

INDEPENDENT COMPLAINTS MECHANISM (ICM) OF FMO AND DEG

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)

November 2017

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 is the second monitoring of the response of FMO and DEG to the Compliance Review by the Independent Expert Panel (IEP or “Panel”) of the Independent Complaints Mechanism (ICM) of their joint investment in the Barro Blanco hydroelectric project in Panama.

The purpose of this review is to assess the major developments related to the project over the 12 months since the previous monitoring report, specifically focusing on the activities and actions taken by both institutions directly in response to the IEP’s report and recommendations.

While the Independent Expert Panel of the ICM has sought to gain as much information as possible about both the progress of the project and any adverse impacts on affected communities and other rights holders, the Panel does not have scope or competency to present findings in relation to the actions of any party other than FMO and DEG, for example the Panamanian government or the project developer, GENISA.

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. The Project 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 respectively stating the lenders should have ensured that the project respected the rights of the indigenous Ngöbe 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 the lenders, 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 issued its Compliance Review report (available [here](#)), in which it made a number of conclusions related to FMO’s and DEG’s compliance with their own standards in relation to BBHP. 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](#)).

In August 2016 the ICM published its first annual monitoring report – which can be found [here](#).

ICM Compliance Review Findings

The IEP found that DEG and FMO were not yet fully complied with their policies in relation to BBHP, as they were not yet fully appraised with regard to the project compliance with IFC PS1 **at the time of credit approval** but only at a later stage. 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:

1. Further raise the bar on the required level of information on stakeholder consultation available at the time of credit approval.
2. 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 the client in the BBHP, an acceptable environmental solution for the 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 Compliance Review (2016-17)

Commitments 1-3

The Panel's previous monitoring report – [which can be found here](#) – set out some of the steps that both institutions had taken in respect of the first three commitments and the Panel declared its opinion that there had been significant internal progress made in adjusting due diligence and assessment processes taking into account the lessons learned from the Barro Blanco case. This report is more focussed on developments in relation to the project itself and Commitments 4 and 5.

Monitoring process

In order to better understand the developments that have occurred in relation to the project in the last 12 months, members of the Panel have carried out the following steps:

- Several interviews and meetings with FMO and DEG specialists dealing with the project – the panel have sought to be in contact with FMO and DEG on a quarterly basis;
- Interviews with the complaint organisations and their representatives – from both the Netherlands and Panama – again the panel have sought to do this on a quarterly basis
- Document review of publicly available information
- Review of FMO / DEG monitoring documents
- Review of consultant monitoring reports made available to the panel.

During the course of the year, the Panel considered the possibility of making a trip to Panama. This was a difficult decision for the Panel to make, but it was decided that the additional

presence of the Panel in the country and at the affected communities would potentially serve to confuse the situation, given that there were planned visits by the government, FMO / DEG, the independent consultants monitoring the project and the NGOs from the Netherlands supporting the complainants. The Panel did make it clear however to FMO / DEG that they would review this decision if there was no visible improvement in communication with the affected communities, including direct visit to the affected communities by both institutions.

Key information

Engagement between the financing institutions and local communities

The Panel is pleased to report that there does seem to have been a greater degree of direct engagement between FMO / DEG and the affected communities and the representatives of the Comarca Ngäbe-Buglé. This has involved a series of calls and meetings between FMO and DEG officials and indigenous community representatives, including a country visit in June 2017. Both the affected communities and FMO / DEG were positive in their feedback on this visit and the openness with which both sides were able to express their point of view. The Panel notes that this was the first time that employed officials of both institutions had visited the affected areas – previously visits had been made by consultants engaged by DEG / FMO. There have also been various meetings in Panama City and other locations with community representatives, government officials and other relevant stakeholders.

