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State responsibility

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# The Dam on the Gualcarque River

**F**rom 2014 until 2017, the Dutch entrepreneurial development bank (*Financieringsmaatschappij voor Ontwikkelingslanden N.V.*, 'FMO') was involved in financing the Agua Zarca hydroelectric project on the Gualcarque river in the region of Rio Blanco, Honduras (see [Independent Fact Finding Mission Report and Recommendations](#), Annex 4, para. A.1., 'Independent Mission'). The river and the surrounding land are sacred to the indigenous Lenca people, and the project has been met by their continued protests. The local community maintains that they were not properly consulted by the State or the owner and developer of the project, the Honduran company Desarrollos Energéticos S.A. ('DESA'). The situation in Rio Blanco gained increased international attention after Honduran activist Berta Cáceres, co-founder of the NGO COPINH, was murdered in her home on the night of 2-3 March 2016. Less than two weeks after this, and only eight days after the Inter-American Commission on Human Rights issued [precautionary measures](#) for all members of the NGO, fellow COPINH member [Nelson García](#) was killed on 15 March 2016. This ultimately led the main [financial institutions](#), including FMO, to withdraw from the project. In November 2018, seven men were convicted of murdering Cáceres, [ordered by DESA executives](#). The executive president of the company has been charged as the ['intellectual author'](#).

In May 2018, COPINH and the children of Berta Cáceres announced they would pursue a [case](#) against FMO in the Netherlands for its role in the human rights violations in the region.<sup>1</sup> The claim concerns FMO's contentious financing of DESA, which allegedly flouted its legal obligations to consult the affected community and used threats, violence, and in the most extreme cases murder to silence opposition. DESA received funds from three main financial institutions: FMO, the Finnish Fund for Industrial Cooperation ('Finnfund'), and the Central American Bank of Economic Integration ('Cabei'). FMO approved a credit of USD 15 million with Finnfund (owned by the Finnish

State for 94.1%) acting as a 'B-lender' (see Independent Mission report, p. 7). Cabei separately invested USD 24 million (ibid). Although the World Bank Group's International Finance Corporation ('IFC') considered financing the Agua Zarca project, no investment was ever made due to human rights concerns.

Grave human rights violations have taken place throughout the project. Reportedly, employees of DESA and Sinohydro, a Chinese company initially employed to construct the dam, fenced off and destroyed communal areas and security guards prevented the local inhabitants from accessing the river (see Report of the Special Rapporteur on the rights of indigenous peoples on her visit to Honduras, Annex, Comments on the situation in Rio Blanco, paras 6 and 10, 'Report of the Special Rapporteur'). The following years the situation worsened: members of the Honduran army permanently guarded the site (ibid, para. 11) and during a peaceful protest in July 2013, Lenca leader Tomas García was shot by a soldier. FMO and Finnfund issued their loan in 2014. Following the assassinations of Cáceres and García in 2016, both suspended their activities. FMO and Finnfund jointly exited the project in July 2017. This blog post highlights the main obligations of FMO under international law, considers the bank's special position as a State-owned enterprise ('SOE'), and discusses the possible implications for the Netherlands.

### **Obligations of FMO under international law**

Agua Zarca was one of the many hydroelectric projects set up after the 2009 military coup d'état. Prior to the coup, national regulations prohibited such projects in certain protected areas, but legislative reforms repealed these and allowed water concessions for third parties (see Report of the Special Rapporteur, para. 5). DESA obtained a concession without obtaining free, prior and informed consent ('FPIC') from the local community and began acquiring land in the Rio Blanco region for the construction in 2011 (ibid, para. 7). Honduras ratified the ILO Convention No 169 on Indigenous and Tribal Peoples ('ILO 169') in 1994 and is party to the main universal and regional human rights treaties. Honduras also voted in favour of the United Nations Declaration on the Rights of Indigenous Peoples. This means that the State was obliged to conduct a process implementing FPIC prior to granting the concession to DESA in 2011 (cf Art. 6 and 15 ILO 169), but the Independent Mission noted that Honduras did nothing in this regard, and that no FPIC had been obtained for the first stage of the project.

In its current Sustainability Policy, FMO states that it 'respects internationally recognized human rights standards and takes measures to avoid supporting activities that may cause or contribute to human rights violations and acknowledges the responsibility of its clients to do the same', in line with the UN Guiding Principles on Business and Human Rights ('UNGPs'). Furthermore, FMO requires that all clients comply with applicable human rights laws in their home and host countries and upholds the standards of, among others, the OECD Guidelines for Multinational Enterprises and the IFC Performance Standards of the World Bank Group. The lack of any regulation by the State meant that it was hard for the companies involved to implement ILO 169, but did not free them from the obligation to consult the local community; IFC Performance Standard 7 required FMO to ensure FPIC (see Independent Mission report p. 12-13, 20-21, 30). In October 2016, several Dutch banks including FMO, civil society organisations, trade unions and the Dutch Government signed up to the Dutch Banking Sector Agreement (IMVO-convenant bancaire sector)

on International Responsible Business Conduct regarding Human Rights. By becoming a party to the Agreement, FMO agreed to respect human rights under the above-mentioned instruments.

