

## ANNEX 10

# THE INDEPENDENT COMPLAINTS MECHANISM OF THE FMO AND DEG

### INTRODUCTION

A standardised assessment framework, based on the UNGPs, was used for this assessment (see Annex 2). It draws on information made publicly available by Independent Complaints Mechanism (ICM), the Dutch Development Bank (FMO) and the German Development Bank (DEG) through their websites, and a survey which was sent out to CSOs (see Annex 3). One CSO has shared its experiences with the ICM and FMO/DEG through that survey.

### MECHANISM AT A GLANCE

The ICM, established by the FMO and DEG, came into force in January 2014. The ICM is comprised of a three-member Independent Expert Panel and can provide either problem-solving, compliance review or both, in either order. The Panel is supported by the FMO's Internal Audit Function and DEG's Corporate Strategy and Development Policy Department.<sup>1</sup>

TABLE 1: ICM/FMO/DEG CASE ATTRITION

TOTAL COMPLETED CASES	FOUND ELIGIBLE	REACHED SUBSTANTIVE PHASE	ACHIEVED RESULTS
4	1	1	1

TABLE 2: ICM/FMO/DEG PERFORMANCE INDICATORS

	RESEARCH PERIOD	TOTAL
CASES FILED	1*	4 <sup>2</sup>
CASES CLOSED WITHOUT REACHING SUBSTANTIVE PHASE <sup>3</sup>	1	3
CASES ACHIEVING RESULTS	1	1

### KEY FINDINGS AND RECOMMENDATIONS

The ICM presents an innovative model for the future of the IAMs, with its shared structure between two national DFIs and the potential for others to join. The shared structure, in theory, could further strengthen the independence of the ICM because it is less beholden to either institution. However, the ICM's handling of its first complaint casts doubt on whether it will fulfil its potential. Because the ICM was created subsequent to the approval of the loan agreement in that case and thus not contemplated in the loan agreement, FMO/DEG determined it was necessary to negotiate a confidential side agreement with their client in order to gain its participation in the complaint process. The confidential side agreement significantly changed the ICM's procedures by allowing the client to review the draft and final compliance report before complainants had the opportunity to do so. Although the ICM assured complainants that the client did not unduly influence its final compliance report, complainants, who did not have access to the side agreement or the client's comments on the compliance report, had no independent means of verifying this claim. As a result, the ICM's legitimacy and predictability were seriously undermined (more information on this case is provided in Chapter 4 of the main report).

Table 3 on the next page contains the recommendations derived from the UNGP assessment that follows. The recommendations describe the reforms needed to the policy and practice of each actor, the IAM and the DFIs. It should be noted, however, that the power to implement some of these recommendations regarding the IAM rests with the DFIs' Boards of Directors.

TABLE 3: RECOMMENDATIONS DERIVED FROM UNGP ASSESSMENT

	ICM	FMO/DEG
<b>LEGITIMACY</b>	<ul style="list-style-type: none"> <li>Panel members should not be allowed to work for FMO/DEG following their term.</li> </ul>	<ul style="list-style-type: none"> <li>Selection committee for ICM Panel members should include external stakeholders.</li> <li>ICM should be provided with an independent secretariat that reports only to the ICM.</li> </ul>
<b>ACCESSIBILITY</b>	<ul style="list-style-type: none"> <li>Remove the one-year time limit on filing complaints.</li> <li>Allow complaints to be filed in the language of the requester.</li> </ul>	<ul style="list-style-type: none"> <li>Require clients to disclose availability of the ICM.</li> </ul>
<b>PREDICTABILITY</b>	<ul style="list-style-type: none"> <li>Adhere to deadlines in ICM policy.</li> <li>Provide regular updates to complainants on the status of their complaints.</li> <li>Monitor the project until all instances of non-compliance have been remedied. Monitor the implementation of agreements reached through problem-solving.</li> </ul>	<ul style="list-style-type: none"> <li>Develop more robust process to respond to ICM's investigation reports.</li> <li>Refrain from negotiating side agreements with clients.</li> </ul>
<b>EQUITABILITY</b>	<ul style="list-style-type: none"> <li>Allow simultaneous review of draft Conclusion Reports by DFI and complainant.</li> <li>Send the final Conclusion Report to the complainants at the same time it is sent to the DFIs.</li> </ul>	<ul style="list-style-type: none"> <li>Undertake consultations with complainants on corrective actions in response to ICM's Conclusion Reports.</li> <li>Provide the ICM with an independent operating budget.</li> </ul>

