

Report of the meeting between the complainants, lenders and independent expert panel on the conclusions of the independent expert panel report.

The meeting took place on June 23, 2015. The meeting was chaired by an independent moderator and involved a representative of one of the two complainants (M10), representatives of the organizations supporting the complainants (SOMO and Both ENDS), representatives of the lenders against whom the complaint was filed (FMO and DEG) and the independent expert panel that has investigated the complaint.

Context

In May 2014, Mrs. Carrera, Cacica General de la Comarca Ngöbe-Buglé, and Mr. Goejeth Miranda, Presidente General del M10, with the support of Both ENDS and SOMO (all together “the complainants”) filed a complaint at the complaints mechanism of DEG and FMO regarding the Barro Blanco Hydroelectric Project (“BBHP”). The project is currently being developed in the district of Tolé in the Chiriqui Province of Western Panama. Loans have been made available by CABEL (not part of this complaint procedure), FMO and DEG. The project is developed by Generadora del Istmo S.A (Genisa) and has an estimated capacity of 28.56 MW. The project will result in a reservoir of 258.67 hectares in the river Tabasará, out of which 6.7 hectares ha belongs to the Annex to the Comarca Ngöbe-Buglé. A dispute about the project’s impacts on indigenous rights on this area of land has given rise to national and international scrutiny, including an UN-mediated process of investigation and dialogue. The nature of the complaint put forward by the complainants is the alleged failure of FMO and DEG to ensure the project’s compliance with international standards in accordance with their Environmental and Social Governance policies, specifically in relation to the right to free, prior and informed consent (FPIC).

Objective of the meeting

The objective of the meeting was to discuss the recommendations of the independent expert panel’s report. Participants explored the options going forward on the basis of the recommendations of the report. It was agreed that this conversation was not confidential unless any of the participants expressly requested this (note: this did not happen during the meeting).

1. Common understanding

Restoration of trust

In reaction to the report of the independent panel, the M10 representative stressed that restoration of trust is important, but also that the M10 wanted to find a solution to the conflict. He also stated that a pre-condition for regaining trust and for the M10 to consider re-entering in further dialogue is the indefinite suspension of the construction of the dam project. The M10 representative would like to discuss the non-compliances mentioned in the report. All parties agreed that creation of trust is the first required step in the process. FMO and DEG confirmed that they want to listen to the concerns of the M10 representative and the affected people and that they want to help re-establish a meaningful dialogue between the community representatives, the Government of Panama and Genisa. They also stressed they want to apply lessons learned from the report of the independent expert panel considering its internal policies and procedures.

Suspension of the construction vs safety concerns

The representative from M10 mentioned that suspension of the construction of the dam is important as the dam has been completed for 95%. He expressed that he wants to avoid that the dam is completed during the dialogue phase, because that would pre-determine the outcome of the dialogue in which case there is no ground anymore to reconsider the construction. DEG and FMO mentioned they have been informed that the permit for further dam construction has been suspended; the only works that are authorised by Panamanian authorities are safety-related. These works are specified in a plan of allowed works and based on hazard analysis by independent experts stating that in case of heavy rains there is a risk of a flood wave that could endanger people further living downstream the river. The lenders raised their strong concerns of the current stalling of the project due to the blockages of the project roads as this would not allow safety measures to be taken. The lenders asked whether the

complainant can accept that safety measures continue. The M10 representative observed that the construction works went beyond what was agreed and was not restricted to safety measures. The independent experts he consulted indicated there is no material risk that the dam could collapse.

Land acquisition and indigenous rights

The representative from M10 stated that the 6.7 hectares in the Annex to the Comarca Ngöbe-Buglé is important as the land has a cultural and spiritual value to the people and is used for the production of food. He explained that the M10 considers the agreement signed by the project company with representatives of the indigenous community not valid as he is of the opinion that they have not consulted the people he represents, who are directly affected by the project, nor the General Congress of the Ngöbe-Buglé, which he believes is required by law. He stated that the project does not have the consent of the relevant local communities or Ngöbe-Buglé institutions, and international standards are not met.

The lenders mention that they want the project to continue with the support of the communities and respect the rights of all involved. The lenders refer to the panel report that notes that there was nothing in Panamanian law which required FPIC to the design and implementation of the project as a whole. The panel report also noted that the operators of BBHP were under the assumption they had obtained documented consent before the agreement was signed in August 2011. Therefore the lenders interpret that the panel report does not come to the conclusion that free, prior and informed consent should have been applied or required for this specific situation. The lenders explained that they relied on the formal agreements that BBHP reached with the Cacique General and with the Regional Congress of the Comarca Ngöbe-Buglé and were of the opinion to operate in line with the IFC performance standards of 2006, which was applicable in the contracting phase in 2011, and with national law.

The Panel is of the opinion that, in relation to this project, there is no provision in the lenders' policies that free, prior and informed consent to the project itself was required as a standard. The panel noted that during their fact-finding they encountered different interpretations of the national law on the matter how to transfer the land, either individual versus collective land titles in the Comarca. Genisa was under the assumption it had obtained documented consent before the agreement was signed in August 2011, but the legitimacy of the agreement was publicly challenged and this was reported already in 2011. The Panel is of the opinion that, disregarding any formal obligation to ask for consent or not, the directly affected people should have been better consulted. The affected communities were not consulted in a way the IFC Performance Standards require (meaningful participation).

Representation of affected people

The lenders attending the meeting asked who should - in the opinion of M10 - be represented in a new dialogue and what would be success factors of such a dialogue. The representative of M10 stated that he represents indigenous people and farmers in the affected area for over 16 years. He expressed that consent is needed from the affected communities in the first place. According to him, it is the General Congress of the Comarca Ngöbe-Buglé that must also approve any agreement in which Comarca land is transferred to private hands. FMO and DEG expressed that within this project the question of representation of the indigenous people has been crucial and not clear so far.

2. Further action

FMO and DEG expressed their concern for the situation that some local indigenous people are currently facing and further expressed their commitment to indigenous rights. They clearly stated that they are willing to support a solution taking into account agreements and initiatives that take place. It is important to note that the lenders are formally not a party to the dialogue table between the government, the indigenous communities and the project company Genisa. As financial institutions they can offer support and facilitate a process towards solutions acceptable to all stakeholders.

The lenders offer to help to identify, select and fund independent experts in mediation/moderating, to:

- facilitate a dialogue process in which all stakeholders (the government, Genisa and all affected indigenous communities) are involved, to come to a common understanding of the positive and negative impacts of

the project on these communities, including safety aspects and seek how adverse impacts can be mitigated and/or compensated and how, together with the communities, positive impacts and benefits can be achieved and reinforced;

- facilitate a process to inform and involve the local communities that are affected by the project in a participative way;
- facilitate a process to explore whether and how the General Congress of the Ngöbe-Buglé Comarca could be engaged.

The complainants indicated that they cannot accept the above mentioned offer of the lenders as long as the lenders do not want to accept the pre-condition of indefinite suspension of the construction. The lenders are asked to send a letter to the Government of Panama to demand for suspension pending further dialogue. FMO and DEG stressed that they are not in the position to suspend the project, temporarily or indefinitely, and that they are very much urging all parties involved to continue the relevant safety construction to be able to minimize risks of major flooding for downstream communities. Finally, based on a proposal from the complainants, the participants agreed on setting up a so-called pre- process with an independent mediator to explore agreed terms for a dialogue process to be resumed. All parties agreed upon the name of this facilitator proposed, Mr. Juan Dumas.