoriality** in the special context of climate mitigation measures is **challenging** (see section 5.1). Individual complaint mechanisms are generally only available for violations committed by states.

A number of **UN human rights treaties** provide for **quasi-judicial individual complaint mechanisms**.<sup>60</sup> In cases where the treaty bodies enjoy jurisdiction and the case is admissible, they issue views, not judgments, which are not enforceable. Individuals may resort to these means after local remedies have been exhausted (or would be ineffective) and if no other redress mechanisms are considering the issue. With regard to the ICCPR, most European states have issued a reservation to the Optional Protocol, stating that if the ECtHR has heard a complaint it cannot be subsequently heard by the Human Rights Committee (see for more detail, Connors & Schmidt, 2014, p. 381 ff).

**Any person** can lodge a complaint with a UN treaty body against a state which is party to the treaty in question providing for the rights which have allegedly been violated and which accepted the treaty body's

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<sup>60</sup> The following UN human rights treaties envisage individual complaints or communications under certain conditions:

- International Covenant on Civil and Political Rights (ICCPR) (state parties to the First Optional Protocol to the ICCPR);
- Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (state parties to the Optional Protocol to the CEDAW);
- International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) (state parties who have made the necessary declaration under article 14 of the Convention);
- Convention on the Rights of Persons with Disabilities (CRPD) (state parties to the Optional Protocol to the Convention);
- International Covenant on Economic, Social and Cultural Rights (ICESCR) (state parties to the Optional Protocol to the ICESCR);
- Convention on the Rights of the Child (CRC) (state parties to the Third Optional Protocol on a communications procedure).

competence to examine individual complaints. Complaints may also be brought by **third parties** on behalf of individuals if they have given their consent.<sup>61</sup>

On a **regional level**, regional human rights regimes with institutions observing compliance exist. Overall it can be stated that a challenge for individuals seeking access to justice is sometimes the non-binding nature of decisions (*e.g.* Inter-American Commission of Human Rights; African Commission of Human and Peoples' Rights) or the ineffectiveness of the system<sup>62</sup> (*e.g.* long duration of proceedings,<sup>63</sup> understaffing and underfinancing<sup>64</sup>).

On a European level, the **ECtHR** issues binding judgments in respect to state parties to the ECHR. While it not yet has direct jurisdiction over the EU, the EU will accede to the ECHR in the near future.

With respect to the European Social Charter, the body observing compliance with this treaty (the **European Committee of Social Rights**) issues decisions which are legally non-binding. However, no individual complaints are possible. Instead, collective complaints are envisaged.

The EU and its member states can also be held responsible for fundamental rights violations at the **Court of Justice of the European Union (CJEU)**. An important source of fundamental rights is the **Charter of Fundamental Rights of the European Union (CFR)**, which is also applicable to the 'institutions, bodies, offices and agencies of the Union'. This can either be done directly or through preliminary rulings. While the latter can be requested by any national court in the course of proceedings where there is uncertainty about the interpretation or validity of EU law, the former may only be lodged by individuals or entities claiming to have been violated in their fundamental rights by an act addressed to or of **direct** and **individual concern** to them (a decision or a regulatory act which does not entail additional implementing measures). (Article 263 TFEU) For PAPs living outside the EU this is hardly applicable. Thus, direct recourse of individuals living outside the EU to the CJEU is not very likely.

Thus, while the European human rights system is – at least with regard to civil and political rights – equipped with a Court delivering legally binding decisions, the major challenge lies in holding European states for acts occurring outside Europe accountable (see section 5.1.). This is also the reason why PAPs often resort to grievance mechanisms of IFIs (see section 5.2.3.2).

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<sup>61</sup> There exist some exceptions to this consent requirement, though – *e.g.* if a person is in prison without access to the outside world or is a victim of an enforced disappearance.

<sup>62</sup> The recommendations of the African Commission of Human and Peoples' Rights are not enforceable but are in theory monitored through state reporting, lack of enforcement powers of the African Commission, supervision of compliance is primarily delegated to the political bodies of the AU. Reports of state reporting are 'usually long overdue and some states have never even submitted a report' and 'states are often reluctant to comply with the recommendations and findings' (see Binder et al., 2016, pp. 430-431).

<sup>63</sup> In relation to the African Commission of Human and Peoples' Rights see Binder et al. (2016, p. 429): 'the overall procedure often-time takes several years before the Commission issues its findings'.

<sup>64</sup> In relation to the African Commission of Human and Peoples' Rights see Binder et al. (2016, p. 425) referring to Viljoen (2012, pp. 292-293) and Baricako (2008, p. 17).

#### 5.2.4.2 Results from Case Studies

Courts of **home states** were accessed with regard to the resettlement aspect only in one case study (Barro Blanco, Panama).<sup>65</sup> Regarding the Bujagali case study, interviewees indicated that it was impractical to make use of Ugandan courts in the Bujagali case, where the Ugandan state was strongly involved (lack of capacity and impartiality of Ugandan courts).<sup>66</sup>

No complaints were submitted to **individual complaints mechanisms of the UN human rights system** or of **regional human rights systems**, neither against home state nor against third state.<sup>67</sup> The fact that no efforts were made to access human rights complaints mechanisms against European states can be explained by the difficulties in addressing **other states** than their home states: While **European actors** have undoubtedly a political responsibility to ensure that their conduct does not infringe the human rights of persons affected thereby, the scope of extraterritorial obligations is contested and the **determination of justiciable rights** which can be claimed in a judicial forum is **difficult** (see section 5.1).

### 5.2.5 Accountability Mechanisms against International Financial Institutions (IFIs) – Institutional Grievance Mechanisms, in particular the EIB

#### 5.2.5.1 Introduction – The Importance of Grievance Mechanism in the Three Case Studies

Grievance mechanisms of IFIs played an important role relating to access to justice for PAPs in all three case studies. In two of our case studies, Olkaria and Bujagali, PAPs accessed – with regard to the resettlement aspect – both the WB-IP as well as the EIB-CM. With regard to the Barro Blanco case study, the joint complaints mechanism of two bilateral financing institutions, of DEG and FMO, was accessed. The grievance procedures resulted partly in findings that the banks had failed to implement Bank policies (e.g. Olkaria: Conclusions Report EIB-CM 2015a,<sup>68</sup> Investigation Report of the WB-IP; Bujagali: Investigation Report of WB-IP 2008). Details see below section 5.2.5.3.3.

In two case studies, grievance mechanisms of different IFIs cooperated during investigation and fact-finding (Bujagali, Olkaria). In the Olkaria case study, the EIB-CM and the WB-IP had entered a memorandum of understanding in relation to complaints received.<sup>69</sup>

The importance of grievance mechanisms of IFIs is also due to the fact that mechanisms of the international human rights system or national courts were not accessed or played only a marginal role. In

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<sup>65</sup> See footnote 54.