	ICM	FMO/DEG
<b>TRANSPARENCY</b>	<ul style="list-style-type: none"> <li>Provide all documentation for cases.</li> </ul>	<ul style="list-style-type: none"> <li>Disclose all projects prior to approval and include detailed information regarding environmental and social risks.</li> <li>Refrain from making confidential agreements with clients that interfere with the ICM's ability to fulfill its mandate.</li> </ul>
<b>RIGHTS COMPATIBILITY</b>	<ul style="list-style-type: none"> <li>Develop procedures to prevent and address reprisals against complainants.</li> <li>Make recommendations for suspension of the project when imminent risk is found.</li> </ul>	<ul style="list-style-type: none"> <li>Adopt robust human rights due diligence procedures to implement human rights commitments.</li> </ul>
<b>LESSONS LEARNED</b>	<ul style="list-style-type: none"> <li>Develop review process that includes opportunity for public comment.</li> <li>Analyse and document lessons learned from cases.</li> </ul>	<ul style="list-style-type: none"> <li>Develop a tracking record to document and report back on commitments taken in response to ICM investigations, including reforms to policy and practice to improve future implementation.</li> <li>Commit not to provide additional financing for similar activities to clients found to be in non-compliance until the non-compliance has been remedied.</li> </ul>

## UNGP ASSESSMENT

### LEGITIMACY

**IAM:** The ICM does have some measures to safeguard its independence, and therefore its legitimacy, but further improvements are needed. For example, the ICM does not have an independent secretariat with dedicated staff that are chosen by and report to the Panel. The ICM policy also does not include an employment ban that would prevent Panel members from being employed by the DFIs after their term on the Mechanism has expired. However, the policy does require a cooling-off period for Panel members. They should not have had any involvement in project-related activities of FMO/DEG for at least a period of two consecutive years prior to joining the Mechanism.<sup>4</sup> In practice, all three panel members appointed were external experts, independent from the FMO and DEG.<sup>5</sup>

**DFIs:** The composition and appointment of Panel members is the responsibility of FMO and DEG's Chief Executive Officer and is approved by their respective Supervisory Boards. There is no further information available on the selection procedure of Panel members, and there are no external stakeholders on the hiring commission, unlike the CAO.

### ACCESSIBILITY

**IAM:** The ICM sections of the FMO and DEG's websites provide an online complaints form; a guide for communities and complainants describing the policy; and a template for writing a complaint. The Mechanism will accept complaints in English or the official language of the country where the project is located, although not in the complainant's language, if that is different from the official language.<sup>6</sup> The accessibility of the Mechanism is limited because it will only accept complaints that are filed within one year from the date upon which the facts alleged in the complaint could have reasonably been known by the complainants.<sup>7</sup> This requirement, not found in most other Mechanisms, may limit access to potential complainants who are unable to discover the availability of the Mechanism within that time, especially as FMO/DEG's clients are not required to disclose the existence of the Mechanism. As a new Mechanism, outreach to CSOs in the Netherlands, Germany and host countries will be important. So far, outreach has been limited. The first event with German CSOs took place more than a year after establishment of the Mechanism.

**DFIs:** The ease of accessing information about the ICM differs between FMO and DEG. On the FMO website, the ICM webpage<sup>8</sup> is three clicks from the homepage. It is not centrally featured on FMO's homepage, but it is easily accessible through the 'Contact' button. It is somewhat harder to find the ICM on the DEG website, but the ICM description is still three clicks away from DEG's homepage. Neither FMO nor DEG has a disclosure policy that requires their clients to disclose the availability of their grievance mechanism.<sup>9</sup>

### PREDICTABILITY

**IAM:** The ICM's policy is, in places, unclear and leaves many provisions open to interpretation. The ICM's policy provides for a number of strict deadlines throughout the complaint process: acknowledgment of receipt of complaint;<sup>10</sup> comments by the Bank and complainants on the draft Conclusions Report;<sup>11</sup> and the Mechanism's monitoring report on proposed corrective actions and recommendations.<sup>12</sup> Timelines for other phases in the process are more flexible.<sup>13</sup> The possibility of delays in the process is foreseen, though it is unclear whether the Panel is required to notify complainants about those delays.<sup>14</sup> In practice, users report that the ICM does not meet its deadlines nor does it provide regular status updates on the process (see section 4.2.5 of the main report). The ICM has a monitoring mandate, but it is limited to monitoring the implementation of corrective actions agreed to by Bank Management, not the remediation of the instances of non-compliance found, and only over a 12-month period.<sup>15</sup> The policy is silent on monitoring the implementation of agreements reached through problem-solving.