Status of agreement related to the project

Based on interviews with the complainants and both institutions, and also a review of available documents, the Panel notes the following:

- The Government of Panama has taken a very direct, leading role in seeking to reach an agreement with the Comarca Ngäbe-Buglé which will provide for the operation of the project going forward
- GENISA has specifically not been included in this process, rather it has been involved in a direct series of dialogues between government representatives and various indigenous community representatives.
- While in many ways the dialogue process led by the government has made significant progress, it has been a lengthy and difficult process and one which has still yet to produce a publicly available agreement
- From the Panel's perspective, there remains (as was the case when the Panel issued its compliance report) some confusion around the processes within indigenous communities and the governance structures related to the Comarca and how any agreement can be reached. Although there are some reports that there have been changes to procedural requirements for approval by the General Congress.

Test filling of the reservoir

The reservoir was filled in mid-2016 for technical testing. The complainants explained to the Panel that in their view there had been substantial impact on the affected communities in terms of a range of issues, including loss of access to land that was used for cultivation, loss of some properties, increase in the number of mosquitos, reduction of access to the river and the ability to carry out recreational, religious and other activities.

From information provided directly to the Panel it appears that the affected communities were not informed about the timescale for the test filling, the likely impact of the test filling or the

duration that the water level would rise. However, the National Public Services Authority (Autoridad Nacional de los Servicios Públicos de Panamá - ASEP) in their communications at the time claimed that all relevant authorities had been informed and did clearly set out the time period for testing – 24 May 2016 to 3 August 2016.

The Panel feels that it is necessary to express grave concern about the fact that the test flooding of the reservoir may have been carried out without effective prior notice to the affected communities. While the test filling clearly is not the same as the formal commencement of the project, the impact is significant and takes the project to a certain point of no return in terms of impacts on environment / landscape and also impacts its relationship with the affected communities.

Impacts on the directly affected communities

The Panel has been informed by various parties that the test flooding and the subsequent operational flooding of the reservoir have had a range of impacts on the directly affected communities. These include lack of access to the petroglyphs, which are claimed to have distinct religious significance by residents of the directly affected villages and other members of the Mama Tata belief, some flooding of land used for agricultural purposes, and some flooding of property, although the exact number of properties affected is a matter of some dispute. The fact that there have been direct impacts is not in dispute based on the information that is provided to the lenders and independently to the panel.

Impact on the shoreline and gallery forest

Given that the test flooding took place without clearance of vegetation and forest on the shoreline of the river close to the affected communities, it is unsurprising that information provided to the Panel by local communities and also information contained in a range of reports which the Panel has had sight of noted that there are potential negative impacts arising from this fact.

The Panel understands that there are some efforts to remove debris from the reservoir, which involves actions by GENISA – and that further actions are planned in the coming months, but also understands that complete tree clearance could only be guaranteed if there was a significant reduction in the water level of the reservoir.

Monitoring of project progress by the lenders on E&S issues

As part of this monitoring process, the Panel has reviewed recent monitoring reports provided by the retained independent consultants to FMO and DEG. This included looking at the terms of reference that have been specifically provided to those consultants. In the Panel's opinion, both institutions are asking the right questions of their consultants and are also sufficiently pressing their consultants in relation to the information that they collect and report back.

The monitoring reports which the Panel has been able to review are of a good professional quality and clearly identify a range of outstanding issues that need to be resolved. However, the report also clearly identifies the limitations which are currently placed on GENISA's actions as a result of a failure directly to engage with communities or ongoing real or perceived hostility to GENISA which restricts their ability to act.

From the perspective of the lenders, however, the Panel considers that the independent consultant reports clearly do provide them with sufficient information to make informed decisions. In short, the picture is much clearer and more objectively stated now than it had been earlier in the project. For example, the degree of knowledge on the nature of the issues related

to decision making around consent for the project from the indigenous communities is significantly more sophisticated and nuanced than at the outset of the project. It is also much more respectful of the nature of the complex and politically charged nature of decision making within the indigenous communities.

Nevertheless, the outcome of all of this is that even though the lenders are better apprised of the issues, the project appears to have taken steps forward without a formal agreement being in place and publicly available. Further, flooding has happened and this appears to have caused negative impacts to directly affected communities.