<sup>66</sup> However, there is a case pending before a Ugandan court for blasting damages in the Bujagali case (*i.e.* outside the resettlement aspect).

<sup>67</sup> Panama: There were deliberations whether to proceed to the Inter-American system (against the home state), however, no proceedings have been initiated so far.

<sup>68</sup> The EIB obliged the borrower to follow the World Bank framework of involuntary resettlement.

<sup>69</sup> The European engagement in Olkaria took place under the Mutual Reliance Initiative (MRI) of EIB, AfD and KfW. For details of the MRI see chapter 4.2.2.

addition, operational-level grievance mechanisms did not always constitute an effective means for PAPs to access justice.

#### 5.2.5.2 Overview – Mechanisms and International Standards

Since international organizations such as the World Bank generally enjoy absolute immunity in domestic court proceedings,<sup>70</sup> **alternative dispute resolution mechanisms** become essential in ensuring access to justice with regard to possible human rights violations. Instruments granting immunity often contain an **obligation to create internal accountability mechanisms**. This obligation is, however, not always fulfilled since mechanisms are not set up for or limited in scope (*e.g.*, to staff disputes). (CoE Committee on Legal Affairs and Human Rights, 2013 para. 31) However, ‘a material factor in determining whether granting [...] immunity from [...] jurisdiction is permissible’ under the ECHR, is ‘whether the applicants had available to them reasonable alternative means to protect effectively their rights under the Convention.’ (ECtHR, *Waite and Kennedy* (1999), para. 68, referring to Art 6 ECHR)

Examples of such alternative dispute resolution mechanisms against IFIs are numerous. All major development banks have issued social and environmental policy documents and **inspection/grievance mechanisms** have been created (Mayer, 2013, 315). This consistent practice by multilateral development banks has also inspired bilateral development banks<sup>71</sup> (*e.g.* recently FMO and DEG) to slowly follow suit and establish internal grievance mechanisms (see below).

These grievance mechanisms are **non-judicial instruments** and aimed at **investigating compliance with the policies** and not at assessing whether the policies or procedures are adequate. (Mackenzie et al. 2010, 461) This means that complaints against the implementation, design or evaluation of a project **can normally not be based on general human rights law** but only on how the project complied/did not comply with the issued policy document and performance requirements. (Mayer, 2013, 317)

The **Guiding Principles on Business and Human Rights**<sup>72</sup> provide in para. 31 **effectiveness criteria for non-judicial grievance mechanisms**. Accordingly, non-judicial grievance mechanisms, both state-based and non-state-based, should fulfil following criteria:

- (a) **Legitimate**: enabling trust from the stakeholder groups for whose use they are intended, and being accountable for the fair conduct of grievance processes;

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<sup>70</sup> Though there are some exceptions contained in the relevant treaties: For example, in light of some of the World Bank’s commercial transactions and its operations in the commercial world, creditors can institute proceedings in some case.

<sup>71</sup> Bilateral financial institutions (BFIs) are institutions primarily funded by or owned by one state. The funds of BFIs are usually provided by the state, but can also be supplemented by own funds of the bank and money raised on capital markets.

<sup>72</sup> The Human Rights Council endorsed the Principles in June 2011. They were proposed by the Special Rapporteur on Business and Human Rights and ‘apply to all States and to business enterprises, both transnational and others, regardless of their size, sector, location, ownership and structure’ (GPBHR, 2011, General Principles).

- (b) **Accessible:** being known to all stakeholder groups for whose use they are intended, and providing adequate assistance for those who may face particular barriers to access;
- (c) **Predictable:** providing a clear and known procedure with an indicative time frame for each stage, and clarity on the types of process and outcome available and means of monitoring implementation;
- (d) **Equitable:** seeking to ensure that aggrieved parties have reasonable access to sources of information, advice and expertise necessary to engage in a grievance process on fair, informed and respectful terms;
- (e) **Transparent:** keeping parties to a grievance informed about its progress, and providing sufficient information about the mechanism's performance to build confidence in its effectiveness and meet any public interest at stake;
- (f) **Rights-compatible:** ensuring that outcomes and remedies accord with internationally recognised human rights;
- (g) **A source of continuous learning:** drawing on relevant measures to identify lessons for improving the mechanism and preventing future grievances and harms

Since accountability mechanisms of IFIs as well as operational-level grievance mechanisms are non-judicial grievance mechanisms, these criteria are relevant.

#### 5.2.5.2.1 World Bank Inspection Panel (IDA, IBRD)

In two of the case studies (Uganda and Kenya), PAPs accessed the World Bank Inspection Panel.

The **World Bank** has installed an **Inspection Panel** which can be called upon by **individuals** who believe that they have been or are likely to be harmed by a World Bank-funded project as a result of the Bank's failure to follow its policies. The Panel then can propose remedies and corrective action plans to the Board of Executive Directors. (Herz & Perrault, 2009) The panel was created in 1993 as the first accountability mechanisms of its kind (Bissel & Nanwani, 2009) by two resolutions of the IBRD and the IDA.<sup>73</sup> The Inspection Panel is an **impartial fact-finding body**, 'independent from the World Bank management and staff, reporting directly to the Board.' (The World Bank Group, 2016a) It is not a judicial body and does **not provide judicial remedies**. (Suzuki & Nanwani, 2005, p. 206)

The Inspection Panel is mandated to 'carry out independent investigations of Bank-financed projects to determine whether the Bank is in compliance with its operational policies and procedures, and to make related findings of harm.' (The World Bank Group, 2016b) The Panel's mandate does not allow it to investigate 'on more general human rights issues'. (Linder et al., 2013, pp. 36-43)

It reviews projects funded through the International Bank for Reconstruction and Development (IBRD) and the International Development Association (IDA). In relation to complaints regarding projects supported by other agencies of the World Bank Group (International Finance Corporation (IFC) and

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<sup>73</sup> In 1996 and 1999 clarifications were added to the Resolution.

Multilateral Investment Guarantee Agency (MIGA)) are dealt with by the office of the **Compliance Advisor Ombudsman (CAO)**.<sup>74</sup>

The Panel is composed of three members who are appointed by the Board of Executive Directors for five years (non-renewable). For fact-finding and investigation the Panels also hires independent experts. (The World Bank Group, 2016a)

The panel sends its findings to the Bank's Board of Executive Directors. The Bank Management has to respond with recommendations and actions to address the findings of noncompliance and harm. The Board of Executive Directors considers the Panel's findings and the Management's response and decides future actions. The Board then takes a final decision.<sup>75</sup> The Inspection Panel so far has reviewed more than 90 cases.<sup>76</sup>

#### 5.2.5.2.2 The Accountability Framework of the European Investment Bank (EIB)

In all three cases studies, PAPs accessed the EIB-CM. However, in one case (Panama, Barro Blanco) the operator cancelled the request for a loan before the visit of the EIB-CM. Thus, the visit of the EIB-CM never occurred.

