

INDEPENDENT COMPLAINTS MECHANISM (ICM)

Preliminary Review Report

9 February 2021

FMO Complaints 20-001 and 20-003

Nyamagasani Hydro Nyamagasani 1 and 2 Run-of-the-River Hydropower Projects

Uganda

Inbal Djalovski

Arntraud Hartmann

Michael Windfuhr

Members of the Independent Expert Panel

Recipients:

Complainants

FMO

Client Company - Frontier Energy

This Report is based on information provided to the Independent Expert Panel (IEP) by the complainants, the lenders, the client company and other relevant parties. This document is not given, and should not be taken, as legal advice, and is not intended to be used as proof for its content in a court of law. The content of this document is only intended for the parties to which it is addressed.

Contents

About the Independent Complaint Mechanism (ICM)	3
1. Summary	4
2. Procedural History	4
2.1. The Complaints	4
2.2. Management Response	5
3. About the Nyamagasani 1 and 2 HPP projects	6
4. Overview of the Issues	6
4.1. Issues raised in the Complaints	6
4.2. FMO's Response	7
5. Addressing Risk of Reprisals	8
6. Preliminary review of the Complaints	8
6.1. Objectives of the Preliminary Review	8
6.2. Method of review and the Parties' agreement to engage in a dispute resolution process	9
6.3. Complexity of the issues raised by the Complaints	9
7. Next steps	11

About the Independent Complaint Mechanism (ICM)

The Independent Complaints Mechanism (ICM) aims to provide complainants with an effective, fair and credible tool to facilitate the resolution of disputes. At the same time, it assists Netherlands Development Finance Company (FMO), Deutsche Investitions- und Entwicklungsgesellschaft (DEG) and PROPARCO in implementing and adhering to its own environmental and social policies and procedures.

The ICM is supported by an Independent Expert Panel (IEP). The IEP is fully independent from DEG, FMO and PROPARCO. It reviews complaints from communities and individuals affected by DEG-, FMO- and/or PROPARCO-financed operations and decides whether a complaint is admissible. In case a complaint is admissible, the IEP processes the complaint in line with the ICM procedures and reports on the outcome of such process.

For more information about the ICM, please visit

- DEG's website: www.deginvest.de/icm
- FMO's website: www.fmo.nl/icm
- PROPARCO's website: www.proparco.fr/icm

1. Summary

Between May and November 2020, the ICM has received eight complaints (collectively, Complaints), comprising of 50 individual cases of alleged harms caused by FMO-financed operations Nyamagasani 1 and 2 Hydro-Power Plant (HPP). The Nyamasasani 1 (15MW) and Nyamagasani 2 (6 MW) hydro-power projects are located on the Nyamughasana river in Kasese District, Western Uganda.

The Complaints were declared admissible by the Independent Expert Panel (hereafter, Panel) in three Admissibility Notices issued on 20 June 2020, 27 July 2020 and 12 November 2020. Upon the Panel's invitation, FMO provided its written response to the Complaints (Management Response).

The Complaints raise allegations of harm caused by the FMO-finance operations. The Complainants argue that their properties – mainly houses, land, or crops – were damaged or rendered unsuitable for living due to construction activities of the Nyamagasani projects. They submit that, despite earlier commitments made by the project, they were not provided with adequate compensation or appropriate replacement housing. Moreover, the Complainants raise allegations of procedural irregularities and unfair treatment by the project's grievance mechanism.

Following discussions with the Panel in the context of its preliminary assessment, both the Complainants and the client company expressed their willingness to participate in a dispute resolution process. FMO's operations team communicated its commitment to support such process.

This Preliminary Review Reports provides an overview of the issues raised by the Complaints and the Management Response. It further provides the Panel's assessment of the complexity of this case. Finally, to provide clarity to the parties, it sets out the next steps with the view to lay the foundation for a collaborative dispute resolution process.

