



INDEPENDENT CONSULTATION
AND INVESTIGATION MECHANISM

MEMORANDUM

COMPLIANCE PHASE ELIGIBILITY DETERMINATION

FROM: Werner Kiene, Chair of the Compliance Review Panel
TO: Executive Secretary
CC: MICI
REFERENCE: PR MICI002/2010
Case "Ruta 10 – Finca 470"
RELATED PROJECT: Program to Improve Highway Corridors in Paraguay, Loan 933/OC-PR (PR-0035)
COUNTRY: Paraguay
TODAY'S DATE: January 11, 2011

Summary:

On November 10, 2010, MICI¹ received a complaint (the "Request") about the impact of "Program to Improve Highway Corridors in Paraguay –PR-0035" (the "Project") on land ownership issues affecting the indigenous Ache community of the Ygatimi District in eastern Paraguay. The Request was sent to MICI by Professors Kim Hill and Magdalena Hurtado on behalf of the Ache community and some of their leaders.

The Request alleges that the Ache have suffered harm and will continue to do so due to the Bank's failure to enforce provisions in the Loan Agreement that were meant to safeguard their rights to ancestral lands. The Request also refers to earlier forceful evictions and to ILO- Convention 169 that the Requesters allege supports the Ache community's claims to the disputed land.

The Ombudsperson determined on December 16, 2010, that the Request is not eligible for Assessment and Consultation as stipulated in the Policies of the Mechanism, since the Requesters were not amenable to a Consultation Phase exercise at this stage and explicitly asked for a Compliance review.

A preliminary analysis of the circumstances surrounding the Request indicates that Bank Policies on Indigenous Populations, Involuntary Resettlement, Environment and Safeguards Compliance may be related to the Request. Based on a review of the available information and without any judgment on the merits of the allegations, the Chair of the Panel determines that the Request is eligible for a Compliance Review by the Panel.

¹ **The terms:** Mechanism, MICI, ICIM, 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

Chair of the Compliance Review Panel

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I. Background

1. The Request addresses issues of land rights that were stipulated in the Loan Agreement as conditions for the funding of “Ruta 10”, an east-west highway strengthening the commercial links between Paraguay’s eastern Departments and the capital. “Program to Improve Highway Corridors in Paraguay”, Loan 933/OC-PR, was approved by the Board in June of 1996. According to the PCR of the Project, the original loan amount was US \$ 82,300.000.00. The total amount disbursed was US \$ 82,445,258.16. The last disbursement took effect on August 31, 2009.
2. Since Ruta 10 crosses through a rich natural and social environment, it was one of the specific provisions of the Project to compensate the expected social and environmental impact through an offset requirement that would set aside approximately 20,000 ha. as forest reserves and some 11,000 ha. of land for indigenous settlements in the area of influence of “Ruta 10”.
3. The land area under dispute is a track of land known as “Finca 470” that was once owned by a Taiwanese investor. To fulfill some of the offset conditions of Loan 933/OC-PR, the Ministry of Public Works (MOPC) bought Finca 470 to establish a forest reserve. It was subsequently titled in the name of the Secretary of the Environment (SEAM) although SEAM had promised in a verbal agreement to turn the land over to the Ache.
4. The Requesters report that the Ache had been encouraged in various ways to prepare for the management of Finca 470 and had actually been beneficiaries of corresponding training and usufruct agreements for their using the lands of Finca 470. They also state that the Ache had met with IADB officials in Asuncion at least half a dozen times from 2001 to 2007.
5. The situation took a new turn for the Requesters when on June 21, 2010, the Minister of SEAM issued an internal notice stating that Finca 470 would be split between the Ache and Ava Guarani communities, and would be so titled. This came as a surprise to the Ache, who, according to the Requesters, see themselves trained to manage Finca 470 in line with agreed-upon provisions and having demonstrated to actually manage the area as a reserve for almost 10 years while waiting for the promised title.
6. The Requesters launched a new complaint on November 10, 2010. MICI claiming that the decisions planned by SEAM constitute a new situation and making the Bank again responsible for non-compliance with the provisions of the Loan Agreement. The Requesters explicitly asked for a Compliance Review. The Ombudsperson determined therefore on December 16, 2010, that the complaint is not eligible for the Assessment and Consultation Phases by the Ombudsperson as stipulated in the Policies of the Mechanism.

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II. Harm and Compliance Issues of the Request

1. Harm:

The Requesters state that the Ache will suffer lasting harm if they are not granted title to the lands that they had been promised as part of the Loan Agreement. Without prejudging the outcome of a possible review, these allegations are plausible in terms of pointing to direct material harm.

2. Operational Policy issues that are explicitly or implicitly referred to by the Requesters:

The Requesters blame the Bank for not having ensured the enforcement of the Loan Agreement which stipulated that the provisions contained in the Loan Proposal will be implemented.