At EU level, climate finance is largely delivered through the EU's development cooperation mechanisms, the EIB and the European Bank for Reconstruction and Development (EBRD).<sup>77</sup> In our case studies, only the EIB played a role.

Any member of the public has since 2008<sup>78</sup> **access to a two-tier system of the EIB**, one internal (the **Complaints Mechanism Division (EIB-CM)**) and one external (the **European Ombudsman (EO)**).<sup>79</sup>

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<sup>74</sup> The CAO was established in 1993. It calls itself an 'independent recourse mechanism for projects supported by the private sector agencies of the World Bank Group'. The office is based in Washington D.C. The CAO has three different roles: ombudsman role; compliance role; advisory role. Any person, group, community, other party can complain to CAO if she/he, they think they are, may be, affected by IFC or MIGA project(s). Complaints can be also made on behalf of affected persons by a representative. In one case study (Uganda) the project was supported by IFC and MIGA and complaints were submitted to the CAO, however not in the context of resettlement.

<sup>75</sup> For more information see The World Bank Group (2016c).

<sup>76</sup> For a case list see The World Bank Group (2016d).

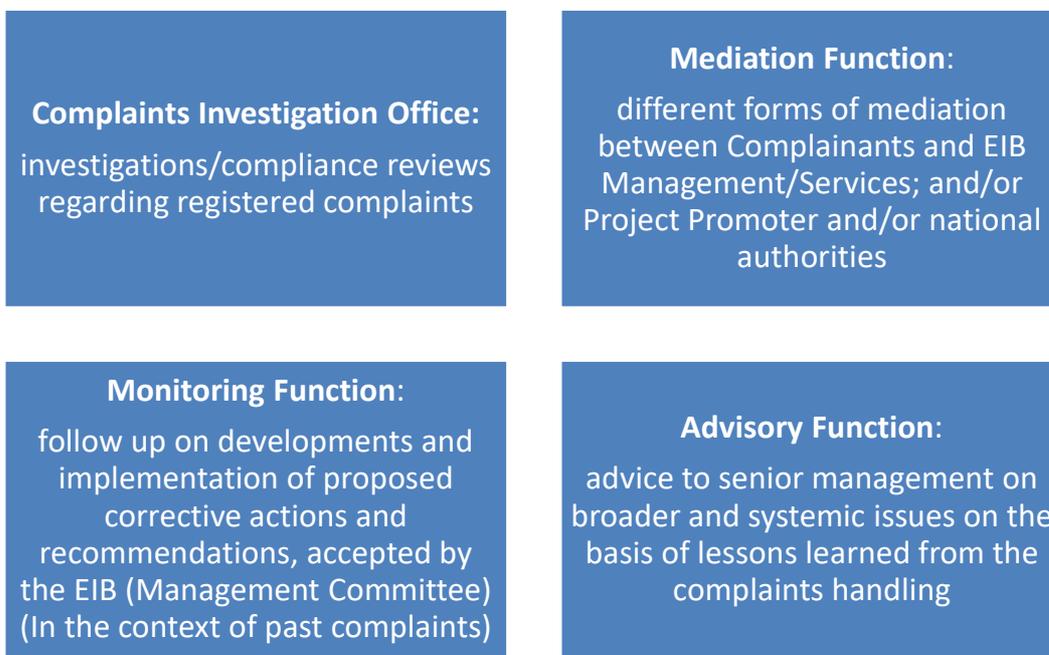
<sup>77</sup> Both subscribe to the respect of human rights and have established safeguards with the aim to avoid negative impacts of their activities. Both include standards on overall assessment and management of environmental and social impacts and risks, as well as specific standards on involuntary resettlement, labour conditions, health and safety, pollution prevention and control, and stakeholder engagement. Some of them are particularly geared to human rights violations. The EBRD has recently revised their Project Complaint Mechanism, which has been operational since 2010 and is aimed at ensuring that the financed project follows policies.

<sup>78</sup> The Complaints Mechanism was put in place in 2008, a 'Complaints Mechanism Division' was established as part of the 'independent Inspectorate General' (IG/CM).

<sup>79</sup> This chapter does not look at mechanisms which are not open to the public, e.g., Audit Committee or Court of Auditors, OLAF, mechanisms settling disputes among EIB shareholders or between the EIB and other EU institutions, or contractual disputes between the EIB and its clients.

If safeguards fail the EIB has an institutional complaint mechanism, the **EIB-CM** (EIB, 2016a), which ‘acts as the lower tier of the mechanism and hears complaints in first instance’. (Hachez et al., 2012, p. 29)

The EIB-CM has the following functions (EIB Complaints Mechanism Operating Procedures, 2013, pp. 3-4):



The EIB-CM is mandated to address **non-compliance** by the EIB to its policies and procedures but also tries to **solve the problem(s)** raised by complainants such as those regarding the implementation of projects by enabling **alternative and pre-emptive resolution of disputes**.<sup>80</sup> The EIB-CM is authorised to act in cases where the public feels that the EIB committed an **act of maladministration**, *i.e.* the mandate of EIB-CM includes verification of potential human rights violations.

After having assessed the complaint’s admissibility, the EIB-CM investigates and conducts a compliance review.<sup>81</sup> Apart from ‘punctual remedies’, the EIB-CM can propose ‘improvements to procedures and policies to the Management Committee, and follows up on them’. (Hachez et al., 2012, p. 30) During an investigation, the EIB-CM can obtain advice of independent experts or perform on-site visits (EIB Complaints Mechanism Operating Procedures, 2013).

The ‘standard procedure’ before the EIB-CM must be completed **within 40 working days**; this can be extended in complex cases, or for consultations and dialogue in problem-solving. An ‘**extended procedure**’

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<sup>80</sup> It has been argued that the CM ‘is primarily ‘compliance-focused’ as it will check that the EIB abided by applicable laws, rules, principles and standards in conducting its activities, and provide recommendations to the EIB management in that regard’. (Hachez et al., 2012, p. 30)

<sup>81</sup> If the project is under appraisal at the time of the complaint, the concerns will be communicated to the operational services (to be taken into consideration during the appraisal itself).

exists specifically for complaints regarding, *e.g.*, the environmental and social impacts of a project. The extended procedure may last **up to 140 days**.