2. Procedural History

2.1. The Complaints

On 18 May 2020, the Complaints Office of FMO received the first complaint concerning alleged harm caused by the Nyamagasani 2 HPP project. The complaint was submitted by an individual complainant who affected by the project. An Admissibility Notice declaring it admissible was issued by the Panel on 20 June 2020.

On 6 July 2020, a second complaint was lodged by two individuals representing a group of 36 complainants from Kanyatsi Parish, Kasese District, Uganda. On 27 July 2020, a second Admissibility Notice was issued by the Panel, declaring the second complaint admissible. The Panel further decided to join the two complaints and address them under one case.

The Panel received four additional complaints on 11 August 2020, 5 October 2020, and 14 October 2020 and on 26 October 2020. On 12 November 2020, the Panel issued a third Admissibility Notice, declaring these complaints admissible. The Panel also decided, as a matter

of procedure, that as the case was under Preliminary Review, it would not publish any additional Admissibility Notices related to the same case. Rather, any new complaints will be assessed by the Panel based on the admissibility criteria set out in the [ICM Policy](#), and if found admissible, will be joined to the ongoing case. To ensure transparency, the public record of the case under the “Status Update” page on the ICM website was regularly updated by the Complaints Office to reflect the accurate number of admissible complaints in the case.

Following the third Admissibility Notice, the Panel received through FMO’s Complaints Office two new complaints on 27 October 2020 and on 24 November 2020, as well as multiple communications from Complainants containing additional grounds for their complaints. Several of these complaints concern the Nyamagasani 1 HPP project. FMO Complaints Office confirmed that both Nyamagasani 1 and 2 run-of-the-river hydropower projects are FMO-financed operations and that both are majority owned by FMO’s client, Frontier Energy (Frontier), a Danish private equity fund.

Overall, the Complaints received in this case encompass alleged harms affecting a total of 50 individual complainants. 36 of the complainants are represented by two members of the community who are also complainants themselves, and a couple of others are also represented by other complainants. Written authorisations for representation were provided by the Complainants upon the Panel’s request.

Confidential Annex 1 to this Report provides individual and personal information of the allegations of harm made by each of the 50 individual complainants. The Annex is made available to the parties, with the consent of the Complainants, but will not be published in order to protect the privacy of the Complainants.

2.2. Management Response

Upon issuing the Admissibility Notices, the Panel invited FMO to submit a written response to the Complaints (Management Response). While submitting a Management Response is currently not part of the standard ICM procedures at the preliminary review phase, paragraph 3.3 of the ICM Policy allows the Panel to request written submissions from the parties, among other methods of inquiry. The Panel considered that it would be useful to introduce such practice at the preliminary review phase based on positive experience of other Independent Accountability Mechanisms (IAMs) and in light of the recent recommendations made in the context of the external review of the Compliance Advisor Ombudsman (CAO), which is the independent accountability mechanism for the International Finance Corporation (IFC) and Multilateral Investment Guarantee Agency (MIGA).¹

The purpose of the Management Response is to allow FMO to have a formal voice early on in the assessment phase and provide its views on the issues raised by the Complaints. The Management Response assists the Panel in ascertaining the scope of the contested issues emanating from the Complaints. It further opens the door for FMO to make its own assessment as to whether there

¹ External Review of IFC/MIGA E&S Accountability, including CAO’s Role and Effectiveness Report and Recommendations (June 2020), see, in particular, paras 56-57.

are issues that are uncontested and could be brought to a mutually satisfactory resolution without the involvement of the ICM.

On 31 August 2020, FMO provided its Management Response accompanied by supporting materials in relation to the Complaints received up to that date. On 14 October 2020, FMO provided an Addendum to its original Management Response following the Panel's request for further information covering all the individual complainants. In addition, two reports were provided by Frontier Energy via FMO deal team in response to specific complaints on 3 December 2020 and on 23 December 2020.

