

February 29, 2016

Steven Priem
Complaints Office
Nederlandse Financierings-Maatschappij voor Ontwikkelingslanden N.V.
P.O. Box 93060
2509 AB The Hague
The Netherlands

Re: Joint CSO Comments on Draft ICM Policy

Dear Mr. Priem:

The undersigned civil society organizations (CSOs) would like to express our appreciation for the opportunity to provide comments on FMO/DEG's draft Independent Complaints Mechanism (ICM) Policy. While the new policy introduces a few improvements and clarifies the ICM's procedures, in several significant ways, it also represents a step backwards from the existing policy. The ICM represents an innovative model, shared between two development finance institutions. To achieve its potential, however, additional changes are needed to the ICM Policy and FMO/DEG's environmental, social, and disclosure policies.

These comments reflect, in large part, the analysis and recommendations of the recent report, *Glass Half Full? The State of Accountability in Development Finance* (available at: glass-half-full.org), in particular Annex 10 on FMO/DEG and the ICM. The report identifies best practice among Independent Accountability Mechanisms (IAMs) that we encourage FMO/DEG to adopt in its ICM Policy. The report also includes a case study of the ICM's first complaint regarding the Barro Blanco project, and, consequently, will not be analyzed in detail in these comments.

We organized the report and these comments according to the effectiveness criteria for non-judicial grievance mechanisms (NJGMs) of the UN Guiding Principles on Business and Human Rights (UNGPs): legitimacy, accessibility, predictability, equitability, transparency, rights compatibility, and lessons learned.¹ As described in the report, both the mechanism and the institution(s) that administers it have common but differentiated responsibilities to fulfill the criteria. Responsibility for providing remedy to those who have been harmed by activities financed by FMO/DEG does not and cannot rely on the ICM alone. FMO/DEG must fulfill their responsibility in order for the ICM to function effectively. For that reason, it may be necessary to elaborate a corollary policy for FMO/DEG that details the responsibility of FMO/DEG services, management and supervisory boards. Alternatively, the ICM policy should better specify the role of FMO/DEG. Modifications to other FMO/DEG policies may also be necessary to improve the accountability system.

¹ UNGP Principle 31.

Cross-Cutting Issue: Confidential Side Agreements

We want to highlight one issue that implicates all of the effectiveness criteria: the practice of negotiating confidential side agreements with FMO/DEG clients to obtain their participation in the complaint process regarding projects that were approved prior to the ICM's creation. Such an agreement was negotiated in the Barro Blanco case, and now the draft ICM policy proposes to formalize the practice through footnote 1. These side agreements seriously threaten the credibility and legitimacy of the ICM, and consequently, our confidence in it.

The side agreement negotiated in the Barro Blanco case superseded the publicly available procedures of the ICM and allowed FMO/DEG's client to review the draft and final investigation reports before they were shared with complainants. In practice, the company review caused significant delays in the process, with the company and/or the FMO/DEG refusing to allow the ICM to share the reports with complainants until the complainants threatened to go to the media. The company review combined with the sequencing of the disclosure, which allowed FMO/DEG and its client to review the draft and final reports before they were disclosed to complainants, undermined the complainants' confidence in the report's contents, despite reassurances from the ICM Panel members.

FMO/DEG's justification is that because the ICM is not explicitly referenced in loan agreements negotiated prior to the ICM's creation, a side agreement with the client is necessary in order to allow ICM Panel members access to project information. We are not aware of any precedent for this. All of the IAMs were established well after the DFIs which administer them. Yet, we know of no other development finance institution (DFI) that found it necessary to negotiate a confidential side agreement to allow its IAM to handle a complaint regarding a project financed prior to the mechanism's creation. We fail to understand why ICM Panel members are not considered FMO/DEG employees for the purpose of the complaint and granted the same access as any other FMO/DEG employee. For that reason, we see no justification for a side agreement on this basis.

Similarly, FMO/DEG's argument that the confidential side agreements are necessary in order to protect business confidential information is unpersuasive. The issues addressed in a compliance investigation, namely the environmental and social impacts of a project, should not be protected as business confidential information. Rather, they are issues that are in the public interest, especially when, as here, those impacts are the result of financing from state-owned enterprises like FMO and DEG. Information that could be considered business confidential—trade secrets, financial information, etc.—is not the subject of the ICM's investigation. Therefore, we see no justification for a side agreement for this purpose either.