If complainants are unhappy with the reply of the EIB-CM they may, within 15 days of the receipt of the EIB-CM's reply, submit a confirmatory complaint. Complainants who are not satisfied with the outcome of the procedure of the EIB-CM and who do not want to make a confirmatory complaint can lodge a complaint of maladministration with the **European Ombudsman (EO)**, an independent EU body.<sup>82</sup> The EO 'therefore provides an external and independent recourse' (Hachez et al., 2012, p. 31) and 'acts as a second recourse failing a satisfactory IG/CM decision.' (Hachez et al., 2012, p. 29)

#### 5.2.5.2.3 Grievance Mechanisms of Bilateral Financial Institutions – The DEG/FMO Accountability Mechanism: The 'Independent Complaints Mechanism'

The DEG/FMO joint complaint system was established only in February 2014. According to the banks' policy document, the 'mechanism provides stakeholders a tool, enabling **alternative and pre-emptive resolution of disputes**. At the same time the Mechanism assists DEG in implementing and adhering to its own policies and procedures and, as such, is the Mechanism a learning-by-doing process.' (KfW DEG 2014, 1.1.2, emphasis added) The Guide for Complainants further states that '[t]he aim of the process is **not to find liability or to enforce a remedy or compensation**' but 'to try to move the parties to a position where they can agree voluntarily how to resolve outstanding disputes' (**dispute resolution**) and 'identifying ways in which DEG can better implement its own policies where shortfalls are found' (**compliance review**) (KfW DEG, Guide for Complainants, p. 4, emphasis added).

Both institutions use the same panel, and when co-financed projects are concerned, they use a joint approach. The **three experts** appointed to the panel are Maartje van Putten, Michael Windfuhr, and Steve Gibbons.

#### 5.2.5.3 Strengths and Weaknesses of Grievance Mechanisms of IFIs, in particular of the EIB

In the following, based on selected effectiveness criteria for non-judicial grievance mechanisms suggested by the GPBHR (see Section 5.2.5.2),<sup>83</sup> the strengths and weaknesses of the grievance mechanisms of IFIs are analysed. Given the focus of the project on the accountability of the EU and its Member States, the analysis concentrates on the accountability mechanism of the EIB.

##### 5.2.5.3.1 Accessibility

In order to be accessible for PAPs, they must be aware of the existence of the grievance mechanisms but also of the project.

Any person (one person suffices) can file a complaint with the EIB-CM 'against virtually any type of maladministration (either project-related or not), without having to show an interest, or to identify the

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<sup>82</sup> According to Art 228 TFEU the EO is competent to hear cases of maladministration by EU 'institutions, bodies, offices or agencies'.

<sup>83</sup> The effectiveness criteria provided by the GPBHR are legitimacy, accessibility, predictability, equitability, transparency, rights-compatibility and a source of continuous learning.

norm relied upon' which is deemed 'liberal' compared to other IFIs. (Hachez et al., 2012, p. 30) Complainants do not have to prove that they are affected and do not need to know the policies of the bank that may have been violated. Thus, the admissibility criteria are not very strict (*i.e.* the reasons why complaints are not accepted are very limited). However, there are two drawbacks: Firstly, the operating procedures of the CM are available only in English (even though there is a flyer translated into 24 languages). (SOMO 2016, Annex 9). Secondly, the procedures of the CM are not easy to understand and procedures vary depending on the complaint type (see for details SOMO, 2016, Annex 9).

However, the **major challenge is that PAPs know about the existence of the CM and find their way to the EIB-CM** (SOMO 2016).<sup>84</sup> It has been criticised that Banks hardly ever inform the people affected about the existence of accountability mechanisms and in most cases, promoters are not aware that an accountability mechanism exists (Alcarpe, EIB-CM, Workshop March 2016). As also criticised by SOMO, '[n]either the CM policy nor any other EIB policy [...] requires the Bank's clients to disclose information about the availability of the EIB grievance mechanism to project stakeholders.' (SOMO 2016, Annex 9). The lack of knowledge about the CM hinders PAPs from making use of their right to complain. (Hachez et al., 2012, p. 32) There exists the idea that project teams should provide information to the promoter and the latter should be obliged to disseminate information about the CM. Until this idea materialises, it is particularly up to civil society actors to get active (*e.g.* in the Bujagali or the Barro Blanco case study). Only in exceptional cases PAPs themselves find their way to grievance mechanisms (*e.g.* in the Olkaria case study where people among the communities were more knowledgeable, knew English well and had access to the internet). (Alcarpe, EIB-CM, 6.12.2015)

With regard to the EO, an additional obstacle may materialise for **complaints from persons from outside of the EU**: Only an EU citizen or 'any natural or legal person residing or having its registered office in a Member State' is allowed to complain to the EO. In order not to exclude complainants relating to projects implemented outside of the EU, a Memorandum of Understanding (MoU) between the EIB and the EO was established in 2008. According to this MoU, if the only reason to dismiss a complaint is the fact that the complainant is not an EU citizen, the EO will open an own initiative enquiry. However, the **MoU is not binding** on the EO or the EIB. Apart from that, other disadvantages exist in relation to the MoU: Firstly, potential applicants from outside the EU may 'still be excluded for reasons of *e.g.* cost or distance'. Secondly, the MoU 'states that the Ombudsman shall not second-guess EIB substantive policies (notably in regard of environmental, social or development issues), and shall strictly focus on compliance review and problem-solving'. (Hachez et al., 2012, pp. 31-32)<sup>85</sup>

#### 5.2.5.3.2 Independence

Grievance mechanisms of IFIs should be independent.

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<sup>84</sup> The report states that most PAPs are 'not aware of the availability' of grievance mechanisms. See in particular Annex 9 on the complaints mechanism of the EIB.

<sup>85</sup> However, it has been argued that in practice people find somebody in Europe who can complain on their behalf, *e.g.*, in the Bujagali case NGOs with an office in Europe complained on behalf of PAPs.

With regard to the WB, a recent study concluded that there is ‘considerable antagonism between the Panel’s findings and Bank Management’s position on whether a violation of Bank policies has occurred’ and that ‘[f]or some time, it even seemed as if Management’s influence on the Board undermined the Inspection Panel’s independence’. Only the Board can authorise an IP investigation resulting in a ‘strong dependency of the Panel from the Board’. Apart from that, the Management ‘can implement action plans without full recognition of the Panel’s recommendations in the eligibility phase’ which ‘considerably weakens the mechanism at the moment where it could have most impact’. (Linder B. et al., 2013, pp. 37-40)

The CM is established within the EIB structure but is a separate division from the other divisions in the bank. The CM reports to the Management Committee of the EIB. The EIB differs from other IFIs (which are generally self-standing international organizations) in so far as it belongs to the ‘strong EU legal order’ and PAPs have the right to complain at a ‘second instance’, the EO, who reports directly to European Parliament. (Van Putten, 19.02.2015) Thus, the special feature of the EIB two-tier system is that there is a **guarantee of independent review** of the CM’s work and Bank’s decision through the EO.

