

Supporting Communication to the Special Rapporteur on the rights of indigenous peoples

Submitted on behalf of the Congreso General Ngäbe Bugle y Campesino by the Justice and Corporate Accountability Project, MiningWatch Canada and Professor Daviken Studnicki-Gizbert at McGill University

Panama Country Visit - July 2013

I. INTRODUCTION

The present report is submitted in support of communications from the Congreso General Ngäbe Bugle y Campesino of Panama to the Special Rapporteur on the rights of indigenous peoples during his Panama Country Visit in July 2013. The purpose of the report is to provide a brief description of factual circumstances impairing the full and effective exercise of the human rights and fundamental freedoms of the Ngäbe Bugle people in Panama.

The report focuses on three extractives projects of concern to the Ngäbe Bugle and provides a brief examination of human rights abuses which have occurred during recent periods of direct action and protest by the Ngäbe Bugle and other indigenous peoples in Panama.

The information provided is a summary of third party research, investigations and publically available documents. No primary or field research was conducted to confirm the accuracy of the information contained in this report. The authors have relied upon multiple and credible sources of information and the information presented in this report is accurate to the best of our knowledge. Information on the contributors to the report is available in Appendix A. The report is designed to provide a brief introduction to the relevant issues to support the presentation of further and more detailed information by representatives of the Ngäbe Bugle. Further research and examination is recommended to fully understand and evaluate the issues described in this report.

The Ngäbe Bugle

The Ngäbe Bugle are the largest indigenous group in Panama, with a population of about 200,000. They comprise of the Ngäbe, who speak Ngäbere and make up the large majority of the group, and the Bugle, who speak Buglére and have a population of about 4,000.¹

The Ngäbe Bugle Comarca (Comarca) is one of the five semi-autonomous administrative regions governed by indigenous groups in Panama, the additional Comarcas belonging to each of the four other indigenous groups in the country.² It is located in north-western Panama and borders the Caribbean Sea on its northern end. The Comarca was created in March 1997 through the approval by the Panamanian

¹ Human Rights Everywhere, “Informe sobre las Elecciones a Delegados para los Congresos General, Regionales y Locales de la Comarca Ngäbe-Buglé (24 de Octubre de 2010)” at 3, online: HREV <<http://www.hrev.org/wp-content/uploads/2011/02/informe-elecciones-Comarca.pdf>>. Historically, the Ngäbe and the Bugle have also jointly been referred to as the Guaymí. The other indigenous groups in Panama are the Kuna, the Emberá Wounaan, the Naso Tjerdi and the Bri Bri, all of whom also have their own Comarcas.

² Jorge Bravo, “Elecciones en la comarca Ngöbe Buglé: un nuevo reto para el TE”, online: Mundo Electoral <<http://www.mundoelectoral.com/html/index.php?id=544>>.

National Assembly of Law 10.³ In August 1999, the Ngäbe Bugle's Organizational Charter ("Carta Orgánica Administrativa") was instituted by way of Executive Decree No. 194.⁴ The Comarca comprises over 6968 km², about 8% of Panama.⁵ The State of Panama retains the rights to develop subsoil resources in the Comarca.⁶

Recent changes to the Carta Orgánica Administrativa and the Comarca electoral system made by the government of Panama have resulted in contested representation within the Comarca. The Congreso General Ngäbe Bugle y Campesino is one of two organizations claiming legitimate governmental authority within the Comarca. They claim that the recent changes to electoral systems in the Comarca were imposed by the State, serve to undermine traditional government structures and have been imposed to facilitate government influence over hydroelectric and extractive development within the Comarca. The other organization is a government-imposed Congreso elected under Decree no 537 that appears to have much less support. For further information on governance issues in the Comarca and general information about the Ngäbe Bugle please see the accompanying report prepared by Professor Daviken Studinicki-Gizbert.

This report will also deal with four Ngäbe communities that are occupying land outside of the Comarca in the Province of Colon. These communities are on or near a large concession called Petaquilla. They have been in conflict with an operating gold mine (Molejón Gold) and now are being threatened with forced relocation for a proposed copper mine (Cobre Panama).

Normative Framework of the Special Rapporteur

The mandate of the Special Rapporteur is to promote "the United Nations Declaration on the Rights of Indigenous Peoples and international instruments relevant to the advancement of the rights of indigenous peoples, where appropriate" (A/HRC/RES/15/14). The following summary identifies those standards within the normative framework of the Special Rapporteur that are applicable to and binding upon the Republic of Panama.

Panama voted in favour of United Nations Declaration on the Rights of Indigenous Peoples (A/RES/61/295) on 13 September 2007. Panama has also signed and ratified the following instruments:

- The International Covenant on Civil and Political Rights (ICCPR)
- International Covenant on Economic, Social and Cultural Rights (ICESCR)
- Convention on the Elimination of All Forms of Racial Discrimination (CERD)

³ Republica de Panamá, Asamblea Legislativa, *Ley Numero 10 de 1997*, "Por la cual se crea la comarca Ngöbe-Buglé y se toman otras medidas" (7 March 1997), online: Legispan

<http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/1990/1997/1997_149_0199.PDF> [*Ley 10*].

⁴ Republica de Panamá, Asamblea Legislativa, *Decreto Ejecutivo Numero 194*, "Por el cual se adopta la Carta Organica Administrativa de la comarca Ngöbe-Buglé", online: Legispan

<http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_NORMAS/1990/1999/1999_500_1081.PDF>.