If the ICM is to be seen as a legitimate grievance mechanism, it must treat all complainants equally. The process must be consistent and predictable for all complainants regardless of which project affects them. The treatment of complainants should not vary, and should certainly not depend on the demands of FMO/DEG's client(s). **We strongly urge**

FMO/DEG to remove footnote 1 from the draft ICM Policy and end its practice of negotiating confidential side agreements with their clients.

Legitimacy

The legitimacy of a grievance mechanism relies, in part, on the mandate it is given. The ICM's mandate and objective are described in different places throughout the draft ICM Policy. In paragraph 1.1.2, its mandate is described as resolving disputes and assisting FMO/DEG to implement its own policies. In paragraph 1.2.1, the ICM is described as "an effective avenue for addressing concerns and [promoting] a mutually constructive relationship between FMO/DEG and External Parties." Elsewhere, the ICM's role is described as holding FMO/DEG accountable to its stakeholders.² However, nowhere does the policy explicitly state that the objective of the ICM is to ensure that those harmed by FMO/DEG financed activities receive remedy, which is the ultimate goal of NJGMs under the UNGPs. **We recommend that the ICM Policy explicitly state that the mandate of the ICM, regardless of whether it is pursuing a compliance investigation or a dispute resolution process, is to ensure the complainant receives remedy for harms caused by FMO/DEG-financed activities.**

A mechanism must have the trust of those who it is intended to benefit, in this case people who have been or will be harmed by activities financed by FMO/DEG. In order to engender that trust, the members of the mechanism must be independent from the staff and management who are responsible for the financing decisions. One way to ensure independence and legitimacy is to include external stakeholders in the selection of the members of the ICM's Panel. Currently, FMO/DEG's chief executive officers (CEOs) select the Panel members, after consultation or approval from their respective supervisory boards.³ The International Finance Corporation's (IFC) Compliance Advisor Ombudsman (CAO), the European Bank for Reconstruction and Development's Project Complaint Mechanism, the Examiners of the Japan Bank for International Cooperation/ Japan International Cooperation Agency, and the Inter-American Development Bank's Independent Consultation and Investigation Mechanism all include external stakeholders in the selection of the mechanisms' staff. In the case of the CAO, the selection committee consists exclusively of external stakeholders. **We recommend that paragraph 3.4.2 be revised to establish a selection committee for Panel members, which includes one or more external stakeholders.**

We appreciate the provision in paragraph 3.4.2 requiring a cooling off period for anyone involved in FMO/DEG operations before joining the Panel. To further enhance the independence of Panel members, **we would recommend that paragraph 3.4.2 also prohibit Panel members from being employed by FMO/DEG following their term on the Panel**, which is consistent with practice at the World Bank's Inspection Panel.

² para. 2.1.2.

³ para. 3.4.2.

Section 1.2 on Institutional Framework should establish an independent and dedicated secretariat to support the work of the Panel. The secretariat could support the Panel in ensuring regular communication with the complainants, site visit logistics, and investigations, among other tasks. The involvement of the secretariat in complaints also necessitates that its staff are independent from FMO/DEG management and report directly to the Panel members.

Paragraph 1.2.6 states that FMO and DEG are members of the IAMs Network. As we understand it, the members of the network are limited to the mechanisms themselves, not the DFIs, in order to preserve their independence and legitimacy. This paragraph should be re-phrased to reflect that the ICM is a member of the network, not FMO/DEG.

Accessibility

Project-affected communities must first know about the ICM in order to access it. For that reason, the most important way in which FMO/DEG can ensure the accessibility of the ICM is to require their clients to disclose information about the mechanism to people affected by their operations in a culturally- and language-appropriate manner. Clients are already required to disclose information regarding the potential adverse environmental and social impacts of the activity and develop project-level grievance mechanisms. It would not be onerous to require clients to disclose information about the ICM at the same time. The Asian Development Bank (ADB) and its clients are required to disclose the availability of the ADB's Accountability Mechanism to project-affected people. In the absence of such a requirement, FMO/DEG are relying on chance that those who need the mechanism will find it. The ICM can and should undertake outreach activities to raise awareness among civil society, but that alone will not ensure that project-affected communities have the information they need to submit a complaint should they feel harmed by activities financed by FMO/DEG. **We recommend that the requirement to disclose the availability of the ICM be included in FMO/DEG's environmental, social and governance policies or the ICM policy, as appropriate. Similarly, FMO and DEG can also improve the visibility of the ICM themselves by adding a link to the ICM from their homepages.**