3. About the Nyamagasani 1 and 2 HPP projects

The FMO-financed operations that are the subject of the Complaints are Nyamagasani 1 and 2 Hydro-Power Plant (HPP). The Nyamasasani 1 (15MW) and Nyamagasani 2 (6 MW) hydro-power projects are located on the Nyamughasana river in Kasese District, Western Uganda, with the weir and intake for Nyamagasani 2 shortly downstream of the powerhouse and tailrace of Nyamagasani 1. The projects have been under construction since April 2017.

The Nyamagasani 1 and 2 HPP projects are developed and owned by Rwenzori Hydro (Private) Limited and Nyamagasani 2 HPP Limited, respectively. Both projects are majority owned by funds managed by FMO's client company, Frontier Energy, a Danish private equity fund that is developing a portfolio of renewable energy independent power producers in Eastern Africa.

FMO acted as Mandated Lead Arranger and Underwriter of the USD 39 million facility, of which 40% is risk-shared with Proparco.² These run-of-the-river hydro power projects are the 4th and 5th hydro project FMO is financing with Frontier Energy in Uganda, totalling 47.5MW.³

4. Overview of the Issues

4.1. Issues raised in the Complaints

The Complaints raise allegations of harm caused by the Nyamagasani projects. The Complainants argue that their properties – their houses, land, or crops – were damaged or rendered unsuitable for living due to construction activities of the Nyamagasani projects. They submit that, despite earlier commitments made by the project, they were not provided with adequate compensation or appropriate replacement housing.

In particular, several of the Complainants assert that, following construction activities, their houses remain located at a steep edge of the constructed canal in areas that present significant risk for their safety and seek replacement housing from the project.

² See Proparco's website: <https://www.proparco.fr/en/carte-des-projets/nyamagasani-1?origin=https://www.proparco.fr/en/page-thematique-axe/renewable-energies-and-energy-efficiency;https://www.proparco.fr/en/carte-des-projets/nyamagasani-2?origin=https://www.proparco.fr/en/page-thematique-axe/renewable-energies-and-energy-efficiency>.

³ For more information, see FMO's website: <https://www.fmo.nl/news-detail/d6343286-eccc-4e35-b477-f22c01c2697a/fmo-enhances-renewable-energy-provision-in-uganda>.

In relation to replacement housing, a number of the Complainants argue the project failed to install kitchens and latrines in their replacement houses and that the sum of 2,000,000 Ugandan Shillings provided to construct these fixtures was insufficient.

A number of the Complainants made allegations concerning the acquisition of land by the project. They argue that the project failed to properly value the acquired land and did not provide appropriate compensation for the land and the property acquired with it. In certain cases, the acquisition of land gave rise to complaints asserting that the remaining non-acquired parcel of land is insufficient to fulfil its purpose and therefore the project should acquire the parcel of land in its entirety. Similarly, a few of the Complainants allege that, due to construction activities, their land became “orphaned”, *i.e.* of no value and should thus be acquired by the project.

In addition, the Complainants raise allegations concerning the fairness and integrity of the project’s grievance mechanism. In particular, certain complainants pointed to irregularities and disparities in the grievance process by which settlements on compensation amount were reached. Certain Complainants assert that settlements that were not respected by the project or by members of the Grievance Management Committee (GMC). Further, some of the Complainants argue that the valuation of their property was conducted unfairly to their detriment.

Finally, a few of the Complainants expressed their distrust in the project’s grievance mechanism and perceive it as serving the interests of the project or the self-interest of the Project’s Liaison Officers who manage it.

4.2. FMO’s Response

In its Management Response, FMO responded that its investment process in the Nyamagasani projects has been performed with utmost diligence and carried out in compliance with FMO’s investment criteria. FMO further responded that active and regular monitoring of issues related to resettlement, displacement and compensation was conducted by FMO and their independent third-party E&S Advisor, Multiconsult, which informed FMO that the compensation provided by the Project to project-affected people (PAP) has been in line with international best practice and was based on values approved by the Government of Uganda.

