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**DOCUMENT OF THE INDEPENDENT CONSULTATION
AND INVESTIGATION MECHANISM**

CO-MICI001-2011

**INDEPENDENT CONSULTATION AND INVESTIGATION MECHANISM.
ASSESSMENT REPORT FOR LOAN 2271/OC-CO, “SAN FRANCISCO-MOCHOA
ALTERNATE ROAD CONSTRUCTION PROJECT – PHASE I”**

This document was prepared by the Project Ombudsperson for the Consultation Phase.

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San Francisco-Mocoa Alternate Road CO-MICI001-2011 Assessment Report



PROJECT OMBUDSPERSON

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**San Francisco-Mocoa Alternate Road
Colombia
Assessment Report**

A. Background

a) The Request

1. On 13 July 2011, the Independent Consultation and Investigation Mechanism (Mechanism)¹ received a Request from Mrs. Carmenza Tez (Representative) on behalf of authorities of the Inga and Kamentsa indigenous communities (the Requesters).² The Request alleges that construction of the San Francisco-Mocoa Alternate Road, Phase 1 (the Project) is causing and could continue to cause materially adverse environmental and social impacts on these indigenous communities.
2. The major concerns raised by the Requesters both in their Request and in subsequent discussions with the Mechanism include:
 - a. **Failure to acknowledge the presence of indigenous communities in the Project area:** According to the Requesters, the Project ignores the presence of indigenous communities within the Project area, thus depriving the communities of indigenous space and culture and denying the environmental and social impacts they sustain as a result of the Project.
 - b. **Impact on the self-governance system and cosmology, and accelerated acculturation:** The Requesters believe that the pressure caused by the Project on certain community stakeholders and the failure to address the concerns of other legitimate community leaders have violated the decision-making system of the Inga and Kamentsa indigenous communities. They also believe that the Project could potentially accelerate their loss of identity and customs, including the use of their language, affecting the relationship of these peoples to the land and their access to culturally important natural resources.

¹ The terms Mechanism, Management, Executive Secretary, Project Ombudsperson, Panel, Mechanism Policies, Eligibility, Consultation Phase, Assessment, and any other relevant term contained in this memorandum will have the meanings assigned to them in the Policy establishing the Independent Consultation and Investigation Mechanism (ICIM) approved on 17 February 2010 and available at the following address: www.iadb.org/mici.

² The Request is signed by governors and former governors of the following indigenous councils: Inga of Santiago, Kamentsa of Sibundoy, and Inga-Kamentsa of San Francisco, all of which are from the Upper Putumayo region, and the Kamentsa Biya council from the Mocoa region.

- c. **No prior consultation:** According to the Requesters, the lack of free, prior, informed consultation with the communities³ violates the rights of the indigenous communities and prevents them from being able to fully express their position on the alternate road's construction. The Requesters allege that the consultations carried out in the context of the Project were inadequate insofar as they were one-way and not participatory and failed to address the needs and issues that concern the communities.
- d. **Impact on the indigenous habitat and the environment:** The San Francisco-Mocoa alternate road will have a direct and irreversible effect on natural resources that are essential for the communities, such as the water, forest, and biodiversity resources existing in the Project area. In addition to these direct Project impacts, the Requesters are concerned about potential indirect impacts on the areas adjacent to the alternate road as a result of increased accessibility. The alleged indirect impacts include accelerated changes in land use, illegal deforestation, the spread of monoculture, and a proliferation of mining and oil fields, increasing the pressure on the Requesters' lands. Other indirect impacts include increased air pollution and erosion of adjacent soil.
3. The impacts described by the Requesters may involve aspects of the Environment and Safeguards Compliance Policy (Operational Policy OP-703) and the Indigenous Peoples Policy (Operational Policy OP-765) of the Inter-American Development Bank (IDB).

b) The Project

4. **General Project description.** The Project's objective is to "*improve the efficiency and safety of the Tumaco-Pasto-Mocoa road corridor, promoting the physical and economic integration of southern Colombia with the country's main production and consumption centers, while seeking to conserve its ecosystems and promote sustainable economic and social development.*"⁴ The Project is financed through an IDB specific investment loan of US\$53 million and has total financing of US\$203 million, of which the remaining US\$150 million is financed by the Government of Colombia. Now in its implementation phase, the Project was approved by the IDB Board of Executive Directors on 14 December 2009, and loan contract 2271/OC-CO between the Republic of Colombia and the Bank was signed on 3 May 2010. The executing agency is Instituto Nacional de Vías [National Institute of Roads] (INVIAS),⁵ the entity in charge of executing policies and projects related to road infrastructure for which the Government of Colombia is responsible, acting through its Large Project Management Office.

