

INDEPENDENT COMPLAINTS MECHANISM (ICM)

Preliminary Review Report

23 January 2020

FMO and DEG Complaint 18-001 LCT re Lomé Container Terminal SA Togo

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Recipients:

FMO, DEG, complainants, LCT

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About the Independent Complaint Mechanism (ICM)

The Independent Complaints Mechanism (ICM) provides complainants with a 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 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 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

This note describes the status of the complaint and the next steps to be adopted by the Independent Complaints Mechanism of FMO / DEG (ICM) in dealing with it. This note summarises the findings of the ICM after the preliminary review of the case under paragraph 3.2.3 of the procedures of the ICM, it also reiterates the findings of the admissibility finding from October 2018. In particular:

- The fact that the ICM panel formally takes note of the compliance review findings of the Office of the Compliance Advisor Ombudsman (CAO)¹ in respect of this complaint to the extent it relates to actions of FMO / DEG that are taken in parallel or common with International Finance Corporation (IFC).
- The finding of the ICM that – as a consequence of this approach –the focus of the ICM’s next steps will be to look at the actions of the lenders since the publication of the CAO compliance review finding in 2016 and the degree to which these address outstanding issues of non-compliance identified in the CAO report.

The panel has determined that the next steps in relation to this complaint are the following:

- To carry out an evaluation of the extent to which the institutions have taken steps to close the compliance gaps, identified in the CAO compliance investigation report². In order to do this the panel will assess / gather, among other, the following information: the monitoring reports and other information of the CAO in relation to the complaints lodged before it; information provided to the panel by the professional staff of FMO and DEG; information in the public domain or elsewhere.
- Evaluate the apparent situation on the ground in relation to the project. In order to do this the panel will review the following: information provided directly by the complainants in response to a request from the Panel; information provided to the panel by the client of FMO / DEG; monitoring reports from consultants and other professionals engaged by the lender and its client. The panel will also make a visit to the project site in early 2020.

¹ CAO is the independent accountability mechanism for IFC and MIGA, the private sector arms of the World Bank Group.

² http://www.cao-ombudsman.org/cases/case_detail.aspx?id=232 - http://www.cao-ombudsman.org/cases/document-links/documents/ToRforTogoLCTInvestigation-08_Jan2016.pdf

2. The complaint and context

2.1. Overview of the complaint

The complaint was received by the ICM of FMO and DEG on 28 August 2018. The letter comprising the complaint was dated 11 July 2018. The complainants are a civil society organisation called “Collectif des personnes victimes d'érosion côtière” (Collective of victims of coastal erosion) who represent a number of members of communities who claim to have been adversely impacted by coastal erosion, who live to the east of the port.

The complainants have suggested that the project has accelerated the erosion of the coast with negative impacts on their homes, livelihoods and communities.

The complaint from the Collectif raises a number of questions in relation to both the due diligence carried out by FMO and other lending institutions and the quality of the Environmental and Social Impact Assessment (ESIA). The ESIA was a core document in the due diligence process. The ESIA had noted that there was coastal erosion of the east of the port but came to the conclusion that the project itself would not have a negative impact in terms of erosion.

DEG and FMO provide finances to the project in a consortium, where environmental and social issues are led by IFC. The CAO has also received two complaints in relation to the project, one of which is very similar to the complaint received by FMO. The panel notes that in cases where other high-standard accountability mechanisms have already received a complaint, clause 3.1.7. of the ICM policy applies, which states “The ICM will assess on a case-by-case approach the admissibility of identical Complaints that already are being handled or which have been settled by other high standard administrative mechanisms (being member of the network of Independent Accountability Mechanisms [IAM]) or judicial review mechanisms, in order not to duplicate work already done or hinder ongoing procedures.”

The complaint makes general points in relation to the impact of the project on erosion and specifically refers to the findings of the CAO in its compliance review. The complaint also notes various actions, which IFC have committed to in light of the CAO reports.

2.2. The CAO report

One of the CAO complaints - Togo LCT-01/Lomé – relates to identical issues as those raised in this complaint. The CAO's compliance investigation – decision date 8 August 2016 – made a number of specific non-compliance findings about the project. These included non-compliance findings on: PS1 - cumulative impacts, insufficient analysis of erosion in the ESIA, a failure to satisfy itself that the ESIA was an ‘adequate, accurate and objective presentation of the issues, prepared by qualified and experienced persons’. Further, the CAO found that IFC had not complied with PS1 requirements on consultation and disclosure of information with affected communities.

The CAO also found there to be non-compliances in relation to activities subsequent to project approval in relation to a failure to respond adequately or to carry out consultation with affected communities. In this regard the CAO found that IFC had not assured itself that the client is responding “to community concerns about the project” or engaging in consultation “on an

ongoing basis as risks and impacts arise”, as per the requirements of PS1. Further, CAO found that IFC had not provided advice which would bring the client back into compliance as per the Sustainability Policy.

The CAO has subsequently issued two monitoring reports, the most recent of which was issued in April 2019. The CAO expects to issue its next monitoring report no later than April 2020.

