



INDEPENDENT CONSULTATION
AND INVESTIGATION MECHANISM

MEMORANDUM

CONSULTATION PHASE ELIGIBILITY DETERMINATION

FROM: Isabel Lavadenz-Paccieri, Project Ombudsperson
TO: Executive Secretary
CC: MICI
REFERENCE: Case BR MICI1/2010
RELATED PROJECT: Program for Social-Environmental Recovery of the Serra do Mar and Mata Atlantica Mosaics (BR-L1241)
COUNTRY: Brazil
DATE: October 8, 2010

Summary:

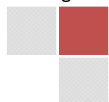
A Brazilian Non-Governmental Organization called Mongue, Coastal System Protection, represented by Mr. Plinio Melo, submitted on May 13, June 15 and October 13, 2009 communications to the old Mechanism with observations and complaints regarding a particular proposed legal framework for the establishment of special conservation units, and changes in the conservation regime of the Ecological Reserve Jureia-Itatins in the Municipality of Peruibe, Sao Paulo, Brazil¹. Said legal framework sought to modify the protection level of the Jureia-Itatins area by following a mosaic approach².

After a detailed review, this Ombudsperson has determined that the complaint is not eligible for the Assessment and Consultation Phases under the Mechanism³.

¹ The State of Sao Paulo submitted a draft bill on December, 2006 for the creation of the Mosaic of Jureia-Itatins. Said proposed law changed the size and regime of some subdivisions within the overall Ecological Reserve Area. Such a proposed bill was rejected as unconstitutional in July 2009 due to failures in the submission procedure. The declaration of unconstitutionality brings things back to the restricted regime of Ecological Reserve. The State's Environment Secretary is working towards presenting a revised draft after National Elections in Brazil.

² The government of Sao Paulo has adopted a protected area management strategy known as "Mosaic", which consists of creating a "mosaic" of conservation areas where previously a single conservation category existed. New conservation categories (ranging from strict preservation to sustainable use) are assigned to different territories according to their potential, current conservation status, and the feasibility of providing the management support that each category would require. This strategy is useful for conservation units which were created four or five decades ago, whose primary conservation purpose can no longer be guaranteed due to changes in land use, encroachment, or even natural changes (See Project Document). The Mosaic approach will be supported in its implementation by the above-mentioned project.

³ **The terms:** Mechanism, Management, Executive Secretariat, Project Ombudsperson, Panel, Mechanism Policy, Eligibility, Consultation Phase, Assessment and any other relevant term in this memorandum shall have the meaning assigned to them in the Independent Consultation and Investigation Mechanism (ICIM) Policy approved on February 17, 2010



Project Ombudsperson

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I. Background

The Program for Social and Environmental Recovery of the Serra do Mar and *Mata Atlantica* Mosaics-BR-L1241- (the Project) funded by an Investment Loan of 162,454,000 million dollars was approved by the Board on September 8, 2010.

Previously, on May 13, 2009, the Requester submitted a query to the old Mechanism and since then, the NGO⁴ he represents and/or he himself have been sending a number of complementary notes on a variety of related issues, but without specifying sufficiently their/his concerns and their relation with IADB's operational policies. More generally, Mr. Melo has expressed his frustration towards the Mosaic Law and towards policies implemented by the State Environment Secretariat (*Secretaria de Meio Ambiente*) of Sao Paulo State. He also emphasized the need for the Project and the Bank to respect the Brazilian legislation and Brazilian Court rulings⁵ by avoiding disbursing project funds for the implementation of a law that has been declared unconstitutional. Overall, the various notes sent by Mr. Melo also highlight the lack of participation during public hearings and inadequate management of protected areas by the State Environment Secretariat.

II. Eligibility Analysis

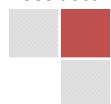
The Ombudsperson's consultation process starts with the Eligibility Determination to then move to the Assessment phase, and finally to the Consultation and mediation phase, if so agreed by all parties.

The request was submitted prior to the approval of the ICIM Policy. Although, the ICIM Policy clearly states that "this policy supersedes the Old Independent Investigation Mechanism Policy..." According to the ICIM Policy, Section 100, last paragraph, requests presented prior to the approval of the ICIM Policy would have to be processed under the rules and procedures of the old Independent Investigation Mechanism⁶. However, not all rules of the old Mechanism could be fully applied at this point due to material impossibility Hence, according to good practices and internationally accepted legal principles we will apply the old rules only to the extent that they are yet applicable and may be more beneficial for the

⁴ According to Mr. Melo's communications, the NGO Mongue is a socio-environmental nonprofit that aims at strengthening the culture and traditional practices of the Caiçara and Indigenous populations in the Jureia-Itatins area in the Municipality of Peruipe, Sao Paulo.