Once project-affected communities find the ICM, there are several elements of the ICM's Policy that enhance its accessibility. We appreciate that the draft policy has eliminated the requirement in the existing policy that requires complainants to file within one year the date on which the facts, upon which the allegation is grounded, could be reasonably known. We also appreciate the continued possibility that the ICM can sequence compliance review and dispute resolution in any order.⁴ These both facilitate access to the ICM. When both functions are used in the same complaint, the policy should specify that different ICM panel members will be assigned to each.

There are, however, several new provisions in the draft that represent a step backwards from the existing policy. The first is the proposed exclusion of complaints regarding activities in which FMO/DEG's investment is made through participation in a B-loan of

⁴ para. 3.2.5.

another DFI with a similar complaints mechanism.⁵ FMO/DEG's obligation to ensure that environmental and human rights standards are respected is not dependent on its leverage over the client. If FMO/DEG does not have sufficient leverage to ensure its client complies with its policies, they should not invest in the project. Further, the policies, practice and IAMs of other DFIs vary considerably. For example, many DFIs do not have a policy similar to FMO's Human Rights Policy. Each investor maintains its own responsibility for ensuring compliance with their own policies, and each investor should be held accountable should those policies be violated. Further, FMO/DEG publish all investments, regardless of the vehicle, on their websites. Thus, potential complainants have a justifiable expectation that the ICM would treat all complaints equally. **We recommend that the definitions of "DEG-Financed Operation" and "FMO-Financed Operation" be amended to ensure that the ICM can receive complaints about any activity financed by FMO/DEG regardless of the vehicle.**

The provisions of paragraph 3.1.6 also unnecessarily limit the accessibility of the mechanism. The language would prevent the ICM from undertaking a dispute resolution process on a complaint that had also been submitted to court. It is not always the case that a pending lawsuit would prevent an IAM from facilitating a successful mediation process or that a mediation process would interfere in a judicial process. The CAO, for example, has successfully mediated a dispute in a case in which some of the complainants had pending lawsuits against the IFC's client. **Instead, the paragraph should be amended to allow the ICM to make a case-by-case determination whether dispute resolution would be possible.**

In the same paragraph, the procedures would allow for the possibility of suspending a complaint requesting compliance review if a complaint was also submitted to another IAM. It is not clear under what conditions and for what period of time a complaint could be suspended or, for that matter, why. As discussed above, a complaint regarding the compliance of another DFI with their policies does not absolve FMO/DEG from its own obligations. This is especially true given that: 1) FMO/DEG's policies are not identical to that of other DFIs; and 2) FMO/DEG has not committed to accept or respond to the findings of other IAMs. If the purpose of the provision is to eliminate duplication of effort with other IAMs, that should be addressed by the MoUs that IAMs adopt when handling complaints on the same project. **We recommend that this provision be deleted.**

We appreciate that the revised policy in paragraph 3.1.1 allows complaints to be filed in any official language of the country of the complainants. Accessibility would be greatly improved by allowing complainants to submit a complaint in their own language, regardless of whether that is an officially recognized language or not. This would be particularly applicable for indigenous peoples. **We recommended that paragraph 3.1.1 be amended to allow complainants to submit complaints in their own language.**

Predictability

⁵ Definitions section, "DEG-Financed Operation" and "FMO-Financed Operation".