In particular, FMO regularly monitors Frontier’s grievance register log showing the updated status of all outstanding grievances handled by Frontier’s redress procedure. In April 2020, Frontier commissioned Mituland, a survey and mapping company, to conduct an independent survey of the project land and to check it against the grievance register to ensure that all project-affected people were duly compensated.

In light of the above and based on Multiconsult’s assessment, FMO is of the view that Frontier has adhered to the Environmental and Social Action Plan developed by FMO for the project.

FMO also recognised that, despite existing clear guidelines and standards, the execution of land acquisition and compensation processes is complex and challenging. It thus welcomed the opportunity to assess its approach and highlight areas for improvement.

5. Addressing Risk of Reprisals

On 1 February 2021, the ICM published its [Non-Retaliatio Statement](#). In all of its cases, the ICM is committed to assessing, preventing and addressing risk of reprisals relating to its processes to the best of its ability, out of deep understanding that such risk undermines the effectiveness of the ICM as a fair and credible mechanism as well as FMO's ability to enhance its environmental and social outcomes. The ICM's Approach to Addressing Risk of Reprisals is based on best practices in the field and on accumulated experience of other IAMs.⁴

The ICM endeavours to work together with the parties and especially in continuous consultation with the complainants to ensure that it does not create or increase any risks to complainants as a consequence of its processes. It also strives to communicate transparently with complainants and affected parties its limitations in providing protection from reprisals. Consistent with its Approach, the ICM has incorporated into its operations – as a matter of routine – practices designed to continuously identify, assess and mitigate risks, starting at the early stages of the ICM procedure.

For this purpose, the ICM has engaged with the parties in this case, including the Complainants, to systematically identify risk factors and appropriate measures that can be taken to address them. To inform its risk assessment, the Panel has also gathered relevant data and collected information from FMO's technical expert, Multiconsult. The Panel will continue to assess and monitor risk of reprisals throughout the next phases of the case.

6. Preliminary review of the Complaints

6.1. Objectives of the Preliminary Review

According to the ICM Policy, the preliminary review phase starts as soon as a complaint has been found admissible. At the preliminary review phase, the Panel conducts an assessment of the issues that the complaint raises, evaluates their complexity and considers any additional circumstances relevant to the management of the case.⁵

Based on the preliminary review, the Panel will either conduct a compliance review or facilitate a dispute resolution process if all parties are willing to participate in such a process. The dispute resolution process and alternatively the compliance review process are the core phases of the ICM procedure. The preliminary review thus requires the Panel, *inter alia*, to engage with the parties to gauge their interest and willingness to participate in a dispute resolution process. Finally, in line with paragraph 3.2.3. of the ICM Policy, the preliminary review aims at providing the parties with information on the next steps and an indication of the timeline of the process.

⁴ See, e.g., Guidelines for Addressing Risk of Reprisals in Complaint Management, Independent Consultation and Investigation Mechanism (MICI), IDB Group (2019); Approach to Responding to Concerns of Threats and Incidents of Reprisals in CAO Operations, Office of the Compliance Advisor Ombudsman, IFC/MIGA.

⁵ See, e.g., Preliminary Review Reports in previous ICM cases available on the [ICM webpage](#) on FMO's website.

6.2. Method of review and the Parties' agreement to engage in a dispute resolution process

As explained above, the Panel has issued three Admissibility Notices in this case, on 20 June, 27 July and 12 November 2020, declaring the Complaints admissible under the admissibility criteria set out in the ICM Policy. Upon issuing the Admissibility Notices, the Panel commenced its preliminary assessment phase and invited FMO to submit a written Management Response to the Complaints.

Due to COVID-19 travel restrictions, the Panel could not meet in person with the relevant stakeholders involved in this case. However, in consultation with the parties, the Panel decided not to delay the preliminary assessment of the Complaints and conducted virtual calls with the parties in lieu of in person meetings.