³ Some Requesters are listed in the Project documents as participants in the consultations conducted in connection with the environmental studies performed for the Project.

⁴ Loan contract 2271/OC-CO between the Republic of Colombia and the IDB for the San Francisco-Mocoa Alternate Road Construction Project, Phase 1, dated 3 May 2010, Annex 1, page 1 (<http://www.iadb.org/es/proyectos/project-information-page.1303.html?id=CO%2DL1019>).

⁵ Idem, page 2.

5. The first disbursement under the Project, in the amount of US\$5.3 million (10% of the total loan), was made on 6 December 2011, upon fulfillment of the conditions precedent to the first disbursement under the loan agreement, namely:⁶ (i) creation, by administrative resolution, of an Independent Technical Advisory Committee (ITAC) for the Project;⁷ and (ii) entry into effect of the Project Operations Manual.⁸
6. The Project is part of the Road Development in Southern Colombia program, which covers the Tumaco-Pasto-Mocoa-Puerto Asís and Airport-Mojarras-Popayán corridors. Once completed, the Project will contribute to international transportation between Colombia and Ecuador through the Andean Integration Hub and will facilitate connection with Brazil through the Multimodal Amazon Hub.⁹ According to the loan proposal, the 78-km section currently connecting San Francisco and Mocoa has serious traffic restrictions, steep slopes, unstable areas, constant cloudiness, and high cliffs, making the accident rate on this section one of the highest in the country. Consequently, according to the loan proposal, to rehabilitate the San Francisco-Mocoa section using the same route would be very costly and environmentally inappropriate, thus justifying the construction of a San Francisco-Mocoa alternate road financed by the Project.¹⁰
7. **Project components.** The Project finances construction of the San Francisco-Mocoa alternate road over a total length of 45.6 km, as well as the socioenvironmental mitigation and compensation measures required for its execution and operation. The Project has two components: (i) civil works and inspection; and (ii) an Integrated and Sustainable Social and Environmental Management Plan (PMASIS).
8. **Environmental and social management.** Component 2 of the Project, the PMASIS, was prepared in 2009 and includes mitigation and compensation measures relating to construction of the alternate road and monitoring and tracking measures during operation, in compliance with the Project's environmental permit.¹¹ The PMASIS consolidates in a single tool the following studies performed in connection with the Project's design: (i) updating and supplementing of the environmental impact study (EIS), completed in 2008; (ii) the strategic regional environmental assessment (REA) of the Pasto-Mocoa road corridor, completed in 2008; and (iii) the Basic Environmental and Social Management Plan (BESMP) for the Forest Reserve of the Upper Mocoa River Basin (the

⁶ Idem, page 4.

⁷ According to the first ITAC report, the definitive ITAC was formed in the second week of November 2010.

⁸ According to the project team, the Operations Manual was approved on 29 June 2011. The current version of the Manual includes the Environmental and Social Management Report (ESMR) and the Integrated and Sustainable Environmental and Social Management Plan (PMASIS) as annexes and will be updated once the updated PMASIS execution plan is prepared.

⁹ Loan Proposal, Colombia, San Francisco-Mocoa Alternate Road Construction Project, Phase 1 (CO-L1019), page 1 (<http://www.iadb.org/en/projects/project,1303.html?id=CO-L101>).

¹⁰ Idem, page 2.

¹¹ Idem, page 5.