One key element to ensuring a predictable complaint procedure is defining deadlines for each stage. The revised policy does not have a deadline for the ICM's completion of the preliminary assessment nor the finalization of a compliance review. While it is to be expected that complex cases might take longer, in order to hold the ICM accountable and provide some level of predictability in the process, an indication of the average time it should take to complete each stage should be indicated in the policy. If additional time is required, the ICM should be allowed to extend the deadline provided that it is communicated to the complainants and disclosed on the registry. That is consistent with the policy and practice at other IAMS. At a minimum, the ICM should include a terms of reference in its admissibility determination that defines the deadlines for that particular complaint. **The ICM policy should identify deadlines for all stages of the complaint.**

Monitoring the results of the process also contributes to predictability by ensuring that commitments made either by FMO/DEG or their clients are implemented. The draft currently does not provide for monitoring of agreements reached through dispute resolution. The success of a dispute resolution is not whether an agreement was negotiated, but whether the commitments in the agreement were implemented successfully to address the conflict. The ICM has a role to play to monitor and publicly report on the implementation of the agreements reached through dispute resolution. **We recommend that a monitoring role in dispute resolution be defined for the ICM in paragraph 3.2.7.**

While the draft policy provides for monitoring following a compliance review, the provisions found in paragraph 3.2.17 are not adequate in two aspects. First, the draft policy requires only that the corrective actions that FMO/DEG have agreed to be monitored. The corrective actions, however, may not be sufficient to address the Panel's findings of non-compliance. In that case, the project could remain out of compliance with FMO/DEG's policies even after the completion of corrective actions. **Instead, the ICM should monitor the case until all instances of non-compliance found in its investigation have been remedied, which may extend beyond the 12 months provided for in paragraph 3.2.17.** This approach to monitoring is standard practice at the CAO. Secondly, the draft policy currently assigns the monitoring role to the Complaints Office, not the Panel itself. Because it is the Panel's responsibility to make findings of non-compliance, it should also be its responsibility to monitor whether its findings have been addressed. The Complaints Office could retain its responsibility for monitoring the implementation of corrective actions, but that should be in addition to the Panel's monitoring role.

In order to adequately discharge its monitoring role, **the ICM should be allowed to undertake site visits it determines necessary to verify the implementation of agreements and whether instances of non-compliance have been addressed.** As described in more detail below, the ICM should also consult the complainant to inform its monitoring reports.

Another basic element of predictability is that complainants know which version of FMO/DEG's environmental and social policies apply to the project. Normally, the version of

the policies that applies to a project is the version that is in effect at the time the project is approved. Currently, FMO's policies are not dated and previous versions of the policies are not available online. For example, we know that recently the reference to the OECD Guidelines on Multinational Enterprises was removed from FMO's Environmental and Social Governance Policy. Potential complainants need to know when the new policy, with the reference to the OECD Guidelines removed, was adopted and have access to the previous version of the policy. More importantly, such an important change to the policy, which means that FMO is no longer in compliance with the guidance of the Ministry of Foreign Affairs, should have been part of a formal review process with an opportunity for public comment. **We therefore suggest that: 1) drafts of new policies are subject to public consultation; 2) all policies are clearly dated; and 3) previous policies and the dates they were in effect remain available online.**

Equitability

An equitable process requires that the complainants have the same opportunities to engage in the process as other parties and that power imbalances between the parties are eliminated to the extent possible. The draft policy has improved equitability in one way, by explicitly recognizing that both parties to a dispute resolution process must agree on the mediator.⁶ If either party does not trust the mediator, the likelihood of a successful outcome is low. This addition to the ICM's policy makes the dispute resolution process more equitable. Unfortunately, several other changes to the policy have made the process less equitable for the complainant and inconsistent with best practices at other IAMs.

The current ICM policy can be read to require that the draft compliance report be shared simultaneously with the complainant and FMO/DEG for their comments. The failure to do so in the Barro Blanco case, in our opinion, was not consistent with the ICM policy, undermined the complainants' confidence in the process, and delayed the completion of the process unnecessarily. The draft ICM policy enshrines that practice by directing the ICM to send the draft report first to FMO/DEG services for their comments.⁷ However, complainants do not have the opportunity to review and comment on that draft report, rather they provide their comments on an updated version without knowing what changes have been made prior to their review.⁸ For those mechanisms that allow complainants to comment on the draft compliance report, all but one allow them to comment on the draft at the same time as the DFI staff. The European Investment Bank's Complaint Mechanism does sequence the review of the draft compliance report, but its rules of procedure are currently under review. **We recommend that the ICM policy require simultaneous disclosure of the draft compliance report to FMO/DEG services and the complainant for comment.**

⁶ para. 3.2.6.