⁵ Rosie Simms & Salma Moolji, "ENVR 451 Final Report: In the Belly of the Machine: Indigenous Mining Experiences in Panama" (25 April 2011), prepared for McGill University, Centro de Incidencia Ambiental (CIAM), the Smithsonian Institute and the *Comarca* Ngöbe-Buglé at 10, online: McGill University

<http://www.mcgill.ca/pfss/sites/mcgill.ca/pfss/files/in_the_belly_of_the_machine.pdf>.

⁶ *Ibid.*

- Convention on the Elimination of all Forms of Discrimination against Women (CEDAW)
- Convention on the Rights of the Child
- Convention on the Biological Diversity

Panama has not ratified the International Labour Organization (ILO) Convention on the Rights of Indigenous and Tribal Peoples in Independent Countries, No. 169. However, Panama has ratified the ILO Convention on the Rights of Indigenous, Tribal and Semi-Tribal Populations in Independent Countries, No. 107 and remains bound by its provisions.

II. THE NGÄBE BUGLE IN THE COMARCA

As explained in the attached report by Professor Daviken Studnicki-Gizbert, the Comarca now has two governing bodies – the traditional Congreso and a Congreso imposed by Decree no.537.

In 2006, the traditional Congreso General Ngäbe Bugle y Campesino ratified Resolution No. 4 and in a meeting of leaders agreed on their complete opposition to medium and large-scale mining projects in the Comarca.⁷ This stemmed from concern about issues related to their territorial rights, as well as the impacts of open pit mining on the environment, their health, and culture.⁸ Extractive development projects outside of the Comarca also present challenges to Ngäbe communities that have settled outside of the boundaries of the Comarca. The traditional Congreso reaffirmed its rejection of mining within the Comarca in 2007 through Resolution No. 1.⁹ The new Congreso imposed by Decree no. 537 also opposes mining in the Comarca, but has left the door open for continued hydro-electric development.

Cerro Colorado

Cerro Colorado has been at the forefront of mobilization against mining in Panama since initial exploration of the site began in the 1970s. It is one of the world's largest remaining untapped copper deposits.¹⁰ The conflicts between the indigenous peoples and mining companies concerning this deposit date back to the 1980s (Canadian Javelin) and Tiomin (late 1990s to early 2000s).¹¹ It has an elevation of 1,500 meters and sits on the continental divide of western Panama, on the north-eastern corner of the Chiriquí province. The continental divide area of western Panama is a tropical mountain region with heavy rainfall.¹² Cerro Colorado occupies a large portion of the Comarca and is located in an area of importance to local water systems.

Tiomin Resources and its Panamanian subsidiary Panacobre undertook drilling exploration program from 1996 to 1998. Corriente Resources has had a more recent presence in the area, as has Chilean company Codelco.¹³ In February and March 2011 there were massive Ngäbe marches and roadblocks

⁷ *Ibid* at 13. Note: Resolution No. 4 preceded changes to the Carta Orgánica Administrativa of the Ngöbe-Buglé.

⁸ *Ibid*.

⁹ Resolution No. 1 (03 August 2007) Comarca Ngäbe Bugle, Congreso General Ngäbe Bugle [Attached hereto as Appendix B].

¹⁰ Simms and Moolji, *supra* note 5 at 10,

¹¹ Dana Holtby, "Mining Conflict Overview Cerro Colorado" (2012) at 1 [on file with the authors].

¹² José Gabriel Mezquita, *The Social Impact of the Development of a Copper Mine on the Ngöbe Bugle Indigenous Community of Cerro Colorado in the Republic of Panama* (MSC Dissertation, School of GeoSciences, University of Edinburgh, 2011) at 10.

¹³ Lesya Nakoneczny & Kathleen Whysner, "ENVR 451 Final Report: In the 'Heart' of the *Comarca*: Understanding the Environmental and Social Impacts of Mining the Cerro Colorado Deposit" (26 April 2010), prepared for McGill University,

against Law 8, which modified the 1963 Mining Code to allow the exploitation of Cerro Colorado by foreign corporations without the consent of the Ngäbe.¹⁴ The law was cancelled and the national government promised a law banning mining in the Comarca.¹⁵ However, late in 2011, Bill 394 was proposed which would reintroduce foreign investment in the mining sector.¹⁶ Again the Ngäbe protested and condemned the government's delay in implementing their promised bill. The government then introduced Bill 415 to implement the agreement with the Ngäbe, but the Ngäbe rejected the Bill because it omitted the part of the agreement that would cancel existing resource concessions in the Comarca.¹⁷ Further protests ensued in 2012 and unresolved conflicts relating to the use of lands within the Comarca for hydroelectric development and extractive industries persist. Human rights abuses associated with the protests are discussed in a later section of this report.

The Cerro Colorado concession is currently held by CODEMIN (the Panamanian state-owned Mining Development Corporation/Corporación de Desarrollo Minero) and there is presently no mining activity at Cerro Colorado.¹⁸ However, "responsible mining" training sessions hosted by a consulting company called Clarke Educational Services headed by a Canadian indigenous individual named Mr. Donald Clarke have been promoting mining in the Comarca. The presence of the individuals associated with Clarke Educational Services in the Comarca has been rejected by Ngäbe authorities within the Comarca and requests have been made to the Panamanian government to aid in securing their departure from the Comarca.¹⁹ Representatives of the Ngäbe Bugle people have also written to the Standing Committee on International Trade of the Parliament of Canada to express concerns relating to the presence of Mr. Clarke in the Comarca and his representations concerning agreements made with Ngäbe Bugle people.²⁰

Violence and Protest in the Comarca

Centro de Incidencia Ambiental (CIAM) and the communities of the Ngöbe-Buglé Comarca, at 10, online: McGill University <www.mcgill.ca/pfss/sites/mcgill.ca/pfss/files/understandingtheenvironmentalandsocialimpact-5.pdf>.