Former Minister for Foreign Trade and Development Cooperation Lilianne Ploumen has stated that FMO would never have invested in the Agua Zarca project had the Agreement been in force at the time of their initial engagement. But the claimants' lawyer has argued that FMO should never have invested in the project in the first place. If it is indeed correct, as the Independent Mission, NGOs, and various media report, that FMO financed DESA *after* the murder of Tomas García in 2013, it is doubtful how effectively FMO carried out their due diligence. According to the International Advisory Group of Experts ('GAIPE'), created at the request of Cáceres' family and with the support of civil society organisations, the financiers had prior knowledge of the human rights risks and the financing of Agua Zarca constitutes 'willful negligence': having been aware of DESA's malpractice, the banks 'preferred to look the other way and maintain the financing and operation of those who carried out these criminal acts.' (GAIPE report, p. 44 and executive summary). The UN Special Rapporteur on the Rights of Indigenous Peoples came to a similar conclusion:

*(...) the investment banks in this case must be aware of their responsibilities, having been in a business relationship with a company implicated in acts constituting crimes and serious human rights violations. Even before the murder of Berta Cáceres, grave human rights violations have occurred including threats, assaults and deaths caused by military agents, individuals connected to the company or supporters of the project. However, it is concerning that notwithstanding this situation, the investment banks never saw reason to question their support of the project, even though, according to FMO (...) due diligence visits and assessments were continuously undertaken and consultants were hired to assess the project's impacts. (Report of the Special Rapporteur, Annex, Comments on the situation in Rio Blanco, para. 58)*

The UN Special Rapporteur also mentioned the UNGP on human rights due diligence for corporations: according to the commentary to UNGP 17, 'questions of complicity may arise when a business enterprise contributes to, or is seen as contributing to, adverse human rights impacts caused by other parties' (ibid, para. 61). Conducting appropriate human rights due diligence would help corporations minimise the risk for the victims of such violations and for their own liability.

### **FMO is a State-owned enterprise**

The Dutch development bank FMO is a *staatsdeelname* (State shareholding, translation JT) of which 51% of the voting shares are in the hands of the Dutch State. The remaining shares largely belong to Dutch banks including ABN AMRO, ING, Rabobank, and Triodos (see *Bijlage Jaarverslag Beheer Staatsdeelnemingen 2018*, p. 55). The OECD Guidelines on Corporate Governance of State-Owned Enterprises 2015 define SOEs as 'any corporate entity recognised by national law as an enterprise, and in which the state exercises ownership (...). [S]tatutory corporations, with their legal personality established through specific legislation, should be considered as SOEs if their purpose and activities, or parts of their activities, are of a largely economic nature.' The Guidelines add that they 'apply to enterprises that are under the control of the state, either by the state being the ultimate beneficiary owner of the majority of voting shares or otherwise exercising an equivalent degree of control.' Applying this to the case of FMO, it appears the development bank fulfils these criteria: FMO has been established through specific legislation

(i.e. the *Wet Nederlandse Financieringsmaatschappij voor Ontwikkelingslanden*, Stb 1970, 237, and Stb 1977, 296, 'Wet FMO'), its purpose and parts of its activities are of a largely economic nature, i.e. to contribute to the expansion of the industry of developing countries (see Art. 1 Wet FMO), and the Dutch State holds the majority of voting shares. This in turn raises the question whether the Dutch State bears any responsibility for the acts of such an enterprise based on the law of State responsibility.

### **Attribution of conduct to the Netherlands?**

While we cannot construe FMO as a State organ under Art. 4 ILC-Articles on State Responsibility (FMO is not a *de jure* organ, and cannot be classified as a *de facto* organ either as it does not meet the strict criterion of 'complete dependence' required by the International Court of Justice<sup>2</sup>), perhaps we could consider a State-owned development bank an entity exercising elements of governmental authority in the sense of Art. 5 ILC-Articles on State Responsibility. The conditions are that the entity is empowered by the law of the State in question to exercise elements of governmental authority and that it is acting in that capacity in that particular instance. As for the legal basis, FMO is a 'legal person with a statutory task' (*rechtspersoon met een wettelijke taak*). This means that the entity is an independent body with legal personality that performs tasks regulated by law and wholly or partially financed with public money. It is less certain that FMO also performs 'elements of governmental authority'. As stated above, Art. 1 Wet FMO stipulates the purpose of the enterprise: to contribute to the expansion of the industry of developing countries in the interest of the economic and social progress of these countries. This is arguably in the public interest. The fact that FMO is financed by public money and that 51% of FMO's shares are owned and managed by the State is not insignificant, and it is worth noting the Minister of Finance's acknowledgement that without a guarantee from the Dutch State, FMO would not be able to invest in projects where traditional banks would not enter due to the risk profile.<sup>3</sup> However, in *Waste Management, Inc. v United Mexican States* (ICSID Additional Facility Case No. ARB(AF)/00/3, award of 30 April 2004) the arbitral tribunal could not answer the question whether the actions of Banobras, a development bank partly owned and substantially controlled by the Mexican government whose objective was 'to promote and finance activities carried out by the Federal, State, and Municipal Governments of the Country', was exercising governmental authority within the meaning of Art. 5 (award, para. 75). The ILC's commentary also prescribes caution: the 'internal law in question must specifically authorize the conduct as involving the exercise of public authority; it is not enough that it permits activity as part of the general regulation of the affairs of the community. It is accordingly a narrow category.' Tentatively concluding that the conduct of FMO is therefore not attributable to the State under Art. 5, this is not necessarily the end of the road for engaging the responsibility of the Netherlands.