⁵ He attaches to his communication, the decision of the Court that declares Unconstitutional the proposed Mosaic Law.

⁶ See documents GN-1830-8; 1830-9; 1830-10 AND 1830-11 Last modified on August 22, 2000.



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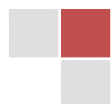
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Requester⁷. It is worth noting that the application of neither the old rules or the ones from the ICIM have had a differentiated impact on the ineligibility outcome.

As part of the Eligibility Analysis, an initial dialogue with the Project team is established, and initial information on the complaint, complainants and the relevant project (s) must be gathered. The results of such an analysis are presented in the table below.

ELIGIBILITY CRITERIA	OMBUDS DETERMINATION	COMMENTS
Names and contact information available	YES	From Mr Melo and Mongue NGO only
Bank-financed operation identified	YES	The Program for Social and Environmental Recovery of the Serra do Mar and Mata Atlantica Mosaics (BR- L1241)
Requesters reside in Project Area	YES	According to the project team and other documents in file, Mr. Melo is one of the occupants of the protected area.
None of the exclusions of the policy applies	Exclusions 37 (a); (b) and (i) of the new MICI Policy apply. In addition, exclusion (1.5, a) of the Independent Investigation Mechanism (old rules) applies.	Mr. Melo raises issues that are the responsibility of parties other than the Bank (in this case the executing agency and the Borrower's legal system). Also, he raises issues exclusively related to laws and policies of the borrower. Finally, some of the actions taken by Mr Melo and/or the Executing Agency are currently under review by the Judiciary in Brazil.
Requesters have asserted that they have been or could be directly, materially affected by the Project, and they have described the direct and material harm by an act carried out or omitted to be carried out by the Borrower in relation to the Project in violation of a relevant Operational Policy	NO	Mr. Melo argues that the mosaic Law will affect him and the families living in that particular area. Although the Project has not yet started any specific Resettlement Plan for the specific area, the State Government is engaged in a Public Civil Action to vacate the plot where Mr Melo's NGO is located in the Biological Reserve
Parties are amenable to a Consultation Phase and dialogue	Not certain	The Project team has expressed its openness, but considers the request difficult to address at this point. Mr. Melo

⁷ This legal principle allows a more extensive interpretation by which the operator will choose the norm or rule which for the case results in more favorable outcomes for the requester and his/her rights.



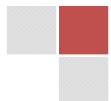
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		was not possible to be contacted before finalizing this memorandum.
Requesters have taken steps to bring the issue to the attention of Management and/or project team	YES, to some extent	Mr Melo contacted -via email- the team in the Brazil Country Office with his initial request.



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III. Contacting the Requester and Management

After receiving Mr. Melo's emails, the Executive Secretariat contacted Mr. Melo in a number of occasions⁸ asking for more specific details to understand and better address his concerns, and also asking him relevant questions that would have reduced the vagueness of Mr. Melo's statements. No responses have been received to date.

This Ombudsperson has met with the Project team to learn what the status of the issue at hand is, learn about the steps taken so far, and about the operational response, if any. Mr Melo did contact the team initially while at the same time he initiated a series of legal actions. The Project team expressed their openness but also their preoccupation with any process that may interfere, at this point, with ongoing judicial processes or the enforcement of prior judicial and administrative resolutions.

IV. Conclusion

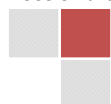
Given that (a) Mr. Melo raises issues that are the responsibility of parties other than the Bank (in this case the executing agency and the Borrower's legal system); (b) issues exclusively related to laws and policies of the borrower and (c) the complainant has already taken some legal actions as well as the implementing agency, and some of them continue or are currently under review by the Judiciary in Brazil, the Project Ombudsperson has determined that the request presented by Mr. Melo in representation of the NGO Mongue related to the Program for Social and Environmental Recovery of the Serra do Mar and *Mata Atlantica* Mosaics (BRL L1241) **is not eligible** for the Consultation Phase.

Although a complaint may not meet ICIM's eligibility criteria, **this does not imply** any judgment on the part of the Mechanism of the merit of the issues raised in the request. According to Section 54 of the ICIM Policy, the requester may wish to ask for a Compliance Review by the Panel.

Within the next two (2) business days, the Executive Secretariat will post the notice of registration on the Registry and notify the Requester, the Board, the President, Management and the Project Executing Agency or Borrower of said registration, and the contents of this memorandum.

Isabel Lavadenz-Paccieri
Project Ombudsperson
Independent Consultation and Investigation Mechanism
IADB

⁸ See emails dated June 14/15, 2010, and September 14, 2010 .from Ana-Mita Betancourt, ES of ICIM.



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