¹⁴ Simms & Moolji, *supra* note 5 at 14; República de Panamá, Asamblea Nacional, *Ley 8 de 11 de Febrero de 2011*, "Que reforma el Código de Recursos Minerales y dicta otras disposiciones relacionadas con la actividad minera", online: Legispan <http://www.asamblea.gob.pa/busca/legispan/enviarPDF.asp?file=/APPS/LEGISPAN/PDF_NORMAS/2010/2011/2011_581_05_02.PDF>.

¹⁵ José González Pinilla, "Martinelli echa para atrás Ley 8" *La Prensa* (4 March 2011), online: prensa.com <<http://mensual.prensa.com/mensual/contenido/2011/03/04/hoy/panorama/2522973.asp>>.

¹⁶ Asamblea Nacional de Panamá, *Proyecto de Ley 394*, "Que restablece la vigencia de normas del Código de Recursos Minerales y de otras disposiciones" (11 October 2011), online: Asamblea Nacional <www.asamblea.gob.pa/apps/seg_legis/PDF_SEG/PDF_SEG_2010/PDF_SEG_2011/PROYECTO/2011_P_394.pdf>.

¹⁷ Flor Bocharel Q, "Indígenas protestarán por eliminación de artículo en proyecto de ley minero" *La Prensa* (29 January 2012), online: prensa.com <<http://www.prensa.com/uhora/locales/indigenas-protestaran-por-eliminacion-de-articulo-en-proyecto-de-ley-minero/61014>>; Asamblea Nacional de Panamá, *Proyecto de Ley 415*, "Que establece un régimen especial para la protección de los recursos minerales, hídricos y ambientales en la comarca Ngöbe-Buglé" (19 July 2011), online: Asamblea Nacional <www.asamblea.gob.pa/apps/seg_legis/PDF_SEG/PDF_SEG_2010/PDF_SEG_2011/PROYECTO/2011_P_415.pdf> [*Bill 415*].

¹⁸ Simms & Moolji, *supra* note 5 at 10-11.

¹⁹ Holtby, *supra* note 11 at 2. Correspondence from Pedro Rodríguez and Octavio Rodríguez, President and 2nd Secretary of the General Congress of the Ngöbe Bugle to the Standing Committee on International Trade Parliament of Canada dated 24 January 2011 [Attached hereto as Appendix C].

²⁰ Correspondence from Pedro Rodríguez and Octavio Rodríguez, *ibid* and Correspondence from Celestino Mariano Gallardo Regional Traditional Chief (Cacique) of Nedrini to the Standing Committee on International Trade Parliament of Canada dated 25 January 2011 [Attached hereto as Appendix D].

The Ngäbe Bugle people of Panama have a difficult history of interactions with the Panamanian Government and their attempts at having their rights enforced.²¹ Conflicts initially arose in the 1970s when the Ngäbe Bugle began petitioning the Panamanian Government for recognition of their cultural and property rights over traditional land. In 1997, after years of negotiations and protests, the Panamanian government introduced Law 10,²² which constitutionally recognized the Ngäbe Bugle's territorial rights.²³ However, these rights were limited in strength and were modified by President Martinelli in June 2010, under Executive Decree 537,²⁴ which modified the ability of the Ngäbe Bugle to elect their own leaders according to their traditions.

Protests surrounding the passage of Ley 8

Recently, these constitutionally protected rights have come under attack as plans to exploit the natural resources on Ngäbe Bugle land have been put forward by national and foreign interests. In February, 2011, in an attempt to encourage the development of large-scale mining projects, the Panamanian Legislature passed Law 8, which modified the Mining Code to allow for foreign state-owned mining corporations to directly invest in Panamanian mining concessions.²⁵ Law 8 was seen by many, including the Ngäbe Bugle, as a violation of the Panamanian Constitution which prohibits granting territorial rights to foreign states.²⁶ In response to these amendments, the Ngäbe Bugle, bolstered by widespread public support, called for the repeal of Law 8. In furtherance of their cause, the Ngäbe Bugle and their supporters launched nationwide protests. They initiated a blockade of the Pan-American Highway near the town of San Felix.²⁷ In response, President Martinelli called in riot police to disperse the protestors and break up the blockade. This altercation between police and protestors resulted in 15 injured policemen, as well as 12 protestors being admitted to hospital with buckshot wounds, and an additional 14 protestors being detained by police.²⁸ Bowing under the pressure from the public, President Martinelli met with Ngäbe Bugle leadership and came to an agreement (the San Felix Agreement) which included the cancellation of Law 8 as well as the promise of the future enactment of a law designed to protect Ngäbe Bugle land from mining projects.²⁹

²¹ Silvio Hernandez, "PANAMA-INDIGENOUS: Ngobe-Bugle Protesters to Remain in Capital" *InterPress Service* (31 October 1996), online:

IPS <<http://ipsnews2.wengine.com/1996/10/panama-indigenous-ngobe-bugle-protesters-to-remain-in-capital/>>.

²² *Ley 10*, *supra* note 3.

²³ Simms & Moolji, *supra* note 5 at 10. .

