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 the 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.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

<table>
<thead>
<tr>
<th>ICM</th>
<th>FMO/DEG</th>
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<tbody>
<tr>
<td><strong>LEGITIMACY</strong></td>
<td>• Panel members should not be allowed to work for FMO/DEG following their term.</td>
</tr>
<tr>
<td><strong>ACCESSIBILITY</strong></td>
<td>• Remove the one-year time limit on filing complaints. • Allow complaints to be filed in the language of the requester.</td>
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<tr>
<td><strong>PREDICTABILITY</strong></td>
<td>• Adhere to deadlines in ICM policy. • Provide regular updates to complainants on the status of their complaints. • Monitor the project until all instances of non-compliance have been remedied. Monitor the implementation of agreements reached through problem-solving.</td>
</tr>
<tr>
<td><strong>EQUITABILITY</strong></td>
<td>• Allow simultaneous review of draft Conclusion Reports by DFI and complainant. • Send the final Conclusion Report to the complainants at the same time it is sent to the DFIs.</td>
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<td><strong>TRANSPARENCY</strong></td>
<td>• Provide all documentation for cases.</td>
</tr>
<tr>
<td><strong>RIGHTS COMPATIBILITY</strong></td>
<td>• Develop procedures to prevent and address reprisals against complainants. • Make recommendations for suspension of the project when imminent risk is found.</td>
</tr>
<tr>
<td><strong>LESSONS LEARNED</strong></td>
<td>• Develop review process that includes opportunity for public comment. • Analyse and document lessons learned from cases.</td>
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</table>
UNG P 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. In practice, all three panel members appointed were external experts, independent from the FMO and DEG.

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. 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. 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 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.

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; comments by the Bank and complainants on the draft Conclusions Report; and the Mechanism’s monitoring report on proposed corrective actions and recommendations. Timelines for other phases in the process are more flexible. The possibility of delays in the process is foreseen, though it is unclear whether the Panel is required to notify complainants about those delays. 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. 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. 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. 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...
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.\textsuperscript{27} 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.\textsuperscript{28} DEG erroneously asserts that the IFC Performance Standards “take full account of the UN Guiding Principles on Business and Human Rights”.\textsuperscript{29}

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.\textsuperscript{30} 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,\textsuperscript{31} 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.\textsuperscript{32}

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.\textsuperscript{33} 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.  

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/l/en/library/download/urn:uuid:e5d3940-2957-4dd8-be95-cf010128a/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-Mechanisms_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.


6 FMO ICM, supra note 1, at ¶ 3.1.1.

7 Id. at ¶ 3.1.7.


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 within 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 ¶ 3.2.3.

17 Id. at ¶ 3.2.8.

18 Id. at ¶ 3.2.10.

19 Id. at ¶ 3.3.1.

20 Id. at ¶ 3.3.2.


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.”).


26 Id.


29 Id.

30 FMO ICM, supra note 1, at ¶ 3.6.1.

31 Id. at ¶ 3.3.2.