However, there are also shortcomings:

#### *Independence of the EIB-CM*

- Under current CM policy EIB staff can change from working for other EIB departments to working for the CM without an interrupting period and vice versa. SOMO recommends the CM to introduce a period of time ‘before Bank staff can work for the mechanism, and prohibit mechanism staff from returning to the Bank after their term expires’ (SOMO 2016, Annex 9).
- Selection of CM staff: It has been criticised that information of the EIB on how CM staff are selected is lacking. SOMO recommends to include external stakeholders in the selection process for the CM Director (SOMO, 2016, Annex 9).
- Difficult position of the CM Office within the EIB: In the Bujagali case study, the EO found that it was ‘partly due to internal difficulties within the EIB that delayed the finalisation of the complaints-handling mechanism’s report’ and pointed to ‘difficult cooperation with some of the other services involved in the handling of complaints, and the need for the EIB’s Board to remind the staff of the need to provide the necessary degree of support and assistance to the Complaints-handling Mechanism’. (European Ombudsman, 2013, para. 31) SOMO recommends to raise awareness among EIB about the need for EIB staff to cooperate with the CM office (SOMO, 2016, Annex 9).
- Limited Resources of the EIB-CM: The CM – consisting of a multidisciplinary team – has 10 staff members who are not only tasked to assess complaints concerning the impacts of projects<sup>86</sup> but also to deal with procurement cases. Resources of the CM, *e.g.*, for fact-finding missions are deemed to be not enough. (Alcarpe, EIB-CM, 06.12.2015, see also Hachez et al., 2012, p. 32) In the Bujagali case study, the lack of sufficient resources became apparent: Whereas the EIB-CM is

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<sup>86</sup> There are 45-50 cases admissible per year.

generally supposed to conclude investigations within about six months,<sup>87</sup> in this case it took two years and nine months until the Conclusions Report was published. This prompted civil society actors to file a complaint with the EO (see above).<sup>88</sup> The EO closed the case in September 2013 on the grounds that the EIB-CM had in the meantime delivered its report, and acknowledged that the complaint had been complex, allowing for more time. It criticised, however, that the delay had at least in part been due to personnel shortage and internal problems (see above). The EO also concluded that there had been no ground for the EIB to suspend the funding while the Bujagali project was under review (European Ombudsman, 2013).

#### *Independence of the European Ombudsman (EO)*

- Limited resources of the EO: The EO has limited resources in terms of staff and technical capacity. It is argued that the EO lacks capacity to ‘effectively’ do something. Therefore the EIB accountability system relies on the EIB-CM.

#### 5.2.5.3.3 Outcome

A drawback of the grievance mechanisms of IFIs is that they result only in legally **non-binding decisions** so that the Management may decide not to apply the conclusions of a grievance mechanism.<sup>89</sup> For the EIB system this means that the EIB-CM ‘has no enforcement power on EIB organs’. In case ‘no mutually agreeable solution can be found, it may be difficult to curb EIB’s or project promoters’ decisions’. (Hachez et al., 2012, p. 32)

However, it is argued that there is a ‘power of persuasion’ and ‘power of the public’. For instance, reports of the EIB-CM and the reaction of the Bank are public and the Management Committee cannot change the report of the CM which makes it difficult for the EIB not to follow the CM’s findings or recommendations. So far it happened only twice that the Bank did not follow the CM which was criticised by the EO.<sup>90</sup> If no agreement can be reached with regard to reports of the CM with the Bank’s lower management, this must be discussed with the Management Committee. (Alcarpe, EIB-CM, 06.12.2015)

Still, there is room for improvement: While complainants have the possibility to turn to the EO as a ‘second instance’, there is no further way to seek justice at the CJEU: The extent to which the EIB as a EU body

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<sup>87</sup> The final reply has to be provided within 40 working days of the acknowledgement of receipt of the complaint. For complex issues, or for reasons beyond the sphere of influence of the EIB-CM, the deadline for providing a final reply may be extended for an additional maximum period of 100 working days.

<sup>88</sup> This process is also mentioned in a joint written statement by NGOs to the Human Rights Council of the United Nations General Assembly, where the complaints sketched above are again outlined (Human Rights Council 2013). There, the fact that the EIB-CM did finally deliver its report is loosely attributed to the complaint to the European Ombudsman, though the link is not made entirely clear.

<sup>89</sup> For the EIB accountability system see Art. 7.16 EIB Complaints Mechanism Principles, Terms of Reference and Rules of Procedure: ‘The Conclusions Report is submitted to the Management Committee [...] for information or decision. The Management Committee, [...] takes the decision on whether or not to apply the recommendations and corrective actions if any.’

<sup>90</sup> Felismino Alcarpe (EIB-CM) referring to the Pizzarotti case (Case No. 178/2014/AN, decision of 23 October 2014) and the Mopani case (Case No. 349/2014/OV, decision of 17 March 2015).

(which is bound by EU law such as the CFR) is fully subject to the jurisdiction of the **CJEU** is contested. It is criticised that the EIB, 'despite being the world's major development lender and an EU body, largely imitated the practices' of other IFIs '**largely escap[ing] the jurisdiction of the ECJ**'. This despite the fact that 'judicial review would be the most effective remedy available to external stakeholders' (Hachez et al., 2012, p. 36). The CM/EO construction is regarded as 'too weak an alternative to judicial review'. (Hachez et al., 2012, p. 36)

In our three case studies, the grievance procedures of the EIB-CM resulted partly in **findings of (non-)compliance**, *i.e.* that the banks had failed to implement Bank policies but also in **mediation efforts**, thus applying a problem-solving approach: For instance, in the **Olkaria** case study, the EIB-CM stated in its Conclusions Report in November 2015, *i.e.* after the publication of the Investigation report of the WB-IP, that 'the project has failed partially to implement the RAP [Resettlement Action Plan] in accordance with key provisions of the World Bank's policy framework<sup>91</sup> for land acquisition and involuntary resettlement, as was agreed by the lenders, including the EIB'. The CM criticised in particular that 'the actual resettlement of the PAPs was carried out before the necessary infrastructure including land titles, water supply, roads and transport was in place' (EIB-CM 2015b, Conclusions, para. 9.4). The two reports of the EIB-CM and WB-IP address similar issues in different ways: Whereas the WB-IP focussed on finding non-compliance with WB policies, the EIB-CM tried to approach the issues from a problem-solving angle. The EIB-CM also conducted a compliance review but also engaged in mediation. A major issue of concern of both grievance mechanisms was that the resettlement did not take account of the **needs of vulnerable groups**, did not recognise the **Maasai as indigenous community in accordance with the World Bank's Indigenous Peoples Policy** (OP 4.10) at the time of appraisal or did not ensure a participatory procedure (see Chapter 4.2.).