²⁴ Ministerio de Gobierno y Justicia, *Decreto Ejecutivo Numero 537*, "Por el cual se modifica el Decreto Ejecutivo 194 de 25 de agosto de 1999, que adoptó la Carta Orgánica Administrativa de la Comarca Ngöbe-Buglé" (2 June 2010), online: Gaceta Oficial <http://www.gacetaoficial.gob.pa/pdfTemp/26548_C/GacetaNo_26548c_20100604.pdf>.

²⁵ Human Rights Everywhere, "Informe preliminar sobre violaciones a los derechos humanos en las jornadas de protesta contra la reforma minera en Panamá, enero-marzo 2011" (March 2011), online: HREV <www.hrev.org/wp-content/uploads/2011/03/HREV-HHRRreport-ENG.pdf>; Asamblea Nacional de Panamá, Ministerio de Comercio e Industrias, *Proyecto de Ley 277*, "Por la cual se reforma el Código de Recursos Minerales, modifica e artículo 33 de la Ley 55 de 1973, modifica y adiciona artículos a la Ley 109 de 1973, sobre minerales no metálicos y se dictan otras disposiciones" (13 January 2011), online:

<www.asamblea.gob.pa/apps/seg_legis/PDF_SEG/PDF_SEG_2010/PDF_SEG_2011/PROYECTO/2011_P_277.pdf>. Bill 277 was passed as Law 8 on 11 February 2011.

²⁶ Simms & Moolji, *supra* note 5 at 14. .

²⁷ La Prensa, "Protesta sigue; Gobierno no cede" (27 February 2011), online: prensa.com <<http://mensual.prensa.com/mensual/contenido/2011/02/27/hoy/panorama/2517674.asp>>.

²⁸ *Ibid.*

²⁹ Pinilla, *supra* note 15.

Bill 194 and the ensuing protests

The Ngäbe Bugle victory was short-lived and in October of 2011, Bill 194, which would amend the Mining Code and reopen the discussion on foreign ownership of mining projects, was brought before the National Assembly for debate.³⁰ The Ngäbe Bugle once again took to the streets, peacefully protesting Bill 194, as well as the government's inaction in implementing the San Felix Agreement.³¹ In an attempt to appease protestors, the Government introduced Bill 415,³² giving effect to a portion of the San Felix Agreement. However, the Ngäbe Bugle rejected Bill 415, as it omitted one key aspect of the agreement which would have cancelled all existing natural resource concessions on Ngäbe Bugle land.³³ President Martinelli continued to ignore the concerns of the Ngäbe Bugle, and in February of 2012, the Ngäbe Bugle once again began blockading several points along the Pan-American Highway. In response to a five day closure of the Pan-American Highway, President Martinelli cut off cellular service in the area and called in Panamanian security forces to disperse the protestors and allow traffic to proceed along the highway.³⁴ The ensuing conflict between police and protestors was reported to have resulted in the killing of two protestors, one of whom was a minor, over 40 injuries, and the arrests of numerous Ngäbe Bugle, including children.³⁵ As well, there have been numerous allegations put forth by those who were detained by police, including complaints that detainees were held for over 24 hours without food or water and were physically, psychologically, and sexually abused by members of the police force.³⁶ Concerns relating to the protests in February 2012 were brought to the attention of the Special Rapporteur and allegations were communicated by the Special Rapporteur to the State of Panama seeking further information (06/02/2012 UA).³⁷ As of September 7, 2012, no response had been provided by the State of Panama to the allegations.³⁸

Bill 415 Resolution

Following the eruption of violence, the national government and Ngäbe Bugle leadership, mediated by the Catholic Church, signed the San Lorenzo Agreement effectively bringing an end to the protests.

³⁰ CONAMUIP & CEASPA & CIAM, "Informe de gira de observacion de derechos humanos luego de las protestas contra la minería e hidroeléctricas en la comarca Ngöbe-Buglé y en las provincias de Chiriquí y Veraguas" at 12.

³¹ Raúl López, "Indígenas iniciarán nueva jornada de protestas, saldrán hoy a las calles" *La Estrella* (26 October 2011), online: *La Estrella* <<http://www.laestrella.com.pa/online/noticias/2011/10/26/indigenas-iniciaran-nueva-jornada-de-protestas-saldran-hoy-a-las-calles.asp>>.

³² *Bill 415*, *supra* note 17.

³³ CONAMUIP & CEASPA & CIAM, *supra* note 30 at 12.

³⁴ *Ibid* at 14.

³⁵ Sandra Alicia Rivera, "Police accused of murder in Las Lomas" *La Prensa* (7 February 2012), online: La Prensa, <<http://www.prensa.com/uhora/locales/indigenas-acusan-la-policia-de-muerte-de-menor-en-las-lomas/63279?en>>. Also see: Amnesty International, "Fears for protestors after two killed" (7 February 2012), online: Amnesty International <<http://www.amnesty.org/en/library/asset/AMR44/001/2012/en/3edfd71b-b713-459d-b0d8-19027d014daf/amr440012012en.pdf>> and Organization of American States, "IACHR Urges Panama to Guarantee Protesters' Physical Integrity and Security" (7 February 2012), online: OAS <http://www.oas.org/en/iachr/media_center/PReleases/2012/013.asp>.

³⁶ CONAMUIP & CEASPA & CIAM, *supra* note 30 at 15.

³⁷ Office of the United Nations High Commissioner for Human Rights, "Reference UA Indigenous (2001-8) PAN 2/2012" (6 February 2012), online: UN <[https://spdb.ohchr.org/hrdb/20th/UA_Panama_6.02.2012_\(2.2012\).pdf](https://spdb.ohchr.org/hrdb/20th/UA_Panama_6.02.2012_(2.2012).pdf)>.