⁷ para. 3.2.10.

⁸ para. 3.2.12.

Alarming, the draft ICM policy also introduces a provision directing the ICM to share the draft compliance report with FMO/DEG's client for its review and comment.⁹ This is at odds with the purpose of the compliance review, which is to assess FMO/DEG's compliance with its own policies.¹⁰ FMO/DEG should be capable of reviewing a report about their own actions and omissions without the help of their client. Client review of the draft compliance report would only be appropriate if the ICM were undertaking a direct audit of the client's own actions and omissions. We would welcome the expansion of the ICM's mandate to include a direct investigation of the client, but unless and until the mandate is expanded, the client has no role in reviewing the draft compliance report. **We recommend that this provision be deleted.**

Following the completion of the report, the Management Board is required to prepare a response, including corrective action plan.¹¹ There is no requirement for FMO/DEG to consult with the complainants on that action plan, as is standard at many other DFIs, including the World Bank Inspection Panel. Consulting with complainants on the corrective actions ensures that those actions respond to their needs. **We recommend that language be included in paragraph 3.2.14 that requires the Management Board to develop its corrective action plan in consultation with the complainants.**

In order to have an effective consultation with complainants on the corrective action plan, complainants must have already received the final compliance report. In another step backwards from the current ICM policy, the draft policy would seemingly only allow the ICM to share the final report with complainants only after it has been sent to the Management Board and after Management has prepared its response and corrective action plan. Even if FMO/DEG will not agree to consult complainants on the development of the corrective action plan, there is no reason for the delay in sending the complainants the final report. **We recommend that the draft ICM policy be amended to require the ICM to disclose the final report simultaneously to the complainants and FMO/DEG.**

The ICM also prepares a report following a dispute resolution process. The draft ICM policy does not provide the opportunity for the parties to review the draft report prior to its disclosure.¹² Especially as dispute resolutions often involve sensitive information, it would be important for both parties to that process to have the opportunity to provide comments on a draft before it is made public. **We, therefore, suggest that paragraph 3.2.7 be amended to allow the parties to review and provide comments on the draft dispute resolution report.**

As described above, the ICM policy should require the ICM to monitor and report on the implementation of any agreements made as a result of a dispute resolution process until the ICM is satisfied that all commitments have been implemented. **The ICM should consult with the parties to inform their monitoring reports. Similarly, the ICM**

⁹ para. 3.2.12.

¹⁰ Definition section, "Compliance Review."

¹¹ para. 3.2.14.

¹² para. 3.2.7.

should also consult with complainants to inform the monitoring reports following a compliance review.¹³ As recommended above, the ICM should monitor and report on cases until such time as it determines that all instances of non-compliance found in the investigation have been remedied.

Rights Compatibility

In order for the complaint process to be rights compatible, the policies the ICM is judging compliance against must be rights compatible. We welcome FMO's recognition in paragraph 1.1.4 of the responsibility of businesses to respect human rights and recommend that similar language is included for DEG. Similarly, we appreciate the explicit reference to the OECD Guidelines for Multinational Enterprises and the UN Guiding Principles on Business and Human Rights, the former of which had been omitted from the current version of the ICM policy.

Those improvements notwithstanding, FMO/DEG have not operationalized the human rights commitments found in the OECD Guidelines and UNGPs. It is not sufficient to apply the IFC's Performance Standards on Environmental and Social Sustainability. Principle 18 of the UNGPs states that business should, "identify and assess any actual or potential adverse human rights impacts with which they may be involved either through their own activities or as a result of their business relationships." The commentary further explains that "while processes for assessing human rights impacts can be incorporated within other processes such as risk assessments or environmental and social impact assessments, they should include all internationally recognized human rights as a reference point, since enterprises may potentially impact virtually any of these rights." The IFC Performance Standards do not require assessment against internationally recognized human rights, except in "limited high risk circumstances."¹⁴ **In order for FMO and DEG to ensure that their clients act in a manner consistent with the UNGPs and, in the case of FMO, comply with its Human Rights Policy, they should require their clients to assess the human rights impacts of their operations, either as part of a larger environmental and social impact assessment or as a stand-alone assessment.**

