

# A summary of the Independent Complaints Mechanism's findings on Barro Blanco and FMO-DEG management response

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The Dutch and German development banks, FMO and DEG, each invested 25 US\$ million in the Barro Blanco hydropower project in Panama. In May 2014, the Movimiento 10 de Abril (M-10), representing indigenous peoples directly affected by the project, with the support of Both ENDS and SOMO, filed the first complaint to the Independent Complaints Mechanism (ICM) of the FMO and DEG. The complaint alleges that the Barro Blanco dam will affect part of the Ngöbe-Buglé indigenous territory, flooding their homes, schools, and religious, archaeological, and cultural sites. Despite national and international human rights obligations, the Panamanian government, GENISA and the banks failed to obtain the free, prior, and informed consent (FPIC) of the Ngöbe-Buglé before the project was approved. This complaint was the first complaint to be admitted by FMO-DEG's Independent Complaints Mechanism (ICM). Last week, almost a year after the complaint was submitted, the ICM issued a critical investigation report on FMO and DEG's compliance with their environmental and social policies with regard to their investment in the Barro Blanco dam.

As part of their Environmental and Social Governance policies, FMO and DEG require their clients to comply with the International Finance Corporation's Performance Standards (PS) on Environmental and Social Sustainability. The ICM finds that the banks were not in the position to assure themselves that the Barro Blanco was fully compliant with Performance Standards 1 (on Social and Environmental Assessment and Management Systems), 5 (Land Acquisition and Involuntary Resettlement), 6 (Biodiversity Conservation and Sustainable Natural Resource Management), 7 (Indigenous Peoples) and 8 (Cultural Heritage).

Below is a summary of the ICM's main findings:

## 1. Appraisal stage failures

In the appraisal phase, the ICM finds that lenders did not ensure complete assessment of all the significant issues related to social and environmental impact, and in particular issues related to the rights of indigenous peoples. In the words of the ICM: *"In relation to this project, while the [loan] agreement was reached prior to significant construction, significant issues related to social and environmental impact and, in particular, issues related to the rights of indigenous peoples were not completely assessed prior to the agreement. As such, the lenders were not fully compliant with their policies at the time of the project approval."*<sup>1</sup> This is further confirmed by the Panel in numerous paragraphs of the ICM report, which are quoted below.

In relation to Performance Standard 1, setting out the requirements for the Social and Environmental Assessment, the ICM finds:

- *"Once again, the Panel is of the view that, while the subsequent actions of the lenders and their client – based on subsequent assessment and analysis – may have put in place appropriate steps, actions and mitigation measures, it cannot be said that at the time of the appraisal of the project and initial agreement of financing, the lenders demonstrated that they were fully apprised of all of the risks and that appropriate actions were identified as were required by PS1."*<sup>2</sup>
- *"The Panel is of the view that, given the acknowledged complexities, the lenders would have been better apprised of issues related to indigenous peoples' rights and land if they had gone ahead to commission a formal opinion from lawyers or other experts with defined expertise in indigenous peoples' rights and the Panamanian legal context."*<sup>3</sup>
- *"In considering the Environmental and Social Action Plan, the Panel is once again of the view that, although the subsequent actions of the lenders may have put in place appropriate steps, actions and*

<sup>1</sup> FMO-DEG Independent Complaints Mechanism, Panel report nr. 1, Barro Blanco Hydroelectric project Panama, para 96

<sup>2</sup> Ibid., para 92

<sup>3</sup> Ibid., para 9

*mitigation measures, it cannot be said that at the time of the appraisal of the project and initial agreement of financing, the lenders demonstrated that they were fully appraised of all of the risks and that appropriate actions were identified.”<sup>4</sup>*

- *“In relation to this project, while the [loan] agreement was reached prior to significant construction, significant issues related to social and environmental impact and, in particular, issues related to the rights of indigenous peoples were not completely assessed prior to the agreement.”<sup>5</sup>*
- *“The ESAP [Environmental and Social Action Plan] dated 15 July 2011 that was agreed at the time of contracting was, in the Panel’s opinion, lacking in any detail or agreed action. The ESAP was, in essence, dependent on various other action and studies which were yet to take place – including the second indigenous peoples study. This ESAP, which is appended to the credit agreement, contains no provision on land acquisition and resettlement and nothing on biodiversity and natural resources management. Neither does it contain any reference to issues related to cultural heritage.”<sup>6</sup>*

In relation to Performance Standard 5 on Land Acquisition and Involuntary Resettlement:

- *“[...] detailed assessment of who needs to be resettled was not done and still remains to be done, because of the breakdown of communication with the affected communities. The Panel is of the view that the lenders should have insisted earlier that this problem needed to be tackled adequately...Based on this, the Panel is of the view that the lenders could not be fully satisfied that this aspect of PS5 and PS7 was complied with in this project.”<sup>7</sup>*
- In relation to land acquisition the ICM also finds: *“This failure meant that the lenders were not in compliance with their policies at the time of project approval, or subsequently.”<sup>8</sup>*