- c. March 1997: The Ministry rejects the alternative submitted by INVIAS and requests submission of an EIS for improving and rehabilitating the current road corridor (see paragraph 6);
 - d. March 1999: A public hearing is called by the Ministry at the request of the Mocoa community in order to “hear the arguments underlying the decisions to reject the requests and appeals filed by INVIAS”;
 - e. June 1999: The Ministry overturns the March 1997 decision and directs INVIAS to submit an EIS for Alternative 1, i.e., the alternative which corresponds to the current alternate road and constitutes the Project;
 - f. December 2002: INVIAS sends the Ministry a copy of the Interior Ministry’s certification as to the nonexistence of indigenous or black communities in the Project’s area of influence (see paragraph 36);
 - g. August 2003: INVIAS submits the EIS to the Ministry;
 - h. September 2005: The Ministry requests additional information to supplement the EIS;
 - i. July 2008: INVIAS submits the updated EIS.¹²
11. According to the loan proposal, the PMASIS includes specific measures to ensure compliance with the Project’s environmental permit.¹³ Certain key aspects of the environmental permit are summarized below:

Table 1: Aspects of the environmental permit

Environmental permit	Impact	Mitigation measure	Comment
Section 1	Removal of a total of 94.4 hectares (89.2 hectares permanently and 5.2 hectares temporarily)	89.2 hectares to be reforested outside the Reserve 94.4 hectares to be reforested inside the Reserve	Included in the PMASIS
Sections 2 and 3	Indirect environmental impacts to be generated in the Forest Reserve due to Project execution	Expansion of the Forest Reserve	The expansion request is submitted by the Project to the environmental authority, which requires technical and legal input before authorizing it. ¹⁴
Section 4	Impact on certain species of moss, lichen, parasite, epiphyte, and orchid	Research, rescue, propagation, and relocation programs	Included in the PMASIS

¹² Ministry of Environment, Housing, and Land Development, Resolution 2170 dated 5 December 2008, pages 1-2 (included in Annex 1 to the ESMR).

¹³ Loan proposal, page 5.

¹⁴ According to the project team, the technical and legal input required by the environmental authority will start to be gathered in January 2012.

12. **Environment and Safeguards Compliance Policy (Operational Policy OP-703).** According to the loan proposal, the Project was classified as category “A” “because it is located in a critical habitat.”¹⁵ Consequently, the Project includes developing and updating the following tools and activities: (i) updating the EIS; (ii) the REA; (iii) the BESMP; (iv) the PMASIS; (v) institutional strengthening of INVIAS, the Project’s executing agency, and of Corpoamazonia, the regional environmental authority taking part in implementing the PMASIS; and (vi) implementation of a socioenvironmental monitoring and control system for the alternate road’s construction and operation. To mitigate the alternate road’s indirect environmental impacts, the PMASIS provides for Forest Reserve management, expansion (from 34,600 hectares to 65,288 hectares), and biodiversity conservation, which according to the loan proposal is “in compliance with Directive B.9 of the Environment and Safeguards Compliance Policy (OP-703), with the result that the alternate road does not degrade or significantly alter critical native habitats in the project area.”¹⁶
13. **Involuntary Resettlement Policy (Operational Policy OP-710).** According to the loan proposal, some five families from the Project’s right of way are expected to be resettled, and the Project has a relocation plan for them. Likewise, the municipio of Mocoa is implementing a relocation program for displaced families located in the right of way at the entrance to Mocoa. According to the loan proposal, this program complies with the principles of OP-710.¹⁷
14. **Indigenous Peoples Policy (Operational Policy OP-765).** According to the Project documents, there are no indigenous reserves along the alternate route or in the Forest Reserve area.¹⁸ ¹⁹ Nevertheless, the regional strategic environmental assessment (REA) acknowledges that the alternate road’s construction “contributes to opening up the indigenous world even further, which in a way marginally increases the vulnerability of the region’s communities to cultural contact.”²⁰ Likewise, the Project’s Environmental and Social Management Report (ESMR) alleges that “the indigenous communities in the Mocoa sector and in the Sibundoy Valley within the Project’s area of influence recognize the alternate road’s construction as necessary for their own communities. [Consequently,] a specific process of consultation with these communities was conducted during the

¹⁵ Loan proposal, page 8.

¹⁶ Idem, page 5.

¹⁷ Idem, page 9.

¹⁸ Idem, page 9.

¹⁹ According to Interior Ministry certifications number 4805 dated 15 November 2002 for indigenous communities and number 318, cited in the Project Profile.