In terms of **predictability** it has been recommended to clarify CM procedures so that the process is easier to understand, to provide complainants with regular updates on the status of their complaints and to monitor implementation of findings of non-compliance as well as agreements reached through mediation (SOMO, 2016, Annex 9).

However, the **management responses** of the different multi- and bilateral banks were partly very short and vague. With regard to the EIB-CM, it has been criticised that even though the 'CM policy identifies some of the responsibilities of Bank Management during the complaint process [...] there appears to be no separate policy detailing the procedure followed by Bank Management.' The SOMO report mentions that concerns were raised that the EIB disregards CM's recommendations and recommends to '[r]eport publicly on the steps it takes to implement recommendations made by the CM' (SOMO, 2016, Annex 9).

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<sup>91</sup> The EIB-CM assessed whether the EIB would have failed to monitor the implementation phase since the European engagement in Olkaria took place under the Mutual Reliance Initiative (MRI) of EIB, AfD, and KfW. Since in this special case the EIB had 'contractually engaged the borrower to follow-up the World Bank policy framework of involuntary resettlement' (EIB-CM, 2015a, p. 5) World Bank policies were the benchmark.

Since the EIB ‘does not consult with the complainants in developing its response and corrective actions’ (Management Action Plans), the latter ‘may not respond to the needs and interests of complainants’ (SOMO, 2016, Annex 9).<sup>92</sup>

Usually **no follow-up procedures** are envisaged and **accountability mechanisms are not allowed to oversee actions plans of the Management** (for the WB accountability mechanism see Linder et al., 2013, pp. 36-43).

#### 5.2.5.3.4 Impact

The impact of grievance mechanisms – in particular for PAPs – is difficult to measure.

One impact – as seen in the Barro Blanco case study – can be that an IFI, in this case the EIB, does **not finance a project** at all: Originally, financing was sought from the EIB for this project. However, in 2009, a complaint was filed by a number of stakeholders, alleging non-compliance with the additionality principle of the Clean Development Mechanism, a lack of adequate consultation and assent of indigenous communities, negative environmental and social impacts of the project, and allegations concerning ANAM. (EIB SG/E/2009/11, 2009) After the EIB initiated an investigation into the project, the promoter GENISA cancelled the request for a loan before an announced visit of representatives of the EIB-CM to directly meet the affected communities. (Letter to the CDM Executive Board, 2011) As a result, the project was financed elsewhere.

The most important impact is seen to be **internal**: Since a Bank’s management is afraid of conclusions of a grievance mechanism, the former is keen on designing and implementing better projects. For instance, it is argued that the existence of the EIB-CM led to improved policies and proceedings of the EIB (*e.g.* the EIB started with one social expert, now there are five). (Alcarpe, EIB-CM, 06.12.2015)

As already mentioned above, arguably there is also something like a ‘**power of persuasion**’ and ‘power of the public’ (*e.g.* reports of the EIB-CM and the reaction of bank are public and the Management Committee cannot change the report of the CM making it difficult for the EIB not to follow). (Alcarpe, EIB-CM, 06.12.2015)

In addition, mediation functions of international grievance mechanisms might have an impact, *e.g.*, in one of our case studies (Olkaria), the EIB-CM became engaged in the active **mediation** between KenGen and the PAPs and between the PAPs internally.

### 5.2.6 Operational-level Grievance Mechanisms: Implementation Challenges

#### 5.2.6.1 Introduction

Operational-level grievance mechanisms should have existed theoretically in all three case studies. However, only with regard to the case study relating to Olkaria (Kenya) in-depth information on the operational level grievance mechanism exists. Regarding the two other case studies, there are indications that the operational-level grievance mechanism did not exist in practice or was not responsible for

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<sup>92</sup> However, it needs to be mentioned that the EIB-CM Draft Conclusions Reports – which include the recommendations to the Bank – are provided to the complainants for comments.

concerns relating to the resettled communities. For details see below, Section 5.2.6.3. With regard to the Olkaria project, in which an operational-level grievance mechanism existed, several shortcomings were identified.

#### 5.2.6.2 Overview – International Standards

The **Guiding Principles on Business and Human Rights** recommend that ‘business enterprises should establish or participate in effective operational-level grievance mechanisms for individuals and communities who may be adversely impacted’ in order to ‘make it possible for grievances to be addressed early and remediated directly’ (GPBHR, para. 29).

Operational-level grievance mechanisms are non-judicial grievance mechanisms. Therefore the effectiveness criteria of the **Guiding Principles on Business and Human Rights** (GPBHR, para. 31) are relevant. Lenders should adapt their guidance and requirements to mirror these developments in soft law, and thus ensure that their operations/funding activities are human rights adequate. In particular following principles are of relevance:

- In addition to the effective criteria applying to all non-judicial grievance mechanisms, operational-level mechanisms should also be ‘[b]ased on engagement and dialogue’. This means that stakeholder groups for whose use they are intended should be consulted about the operational-level grievance mechanism’s design and performance since this ‘can help to ensure that it meets their needs, that they will use it in practice, and that there is a shared interest in ensuring its success’. (Commentary GPBHR on para. 31(h))
- These mechanisms ‘should **focus on reaching agreed solutions through dialogue**’ since the operator, ‘a business enterprise cannot, with legitimacy, both be the subject of complaints and unilaterally determine their outcome’. If adjudication is needed, ‘this should be provided by a legitimate, independent third-party mechanism’. (Commentary GPBHR on para. 31(h))
- **Imbalances between enterprises and affected stakeholders** with respect to access to information, expert resources, and the financial means to acquire them, have to be **addressed** to ensure a fair process. (Commentary GPBHR on para. 31(d), effectiveness criteria ‘equitable’)
- An operational-level grievance mechanism **should not ‘preclude access to judicial or other non-judicial grievance mechanisms’**. (Commentary GPBHR on para. 29)

In part, the institutional policies of international financial institutions reflect these requirements:

- The introduction of an operational-level complaints mechanism is a mandatory requirement of the applicable **World Bank operational policies**.<sup>93</sup> The annex to OP 4.12 contains more detailed

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<sup>93</sup> Para. 13(a) of OP 4.12 (on involuntary resettlement) explicitly requires that ‘[a]ppropriate and accessible grievance mechanisms are established’ for displaced persons and their communities, and any host communities. Para. 14 of OP 4.12 on determining eligibility for compensation mentions that a procedure to assess eligibility ‘includes provisions for meaningful consultations with affected persons and communities, local authorities, and, as appropriate, nongovernmental organizations (NGOs), and it specifies grievance mechanisms’.

information on how such a mechanism should be designed.<sup>94</sup> Apart from that, little guidance can be found.

