

NGO Briefing on Independent Complaints Mechanism of FMO and DEG
February 2014

The Dutch development bank, FMO, together with the German Entrepreneurial Development Cooperation (DEG) is the first European Development Finance Institution (DFI) and the first Equator Principles Financial Institution (EPFI) to introduce an Independent Complaints Mechanism ('Mechanism'). Amnesty International, BankTrack, Both ENDS and SOMO engaged in the limited consultation process that was organized in the Netherlands by FMO, which led to this mechanism. There was no similar consultation in Germany, nor has DEG announced the availability of the Mechanism. This briefing presents you with our view on the final outcome of this process.

Dutch Development Bank-FMO

FMO is the Dutch development bank supporting companies, projects and financial institutions in developing and emerging markets. It specialises in sectors where its contribution can have the highest long-term impact: financial institutions; energy; and agribusiness, food and water. In addition to its direct lending and investment activities, FMO also manages a number of specific development funds on behalf of the Dutch government. With a total investment portfolio of 6.3 billion euros, it is one of the largest European DFIs.

German Entrepreneurial Development Cooperation (DEG)

DEG is the German development bank, with a current portfolio of around 6 billion euros, targeting agribusiness, the manufacturing industry, the financial and infrastructure sectors in developing and emerging countries in all continents. DEG is part of the KFW Bankengruppe.

Why is this mechanism important?

DFIs invest their money in commercial projects in developing countries. European DFIs have grown considerably in size over the past 10 years, with a combined portfolio of €26 billion in 2012, marking the increased use of private sector support for development. Just like multilateral development banks, DFIs often invest in large-scale projects in sectors such as energy, infrastructure, agribusiness and extractives projects. Such projects can have a potential negative impact on the livelihoods and human rights of members of adjacent communities and on the environment.

Both FMO and DEG apply the Performance Standards of the International Finance Corporation (IFC), the World Bank's private sector arm, as well as their own human rights and social and environmental policies to ensure that such negative social and environmental impacts are avoided or mitigated. While a commitment to these standards is important, it is crucial to ensure that the implementation thereof can be independently assessed and grievances of stakeholders can be addressed. Through the new established Mechanism, people affected by a project financed by these banks can submit a complaint and enter into

mediation with the Banks' client, or request that the independent experts on the panel perform an assessment to determine whether the Banks have complied with their policies.

Features of the mechanism

Our organizations have provided input to FMO on the establishment of the Mechanism in two consultation rounds in 2013. We emphasized the importance of structuring the Mechanism to guarantee a high level of **independence** from the Banks' management; so that it would be **accessible** to complainants so as to reduce the barriers to filing a complaint; so that it would be fully **transparent** in its operations; and **effective** in providing fair and positive results for affected communities and holding the institutions accountable.

To their credit, FMO has accepted a large number of our suggestions, thereby considerably strengthening the final structure and function of the mechanism as compared to the first two drafts we reviewed. Positive features include:

- A user-friendly online complaints form;
- The acceptance of complaints in the national language of complainants;
- An online register of complaints;
- The flexibility to conduct an investigation prior to mediation or vice versa;
- Sufficient independence given to the experts;
- A clear division of roles between management, the expert panel and the Advisory Board; and
- A commitment to explore the creation of an appeals mechanism.

Despite these positive features, the Mechanism in its current form also needs improvement on a number of key issues:

- The Mechanism can review compliance against FMO policy, including FMO's Human Rights Policy. Unfortunately, FMO's Human Rights Policy does not go beyond the IFC Performance Standards, which only mention human rights in a footnote. The inclusion of the OECD Guidelines for Multinational Companies and the Guiding Principles on Business and Human Rights in the list of policies that the Mechanism could review, which was present in the first two drafts, was removed from the final version. The final version of the policy only states that FMO's policies are "based on" the UN Guiding Principles and makes no mention of the OECD Guidelines, leaving a much weaker commitment to human rights due diligence and inconsistent with the Dutch government's commitments that institutions with state participation (including FMO) comply with the OECD Guidelines.¹

¹ Nationaal Actieplan Bedrijfsleven Mensenrechten, p. 6,
<http://www.riksoverheid.nl/onderwerpen/mensenrechten/documenten-en-publicaties/rapporten/2013/12/20/nationaal-actieplan-bedrijfsleven-en-mensenrechten.html>

- The Mechanism 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. It will often be difficult for communities to discover that FMO financed the company whose operations have adversely affected them, especially as FMO's clients are not required to disclose the existence of the Mechanism. This time limit creates an unnecessary barrier to communities who are adversely affected by FMO-financed operations and should be removed.
- The Mechanism seems to require that complainants first use a project-level grievance mechanism. The policy reads: "If applicable other action and consultations with relevant responsible parties [need to] have already taken place." This language is quite vague and leaves it to the Panel to decide when local actions have been sufficient, but keeps the possibility open that a complaint be denied on this basis. Trust between the Banks' client and the affected communities is often severely eroded by the time a complaint is filed. Project-level grievance mechanisms are often not robust or independent enough to address the communities' grievances effectively. For that reason, this criteria should be removed.
- The Mechanism will not accept complaints that are identical to those that have already been filed at other complaint mechanisms of banks supporting the same project. While accountability mechanisms should, and in practice do, coordinate on complaints, the objective of each Mechanism is hold its institution accountable to its own policies, which can differ between banks. For example, findings by the Compliance Advisor Ombudsman (CAO) of the International Finance Corporation about the actions or omissions of IFC staff are not material to whether FMO staff complied with its policies. This restriction should be removed to ensure that FMO will address any instances of non-compliance with its own policies.
- Despite our recommendation to the contrary, FMO will not require that its clients disclose the availability of the Mechanism on their websites, or otherwise. This undermines the effectiveness of the Mechanism by reducing its accessibility. Project-affected communities often do not know who is investing in a project, let alone what options there are for filing complaints.
- The Mechanism will only accept complaints if the adverse actual or potential impacts are alleged to be "substantial," a term that is not defined in the policy and is left open to interpretation and debate - both within the Mechanism and between the Mechanism and FMO. What could seem trivial to FMO or the Mechanism may be quite substantial to an affected community. This requirement is not found at the other leading accountability mechanisms and should be removed.

Moving forward

While this mechanism is not perfect, it presents an important step in ensuring that project-affected people can hold FMO accountable to its policies. As FMO has adopted the Equator Principles the establishment of FMO's Mechanism also sets an important precedent for other Equator Principle Financial Institutions, which so far have categorically refused to establish an accountability mechanism as part of the Equator Principles governance system.² We further support FMO's invitation to other European DFIs to join them in their commitment to redress any harm caused by their investments through the establishment of, or linking themselves to, this mechanism.

Establishing a mechanism is one thing. The proof of the pudding, as always, is in the eating. Please get in touch with us if you or a community you work with has been adversely affected by a project financed by the FMO or DEG. We from our side will seek to ensure that the Mechanism gets tested and improved. We will keep pushing for greater public participation and transparency in future reviews of the Mechanism.

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More information:

<http://www.fmo.nl>

<http://www.fmo.nl/page/1115>

<http://www.banktrack.org/show/bankprofiles/fmo>

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[http://www.banktrack.org/show/news/new_equator_principles_to_have_deepl...
eople_and_planet](http://www.banktrack.org/show/news/new_equator_principles_to_have_deepl...)