Commitment 4

With respect to the fourth agreed commitment - to find an acceptable environmental solution for the remaining fraction of the total shoreline - the ICM noted last year that “FMO and DEG were engaging with the independent environmental and social expert, the client and environmental authorities on approaches to adequately manage the environmental impacts once preparations for filling of the reservoir would be agreed upon”.

It is without doubt that, first, the test filling and, then, the operational filling, of the reservoir has significantly impacted on the shoreline under consideration. Also, it appears that the Government agencies responsible had taken responsibility for communication with communities and requested GENISA not to communicate. This is a difficult situation, as FMO and DEG and their client were being asked to refrain from taking steps which it seems to the Panel should have been taken. For various reasons, it appears that steps that would seem necessary to take prior to flooding, in terms of clearance and communication, were not taken.

What’s more, the Panel notes that there are some responsive measure are being taken by GENISA to remedy some of the immediate impacts that seem to have been felt by the community as a result of the flooding. While there is some clearance of debris from the reservoir, this is a limited response, the Panel understand that there are plans to clear more debris going forward and the Panel look forward to seeing what will hopefully be positive results, but note that this is a now a significant time after the first flooding. Similarly, it is understood that there is some provision of mosquito netting, but whether this is sufficient to deal with the consequences of greater mosquito presence, is unclear. Again, the Panel have been informed that since the FMO/DEG visit there are more plans to carry out fumigation and provide netting, and will address progress on this issue in collection of information for the next monitoring report.

Commitment 5

With regard to the commitment to “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.” There, again, seems to have been some significant questions in terms of the explanation and notification of the flooding and any potential impact to water quality as a result of the failure to clear trees and vegetation prior to flooding.

While the Panel is lacking detailed information on the water quality question, the Panel wishes to reiterate that various water quality risks that stem from failure to clear vegetation were identified in the original EIA. This ongoing monitoring put in place by the lenders is important and demonstrates a focus on Commitment 5, however, the Panel are surprised that there have

not been any publicly disclosed outcomes of any water quality monitoring in the last year and would respectfully suggest that water monitoring should continue to be carried out going forward and the results shared with the affected communities as part of the ongoing engagement process in implementation of Commitment 5.

Government role cf. FMO and DEG's role

Regarding the broader question of support for a solution to the impasse over the project, the Panel note that FMO and DEG have previously offered to facilitate the dialogue by identifying parties that could play a constructive role as a mediator in this process. They have also offered to take up the costs for this mediation support. The Government, perhaps understandably, has always made it clear that they want to take the lead in this process and that they will call on other parties when required. The Panel notes that this approach clearly places FMO and DEG in a position where they cannot, and perhaps should not, take any direct role in relation to the broader dialogue.

Conclusion

The situation of the project is complex and still the subject of considerable uncertainty and concern. There is a distinct lack of public information about what the current situation is in relation to any agreement and the procedural requirements for such an agreement inside the indigenous community's own governance structures. While it has been reported to the Panel that there is an agreement and that this is in line with revised General Congress Standards, no documentary evidence of this has been provided to the Panel or made public. Whether and how this is made public is, arguably, a question for the General Congress and the Panamanian Government.

The Panel wishes to note the noticeable improvement in the approach of FMO and DEG in their attempts to forge ongoing relations with the directly affected communities, particularly in the last six months of the period covered by this report. The Panel also welcomes the visit of the two institutions to the affected communities.

However, the Panel needs to make clear its extreme concern at the apparent impacts that have been caused by the test flooding, and then compounded as the project has moved towards operation. The Panel understands that the primary responsibility for these have been taken by the Government and notes that FMO and DEG have made their position much clearer in relation to their expectations where third-party action or inaction will impact on issues covered by their policies and the IFC Performance standards.

Nevertheless, the Panel would like to request that the institutions consider to what extent they can take actions to plug gaps on these issues arising from a failure to act or sub-optimal notification of local communities.

Given the still serious and open nature of the ongoing commitments and the complex nature of the project, the panel intends to continue monitoring this project for the time being.