

INDEPENDENT COMPLAINTS MECHANISM (ICM)

Monitoring of FMO's and DEG's response to the ICM Compliance Review of FMO's and DEG's joint investment in the Barro Blanco Hydroelectric Project in Panama (Case 14-002)

1 August 2016

Independent Expert Panel for the Independent Complaints Mechanism of the Deutsche Investitions- und Entwicklungsgesellschaft (DEG) and the Netherlands Development Finance Company (FMO)

ICM Compliance Monitoring

This Monitoring Report relates to the complaint about the Barro Blanco Hydroelectric Project (BBHP) in Panama. During the monitoring the Complaints Offices and the Panel (together the ICM) assessed the extent to which the recommendations of the Independent Expert Panel (IEP) as documented in the IEP Compliance Review Report and accepted by FMO's and DEG's Management Response in 2015 have been implemented. This report covers the developments until 1 July 2016.

Background

The Barro Blanco Hydroelectric Project ("BBHP") is a 28.56 MW hydroelectric project located on the Tabasara River in the district of Tolé in the Chiriqui Province of Western Panama. BBHP is being developed by Generadora del Istmo S.A. (Genisa), a Panamanian developer established in 2006. The project financing by DEG and FMO took the form of a secured project finance loan of approximately US\$50 million and the agreement to finance was reached in August 2011.

In May 2014, complaints were lodged with the ICM of both FMO and DEG by the M10 movement and the Cacica General of the Comarca Ngäbe-Buglé. Both complainants are supported and represented by two international NGOs with offices in the Netherlands – SOMO and Both Ends. The complaints state the lenders should have ensured that the project respected the rights of the indigenous Ngäbe-Buglé people, in particular the right to free, prior and informed consent (FPIC). The nature of the complaint put forward by the complainants was that the failure to ensure the project's compliance with international human rights standards meant that the lenders failed to comply with standards which applied to them, in particular IFC's performance standards, FMO's Human Rights Policy and the OECD Guidelines on Multinational Enterprises.

On 29 May 2015 the Independent Expert Panel (IEP) issued its Compliance Review report (available [here](#)), in which the IEP made a number of conclusions related to FMO's and DEG's compliance with their own standards. In response to the conclusions of the IEP, the Management Board of FMO and DEG have formulated a Management Response and actions to improve future operations (available [here](#)).

ICM Compliance Review Findings

The IEP carried out a review of the way in which DEG and FMO assessed the project and then monitored it against the standards to which they had committed themselves at the time the financing of the project was agreed to in 2011. The IEP found that, while DEG and FMO were, by the time of the first disbursement, fully appraised of many of the issues related to indigenous peoples, they were not so appraised at the time of credit approval as required by IFC Performance Standard 1 (PS1), one of the standards adopted by both institutions. Consequently, DEG and FMO had not been able to identify and require appropriate actions in the initial Environmental and Social Action Plan (ESAP), although subsequent actions were identified and agreed with the project developer. The specific gaps included

appraisal of issues related to: land acquisition and use; quality of consultations with the affected communities; cultural heritage; as well as biodiversity and ecosystem impacts.

DEG's and FMO's Response to the ICM Compliance Review

In their response, the Management of DEG and FMO committed to extract lessons learned from the Compliance Review report with the purpose of improving the quality of their appraisal and monitoring process of environmental and social risks and impacts related to their investments.

More specifically, the Management of DEG and FMO committed to [*hereafter "the commitments"*]:

1. Further raise the bar on the required level of information on stakeholder consultation available at the time of credit approval.
2. Be receptive to the recommendation to have a more comprehensive Environmental and Social Action Plan (ESAP) at the time of signing of the credit agreement and not as a condition precedent to first disbursement.
3. Strive for a more elaborate formal opinion from lawyers or other experts, with defined expertise in indigenous peoples' rights and the local legal context, on the matter of the formal representative structures in relation to indigenous communities affected by projects and to structurally consider this for future investments.
4. Seek, together with Genisa, an acceptable environmental solution for the small remaining fraction of the total shoreline where access is still under discussion.
5. Ensure that explanation efforts related to flood levels continue and that water quality management and monitoring remain of significant importance and therefore subject to the Lenders' ongoing reviewing of the project.