³⁸ United Nations General Assembly, "Report of the Special Rapporteur on the rights of indigenous peoples, James Anaya Addendum Communications sent, replies received, and follow-up", Human Rights Council Twenty-first session, A/HRC/21/47/Add.3 (7 September 2012) at para 63, online: UN <<http://unsr.jamesanaya.org/docs/cases/2012-communications-a-hrc-21-47-add3-es.pdf>>.

Under this agreement, the government guaranteed the release of all prisoners, financial compensation for the families of the protestors who were killed, and a complete withdrawal of police and security forces from the conflict areas.³⁹

In response to the protests and public pressure, on March 22, 2012, the National Assembly passed Bill 415 as Law 11, creating a special regime for mining and hydroelectric projects on Ngäbe Bugle land. Though the government refused to halt the construction of a dam project already underway, or to impose a permanent ban on mining in the Comarca, it agreed to cancel all existing mining concessions in the territory. The law also requires that all future hydroelectric concessions be approved by both the Ngäbe Bugle National Congress and by popular referendum.⁴⁰

One of the controversial features of Law 11 is that it allowed for the continuation of the Barro Blanco hydroelectric dam⁴¹ which is believed will cause huge flooding of three nearby villages.⁴² The Ngäbe Bugle began protesting outside of the construction site leading to a number of violent altercations with police forces, including physical violence and the criminalization of community leaders.⁴³ Unconfirmed internet sources allege that police were involved in the killing of Onésimo Rodríguez, a leader of the Ngäbe Bugle, who was beaten to death by masked attackers.⁴⁴

III. THE NGÄBE COMMUNITIES OUTSIDE OF THE COMARCA, NEAR THE PETAQUILLA CONCESSION

The Four Communities

The attached map shows the location of the four communities. The map is difficult to read, but the community of Nuevo Sinaí is located at about 1:00 on the circle. Nueva Lucha is at about 11:00; and Rio Palmilla is near the coast to the left of Nueva Lucha. Nuevo Sinaí appears to be outside of the concession area, but it is listed by the mining company, Inmet, as a community that will be directly influenced and must be relocated. Nueva Lucha appears to be on the other side of the concession, on the Petaquilla River. It may be located within the concession and is listed as indirect influence. Rio Palmilla is near the coast and out of the concession area. Chicheme is mentioned as a small agricultural area used by people from Nuevo Sinaí in late 2009 or early 2010.

Date of establishment

According to Martín Rodríguez, president of the Asociación Rey Quibian, the Ngäbe people began moving into the area in the late 1980s and early 1990s. In 2002, the communities announced their

³⁹ CONAMUIP & CEASPA & CIAM, *supra* note 30 at 14-15.

⁴⁰ Asamblea Nacional de Panamá, *Ley 11 de 26 de marzo de 2012*, “Que establece un régimen especial para la protección de los recursos minerales, hídricos y ambientales en la comarca Ngäbe-Buglé”, artículo 4, online: Gaceta Oficial <www.gacetaoficial.gob.pa/pdfTemp/27001/37392.pdf>.

⁴¹ World War 4, “Panama: Ngöbe-Buglé renew anti-dam protests” (19 March 2013), online: WW4 Report <<http://ww4report.com/node/12101>>.

⁴² Weekly News Updates on the Americas, “WNU #1170: Panamanian Anti-Dam Activist Murdered” (1 April 2013), online: Weekly News Updates <<http://weeklynewsupdate.blogspot.ca/2013/04/wnu-1170-panamanian-anti-dam-activist.html>>.

⁴³ Weekly News Updates on the Americas, “Panama: Ngöbe-Buglé Renew Protests Against Dams” (17 March 2013), online: Weekly News Updates <<http://weeklynewsupdate.blogspot.ca/2013/03/wnu-1168-40-arrested-in-occupation-of.html>>.

⁴⁴ *Ibid.*

presence to the government and some degree of recognition followed thereafter with the establishment of schools. Inmet takes credit for building the schools in Nuevo Sinaí and Nueva Lucha. According to Inmet, Nueva Lucha was founded in 2005 and Nuevo Sinaí in 2003.⁴⁵

Population

According to Martín Rodríguez, the population of the Ngäbe in the area is about 1500 and Chicheme had about 70 people. Inmet's 2012 Analyst report says Nueva Lucha has a population of 216 and Nuevo Sinaí a population of 259.⁴⁶ Golder Associates, in their EIA shows a chart showing the 2008 population of Nueva Lucha as 300 and Nuevo Sinaí as 350.⁴⁷

Governance

According to the Rey Quibian Association, communities did not have a formal governance structure until 2006, when it is alleged that people working for Petaquilla Gold (from the Molejón Gold project) burned Ngäbe houses. At that time, a more formal structure was established so that each community elected its president, and the Asociación Rey Quibian was formed to represent all three communities. Martín Rodríguez is current President of Nueva Lucha and President of Asociación Rey Quibian. There are no other formal government structures in these communities, such as alcaldes or caciques.

Inmet, in its 2012 analyst report says that there is “no traditional political structure” and that “self-proclaimed leaders are competing for power based on time in area, religion (non-traditional Christian) and family ties.”⁴⁸

⁴⁵ Inmet Mining, “Cobre Panama Project: Analyst Visit November 2012” at 34, online: Inmet <www.inmetmining.com/files/pdf/2012/2012_Nov%20Cobre%20Panama%20Analyst%20Visit.pdf> [Analyst Report].