During the preliminary review phase, the Panel has held video calls with the Complainants, with representatives of Frontier, and with FMO's operations team. Furthermore, the Panel conducted a desk review of project documentation received from FMO's operations team as well as documents and photographs provided by the Complainants.

The Panel's conversations with the parties were dedicated primarily to discussing the possibility of engaging in a dispute resolution process. The Panel explained the principles and objectives of such process, compared with a compliance review process. It further responded to questions and concerns raised by the parties with regard to entering a dispute resolution process.

Both the Complainants and the client company, Frontier, expressed their willingness to participate in a dispute resolution process. FMO's operations team likewise communicated its commitment to support such process. This Report thus focuses on laying the foundation for a dispute resolution process in this case.

6.3. Complexity of the issues raised by the Complaints

In light of the parties' agreement to enter into a voluntary and collaborative dispute resolution process, the Panel decided to refrain from making any *prima facie* factual or legal findings on the alleged harm or on FMO's compliance with its environmental and social obligations. The ICM Policy does not require, at the preliminary review stage, that neither harm nor non-compliance be established by the Complainants as a pre-condition to enter a dispute resolution process. Furthermore, in a dispute resolution process the parties themselves ought to decide on the framework and issues under discussion, and therefore it is not useful that the Panel present findings on harm or non-compliance. Suffice it to indicate at this stage that the issues raised in the Complaints, as detailed above, relate to the following applicable standards: Performance Standard (PS) 1: Assessment and Management of Environmental and Social Risks and Impacts; PS 4: Community Health, Safety and Security; and PS 5: Land Acquisition and Involuntary Resettlement.

In the Panel's assessment, the complexity of this case derives primarily from the following factors: (1) the multi-layered structure of complaints management and the relationship between the ICM process and the project-level grievance mechanism; (2) the multiplicity of the complaints; and (3) COVID-19 restrictions on travel and gatherings.

The relationship between the ICM process and the project-level grievance mechanism

By way of background, the project-level grievance mechanism consists of a community Grievance Management Committee (GMC) for each of the Nyamagasani projects, with 10-11 members in each including members of the community and the Project's Liaison Officer. The GMC's role is to continuously engage in community development and provide a venue to address community concerns. It also serves as the first contact point for project affected persons to report damage of risk to their property as a result of the project's activities. GMC members from the community would receive complaints and be present at the time of the assessment and valuation of the damage as independent observers.

The community grievance register of the GMC was provided to the Panel through FMO. The GMC grievance register indicates that at least 131 complaints were filed with the local grievance mechanism, and that the vast majority of those complaints were resolved and closed with a mutual agreement. These numbers indicate a good level of accessibility to the community members. The Panel is also informed that complaints continue to be accepted and handled by the local grievance mechanism.

In addition to the GMC, Frontier has set up a grievance redress procedure to address cases where project affected persons are unsatisfied with the process or the outcome of their grievance case, or where their grievances remained unresolved by the GMCs.

The Panel is of the view that the ICM process should not halt the functioning and continuous improvement of the existing redress mechanisms. The ICM is not meant to replace the project-level grievance mechanism nor to function as an appeals procedure for that mechanism. Rather, the Panel wishes to encourage Frontier and FMO to continue to ensure that any harm or negative impact caused by the project is addressed at the project-level in line with the project's existing obligations and not left unresolved due to the ICM process.

At the same time, the Panel notes that the Complaints raise concerns related to the operations and fairness of the project's grievance mechanisms. The Panel thus advises the parties to prioritise these issues in the expected dialogue as part of the dispute resolution process with the view to strengthen the existing mechanism's effectiveness by increasing its credibility and trust on the part of the community.

The multiplicity of the Complaints

The Complaints comprise alleged harms affecting a total of 50 individual cases, and were received over several months between May and November 2020. The alleged harms vary in the types of alleged harms, the time period of their occurrence and the respective phase of the project, as well as in their geographical locations along the project's area.