FMO/DEG should also clarify its policy commitments. Potential complainants and, for that matter, clients, need to know what standards apply to projects financed by FMO/DEG. The draft ICM policy introduces uncertainty about the standards FMO/DEG apply to their projects. For example, paragraph 1.2.4 in the draft ICM policy states, "[FMO/DEG] *strives* that its activities respect national and EU policies and international standards."¹⁵ Similarly, paragraphs 2.3.2 and 2.4.2, instead of committing explicitly to complying with the OECD Guidelines, the UNGPs and the IFC Performance Standards, FMO/DEG state only that their policies are "based upon and/or guided by" them. It is of limited value to describe what FMO/DEG aspires to or how they arrived at their current policies. **FMO and DEG should**

¹³ para. 3.2.17.

¹⁴ PS1, fn 12. To the best of our knowledge this footnote has never been invoked.

¹⁵ para. 1.2.4 (emphasis added).

clarify whether they expect compliance with these standards or, if not, how they deviate from them.

Rights compatibility also requires measures to prevent and address retaliation against those who seek to use the ICM. Paragraph 3.1.7, which allows the complainant to request that his/her identity be kept confidential, is an important step in that regard. That provision could be further strengthened by specifying that the ICM will not disclose the complainant's identity to internal or external parties. More, however, can be done by the ICM and FMO/DEG. **The ICM should explicitly discuss the risk of retaliation with complainants and any precautionary measures that could be taken to mitigate those risks. Similarly, FMO/DEG should discuss with their clients what is expected of them when a complaint has been filed, including their expectation that no retaliatory actions are taken against complainants.**

Transparency

The ICM should not only be transparent in its activities, but it is equally important for FMO/DEG to disclose sufficient information about the activities they fund. Although the ICM can receive complaints prior to project approval,¹⁶ FMO and DEG do not publish information about the activities they finance until after they have been approved. The earlier a complaint is filed in the project cycle, the better the chances are that the issues raised can be addressed and the more the ICM can realize a “pre-emptive” role in the resolution of disputes, as described in paragraph 1.1.2. However, in order to realize that potential, FMO/DEG must disclose information about their projects earlier. The information provided about projects should also be enhanced. Currently, the information is limited, often only to a few paragraphs without any environmental and social assessment of the project. **Consequently, we recommend that FMO/DEG revise their disclosure policies and require that comprehensive information regarding projects and their environmental and social risks be published prior to their approval.**

Disclosure of the ICM's cases could also be improved. Currently, visitors must download a separate document to understand the status of a complaint. We recommend that the status of the complaint be more immediately visible on the registry, including deadlines for each major stage of the process. **We also recommend that the ICM publish information regarding cases it deems ineligible.**

Lessons Learned

Although the main objective in any complaint is to remedy the harm to the complainant and return the project to compliance with relevant policies, it is also important for the ICM and FMO/DEG to learn lessons that it can apply to future complaints and projects.

To identify lessons learned for itself and FMO/DEG, it would be useful if the ICM also had an advisory function that would allow it to identify patterns across its complaints.

¹⁶ para. 3.1.4.

Paragraph 2.1 empowers the ICM to provide advice and recommendations to FMO/DEG management, but it is unclear whether this only refers to the recommendations that would be included in a compliance report or if it refers to a broader set of activities. **We recommend that the ICM policy explicitly give the ICM an advisory function and how that function will be performed.**

To improve the handling of complaints, the ICM could implement a system to solicit input from parties following the closure of the case to learn how they experienced the process and receive their suggestions.

FMO/DEG should also develop and publish a tracking record to report back on commitments taken in response to ICM investigations, including reforms to policy and practice to improve future implementation.

Again, we appreciate the opportunity to provide comments on the draft ICM policy. If we can provide any information or clarification, please contact Kris Genovese at SOMO (k.genovese@somo.nl). We look forward to discussing this further with you.

Sincerely,

Centre for Research on Multinational Corporations (SOMO)
Both ENDS
Accountability Counsel
Center for International Environmental Law (CIEL)
Lumière Synergie pour le Développement (LSD)
BankTrack
Oxfam Novib
ActionAid Netherlands
Foundation for the Development of Sustainable Policies (FUNDEPS)
Urgewald

cc: ICM Panel members and Secretariat