An analysis of the Complaint suggests that the issues raised by the Requesters may relate to the following Operational Policies of the Bank:

- Indigenous Peoples
- Involuntary Resettlement
- Environment and Safeguard Compliance

3. Precursor policies:

It needs to be noted that the alleged non-enforcement of the Loan Agreement implies the non-enforcement of Operational Policies that were applicable at the time the Project was approved in June of 1996. Although the IADB Policies have evolved since then, the decisions and actions of greatest concern to the Requesters were guided by precursors of today's Policies. As was already pointed out in the eligibility determination of the Ombudsperson, the Bank's Eighth Replenishment Report, adopted in 1994, the systematic inclusion of indigenous issues in Bank policies and projects was required (document AB-1704, paragraph 2.27). Similarly, at the time of Project approval, there existed policy mandates related to Involuntary Resettlement (document AB-1704, paragraph 2, 44[g]) and environmental issues (document OP 703 – December 1994) that also may be related to this case.

Although MICI exists only since 2010, the Policy establishing this Mechanism specifies that the Relevant Operational Policies that shall be applicable to a Compliance Review shall be "the version in effect at the time of Board approval of the operation" (MICI Policy, paragraph 26).

III. Eligibility Analysis

The Panel's Eligibility Analysis followed the Mechanism's Policy, Paragraphs 55 and 56. Furthermore, the information received from the Project team and the Requesters during the eligibility determination of the Ombudsperson was carried forward and re-examined. The results of this analysis are summarized in the table below.

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Eligibility Analysis		
ELIGIBILITY CRITERIA FOR A COMPLIANCE REVIEW PHASE	CRITERIA MET?	COMMENTS
a) The names and contact information for the Requester are available;	YES	MICI files contain information on the Ache community, the names of some of their leaders and of their representatives who sent the Request.
b) The names and contact information for the Representative, if any, and proof of the authorization are available;	YES	Professors Kim Hill and Magdalena Hurtado testify that they are authorized to file the Request on behalf of the Ache and can provide proof to this authorization.
c) The Bank-Financed Operation(s) at issue has been identified;	YES	PR-0035 "Program to Improve Highway Corridors in Paraguay", Loan 933/OC-PR.
d) the Requester resides in the country where the relevant Bank-Financed Operation is or will be implemented (or a qualified Representative has been appointed);	YES	The Requesters reside in Paraguay. The representatives they have appointed to write the complaint have lived with them for many years.
e) None of the exclusions set forth in Section 37 applies;	YES	<p>The Chair examined changes that occurred since the case was determined ineligible by the Previous Mechanism (IIM) and concluded that the then determined exclusion because of expiration of the time limit for filing a complaint does not apply any longer. The current Request is filed within the time period stipulated by MICI Policy 37 (f).</p> <p><u>Exclusion 37 (a) does not apply:</u> The Bank is responsible for the actions that are subject to the Request.</p> <p><u>Exclusion 37 (b) does not apply:</u> The Request focuses on the Bank's omission in securing adherence to the Loan Agreement. It does not relate exclusively to the laws, policies or regulations of Paraguay and the executing agencies.</p> <p><u>Exclusion 37 (c) does not apply:</u> The Request deals with issues arising from an IADB-funded Operation. Requesters are concerned about problems that may be related to Bank Policies on Indigenous Peoples, Involuntary Resettlement, Environment and Safeguard Compliance (see Section II above).</p> <p><u>Exclusion 37 (d) does not apply:</u> The Request does not address procurement issues.</p> <p><u>Exclusion 37 (e) does not apply:</u> Although the issue had been filed with IIM, the Prior Mechanism, the Requesters base their renewed Request on new circumstances and support it with new evidence².</p> <p><u>Exclusion 37 (f) does not apply:</u> The current Request is filed within the stipulated time period of 24 months after the last disbursement.</p> <p><u>Exclusion 37 (g) does not apply:</u> The Request deals with operational issues germane to the Mandate of MICI. The Requesters focus on concerns about environmental management and indigenous peoples' land rights.</p>

² On September 8, 2009 Professor Magdalena Hurtado, representing the Ache claim, submitted a request for a review to the Office of Institutional Integrity (OII) of IADB which was then turned over to the Independent Investigation Mechanism (IIM, the "Prior Mechanism"). The complaint noted that the Paraguayan Government had failed to comply with the conditions of the loan and that the Ache expected the Bank to insist on fulfillment of the conditions of the Loan agreement. On October 16, 2009, the IIM declared the request ineligible pursuant to Section 1.5 (D) of the former policy that excluded from the scope of the Mechanism requests submitted after the entire loan was disbursed. Since new circumstances have arisen since then, the matter can be subjected to a new review as per MICI Policy 37/e