### **Other avenues for State responsibility?**

The State may still have a case to answer, i.e. for a failure to meet its own, independent obligations under international human rights law. In an open letter to the former Minister of Foreign Trade and Development Cooperation dated 14 March 2016, SOMO, a Dutch NGO focused on multinational corporations, stated that the 'Government of the Netherlands has an obligation under human rights law to ensure that its state-owned enterprises respect human rights in their operations.' UNGP 4 is

illustrative here: under this principle, states should ‘take additional steps to protect against human rights abuses by business enterprises that are owned or controlled by the State, or that receive substantial support and services from State agencies such as export credit agencies and official investment insurance or guarantee agencies (...)’. The commentary includes development finance institutions and notes that where such agencies ‘do not explicitly consider the actual and potential adverse impacts on human rights of beneficiary enterprises, they put themselves at risk (...) for supporting any such harm, and they may add to the human rights challenges faced by the recipient State.’ The commentary ends by stating that ‘a requirement for human rights due diligence is most likely to be appropriate where the nature of business operations or operating contexts pose significant risk to human rights.’ This would include an obligation on the Netherlands to inform itself of the risks indigenous rights activists faced in the area – which were arguably already apparent at the time of FMO’s investment in 2014. Although the claimants have chosen to bring a case against FMO alone, is it worth considering the duty of the State to protect against adverse human rights impacts (cf UNGP 1). Moreover, UNGP 7, drafted specifically for business and human rights in conflict-affected areas, obliges States to help ensure that businesses operating in those contexts are not involved with gross human rights abuses, with para. (a) requiring the State to help the business enterprise identify, prevent and mitigate human rights-related risk. Research has shown that the terminology employed in this provision reflects the intention of the drafters to expand the scope of UNGP 7 beyond the traditional concept of armed conflict in international humanitarian law. The exact meaning of ‘conflict’ here is another debate, but for the case of Honduras, one of the most dangerous countries for human rights and environmental activists in the world, the threshold would possibly be met, meaning UNGP 7 would be applicable for the Netherlands in this case too.

## In conclusion

In a piece for The Guardian, former UN High Commissioner for Human Rights Mr. Zeid Ra’ad Al Hussein wrote that ‘the actions taken by FMO are surely among the minimum required for a financier in a situation like this.’ FMO, a SOE with a considerable amount of available knowledge of and expertise in developing countries and conflict areas, chose to finance a highly contentious project a year after local protesters were attacked and even killed by those affiliated with the very company in charge of carrying out the work. This conduct seems to be in contravention of the actions prescribed by applicable human rights standards. Last month, the Dutch national newspaper *Trouw* published an article on FMO’s controversial decision to spend a ‘phenomenal’ amount of money on a law firm; a sum far higher than any settlement with the claimants would cost. If a judgment is rendered, it will likely clarify the scope of the duty of care foreign finance institutions have in such development projects and perhaps address whether this duty is higher considering FMO’s connection to the State. Although attributing FMO’s conduct directly to the State may be a step too far, the State’s own duty to protect under the UNGPs may also inform the ultimate decision.

1. On 16 July 2018, FMO received a writ of summons initiating legal action by COPINH and the children of Berta Cáceres against FMO in relation to its former financing relationship with the Agua Zarca project. In its first Human Rights Progress Report of 18 December 2018, FMO stated it ‘recognizes the right to a legal process and trusts that the Court will confirm that FMO

acted in good faith.’ See <<https://www.fmo.nl/news-detail/62ddcf18-8041-4968-b0e3-0bc257750e08/fmo-publishes-its-first-human-rights-progress-report>> accessed 19 November 2019.

2. *Application of the Convention on the Prevention and Punishment of the Crime of Genocide (Bosnia and Herzegovina v. Serbia and Montenegro)* Judgment, ICJ Reports 2007, p. 43 para. 392; *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)* Merits, Judgment, ICJ Reports 1986, p. 14, para. 110.
3. Minister van Financiën, Deelnemingenbeleid Rijksoverheid, lijst van vragen en antwoorden, Kamerstukken II 2013/14, 28165, 170, antwoord 66. See also Cees van Dam & Heleen Tiemersma, *Staatsondernemingen en mensenrechten*, NJB 2018/2196, 3 December 218, para. 4.6.

State responsibility

Due diligence

Supply chain

DARS

South America

UNGPs

State-owned enterprise