⁴⁶ *Ibid.*

⁴⁷ Golder Associates, “Environmental and Social Impact Assessment of the Mina de Cobre Panamá” (2010), prepared for Minera Panamá at 9-789.

⁴⁸ Analyst Report, *supra* note 45 at 34.



Cobre Panama

Cobre Panama is a large open-pit copper development project in Panama. The concession is located 120 kilometres west of Panama City and 20 kilometres from the Caribbean Sea coast, in the district of Donoso, Colon province.⁴⁹ The Cobre Panama project proposes to strip 5900 hectares of tropical rainforest to make way for three open pits, as well as a new port facility and a coal-fueled energy plant that will power the entire project. It will be the second-largest modern investment in the country, after the current expansion of the Panama Canal.⁵⁰

Cobre Panama is adjacent to, and part of the same concession as, a gold mine called Molejón (discussed below). Mineral rights to the concession were granted to Minera Petaquilla – now Minera Panama S.A. (“MPSA”) – in 1997 pursuant to the Ley Petaquilla (Ley Petaquilla No. 9 of February 26, 1997).⁵¹ Until recently, MPSA was a subsidiary of Canadian mining company, Inmet Mining. In April 2013, First Quantum acquired Inmet Mining and its 80% equity interest in MPSA. LS-Nikko Copper Inc (“LS-Nikko”), a Korean corporation, holds the remaining 20% of the MPSA through its wholly-owned subsidiary Korea Panama Mining Corp (“KPMC”).⁵² It should be noted that First Quantum has been the subject of allegations concerning human rights abuses relating to operations in other countries. According to OECD Watch, Oxfam-Canada together with Zambian organization DECOP have complained that the company has been involved in the eviction of “longstanding squatter communities” in Zambia, causing the squatters “economic, social and psychological hardships”.⁵³ In 2002, the company was alleged to have played a role in the illegal exploitation of natural resources in the Democratic Republic of Congo.⁵⁴ First Quantum has made public its intention to complete major cost cutting as part of the development of its acquisition.⁵⁵

The Cobre Panama project is located on the Petaquilla Concession, which consists of four zones totaling 13,600 hectares. The topography in the concession area is low elevation (less than 300 metres) and rugged with considerable local relief covered by dense rainforest. Climatic conditions are tropical with high precipitation levels, high humidity and relatively high temperatures of 25°C to 30°C year-round.⁵⁶ According to Inmet’s own environmental assessment, predicted negative impacts from the project include massive deforestation; reduction in air quality; increased noise levels; reduction in soil quality;

⁴⁹ Inmet Mining, “Cobre Panama”, online: Inmet <<http://www.inmetmining.com/ouroperations/development/Cobre-Panama/default.aspx>> [Inmet Mining, Cobre Panama].

⁵⁰ Melissa Fung, “The New Conquistadors: Canadians mining in Panama”, *Global Post* (5 December 2012), online: Global Post <<http://www.globalpost.com/dispatches/globalpost-blogs/rights/the-new-conquistadors-canadians-mining-panama>>.

⁵¹ MiningWatch Canada, “Important Information about the Petaquilla Mining Project in Panama” (18 November 2008) at 2, online: Mining Watch <http://www.miningwatch.ca/sites/www.miningwatch.ca/files/Petaquilla_background.pdf>; Asamblea Nacional de Panamá, *Ley 9 de 1997*, “Por la cual se aprueba el contrato celebrado entre el Estado y la Sociedad Minera Petaquilla, S.A.” [*Ley Petaquilla*], online: Legispan <http://www.asamblea.gob.pa/APPS/LEGISPAN/PDF_GACETAS/1990/1997/23235_1997.PDF>.

⁵² Inmet Mining, Cobre Panama, *supra* note 49.

⁵³ OECD Watch, “Oxfam vs First Quantum Mining”, online: OECD Watch <http://oecdwatch.org/cases/Case_19>.

⁵⁴ OECD Watch, “Table de Concertation sur Droits Humains vs First Quantum”, OECD Watch online: <http://oecdwatch.org/cases/Case_51>.

⁵⁵ Pav Jordan, “First Quantum starts cost-cutting at Cobre Panama mine, suspends SNC-Lavalin contract” *The Globe and Mail* (2 April 2013), online: The Globe and Mail <<http://www.theglobeandmail.com/report-on-business/industry-news/energy-and-resources/first-quantum-starts-cost-cutting-at-cobre-panama-mine-suspends-snc-lavalin-contract/article10706824/>>.

⁵⁶ Inmet Mining, Cobre Panama, *supra* note 49.

reduction in water quality; effects on plant and animal life; waste; risk of workplace accidents; loss or disturbance of archaeological sites; displacement of indigenous populations and farmers; and increased in-migration and rise in associated social problems.⁵⁷ The mine is predicted to have a potential life of 40 years.⁵⁸ Inmet recognizes that “[w]ater quality in local watercourses may be affected by site clearing and disruption of natural drainage patterns, disposal and storage of waste rock, ore and tailings, ore processing, sewage treatment effluent, accidental spills, and site reclamation and closure activities.”⁵⁹ The project is expected to be in its construction phase from January 2012 until the end of 2015 and to be operational from 2016-2044.⁶⁰