For a dispute resolution process to successfully address the issues and all the individual cases brought by the Complaints, some preparatory work would be mandatory. In particular, the parties should agree on ground rules for the dispute resolution process including questions of representation, defining the scope of the mediation process and its guiding principles, and setting up the practical arrangements for communications between the parties, the mediator and the

Panel. Additionally, the parties will have to agree on a framework by which the issues that fall within the agreed scope of the process will be structured and addressed in the mediation.

In a dispute resolution process, the parties are in charge, through a collaborative and voluntary process, of shaping the process itself as well as ultimately finding mutually agreed resolutions that could address their needs and interests. The preparation work of developing the process itself is always an important step in a mediation, and all the more so in this case which involves a large number of individual cases. The Panel considers the preparatory stage as an inseparable part of the dispute resolution process, which should thus be guided by the mediator.

COVID-19 restrictions on travel and gatherings

COVID-19 restrictions on travel and gatherings have already affected the work of the Panel and the discussions in this case which took place remotely via virtual platforms. While remote communication was possible with all relevant stakeholders, it was not without challenges.

In the Panel's assessment, based on its consultations with the parties so far, the preparatory work towards setting up a mediation can be done remotely. This would include selecting and appointing a qualified neutral mediator, and engaging in a dialogue over ground rules and framework for the mediation.

Once the preparatory arrangements are agreed and depending on whether COVID-19 restrictions are lifted, the Panel, together with the parties, will reassess whether the mediation can continue remotely or in person.

7. Next steps

Both the Complainants and the client company, Frontier, expressed an interest to participate in a collaborative dispute resolution process. Thus, the Panel recommends that this case will proceed to a dispute resolution process under paragraphs 3.2.6 - 3.2.11 of its procedures.

To provide clarity to the parties on the dispute resolution process, the Panel sets out below the expected next steps. Importantly, in a dispute resolution process, the procedures and the solutions are in the hands of the parties and are subject to their mutual voluntary agreement. Therefore, the timeframes noted in steps 2-5 represent the Panel's estimate but could be shorter or longer, depending on the parties' themselves.

1. Selection and appointment of a mediator

The Panel will search and select a qualified neutral mediator with appropriate experience, expertise in the subject matter of the case, and knowledge of the relevant context and languages. As soon as the Panel identifies a suitable mediator, it will propose the mediator to the parties by sharing her or his profile and background. The parties will have an opportunity to raise concerns or objections on the selection of the mediator.

Expected completion by mid-April 2021

2. Establishing ground rules and framework for mediation

The first phase of the dialogue will lay the foundation for the process by setting ground rules for communication, practical arrangements, clarifying representation and participation issues, disclosure of information, etc.

Additionally, once the ground rules have been set with the assistance of the mediator, the parties should design a framework to structure their dialogue over the issues in dispute.

Finally, depending on COVID-19 situation at the time of the agreement on ground rules and framework, the parties together with the mediator and the Panel may have to decide whether a remote mediation of the disputed issues is possible and desirable in this case.

Expected by end of June 2021

3. Facilitated dialogue

During this step, the mediator will work with the parties to identify and effectively communicate their needs and interests. The parties, with the guidance of the mediator, will explore ways to address those needs and negotiate possible settlements.

Subject to COVID-19 situation, expected by end of October 2021

4. Settlement Agreement

Any settlement agreement resulting from the dialogue between the parties should be captured in a written settlement agreement, which typically includes specific actions and commitments agreed upon by the parties, as well as targets for monitoring the implementation of the agreement and available measures in case of failure to implement the agreement.

Expected by November 2021

5. Monitoring

Upon the conclusion of a settlement agreement, the Panel will undertake to monitor the implementation of the agreement. The Panel will close the case and cease monitoring when it is satisfied that the agreed items have been implemented to the satisfaction of the parties.