In relation to Performance Standard 6 on Biodiversity:

- *“The Environmental and Social Action Plan (ESAP) which was annexed to the finance agreement did not have any corrective actions or measures related to biodiversity and natural resources management, but rather suggested that recommendations which would be made by the Independent Expert would be included in the future. This is consistent with the downplaying of these issues in the consultant’s reports. Therefore the Panel concludes that the lenders were not in a position to properly assess compliance with PS6 at the time of approval of the project.”<sup>9</sup>*
- *“From the material made available to it, the Panel is of the view that the subject of the (gallery) forests, its value and social economic use of the communities remains un-resolved. However, the lenders were not in compliance with PS 6 at the time of project approval. This is not to say that there has not been a complete identification of the issue in a number of reports. The Panel notes again that the initial assessment was relatively weak, but subsequently – and in the light of the UNDP reports – a better understanding of the importance of the Gallery Forest has been achieved. The inability to finalise the assessment and put in place appropriate actions in the disputed area stems from the failure to enter into healthy dialogue and consequently an inability to carry out detailed analysis and visits to the forest. This has consequences also for any process of forest clearance. The Panel were informed also that the gallery forest needs to be cut prior to flooding in order to secure carbon credit under the CDM mechanism.”<sup>10</sup>*

In relation to Performance Standard 7 on Indigenous Peoples:

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<sup>4</sup> Ibid., para 10

<sup>5</sup> Ibid., para 11

<sup>6</sup> Ibid., para 90

<sup>7</sup> Ibid., para 119 and 120

<sup>8</sup> Ibid., para 128

<sup>9</sup> Ibid., para 181

<sup>10</sup> Ibid., para 198

- “[...] there are serious questions as to whether the lenders could be satisfied that the consultations with the affected communities have been conducted in a format and intensity (good faith negotiations) that is required by PS7, paragraph 13. The panel is of the opinion the lenders have not taken the resistance of the affected communities has not been taken seriously enough. This maybe, to an extent, because a legal agreement was reached between BBHP and the regional council of the Comarca and this was considered by the lenders to be sufficient to deal with the issue. Nevertheless, the Indigenous Peoples report clearly documented that the directly affected communities challenged the legitimacy of such agreements. This should have triggered the further steps identified in the IP Report.”<sup>11</sup>
- “Therefore, the Panel is of the view that the lenders should have sought greater clarity on whether there was consent to the project from the appropriate indigenous authorities prior to project approval.”<sup>12</sup>
- “The Panel is of the view that, given the acknowledged complexities, the lenders would have been better appraised of issues related to indigenous peoples’ rights and land if they had gone ahead to commission a formal opinion from lawyers or other experts with defined expertise in indigenous peoples’ rights and the Panamanian legal context. This means that the lenders had failed to be fully appraised on the risks and issues in accordance with the requirements of the IFC Performance Standards and their own Environmental and Social policies at the time of project approval.”<sup>13</sup>

In relation to Performance Standard 8 on Cultural Heritage:

- “However, as with a number of other issues related to indigenous peoples, the question of cultural heritage was not fully assessed during project appraisal. A proper assessment only started with the indigenous peoples report in 2012. In this sense the lenders were not in a position to properly assess whether their client was in a position to comply with the relevant standards, including PS8, the time of project approval.”<sup>14</sup>

**FMO/DEG’s Response:**

- “We acknowledge the conclusion of the IEP that DEG and FMO were not fully appraised at credit approval...”
- “With regard to the biodiversity and environmental issues, the Lenders and the client still seek an acceptable solution for the small remaining fraction of the total shoreline where access is still under discussion.”

## **2. Supervision stage failures**

The PS require that affected communities receive accurate information about project impacts initially and if there are any changes in expected impacts. The supplemental information requested by the banks that the Panel refers to in its findings was not disclosed or consulted with communities or included in an amended EIA. So while it is necessary for the lenders to have access to additional information, it is not sufficient for the purposes of compliance with the policy. This was acknowledged by the Panel as evidenced in the quotes below.