Displacement is a primary concern for the Ngäbe communities which stand to be affected by the project. Inmet does not consider the Cobre Panama project to be on or adjacent to indigenous territories but does acknowledge “several indigenous settlement communities” in the area and these communities’ customary use of the lands.⁶¹ Inmet acknowledges that the Cobre Panama project will displace people, including indigenous populations, and has created a “multi-faceted” resettlement process that the company claims to have developed in collaboration with those affected. It is anticipated that 500 people will be displaced, including farmers and Ngäbe settlements.⁶² The project seeks to address concerns through an Indigenous People’s Action Plan and a Resettlement Action Plan.⁶³

Molejón Gold Project

The Molejón Gold Mine is 100% owned by Petaquilla Minerals Ltd and is located on the Petaquilla mining concession, adjacent to Cobre Panama. Like Cobre Panama, it is regulated under Ley Petaquilla No. 9 of February 26, 1997. Petaquilla Minerals Ltd is incorporated and domiciled in British Columbia, Canada, and engages in the mining and mineral exploration of gold-bearing mineral properties in Panama and other countries. Petaquilla Minerals Ltd commenced commercial production at the Molejón Gold Project on January 8, 2010, located on 842 square kilometres in the Province of Colon, Panama.⁶⁴ Molejón Gold Mine is the only large-scale, functioning mine in Panama.⁶⁵ It currently operates at the rate of approximately 3,000 tonnes per day.⁶⁶

The Molejón Gold Mine is being developed in an area that was previously pristine rainforest within the Mesoamerican Biological Corridor. It has been developed in a piecemeal fashion without a feasibility study when it first began. The mine lies at the headwaters of three rivers: Rio Turbe, Rio Molejón and Rio San Juan and rain fall in the Donoso region averages five metres per year, rendering tailings spills a

⁵⁷ Inmet Mining Inc, *Aviso de Consulta Publica: Ultima Publicacion*. (on file with the authors). See also Golder Associates, *supra* note 47.

⁵⁸ Inmet Mining, Cobre Panama, *supra* note 49.

⁵⁹ Golder Associates, *supra* note 47 at 107.

⁶⁰ “Introduction”, *Minera Panama Sustainable Development Plan*.

⁶¹ Inmet Mining, “2011 Corporate Responsibility Report” at 60, online: Inmet <<http://www.inmetmining.com/files/2011report/index.html>>.

⁶² *Ibid* at 29.

⁶³ Golder Associates, *supra* note 47 at 2-77 to 2-78.

⁶⁴ Petaquilla Minerals Ltd., “Condensed Interim Consolidated Financial Statements: For the Three and Nine Months Ended February 28, 2013” (unaudited) online: PML <http://www.petaquilla.com/finance/2013/PTO2013Q32013Feb28FinacialStatements_Final.pdf>.

⁶⁵ Simms & Moolji, *supra* note 5 at 11.

⁶⁶ Petaquilla Minerals Ltd, “Welcome to Petaquilla”, online: PML <<http://www.petaquilla.com/>>.

serious threat.⁶⁷ Campesino communities near the town of Coclesito claim to have suffered from cyanide contained in tailings leaching into the river supplying their drinking water. In 2010, the Donoso area experienced very heavy rainfall and widespread flooding. Three communities claim that there was a breach of cyanide-bearing mine tailings ponds and that the material escaped into the local river. The National Environmental Authority investigated and found that the tailing vat walls were eroding and there was evidence of sediment runoff from the mine site into the Molejón River. Petaquilla denied the findings of the National Environmental Authority.⁶⁸

Representatives from Rey Quibian and individuals from Nuevo Sinaí have noted heavy sedimentation in the water and skin irritations that they link to the activities of the mines.⁶⁹ Communities also claim to have witnessed fish kills and an increase in skin diseases.⁷⁰ Residents also claim that the mine is responsible for the destruction of personal property, forced evictions, increases in alcohol and drug consumption, and social rifts in the community between those in favour and those against mining.⁷¹ There are also concerns that development projects that were promised remain unfulfilled.⁷²

Local communities have opposed the mining operations through blockades, vigils and marches since 2006 and there have been allegations of instances of violent police repression against protesters.⁷³

Free, Prior and Informed Consent to Relocation

Indigenous interest in land

The existence of indigenous interest is based on three facts.

First, the people are clearly Ngäbe and Ngäbe-speaking. Inmet has also identified them as indigenous communities.

Second, indigenous people have inhabited the Caribbean shores and rivers of Panama region for 3000 years or more. They are historically known as the Coclé or Guaymi. Currently, the indigenous people of the area are either Ngäbe or Bugle. The area under consideration was continuously occupied by indigenous peoples until the early twentieth century. There is then a break in the historical record until the late 1980s when the Ngäbe began moving back and formed the three communities. This pattern of migration, settlement and re-settlement are classic features of forest horticulturalists (whether Ngäbe, Guaymi, Coclé or other). There is excellent archaeological evidence for this from 4700 BCE to 1620 CE as well as excellent contemporary evidence and studies of the pattern. There is good historical evidence of indigenous settlements in the zone for the 16th to 18th centuries. More recently, there is good evidence of the movement of *cholos* (Christian and latinized indigenous people who do not speak a native tongue)

⁶⁷ Minera Panama, “Resumen Ejecutivo: Estudio de Impacto Ambiental y Social Proyecto Mina de Cobre” (2010) (Map on pg. 51 shows Petaquilla in relation to the rivers) as cited in Simms & Holtby “The Pillage of Panama: How multinational mining companies are rupturing Panama’s environmental and social fabric” at 6 [on file with the authors].

⁶⁸ Simms & Holtby, *ibid* at 6-7.

⁶⁹ Interviews conducted by Professor Daviken Studinicki-Gizbert [on file with the author].