**DFIs:** There is no clear description of the role of the Banks' Management in the complaints process. The ICM's policy refers to "agreed corrective actions", but does not indicate with whom the actions are agreed or whether the banks should consult with the complainants about those actions.<sup>16</sup> In the only investigation that has been concluded by the ICM, the banks did provide a written response, but the response did not clearly specify the corrective actions the banks planned to take, nor did the banks consult with complainants on those actions prior to publishing the response. In that case, the client refused to cooperate with the ICM or allow them access to relevant, non-public documentation related to the project, arguing that there was no provision in the loan agreement, which was approved prior to the creation of the ICM, that required them to do so. In response, FMO/DEG negotiated a confidential side agreement with their client, signed by the ICM, in order to gain its participation in the complaint process. However, because the agreement was confidential, its provisions are unknown to the complainants, but it did in effect change the ICM's policies, resulting in considerable delays and allowing the client access to the ICM's draft and final Conclusions Report, an opportunity for which the ICM policy did not provide. Complainants and the CSOs supporting them found this arrangement significantly undermined the predictability of the process, but, more importantly, its legitimacy.

### EQUITABILITY

**IAM:** The ICM's policy could be interpreted to allow an equal opportunity to review the ICM's draft Conclusions Report for both the Bank Management and complainants.<sup>17</sup> It does not explicitly require that the review happen simultaneously or that the parties review the same version of the draft, but neither does it require a sequencing of the review periods. In practice, the Mechanism has interpreted these provisions to mean that the Banks' review and comment on the draft Conclusions Report first, and then, after the ICM has incorporated their comments, the complainants are given an opportunity to

review and comment on the revised draft. The policy does guarantee that the Panel has the final authority to decide on the text.<sup>18</sup> The final Conclusions Report, however, is not shared with the complainant until after the decision of the Boards.<sup>19</sup>

**DFIs:** There are no requirements regarding the preparation of the Banks' response to the ICM's Conclusions Report. Unlike with other IAMs, the Banks are not required to consult with the complainants in preparing any "corrective actions" to respond to the Panel's findings of non-compliance and, in practice, they have not done so. To ensure an equitable process in which the complainants have access to expertise and resources to allow them to participate on an equal footing, the Mechanism must have sufficient budget to cover those costs. It is unclear whether the ICM has an independent operating budget. The Panel, however, was able to secure sufficient resources for its first site visit, including reimbursement for complainants' travel expenses to attend meetings with the Panel.

### TRANSPARENCY

**IAM:** Consistent with the ICM's policy,<sup>20</sup> the ICM's websites include a registry with basic information regarding the complaints received.<sup>21</sup> The only critical information that is missing in the registry entry for its first complaint, Barro Blanco, is the complaint itself.

**DFIs:** The FMO Disclosure Policy applies to all "projects related to Government funds agreed from January 1, 2012 and onwards, and to all financing and investments agreed from January 1, 2013 and onwards."<sup>22</sup> The DEG Disclosure Policy is similar.<sup>23</sup> The project-related information that is made available,<sup>24</sup> however, is limited, often only to a few paragraphs without any environmental and social assessment of the project, and only available following project approval. The lack of sufficient and timely information about the activities supported by FMO/DEG can present a barrier to project-affected people in accessing the ICM.

### RIGHTS COMPATIBILITY

**IAM:** The ICM assesses compliance against the standards listed in its policy, which, in the case of FMO includes FMO's Human Rights Policy. Furthermore, it can provide confidentiality for complainants if requested. However, the Mechanism does not have the mandate to recommend suspension of financing if the Panel finds a risk of imminent harm, nor does it have procedures to prevent or address threats against complainants.

