

BANKTRACK

ALBERT VAN LEEUWEN
SENIOR ENVIRONMENTAL SPECIALIST
FMO
PO Box 93060
2509 THE HAGUE
NETHERLANDS

SUBJECT:
ADDITIONAL QUESTIONS ON AGUA ZARCA DAM PROJECT, HONDURAS
FOLLOWING CONFERENCE CALL SEPTEMBER 26

7 OCTOBER 2013

Dear Mr Van Leeuwen,

On behalf of my colleagues, I would like to thank you for your willingness to frankly discuss with us the potential involvement of FMO in the Agua Zarca Dam project on the phone last week. The discussion provided us with valuable insights on the due diligence and decision making process of FMO but also raised additional questions with us. We would be pleased if you could also address these questions when responding to our letter of September 25:

Your due diligence process

It is our understanding now that the Agua Zarca dam has not yet been financed by FMO or CAMIF. Both investments are still in the structuring phase. Apparently the Environmental and Social Impact Assessment for the project has already been conducted, and this did not identify indigenous communities among those impacted by the project. However, given recent developments, FMO has hired a consultant to once more review the conditions surrounding the project, a consultant that does not have specific expertise in indigenous issues but that has access to such expertise.

- Can you confirm that we are correct in our current understanding of your due diligence process?

Equator Principles

In our first letter we mistakenly assumed that for FMO this project was not subject to the Equator Principles. However, your website states that 'FMO has chosen to apply the Equator Principles to all financing, meaning that we apply the principles to financing under US \$10 million and not only our



project finance transactions but corporate finance as well.¹ From this we now conclude that the Equator Principles *do* apply to this project.

- Can you confirm that the Equator Principles apply to this project, or state the reasons if they are not?

As the project is still being considered, we assume that EPIII will apply. Even if the project is still considered under EPII this would place important additional obligations on both FMO and the project sponsor, beyond those already contained in your 'environmental and social policy':

Principle 1: Review and Categorization

We assume that your categorization process follows the criteria of IFC/Equator Principles. Due to the project's impacts on land, indigenous peoples, and its health and safety risks, among others, we would assume that this project is placed in Category A.

- We would like to hear from you in which category you place this project.

Principle 2: Environmental and Social Assessment

As you mentioned in our call, DESA has prepared an Environmental and Social Impact Assessment (ESIA), which has been reviewed by an independent expert. Following recent developments in the area, FMO has ordered further assessments. It is unclear to us whether the assessment has been complemented by specific human rights due diligence as is also required under Principle 2. Your remark that the initial due diligence did not bring to light any issues around indigenous lands left us concerned that such human and indigenous rights due diligence has not been conducted.

- Can you confirm that the Equator Principles and IFC's Performance Standards serve as terms of reference for the ongoing review by the consultant?
- Can you clarify whether additional human rights and indigenous rights due diligence has been conducted?

We also like to note that Principle 5 requires that the assessment documentation is made '*readily available to the Affected Communities, and where relevant Other Stakeholders, in the local language and in a culturally appropriate manner.*'² Principle 10 further states: '*The following client reporting requirements are in addition to the disclosure requirements in Principle 5. For all Category A and, as*

¹ <http://www.fmo.nl/reports>

² http://www.equator-principles.com/resources/equator_principles_III.pdf, p.7



*appropriate, Category B Projects: The client will ensure that, at a minimum, a summary of the ESIA is accessible and available online*³

As neither the Civic Council of Popular and Indigenous Organizations of Honduras (COPINH), nor other relevant stakeholders have ever seen such documentation, we note that DESA has not met its obligations under Principle 5 and Principle 10.

- We request that you urge DESA to make this documentation publicly available to both COPINH and on FMO's website.

Principle 4: Environmental and Social Management System and Equator Principles Action Plan

The Equator Principles require the client to *'develop or maintain an Environmental and Social Management System (ESMS), plus an Environmental and Social Management Plan (ESMP) to address issues raised in the assessment process and incorporate actions required to comply with the applicable standards. Where the applicable standards are not met to the EPFI's satisfaction, the client and the EPFI will agree to an Equator Principles Action Plan (AP).'*⁴

You mentioned in the call that FMO may at times also consider financing projects that do not yet meet the requirements, but where you are confident that the client will be able to meet the requirements in the near future. You emphasized that this is often the case and that this is also an essential part of FMOs' desired role; to assist clients in meeting advanced standards when conducting their business. This implies that Agua zarca is such a project and that DESA, in addition to the ESMS and ESMP, also has, or is to have, an Equator Principles Action Plan (AP) in place.

- Can you clarify if DESA has been required to develop such an Action Plan, and what were the areas of non compliance?

Principle 5: Stakeholder engagement

In the call you mentioned that it is unclear to you whether there is indeed such widespread resistance to the project by local communities as claimed by COPINH. You mentioned that FMO obtained documentation from DESA that suggested otherwise, without being specific. You also added that it is hard to establish who is right here as 'such situations are always confusing'.

