

Annual Report
DEG / FMO Independent Complaints Mechanism
First Panel Report January 2014 – June 2015

6 August 2015

Steve Gibbons
Maartje van Putten
Michael Windfuhr

Table of contents

1. Introduction.....	2
2. Complaints assessed and processed	2
2.1 Overview of complaints received	2
2.2 Barro Blanco complaint	3
3. Other work related to the Mechanism.....	5
4. Lessons and recommendations for the Mechanism	5

1. Introduction

As part of their commitment to act responsibly and transparently, DEG and FMO developed an Independent Complaints Mechanism (“ICM” or “Mechanism”) to ensure individuals, groups, communities or other parties who believe to be adversely affected by a project financed or planned by DEG and/or FMO the right to be heard and the right to complain.

The ICM is made up of Complaints Offices in both institutions and an Independent Expert Panel (“IEP” or “Panel”). The Panel decides on the admissibility of each complaint and will process admissible complaints afterwards, including carrying out any compliance review activities. The Independent Expert Panel consists of three members:

- Steve Gibbons
- Maartje van Putten
- Michael Windfuhr

The Panel was established in January 2014 and this report is the first report of the Panel and covers the work of the Panel from January 2014 until June 2015, a period of 18 months.

2. Complaints assessed and processed

2.1 Overview of complaints received

Since the start of the Mechanism the Panel has received four complaints, of which one complaint was deemed admissible under the criteria of the Mechanism. Of the three inadmissible complaints, one related to allegations of corruption and financial mismanagement, which are outside the scope of the Mechanism. The other two were complaints by employees of projects or project contractors in relation to the way they had been treated in their employment and both failed to identify policy breaches by DEG or FMO. One of these two cases had already been addressed to comparable complaints mechanisms of other financing institutions and, as a consequence, was declared inadmissible. In the second case, rather than declaring the complaint inadmissible, the Panel wrote to the complainant indicating that it appeared on the information provided that the complaint was not within scope, but giving the complainant an opportunity to provide further information which would bring it in scope. No further information was received.

		2014	2015 (until June)
DEG client	Inadmissible		
	Admissible		
FMO client	Inadmissible	1	
	Admissible		
Joint client	Inadmissible	1	1
	Admissible	1	

2.2 Barro Blanco complaint

One complaint was ruled admissible under the terms of the Mechanism. This complaint related to the Barro Blanco Hydroelectric Project (BBHP) in Panama, which has received significant public exposure and is detailed below.

The complaint was submitted to DEG in April and to FMO in May 2014 and was brought by local indigenous leader Silvia Carrera, the Panamanian indigenous peoples group M10 and Dutch NGOs SO-MO and Both ENDS. The complaint was that, in general terms, the alleged failure to ensure the project's compliance with international human rights standards meant that FMO and DEG failed to comply with standards which applied to the both institutions, in particular Performance Standards of the International Finance Corporation (IFC), FMO's Human Rights Policy and the OECD Guidelines on Multinational Enterprises.

The complaint sought a **compliance review** of DEG's and FMO's compliance with their own standards. The Panel carefully consulted with the complainants, the project, and FMO and DEG to see whether the Panel could also assist in a problem solving role, but the Panel was not requested to formally do so.

The Panel carried out the following broad phases of activity: document review, interview with FMO and DEG staff and consultants, site visit to the project location, interviews with the project sponsor and other relevant stakeholders.



Independent Expert Panel visiting communities of the Ngöbe Buglé in Panama. From left to right: Michael Windfuhr, Maartje van Putten, Anne-Marie Lévesque (Panel support), Steve Gibbons.

As this project was signed in 2011, well before the initiation of the Mechanism, a separate agreement with the developing company had to be signed for the Panel to be able to access DEG, FMO and client data. While the client did agree to sign and enabled the processing of the complaint, the process however was slowed-down and complicated significantly because of this special circumstance (also see below at section 4 under lessons).

Based on careful consideration of the complaints, a thorough review of the relevant documentation, and interviews with officials of both institutions and a visit to Panama to discuss the complaint with the complainants, affected communities, the company developing the BBHP and the Panamanian Government, the Panel has made the following key findings:

- The lenders took all appropriate steps to put themselves in a position of understanding regarding the legal argument being pursued through the Panamanian courts with regard to the validity of the Environmental Impact Assessment (EIA). The lenders took additional steps to the EIA to be appraised on social and environmental issues.
- Although the lenders were fully appraised of the issues of environmental and social impact of the project in general by the time of the first disbursement of finance, they were not so appraised at the time the financing of the project was agreed. This meant that they were not fully in compliance with their policies as they were not fully appraised with regard to the project's compliance with Performance Standard 1 (PS1)¹ when the project was approved.
- The lenders should have commissioned and received an indigenous peoples report and accompanying legal advice related to consent and approval from indigenous peoples before they agreed to finance the project. The indigenous peoples report that was commissioned in 2011 and received in 2012 concluded that it was not aware of any plan how to relate to the Ngöbe people in the affected communities. This conclusion should have been taken more seriously by the lenders and they should have insisted in clarifying the issue faster and trying more options for consultation.
- While acknowledging that it is not a straightforward issue, the Panel is of the view that the lenders could have done more to seek a greater degree of clarification of the legal situation related to land acquisition and use. This could have been progressed through the commissioning of a formal legal opinion and seeking greater clarity from BBHP on its legal understanding. A possible approach could also have included dialogue with the Government through its client to seek clear guidance from the Government on its view on the appropriate legislation.
- On the question of physical displacement of communities, the Panel is of the opinion that while both institutions were entitled to take a view that there was likely to be limited displacement, they should have reassessed this after a UNDP study indicated that this might not be the case.
- The lenders have not, in the Panel's view, taken the resistance of the communities seriously enough and there are serious questions as to whether the lenders could be satisfied that the consultation with the affected communities have been conducted in sufficient format and intensity to amount to good faith negotiations to satisfy the provisions of IFC Performance Standard 7² which applied to the project.
- In relation to issues based on the forced easement process, the evaluation of changes in potential flooding levels from the dam reservoir and cultural heritage, the Panel found that

¹ PS1 relates to the identification and assessment of environmental and social impact, the minimization, mitigation or compensation of adverse impacts and the client's effective management of environmental and social performance. Furthermore, PS1 requires that affected communities are appropriately engaged on potential adverse impact.

² PS 7 refers to Indigenous Peoples' rights.

both institutions had taken appropriate steps in the circumstances and were not out of line with their policies.

- With regard to water flow and water quality, the Panel is of the opinion that the lenders had commissioned professionally determined assessments on the flooding level and the impact on water quality and were in line with the policy requirements adopted by both institutions. Nevertheless, it remains as an important subject that needs proper clarification and/or explanation for the communities involved.

The Panel has made a number of recommendations to FMO and DEG. The Management Boards of both institutions have acknowledged the work of the Panel and expressed their commitment to implement the recommendations to continuously improve the way investment decisions are made and projects are executed in a sustainable manner. The full Management Response can be found on each institution's websites. The Panel has discussed the report with the Management Board of both FMO and DEG and also subsequently participated in a meeting with the management of both institutions and representatives of the complainants.

3. Other work related to the Mechanism

In addition to the work on actual complaints, the Panel contributed to strengthening the Mechanism and raising internal and external awareness for the Mechanism. Amongst others, the work by the Panel included:

- Contributing to defining ICM clauses for new clients.
- Presenting the ICM and its results in internal DEG and FMO meetings.
- Attending the symposium of "Accountability in Finance: sharing experiences on shared principles" at the University of Windesheim in Zwolle, the Netherlands in June 2014.
- Attending the annual meeting of the Network of Independent Accountability Mechanisms at EBRD in London in September 2014.
- Presenting the Mechanism in NGO and other meetings, e.g. a meeting with German NGOs at DEG on the 13th May 2015.
- Conducting a review of the Mechanism in mid 2015.
- Presentation of the findings of the first case to staff in DEG on June 8, 2015 in Cologne.

4. Lessons and recommendations for the Mechanism

Based on the first year of operations, the Panel is of the opinion that certain elements of the Mechanism work well:

- The experts that together form the Panel were selected based on different experiences, flexibility, language skills, etc., which has proven to be a correct match.
- The team spirit in the Panel was good, which helped in improvising and finding the right way for handling the BBHP complaint.

- The Panel was able to develop an approach of working on compliance reviews. This approach is now being captured in operating guidelines to be used for future compliance reviews.
- Support from the Complaints Offices has worked well, although additional support was required during some phases, for example the planning of the site visit.

Nevertheless, the Panel and the Complaints Offices have also identified some areas for improvement in the Mechanism and recommend to:

- Define clear operational guidelines in relation to:
 - Client and complaint liaison during the course of a complaint.
 - More regular updating of parties on the status of a complaint.
- Further develop the working methods for handling a complaint, which entails amongst others:
 - For each complaint, one Panel member will take the lead for communications on behalf of the Panel for more efficient coordination between the Panel, the Complaints Offices and the complainant.
 - Streamlining templates, to facilitate a more efficient and effective reporting process, taking into account reports of other Accountability Mechanisms as best practices.
 - Considering a structure to provide independent support to the Panel, in addition to the support of the Complaints Offices, to improve both support to the IEP and protect the IEPs independence. Such support could include assistance to the Panel in collecting and assessing relevant documentation, planning visits and drafting reports.
 - Timely identification and selection of additional resourcing to support the work of the Panel and Complaints Offices in relation to complex cases.
- Clarify how the ICM process could work for complaints related to clients with contracts prior to the set-up of the ICM. This can include template guidance and clearer approaches.

These recommendations are currently being evaluated. Changes to guidelines and templates are being implemented, while the actual implementation of additional resourcing and support will be addressed as soon as the next complaint is declared admissible.