**DFIs:** Unlike some other development banks, most notably the IFC, FMO has a human rights policy,<sup>25</sup> which states that "FMO recognizes the responsibility of businesses to respect human rights.... FMO itself respects human rights, and also acknowledges the responsibility of its business clients to respect human rights."<sup>26</sup> Unfortunately, FMO's Human Rights Policy interprets that to mean compliance with the IFC Performance Standards, which do not require human rights due diligence. The ICM policy states that

FMO's policies are "based on" the UN Guiding Principles on Business and Human rights, but makes no mention of the OECD Guidelines on Multinational Enterprises, which incorporates the UNGPs in its human rights chapter. This is inconsistent with the Dutch Government's commitments that institutions with state support, including FMO, comply with the OECD Guidelines.<sup>27</sup> DEG does not have its own human rights policy. Instead, it applies its own environmental and social guidelines, an exclusion list, the IFC Performance Standards, and ILO conventions.<sup>28</sup> DEG erroneously asserts that the IFC Performance Standards "take full account of the UN Guiding Principles on Business and Human Rights".<sup>29</sup>

### LESSONS LEARNED

**IAM:** There were no public consultations on the design and creation of the ICM. FMO consulted a few select CSOs in the Netherlands, but DEG did not consult stakeholders in Germany. The ICM policy provides for a review of the Mechanism at least every four years, or more frequently if needed.<sup>30</sup> It is unclear from the policy whether the reviews will include a public consultation period. In practice, both the Panel and FMO/DEG staff in the corresponding complaint offices have demonstrated an openness to learn and discuss issues with the complaint process. The ICM does not have an advisory function that could draw lessons on challenges that FMO/DEG face in implementing the relevant standards.

**DFIs:** It is unclear if DEG and FMO have a system in place to capture lessons from ICM cases in order to improve their clients' implementation of environmental and social policies in future projects. However, because the ICM has a mandate to make recommendations on existing policy and practice, in addition to corrective actions on the project,<sup>31</sup> FMO/DEG are obliged to respond. For example, FMO/DEG's response to the ICM's findings in its first case includes a commitment to have a more comprehensive environmental and social action plan at the time of project approval, but does not include how it will do so or commit to reporting back on specific measures it adopted to address the ICM's findings.<sup>32</sup>

## ANALYSIS OF COMPLAINTS CLOSED WITHOUT REACHING A SUBSTANTIVE PHASE

According to the *Annual Report of the DEG/FMO Independent Complaints Mechanism First Panel Report January 2014 - June 2015*, at least one complaint was deemed "inadmissible" and closed within the research period without reaching a substantive phase of the complaint process.<sup>33</sup> The annual report provides reasons for closing this case and two others: "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.<sup>54</sup>

Since the annual report does not identify which reasons apply to which case, it is not possible to determine the reason for the inadmissibility decision for the one case within the research period.

\* Two cases were filed in 2014 but information is not available regarding the month and date of filing. Without this information, the research team was unable to determine whether these cases were filed within the research period so we have left them out of this column.

## NOTES

- 1 Dutch Development Bank [FMO], Independent Complaint Mechanisms (2013), [https://www.fmo.nl/1/en/library/download/urn:uuid:e15d0940-2f57-4dd8-be94-cfe1101218a/independent+complaints+mechanism+fmo.pdf?format=save\\_to\\_disk&ext=.pdf](https://www.fmo.nl/1/en/library/download/urn:uuid:e15d0940-2f57-4dd8-be94-cfe1101218a/independent+complaints+mechanism+fmo.pdf?format=save_to_disk&ext=.pdf) [hereinafter FMO ICM]; German Development Bank [DEG], Independent Complaints Mechanism (2013), [https://www.deginvest.de/DEG-Documents-in-English/About-DEG/Responsibility/DEG\\_Complaints-Mechanism\\_2014\\_05.pdf](https://www.deginvest.de/DEG-Documents-in-English/About-DEG/Responsibility/DEG_Complaints-Mechanism_2014_05.pdf). Though FMO and DEG share one Independent Complaints Mechanism, the policies show some slight differences (for example in articles 3.2.11 and 3.2.12), but since both documents refer to the sharing of the Mechanism, the differences are not further highlighted in this report.
- 2 This number may differ from the 'total completed cases' in the previous table, because it includes all cases filed, including cases that are currently active and have not yet closed or entered monitoring.
- 3 This row includes cases that were not registered, were found ineligible or were closed after being found eligible, but before reaching a substantive phase.
- 4 FMO ICM, *supra* note 1, at ¶ 3.4.2.
- 5 FMO Independent Expert Panel, <https://www.fmo.nl/independent-expert-panel>.
- 6 FMO ICM, *supra* note 1, at ¶ 3.1.1.
- 7 *Id.* at ¶ 3.1.7.
- 8 FMO Project Related Complaints, <https://www.fmo.nl/project-related-complaints>.
- 9 FMO Disclosure Policy, <http://www.fmo.nl/disclosure>; DEG's Disclosure Policy, <https://www.deginvest.de/International-financing/DEG/Die-DEG/Verantwortung/Disclosure-policy/>.
- 10 FMO ICM, *supra* note 1, at ¶ 3.2.1.
- 11 *Id.* at ¶¶ 3.2.8, 3.2.10.