That may be. However, Principle 5 states that *'the EPFI will require the client to demonstrate effective Stakeholder Engagement as an ongoing process in a structured and culturally appropriate manner with*

³ idem, p 10

⁴ Idem, p.7



Affected Communities and, where relevant, Other Stakeholders' It further states that *'For Projects with potentially significant adverse impacts on Affected Communities, the client will conduct an Informed Consultation and Participation process. The client will tailor its consultation process to: the risks and impacts of the Project; the Project's phase of development; the language preferences of the Affected Communities; their decision-making processes; and the needs of disadvantaged and vulnerable groups. This process should be free from external manipulation, interference, coercion and intimidation.'*⁵

This signifies that you need to assess two different things: 1) whether the quality of the consultation process conducted by DESA has met the criteria listed above, so an assessment of *the process*, and 2) whether DESA has indeed obtained a license to operate from affected communities, so an assessment of *the outcomes of that process*.

- Can you share your opinion on the quality of the consultation *process* conducted by DESA?
- Can you share with us the consultation report, or any other documentation that sheds light on the position of DESA that there is sufficient support for the project from local communities?
- Can you share with us your opinion on DESA's claim on the *outcome of the consultation process*, namely that there is sufficient support for the project?

We note that if in the past the consultation has been conducted in an unsatisfactory manner, which we have every reason to believe, this non-compliance with the Equator Principles requirements cannot be addressed in any future Action Plan as it is simply too late now.

Principle 5 places additional requirements on projects that affect indigenous peoples. It states that these *'will be subject to a process of Informed Consultation and Participation, and will need to comply with the rights and protections for indigenous peoples contained in relevant national law, including those laws implementing host country obligations under international law. Consistent with the special circumstances described in IFC Performance Standard 7 (when relevant as defined in Principle 3), Projects with adverse impacts on indigenous people will require their Free, Prior and Informed Consent (FPIC)'*⁶

We are very concerned that your initial due diligence process has apparently overlooked many issues that relate to the presence of indigenous communities in the project area. We further think that the consultation process has not met the requirements stated above with regards to consultation of indigenous people and obtaining their Free, Prior and Informed Consent.

⁵ Idem p.7

⁶ Idem p.7/8



It is relevant to point out that the IFC's performance standards explicitly state that *"In addition to meeting the requirements under the Performance Standards, clients must comply with applicable international law, including those laws implementing host country obligations under international law."* This language mandates the implementation of the International Labor Organization's Convention 169, as it was ratified by Honduras in 1994 and now forms part of Honduras' body of law. Thus, the ILO guidelines for the implementation of ILO 169 should serve as an important reference for the current review of project compliance with the IFC's Performance Standards.

- Please clarify to us the opinion of FMO on whether indigenous peoples issues have been adequately addressed by DESA in light of the requirements and obligations listed above

Principle 7: Independent Review

You have mentioned that, in accordance with Principle 7, FMO has hired an independent consultant to review (we presume) *'the Assessment Documentation including the ESMPs, the ESMS, and the Stakeholder Engagement process documentation in order to assist the EPFI's due diligence, and assess Equator Principles compliance.'*⁷ You also stated that FMO has commissioned a new round of investigations and independent review of the documentation.

We think that for the independent consultant to make a proper assessment as described above it is essential that he/she also receives information that has not been provided by DESA.

- We kindly request FMO to share the contact details of the independent consultant with us.

Principle 10: Reporting and Transparency

As already mentioned, this principle requires that *'The client will ensure that, at a minimum, a summary of the ESIA is accessible and available online'*.

- We note that until now DESA has not been in compliance with this requirement and urge you to insist on publication of, at minimum, this summary.

Overall, we would like to reiterate that the Equator Principles are a risk management tool at your disposal to identify and if possible, manage risks associated with this project. We appreciate your role and desire to help clients to better manage risks associated with projects they undertake, and understand that this may take time to achieve. However, from the perspective of our organisations it is

⁷ Idem p 8



clear that this project does not fall into the category of projects that can still be made Equator compliant in due time; too much has already gone badly wrong;

There has been systematic violation of indigenous rights, as well as illegal acquisition of lands. The vast majority of the local indigenous population of the affected area, Río Grande, have been hindered in expressing their rejection to the hydroelectric project: The region has been militarized, there has been intimidation of the protesters, death threats, arbitrary house searches, arbitrary detentions, criminalization of indigenous leaders by illegitimate charges while at the same time legal complaints made by COPINH have been ignored so far. The peaceful blockade of the road got evicted various times. One community member even got shot and killed by a soldier, others were injured. This climate of fear, intimidation and criminalization has not convinced the local population of quitting protests against the dam project, it rather fuels their resistance against Agua Zarca.

For all the reasons above we strongly urge you to cancel your ongoing engagement with DESA and withdraw from the project. We will continue to closely monitor your decision making process that we expect to be based on a good faith implementation of the Equator Principles.

Sincerely

Johan Frijns, Coordinator BankTrack
<Johan@banktrack.org>

Also on behalf of:

- Berta Cáceres, Consejo Cívico de Organizaciones Populares e Indígenas de Honduras (COPINH)
- Annie Bird, Rights Action
- Beverly Bell, Institute for Policy Studies
- Hans Berkhuisen, Milieudefensie
- Jeff Conant, Friends of the Earth US
- Magdalena Heuwieser, Honduras-Delegation
- Monti Aguirre, International Rivers