		<p><u>Exclusion 37 (h) does not apply:</u> The Request deals with feared or actual harm to the livelihood of the Ache and has not been submitted to gain a competitive business advantage.</p> <p><u>Exclusion 37 (i) does not apply:</u> The Requesters assert that they are currently not part of any judicial or arbitral process, but they are aware that some local NGOs, in defense of the Ache claims, are demanding the nullification of the Internal Notice of SEAM 2010.</p>
f) The Requester has reasonably asserted that it has been or could be expected to be directly, materially adversely affected by an action or omission of the IDB in violation of a Relevant Operational Policy in a Bank-Financed Operation and has described in at least general terms the direct and material harm caused or likely to be caused by such action or omission in the Bank-Financed Operation;	YES	<p>The Requesters reasonably assert that the livelihoods of the Ache are threatened by the Bank's failure to ensure adherence to the Loan Agreement. They allege that non-compliance with the Loan Agreement resulted in non-compliance with crucial Bank policies. They would like to pursue an avenue that ensures that IADB recognizes the violations of its Loan Agreement and its relevant indigenous peoples' policies, and withhold further disbursements for any other operation related to the regularization of Finca 470 and paving of Route 10³.</p> <p>Without in any way prejudging the findings of an eventual Compliance Review, this could point to potential non-compliance with relevant sections of the Banks policies on Environmental and Safeguards Compliance, Indigenous Peoples and Involuntary Resettlement.</p>
g) With respect to an issue raised in the Request, a Compliance Review may assist in determining whether (and if so, how and why) any Bank action or omission, in respect of a Bank-Financed Operation, has resulted in non compliance with a Relevant Operational Policy and direct, material adverse effects (potential or actual) to the Requester; and	YES	<p>The Requesters voiced reluctance to participate in a Consultation exercise at this stage. They explicitly requested a compliance review which may assist the parties involved in determining more precisely the background and nature of the Bank's alleged failure to enforce the Loan Agreement and the operational policies embodied in the alleged non-enforcement.</p> <p>A Compliance Review may help to identify more clearly the nature of the harms expressed in the Complaint, the alleged non-enforcement of the Loan Agreement and how this may relate to non-compliance with respect to Policies on Indigenous Peoples, Involuntary Resettlement and Environment and Safeguard Compliance (see section II above).</p> <p>A Compliance Review may also lay a basis for re-establishing a fact-based consultation process among the various stakeholders of this Project</p>
h) The Requester has taken steps to bring the issue to the attention of Management. The Panel Chairperson shall consult with Management as to its response and if Management is involved in addressing the concerns raised, the Panel Chairperson shall allow forty-five (45) calendar days from the date of receipt by the Executive Secretary of the Request for purposes of the Compliance Review before it is deemed eligible. The Panel Chairperson may waive this requirement in his or her discretion if the 45-day period has been invoked by Management during the Consultation Phase.	YES	<p>Both Management and the Requesters have documented protracted exchanges to solve the concerns of the Ache. Further exchanges between the Requesters and Management might not be productive at this stage without a firm basis of facts that could emerge from a Compliance Review. Management has indicated its willingness to deal with the issues once more information will have been brought forward by MICI's involvement.</p>

³ Some other relevant operations that were implemented simultaneously to Loan 933 are Loan 1230/OC-PR1 of 1999 "Rural Roads National Program II", Loan 1300 of 2000 "National Support Program for the National Environmental System".

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IV. Conclusion

“Program to Improve Highway Corridors in Paraguay” (project PR-0035), and its components of financing Ruta 10 constitute an important investment in Paraguay’s infrastructure. The planned establishment of “off-sets” to satisfy social and environmental safeguards particularly for ensuring the livelihood of the Ache has not been accomplished as was stipulated in the Loan Agreement. The feared harm for this indigenous population due to the alleged non-compliance of the Bank of not enforcing the stipulations of the Loan Agreement could pose reputational risks for the Bank as well as a risk for the development effectiveness of this Project.

Based on a detailed review of the information currently available, the Chair of the Panel, in line with the Policies of the Mechanism and without any judgment on the merits of the Complaint, determines that the Request is eligible for a Compliance Review by the Panel.

Since existing documentation points to conflicting assertions about the implementation of this project and the related Loan Agreement, it will be necessary for the Panel to engage in detailed discussions with the Requesters, the Project authorities and related institutions, as well as with the Project team both in the Country Office and at IDB Headquarters.

A Compliance Review may help to identify more clearly the nature of the alleged non-compliance, how it may relate to non-compliance with respect to Policies on Indigenous Peoples, Involuntary Resettlement and Environment and Safeguard Compliance (see section II above). Such a review may also lay a basis for re-establishing a fact-based consultation process among the various stakeholders of this Project at a later stage.

As per the Mechanism’s Policy, Paragraph 55, 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.

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