⁷⁰ Simms & Moolji, *supra* note 5 at 13.

⁷¹ Simms & Holtby, *supra* note 67 at 7.

⁷² *Ibid* at 5.

⁷³ *Ibid* at 7.

over this area for the 20th century, moving their ranchos and communities throughout the zone and into Petaquilla concession.⁷⁴

Third, the communities continue their traditional socio economic structures and lifestyles. In their EIA prepared for Inmet, Golder Associates says this :

Nuevo Sinaí and Nueva Lucha also appear to be high users of forest resources within or near the Project. Since these communities have only been established over the past decade, they still have sufficient land to fulfill most household and community needs. These needs include the construction of homes, schools and churches using local resources. Both use land for the production of agricultural products to feed their families. Plants, wildlife and fish are generally used as food sources, not for commercial ends. Other vegetation uses include medicinal plants and construction materials. Fish species caught for consumption include shrimp, snook, whiting (guabina) and sardine. Large catches are shared among the whole community. Animals from hunting are generally not sold but consumed, although not frequently.⁷⁵

Recognition of indigenous interest in Panamanian law

Section 127 of the Constitution guarantees reserve lands (*tierras colectivas*) necessary to achieve economic and social well-being. Ley no 72 of 2008 provided a process for communities to apply for *tierras colectivas*. Whether the Ngäbe communities would meet domestic law requirements for *tierras colectivas* is complex. The region is covered in concessions, and both Nueva Lucha and Nuevo Sinaí appear to be located on these concessions. Some concessions appear to have been first granted (to prior owners) before the communities resettled on their particular communities. We have not been able to do a comprehensive legal analysis to determine whether or not the Ngäbe communities could have their land recognized under domestic Panamanian legislation.

Forced relocation

Inmet says that it helped build schools, give vaccinations, education, clean water, agriculture and job training,⁷⁶ but that there are no indigenous lands in the area of the concession, and that there is no “collective traditional tenure”.⁷⁷ Consequently, although there appear to have been regular meetings in the community, according to Martín Rodríguez, representatives of the company threatened members of the community by telling them that if they did not reach a settlement with the company to be displaced, the police would evict them by force.

Rey Quibian is opposed to relocation, but Inmet says that there is no formal leadership in the communities and Martín Rodríguez represents only a few families. The small breakaway community of Chicheme (about 70 people) have agreed to be relocated, but there has been no agreement by Nuevo Sinaí or Nueva Lucha. There has not been a vote or other mechanism for determining community

⁷⁴ Personal communication, Daviken Studnicki-Gizbert.

⁷⁵ Golder Associates, *supra* note 47 at 8-2.

⁷⁶ Analyst Report, *supra* note 45 at 34.

⁷⁷ *Ibid.*

perspectives on the question of relocation. The third community, Rio Palmilla, is located further away from the Petaquilla concession and is not part of Inmet's relocation plans.

IV. CONCLUSION

The Ngäbe Bugle represent a sizable portion of the indigenous population of Panama. They assert many different forms of violations of their rights and fundamental freedoms associated with actions taken by both the State of Panama and various corporations to advance extractive industries. Primary concerns relate to the exercise of self-determination and control over their traditional lands, territories and resources. Insufficient consultation and the failure to adhere to the requirements of free, prior and informed consent by both State actors and corporations has fostered conflict and impaired the full enjoyment, as a collective or as individuals, of the human rights and fundamental freedoms of the Ngäbe Bugle.

APPENDIX A

Justice and Corporate Accountability Project

The Justice and Corporate Accountability Project (JCAP) is a Toronto based volunteer organization dedicated to providing legal services and advocacy support to communities adversely impacted by extractive industries in the Americas. JCAP specializes in legal work and advocacy at the intersection of transnational corporate activities, resource extraction, and communities. Our approach to working with communities is guided by the principles of community self-determination, corporate accountability and transnational legal activism.

MiningWatch Canada

MiningWatch Canada is a pan-Canadian initiative supported by environmental, social justice, Aboriginal and labour organisations from across the country. The aims of MiningWatch Canada are to:

- ensure that mineral development practices are consistent with the goals of sustainable communities and ecological health;
- strengthen technical and strategic skills within communities and organisations faced with impacts of mineral development;
- impose appropriate terms and conditions on mining and in some cases prevent the development of projects that would adversely affect areas of ecological, economic and cultural significance; and
- advocate policies to improve the efficiency and reduce the risks of mineral development.

With technical and strategic expertise from across Canada, MiningWatch Canada carries out and/or supports the monitoring, analysis and advocacy necessary to affect the behaviour of industry and public decision-makers.

Professor Daviken Studinicki-Gizbert

Professor Studnicki-Gizbert is an associate professor in the Department of History at the University of McGill in Montreal, Canada. He teaches classes in world history, environmental history and the history of colonial Latin America. Professor Studnicki-Gizbert teaches a field course in Latin American environmental history as part of McGill's Panama Field Studies Semester and has worked closely with the Congreso General Ngäbe Bugle y Campesino and other indigenous organizations in Panama to advocate for the full and effective protection of the rights of indigenous peoples.

The authors would also like to recognize and offer appreciation for the valuable contributions of Osgoode Hall Law School students, Emma Landy, Sarah Molyneaux, Ladan Mehranvar, Elsa Arismendi, Valerie Crystal and Stefan Rosenbaum.

The authors would also like to extend their appreciation to Lic. Francisco A. Gómez for translating and editing the Spanish version of this report.