- The **EIB's Statement on Environmental and Social Principles and Standards (ESPS) 2009** (EIB, 2009) states in the context of consultation requirements that '[t]his includes the rights to due process via recourse to independent appeal and arbitration procedures in the case of disputes' (*ibid.* p. 20). It does, however, **not mention an operational-level complaint mechanism**. The current version of the Environmental and Social Handbook of the EIB (EIB, 2013a), which is not applicable to our case studies, requires operational-level grievance mechanism complying with specific criteria.<sup>95</sup>

### 5.2.6.3 Results from Case Studies

Only with regard to the case study relating to Olkaria (Kenya) in-depth information on the operational level grievance mechanism exists. Regarding the two other case studies, there are indications that the operational-level grievance mechanism did not exist in practice or was not responsible for concerns relating to the resettled communities:

In the Barro Blanco case, the project operator acknowledged in its Environmental and Social Summary Report that international standards require the setting up of a grievance mechanism. Even though this report mentions that the system has been installed, stakeholders interviewed by the project team indicated that the mechanism did not exist in practice. Apart from that, the mechanism is not mentioned in the complaint mechanism of the bilateral donors at all.

In the Bujagali case study, the project operator worked with a witness NGO to support a grievance mechanism that would address grievances from affected persons or related to the construction activities (R.J. Burnside 2006). However, the CDM validation report from 2011 does not report the outcomes of the grievance mechanism and the project design document (PDD) from 2014 simply states that 'BEL maintains a grievance mechanism in order to record and address public grievances or concerns raised during project implementation' (CDM 2014, 49). While an EIB representative maintains that the mechanism existed, none of the interviewees in Uganda referred to such a mechanism.

Only in the Olkaria case study, in-depth information on the operational level grievance mechanism, the Grievance and Complaint Handling Mechanism (GCHM) facilitated by the project operator KenGen, exists

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<sup>94</sup> Such mechanisms should be characterized by '[a]ffordable and accessible procedures for third-party settlement of disputes arising from resettlement' and 'should take into account the availability of judicial recourse and community and traditional dispute settlement mechanisms' (OP 4.12, annex A, para. 17). It further states that the resettlement policy framework document 'should describe the process for resolving disputes relating to resource use restrictions that may arise between or among affected communities, and grievances that may arise from members of communities who are dissatisfied with the eligibility criteria, community planning measures, or actual implementation' (*ibid.* para. 27). The World Bank's resettlement sourcebook states that a 'project should provide legal assistance to affected people who wish to lodge an appeal' (World Bank, 2005, p. 339).

<sup>95</sup> The new standards are intended to be 'consistent with [...] international and EU human rights law.' (EIB, 2013a, Policy Alignment, pp. 52, 55). As a body of the EU, it is also bound by the EU CFR (Article 51). While this does not mean that EIB must actively promote human rights, it is bound to 'not support projects that have a negative impact on those rights.' (Pistoia, 2014, p. 333).

(see Section 5.2.6.3). The mechanism is organised as a four-level mechanism, in which the second level, the Resettlement Action Plan Implementing Committee (RAPIC), constitutes the most important level channelling all communication on complaints. If in a RAPIC meeting no solution can be achieved, the affected and KenGen are expected to agree on an **independent external arbiter** (third level). If the independent arbitration process does not result in a positive outcome ‘the aggrieved party is free to seek court’ (fourth level).

However, several shortcomings of RAPIC were identified by the WB’s and EIB’s institutional grievance mechanisms. The WB-IP even found it to be in **non-compliance with OP 4.12**, para. 2b, given the ‘serious shortcomings in achieving meaningful consultations and inclusive participation in the Project’s resettlement activities’ ‘due to the ineffective communication with the community, the sidelining of the community’s traditional authority structure (the Elders), the omission of Maa language during consultations, and failure to disclose documents to the affected community in a place accessible to them and in a form, manner, and language understandable to them’ (WB-IP Investigation Report 2015, Executive Summary para. 10). The EIB-CM identified three circumstances preventing the grievance mechanism from fulfilling its role such as the ‘non-declared conflict of interests of the RAPIC’ (RAPIC versus Council of Elders); the fact that the Council of Elders was set up only after the creation of the RAPIC and that Elders complained that their opinions were not being taken into consideration in accordance with Maasai traditions; the distrust of the members of the community if complaints are referred to an external mediator (EIB-CM Conclusions Report, 9.8).

### 5.2.7 Conclusion

In general, prevention is better than cure: Requiring clients to assess the human rights impacts of their operations or mediation skills at the time of the design and implementation of a project would be better than running mediation processes once a problem is already in a too advanced stage. Apart from that, direct engagement of EIB social experts with PAPs could prevent misunderstandings and conflicts already at an early stage and maybe eventually avoid grievance handling later on. In general, it is important that all IFIs adopt social safeguards that are in accordance with human rights principles.

If prevention is not possible, grievance mechanisms of IFIs are important means for PAPs to access justice – in particular since the scope of ETOs are disputed and difficult to enforce, since national courts are not always working effectively and since operational level-grievance mechanisms are not implemented adequately. In a nutshell, PAPs are currently better off with grievance mechanisms of IFIs than without them (see also SOMO 2016, p. 8). Still, there exists room for improvement (for details see below). In general, all IFIs should have an accountability mechanism fulfilling the Effectiveness Criteria of the GPBHR.

#### **What needs to be improved with regard to the EIB two-tier system?**

- **Accessibility:** Access of PAPs to information about the existence of the EIB-CM and EO needs to be improved: On the one hand, the EIB-CM should enhance efforts to make its grievance procedures better known to potentially affected people. On the other hand, the EIB should ensure that its clients are ‘required to disclose the availability of the CM’. (SOMO (2016) Annex 9 on the complaints mechanism of the EIB).

- **Independence** of EIB-CM and EO: In order to ensure real independence of the EIB accountability system, sufficient resources need to be allocated to both EO and EIB-CM. Apart from that, EIB staff should not be in a position to immediately take a position in the CM (and vice versa). Recruitment procedures should be designed to enhance the independence of the CM. EIB staff should be obliged to cooperate with the CM office.
- **Role of EU law and the CJEU:** Since the EIB's forms part of the 'strong' EU legal order, EU law 'should play a more pervasive role in setting the normative framework of the EIB's operations, notably outside the EU' (Hachez et al., 2012, p. 37) and the **CJEU could play an important role in the external accountability** of the EIB. Experts criticise that 'the EIB's retrospective accountability toward external stakeholders chiefly relies on bland 'maladministration' grounds and mechanisms just like all other MLIs'. Since the EIB must – also according to the CJEU – comply with applicable EU law, this should also concern the justiciability of EIB finance decisions. (Hachez et al., 2012, p. 36)
- **Democratic control of EIB:** The EIB as the largest IFI is currently not obliged to respond to the EP and its committees. The EIB should be obliged to reply to EP reports on its activities.
- **Follow up:** Grievance mechanisms should be allowed to follow up on their recommendations.