In relation to its monitoring of the complaint, the CAO states that:

IFC has reported a number of actions taken and/or proposed in response to CAO’s investigation of its investment in LCT. At the level of policies, practice, procedures and knowledge, CAO’s first monitoring report (March 2018) acknowledged positive changes initiated by IFC.

At project level, CAO recognizes IFC’s efforts to engage with the complainants and respond to their concerns since the publication of CAO’s investigation in October 2016. While noting significant delays in implementation since CAO’s first monitoring report, the actions proposed are welcomed and CAO is encouraged by the progress made in this regard in early 2019. The commissioning of an environmental audit including a component on coastal erosion, as well as the initiation of a study on the contribution of different infrastructure projects on coastal erosion, which both envisage consultations with coastal communities, are positive steps towards bringing the project back into compliance.

The CAO states that it will keep the investigation open for monitoring and plans to issue a follow-up monitoring report no later than April 2020. Prior to closing this monitoring process, CAO expects to review the additional studies commissioned by IFC and its client together with corrective actions, as appropriate, depending on the results of the audit and the study.

3. Management of the complaint to FMO / DEG to this point

Following the receipt of the complaint, the following steps have been taken by the ICM:

- The complaint was declared admissible in October 2018, with caveats for further consideration about the overlap with the CAO complaint.
- In late Feb / March 2019 the panel member tasked to take the lead in the case, reviewed the various documents and also had a call with both the ICM secretariat and the deal team at FMO.
- In April 2019 the ICM panel discussed the best approach to this case, given the overlap with near identical complaint before the CAO in the light of the outcomes from the document review and initial case analysis.
- In June 2019 the ICM panel met with technical specialists at FMO who led with the due diligence and monitoring in relation to the project and sought to understand the extent to which there was any divergence or additional activities from those carried out by IFC.

4. Preliminary review of the complaint by the ICM panel

Based on an analysis of the extensive documents provided to the ICM by FMO and DEG and also an interview with the FMO deal team and environmental and social (E&S) specialists working on the project, the following can be summarised:

- FMO/DEG entered the project appraisal later than IFC.
- IFC took the lead in terms of both financial and also E&S matters.
- At almost every early stage FMO/DEG followed IFC's lead in terms of their judgement in terms of the assessment of reports, client actions, etc. for the purpose of IFC Performance Standards due diligence.
- Over time, some of the due diligence and, in particular, monitoring has also included FMO/DEG staff, it appears that the approach has sometimes been to agree either a common response and assessment, or to follow IFC assessment, and sometimes for the two institutions to reach their own view. This will be explored further.
- At various times FMO/DEG have asked additional questions as part of inter-team conversations to test information. But this was in the context of this common approach and did not take the due diligence in any way outside the scope of activities carried out by the lead agency, IFC.

In reference to cause in 3.1.7. of the ICM policy, the panel decided at the admissibility phase that the key criteria which apply to this case are the following:

- The subject of the complaint is identical with Togo LCT-01/Lomé to that lodged before the CAO.
- The approach to the application of the performance standards was common by the FMO, DEG and IFC.
- The subject matter of the complaint in terms of appraisal and project implementation and the common due diligence have already been adjudicated on by a high standard administrative mechanism which is a member of the Independent Accountability Mechanisms network – the CAO – up to August 2016.
- There is no additional policy which is claimed that FMO/DEG should have adhered to in addition to those policies which they share with IFC.
- The findings of non-compliance of CAO are clear, and significant, and in the view of the ICM panel it would be inappropriate to re-open or reconsider those.

The ICM takes formal notice of the compliance review findings reached by the CAO in August 2016 and will not re-open or second-guess any of those findings. They are findings that have been settled by another “high standard administrative mechanisms (being member of the network of Independent Accountability Mechanisms [IAM]) or judicial review mechanism”, and to reopen them or question them would “duplicate work already done or hinder ongoing procedures”.

5. Next steps

Based on these findings, the ICM panel proposes to process this complaint in the following manner:

- The ICM will carry out compliance review under para 3.2.4 of its procedures. This compliance review will assess: (i) the present status of non-compliances and related harm; (ii) the status only of those measures carried out or omissions since the issuance of the CAO report in 2016 ; (iii) whether adequate due diligence has been done by FMO/DEG in assuring that adequate progress is underway to bring this project into full compliance status and correct any consequential harm. In doing so the panel will assess monitoring activities carried out by IFC and CAO and additional activities carried out by FMO/DEG.
- The ICM will contact the complainants to seek to understand what developments have taken place from their perspective since August 2016. The ICM will also visit the project and the complainants in Lomé to understand the current state of the project in relation to the non-compliances identified in the CAO report.
- The ICM will also liaise closely with the CAO and IFC to ensure that the steps it takes are aligned with and do not undermine the supervision processes of IFC and monitoring process which the CAO is currently undertaking. The ICM will take due note of the monitoring reports and process of the CAO to avoid duplication of effort.