Developments subsequent to the publication of the Compliance Review

Commitments 1-3

Both FMO and DEG report that they have worked on their internal policies and procedures to implement the agreed commitments 1-3 as stated above. Considering both institutions have their own respective policies, the implementation of commitments 1-3 is described per institution.

- **FMO:**

The Complaints Office of FMO notes that FMO has followed up to the commitments 1-3 as defined above.

Regarding **FMO's internal credit process**, the Complaints Office notes that FMO has developed an additional set of investment criteria for very high Environmental and Social (E&S) risk projects (direct debt and equity investments). Very high E&S risk projects are defined as those that either trigger specific aspects of the IFC Performance Standards (e.g. complex resettlements, impacts on critical habitats, Free Prior and Informed Consent

requirements and impacts on critical cultural heritage), or those projects that demonstrate a context of social/political conflict or severe security issues that pose a significant potential risk to the project.

In practice, these additional criteria mean that specific information and process requirements are in place prior to the final approval of a project which falls within the definition of such a high risk project. More specifically, a full E&S Impact Assessment must be available, an Environmental and Social Action Plan should demonstrate the client's commitment to meet all necessary requirements set out in that plan and comprehensive legal opinions should demonstrate the legality of any relevant agreement between stakeholders.

- **DEG:**

DEG has informed the IEP that the internal credit process for projects with significant risks (e.g. large-scale land use), especially those in areas where indigenous people are present, have been further enhanced to identify and address critical aspects at an earlier stage: In addition to its current set of investment criteria, DEG will also commission comprehensive legal opinions in case Free Prior and Informed Consent (FPIC) is applicable which demonstrate the legality of any relevant agreement between stakeholders. The IEP have had sight of DEG's internal procedures and are satisfied that appropriate procedural steps have been put in place.

Commitment 4

With respect to the 4th agreed commitment to find an acceptable environmental solution for the small remaining fraction of the total shoreline, the IEP notes that FMO and DEG are engaging with the independent environmental and social expert, Genisa and environmental authorities on approaches to adequately manage the environmental impacts once preparations for filling of the reservoir would be agreed upon.

While the test filling of the reservoir has started end of May 2016, it has subsequently been suspended by the Panamanian government, while ongoing dialogue is taking place. On the basis of information currently available, the IEP cannot yet conclude whether the solutions found are acceptable.

Commitment 5

With respect to the 5th agreed commitment regarding the communication with the affected communities, the IEP notes that FMO and DEG offered to facilitate the dialogue by identifying parties that could play a constructive role as a mediator in this process. They also offered to take up the costs for this mediation support. The government did not react directly to this proposal and indicated to the client that they wanted to take the lead in this process and that they would call on other parties when required. FMO and DEG have not received such a request.

FMO and DEG have informed the IEP that they have been in regular contact with government officials in order to facilitate the search for a solution to the problems

and have been informed by the government that adequate information was given at the time to all villages affected.

FMO and DEG have informed the IEP that they continue to encourage the government through meetings and letters to strive for a solution supported by all parties involved.

The IEP cannot conclude whether the dialogue efforts - for which the government is the lead actor - were adequate and given directly to the affected communities, and is not in a position to interfere or monitor this situation.

Conclusion

DEG and FMO management have taken up the recommendations by the IEP and implemented changes to further improve the quality of their appraisal and monitoring process of environmental and social risks and impacts related to their investments with significant environmental and social risks.

Concerning commitment 4 and 5, which are still pending, the IEP will continue to follow developments regarding FMO's and DEG's Management Response to better understand the context and to understand the extent to which activities by FMO and DEG produce additional relevant impacts related to the complaints addressed by the panel. The IEP will produce at least one intermediate monitoring bulletin prior to the 2017 annual report of the ICM and a status update in the ICM annual report in 2017.