## 6 Conclusions

The research project ClimAccount Human Rights Accountability of the EU and Austria for Climate Policies in Third Countries and their possible Effects on Migration set out to explore the complex relationship between climate change, migration and human rights by focusing on the effects of climate change measures on human rights in third countries. The key element of the research consisted of three case studies focusing on projects registered under the CDM: the Barro Blanco Hydropower Plant in Panama, the Bujagali Hydropower Plant in Uganda and the Olkaria IV Geothermal Project in Kenya. The main insights can be summarised as follows:

With the example of the CDM it was demonstrated that human rights are inadequately taken into consideration in the international legal and institutional framework of climate policy. Although one of the CDM's two objectives requires assisting developing states in achieving sustainable development, it is up to host countries to define criteria for sustainable development and procedures for local stakeholder consultations. Furthermore, the CDM procedures do not contain any mechanisms for addressing problems that may arise during the implementation of a project. Although host countries may reject projects or withdraw approvals, most host countries do not thoroughly scrutinize the human rights implication of projects. The 2015 Paris Agreement, however, opens up to better integrate human rights considerations within a future market mechanism by calling on state parties to respect, promote and consider their human rights obligations when taking action to address climate change.

The case studies revealed that there are certain common patterns of human rights implications occurring in the context of the implementation of the projects. They refer to the issues of participation, migration/displacement/resettlement (MDR) and due diligence:

The participation of PAPs during the whole course of the project is a crucial part in ensuring the adequate protection of human rights of the affected communities. However, one core problem of all three case studies relates to the failure of the project operator, governmental authorities and international partners to obtain the consent of the affected population or ensure their adequate participation/consultation in the course of the project's approval. Especially, the recognition and protection of vulnerable groups such as indigenous peoples (FPIC) as well as their traditional representative structures which should be an essential element in the context of project approval and implementation, seems to be a particular challenge. This issue is exacerbated by the fact that the CDM process does not provide a meaningful mechanism to engage with the affected communities and the lack of a mandate of the Executive Board to demand better consultations with PAPs prior to authorizing the registration of a project.

With regard to the resettlement or relocation of persons it is important that it is undertaken in accordance with human rights obligations. Resettlement is a very sensitive issue especially for indigenous peoples as the importance of land for them is more than a matter of possession but includes also a spiritual and material element. Also for other vulnerable or marginalised groups resettlement is particularly challenging and it is important that the specific needs of affected communities are addressed and that relevant international standards and institutional policies are respected. The three case studies revealed that a major issue regarding the resettlement process concerned the initial data set/census, which formed the basis for the planning and carrying out of the resettlement process. This included for example the lack of

precise data, the lack of clarity about the number of eligible PAPs as well as their entitlements and the absence of structured planning of compensation measures. However, the initial process of evaluating and assessing the risks with the proposed project is crucial for ensuring the adequate protection of the right to property/tenure and consequently, for the determination of those entitled to receive compensation as well as for beneficial conditions for livelihood restoration and thus the right to an adequate standard of living. In addition, the site selection for resettlement is important in order to reach a culturally appropriate and sustainable outcome of the resettlement process as well as the issue of full and fair compensation for (communal) property and/or land. In one case study – Barro Blanco – no resettlement has been drawn up at all and no agreement has been reached on compensatory measures yet, even though it has been confirmed by numerous sources that the flooding of the reservoir site will result in the displacement of several members of the affected communities.

As a third point of concern the issue of the adequacy of the conducted environmental impact assessment as well as the monitoring activities by the financing institutions was identified. This refers, in other words, to the question whether the involved parties have complied with their due diligence obligations to prevent or minimize potential damage/harm from occurring. Problematic points in this regard relate to the way the ESIA was carried out, including incomplete ESIA's, the omission of applying a heightened level of due diligence in critical and controversial (historical) circumstances or the acceptance of the ESIA by authorities and project financers despite flaws, but also the failure of the ESIA to adequately address the suitability of the selected site and solutions to the challenge of carrying capacity. The CDM rules leave the assessment of socio-economic impacts to the host state to regulate and abstain from defining clear indicators within the CDM project cycle to ensure that the impact of the project will have a positive effect on human rights. This leaves local communities particularly vulnerable.

The second part of the report was dedicated to the issue of accountability and responsibility particularly of the EU and its member states in the case of adverse effects of climate measures on the human rights of affected communities. The question of extraterritorial human rights obligations is a particularly challenging one as human rights have traditionally been perceived as a matter owed by states to their nationals or to persons residing on their territory. Nevertheless, recent years have seen a growing debate on how far human rights obligations of states extend. While the implementation of climate protecting activities will only in limited circumstances amount to such a control-relationship between the financing state and affected communities/territory that it will fall within the jurisdictional scope of application of the ECHR or ICCPR, extraterritorial obligations also play an important role in determining the expected conduct by states at the international level. In this regard, particularly the obligation to refrain from conduct which impairs the enjoyment of human rights outside of their territory and the obligation to ensure appropriate legislative and administrative regulatory frameworks in such circumstances must be mentioned. This is not only expected under the ECHR and ICCPR but specifically under the ICESCR. Hence, the scope of the ICESCR is said to be broader and lays a particular focus on the 'international obligations' of state parties, including the obligation to regulate. As the determination of justiciable extraterritorial rights which can be claimed in a judicial forum is hard to make, affected communities are, as the case studies clearly demonstrated, very often left to resort to grievance mechanisms of IFIs. Access to justice is a crucial aspect in ensuring the effective protection of human rights and implies inter alia to have an effective forum for persons affected by human rights violations to obtain justice. However, the question

of access to justice of PAPs is a particularly challenging one since – as in the case studies – third states are financing climate protecting activities having negative human rights implications in third states, *i.e.* ‘somewhere else’. All three case studies revealed that grievance mechanisms of IFIs were important means for PAPs to access justice – in particular since the scope of ETOs are disputed and difficult to enforce and since operational level-grievance mechanisms are not implemented adequately. Courts of home states played in our case studies only a minor role in accessing justice with regard to the resettlement aspect. Besides, no complaints were submitted to individual complaints mechanisms of the UN human rights system or of regional human rights systems (neither against the home states nor against European states which were financing the projects). Despite the importance of grievance mechanisms of IFIs, there exists room for improvement, in particular with regard to the accessibility of the mechanisms (PAPs were not always aware of the existence of the mechanisms) or independence of the mechanisms. Although in all three case studies operational-level grievance mechanisms should have existed, only in one case a grievance mechanism existed in practice that was relevant for the resettled communities.

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