- 12 *Id.* at ¶ 3.2.13.
- 13 For example: "FMO strives to decide on admissibility within 25 working days after acknowledgement of receipt" and "FMO strives to finalize the Compliance Review phase 75 working days after the Complaint has been deemed admissible." *Id.* at ¶ 3.3.4. There is no time constraint on the response for the Mediation phase.
- 14 *Id.* at ¶ 3.3.2. ("The Panel will ensure that imposed and/or agreed delays and notices are respected.")
- 15 *Id.* at ¶ 3.2.13.
- 16 *Id.* at ¶ 3.2.9.
- 17 *Id.* at ¶ 3.2.8.
- 18 *Id.* at ¶ 3.2.10.
- 19 *Id.* at ¶ 3.2.12.
- 20 *Id.* at ¶ 3.5.2.
- 21 FMO Complaints Disclosure, <https://www.fmo.nl/complaints-disclosure>; DEG Overview of Complaints, <https://www.deginvest.de/International-financing/DEG/Die-DEG/Verantwortung/Beschwerdemanagement/#4>.
- 22 FMO Disclosure Policy, *supra* note 9.
- 23 DEG's Disclosure Policy, *supra* note 9 ("from 2015 onwards we will publish investment-related information about new financings using DEG funds committed as of January 1, 2015 and for which a contractual basis exists at. Furthermore, we will continue to publish information on projects and programmes financed with public funds.")
- 24 FMO Project List, <https://www.fmo.nl/project-list>; DEG Investment-related Information, <https://www.deginvest.de/International-financing/DEG/Die-DEG/Verantwortung/Investment-related-information/>.
- 25 FMO, Environmental, Social, And Corporate Governance Policy, <http://www.fmo.nl/esg-policy> (providing links to Environmental and Social Policy and Human Rights Policy); FMO, Human Rights Policy (2013), [https://www.fmo.nl/1/en/library/download/urn:uuid:5b6acfl6-afba-4f3c-8565-fa5c6a6ad6cc/fmo+human+rights+policy.pdf?format=save\\_to\\_disk&ext=.pdf](https://www.fmo.nl/1/en/library/download/urn:uuid:5b6acfl6-afba-4f3c-8565-fa5c6a6ad6cc/fmo+human+rights+policy.pdf?format=save_to_disk&ext=.pdf).
- 26 *Id.*
- 27 NGO Briefing on Independent Complaints Mechanism of FMO and DEG (Feb. 2014), <http://grievancemechanisms.org/attachments/FMOcompliancemechanismbriefing.pdf>.
- 28 DEG, Acting Sustainably, <https://www.deginvest.de/International-financing/DEG/Die-DEG/Was-wir-tun/#3>.
- 29 *Id.*
- 30 FMO ICM, *supra* note 1, at ¶ 3.6.1.
- 31 *Id.* at ¶ 3.2.9.
- 32 See DEG & FMO, *Management Response to the Independent Expert Panel's Compliance Review Report regarding the Complaint on the Investment in the Barro Blanco Hydroelectric Project* (May 29, 2015), [https://www.fmo.nl/1/en/library/download/urn:uuid:3766a880-119e-44f6-9e8c-eae30583194c/150529+management+response.pdf?format=save\\_to\\_disk&ext=.pdf](https://www.fmo.nl/1/en/library/download/urn:uuid:3766a880-119e-44f6-9e8c-eae30583194c/150529+management+response.pdf?format=save_to_disk&ext=.pdf).
- 33 Annual Report of the DEG / FMO Independent Complaints Mechanism First Panel Report January 2014 - June 2015, at 2 (Aug. 6, 2015), <https://www.deginvest.de/DEG-Documents-in-English/About-DEG/Responsibility/ICM-Annual-Report-2014-HY-2015.pdf>.
- 34 Annual Report of the DEG / FMO Independent Complaints Mechanism First Panel Report January 2014 - June 2015, at 2 (Aug. 6, 2015), <https://www.deginvest.de/DEG-Documents-in-English/About-DEG/Responsibility/ICM-Annual-Report-2014-HY-2015.pdf>.