In relation to Performance Standard 1, setting out the principles for the Social and Environmental Assessment and Performance Standard 7 on Indigenous Peoples, the ICM found:

- “As would be expected, this ESAP was updated and changes were agreed upon at various points throughout the project. However, substance of the information contained in these documents and changes were not publicly disclosed in accordance with PS1.”<sup>15</sup>
- “In relation to this project, while the [loan] agreement was reached prior to significant construction,

<sup>11</sup> Ibid., para 146

<sup>12</sup> Ibid., para 84

<sup>13</sup> Ibid., para 86

<sup>14</sup> Ibid., para 19

<sup>15</sup> Ibid., para 89

*significant issues related to social and environmental impact and, in particular, issues related to the rights of indigenous peoples were not completely assessed prior to the agreement, even if they were subsequently identified and included in the ESAP. Furthermore, the nature of the company's assessment of these issues and the subsequent changes in the ESAP were not properly disclosed to the communities.”<sup>16</sup>*

- *“... there was no ongoing communication with the affected communities about project construction, planned adjustment measures and the results of a changed ESAP. While noting the difficulty to do so, given the fact that the affected communities were not open to any information exchange, the Panel is of the view that the lack of communication on this issue was out of line with that anticipated by PS1.”<sup>17</sup>*
- *“In the view of the Panel the implementation of the recommendations from the independent E&S Advisor IP report (see issue 2) have unnecessarily been postponed or not been taken up. The Panel is of the view that at least after the closing of the UN processes the commissioning of a legal advice on the land and indigenous issues would have been advisable, given the number of open issues that remained unsolved or not adequately dealt with at this time.”<sup>18</sup>*

In relation to Performance Standard 6 on Biodiversity:

- *“The consultant concludes that while many environmental issues have been taken care of, the remaining issue of the **environmental cumulative impacts** is outstanding.”<sup>19</sup>*

In relation to Performance Standard 7 on Indigenous Peoples

- *“The Indigenous Peoples Report 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.”<sup>20</sup>*

**FMO/DEG's Response:**

- *“With regard to land, resettlement and displacement, we will strive for a more elaborate formal opinion from lawyers or other experts, with defined expertise in indigenous peoples' rights and the local legal context, on the matter of the formal representative structures in (indigenous areas like) the Comarca and we will structurally consider this recommendation for future investments.”*

**3. On support from NGOs**

Another important issue, highlighted in the Panel's report, regards the supporting role of local, national and international NGOs. Against assertions to the opposite, e.g. that NGOs oppose a certain type of development, the Panel concludes that there has been no undue influence by NGOs, but rather that they assisted the M-10 in ensuring their case would be heard nationally and internationally.

- *“The independent E&S Advisor notes that in the communities visited, parallel to the formal power and governance structure established pursuant to the law, informal structures exist, “which exercise power, whose beliefs and principles appear to emanate from the Mama Tata religious framework” that converted into a social movement. The movement based on this religious framework has a strategy of rejection of all elements foreign to its culture. Additionally, these informal structures were able to collaborate with local, national and international NGOs - some of them working in the Comarca to support the capacity for community development, many of them with clearly defined attitudes*

<sup>16</sup> Ibid., para 211

<sup>17</sup> Ibid., para 154

<sup>18</sup> Ibid., para 126

<sup>19</sup> Ibid., para 187

<sup>20</sup> Ibid., para 219

*regarding the issue of hydroelectric power development and indigenous peoples. The independent E&S Advisor does not find that these NGOs influence the M10 movement, but rather that the NGOs have “contributed in disseminating the position of the Ngöbe regarding mega mining and hydroelectric projects, including Barro Blanco”.<sup>21</sup>*

#### **4. Systemic issues**

Barro Blanco is not the only controversial dam in Central America being funded by FMO. Similar criticism in relation to the failure to obtain FPIC has been voiced by local, national and international groups on dams like Santa Rita in Guatemala and Agua Zarca in Honduras. FMO was involved in a controversial palm oil project, through its investment in a Honduran bank, Ficohsa, which was similarly found to be out of compliance with IFC policies. It is important to realise that due diligence standards have been put in place exactly to avoid the conflicts that we see in these types of investments.

In our view, the ICM report contributes to the body of evidence that development banks, including FMO and DEG, must ensure respect for human rights standards, which would require undertaking a human rights impact assessment prior to project approval.

#### **5. CSO demands to FMO and DEG**

##### ***Directly related to Barro Blanco:***

According to FMO’s policies, projects are supposed to be in full compliance with all relevant standards within three years of project approval. More than three years after FMO and DEG invested in Barro Blanco, the ICM’s report makes it clear that the project is still not in compliance with relevant environmental and social standards. In particular, FPIC has not been obtained according to the Ngöbe-Buglé’s rules and procedures. For those reasons, the M-10 and international civil society call on FMO and DEG to withdrawal their investment.

##### ***Policy lessons for FMO and DEG:***

- Commit to carry out human rights impact assessments for all high risk projects or projects in high risk countries.
- Refrain from financing projects affecting the lands and natural resources of indigenous peoples that do not have their free, prior, and informed consent.
- Review the information disclosure policy through public consultation, so as to ensure that this policy is in line with the requirements in IFC’s Access to Information Policy and Performance Standard 1.

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<sup>21</sup> Ibid., para 133