²⁰ Regional environmental assessment of the Pasto-Mocoa road, <http://www.iadb.org/es/proyectos/project-information/page.1303.html?id=CO%2DL1019>.

project's preparation, making it possible for the PMASIS to include measures to support their development.”²¹ Lastly, the BESMP recognizes: (i) the existence of indigenous communities in the area outside the Forest Reserve, including the Inga and Kamentsa indigenous peoples historically settled in the Sibundoy Valley and Mocoa; (ii) that these communities have stated interests relating to requests for expansion and/or creation of indigenous reserves, which could conceivably occupy the area of the Upper Mocoa River Basin reserve; and (iii) that Camino de Sachamates,²² or Camino Real, has been used by Andean and Amazonian indigenous communities, among others, since ancestral times as a communication artery and for gathering medicinal plants.²³

Photo 1: Detail of Camino de Sachamates, area known as La Tortuga (*)



Source: The Requesters

(*) According to the Requesters, La Tortuga is one of the sacred sites of the Inga and Kamentsa communities

15. Because of this, according to the project team, despite the nonexistence of lawfully established indigenous reserves in the Project's direct area of influence and the fact that no significant negative impacts on indigenous communities have been identified, the Project has made great efforts to inform, consult with and ensure the participation of the indigenous communities (see paragraph 16). The results of these efforts have informed the Indigenous Community Support Plan (Support Plan) contained in the PMASIS. The Support Plan consists of:

²¹ Environmental and Social Management Report, page 147, <http://www.iadb.org/es/proyectos/project-information-page.1303.html?id=CO%2DL1019>.

²² The alternate road is being built parallel to Camino de Sachamates.

²³ Preparation of the Basic Environmental and Social Management Plan (BESMP) for the Protected Forest Reserve of the Upper Mocoa River Basin, in the department of Putumayo, page 38, <http://www.iadb.org/es/proyectos/project-information-page.1303.html?id=CO%2DL1019>.

- a. Program for support of priority projects: (i) project supporting the creation of an indigenous mining area; (ii) project supporting roundtables with communities led by the Ministry of the Interior; (iii) project for strengthening the local councils; and
 - b. Comprehensive life plan development program: (i) improvement and implementation of comprehensive life plans; (ii) strengthening of capacities for coordination with municipios; (iii) strengthening of intercultural adaptation of ethnoeducation and ethnohealth services.²⁴
16. **Public consultation.** The Project led an information, participation, and consultation process²⁵ that included public participation at two separate stages: (a) the first consisted in preparing the terms of reference for the socioenvironmental technical studies; in other words, updating the EIS, BESMP, and REA. These consultations were conducted between October 2006 and February 2007 and included various NGOs, Corpoamazonia, territorial political authorities, and civil society representatives; (b) the second public consultation took place as part of the actual drafting of the socioenvironmental technical studies during the period from March 2007 to August 2008 and involved a total of 1,844 people.²⁶ Certain indigenous leaders²⁷ appear in the Project documents as participants in the consultations for updating the EIS in the context of collectively assessing the positive and negative aspects of the alternate route;²⁸ in explaining and publicizing the BESMP and sustainable planning for the Forest Reserve; and in preparing the REA through interviews aimed at identifying strategic issues.²⁹ In addition, according to the project team, the Project calls for continuing contacts and consultations with the affected communities during Project implementation (see paragraph 45).

²⁴ PMASIS, pages 159-167, and ESMR, pages 201-208.

²⁵ The terms participation and consultation will have the meaning attributed to them in the Indigenous Peoples Policy (Operational Policy OP-765) approved on 22 February 2006 and available at the following address: <http://www.iadb.org/es/temas/genero-y-diversidad/pueblos-indigenas,2605.html>.

²⁶ Integrated and Sustainable Environmental and Social Management Plan, page 102, <http://www.iadb.org/es/proyectos/project-information-page,1303.html?id=CO%2DL1019>.

²⁷ According to the ESMR, page 103, “the participants in these sessions include: Inga Kamentsa and Kamentsa Biya councils of Mocoa (Phase II); Inga Kamentsa council of San Francisco. It is worth noting that the signers of the Request submitted to the Mechanism include leaders of the Kamentsa Biya and Inga Kamentsa councils of San Francisco.

²⁸ PMASIS, page 103.

²⁹ Pasto-Mocoa Road Corridor, San Francisco-Mocoa Alternate Road: The Public Information and Participation Process, Annex 1, pages 3-11.

B. Assessment Methodology and Main Findings

a) Assessment methodology³⁰

17. To assess this case brought before the Mechanism, the consultation team carried out the following activities: (i) technical analysis of the documents and information submitted by the Requesters, the executing agency, and the Bank's project team, as well as documents obtained by the Mechanism and/or collected by independent experts such as the ITAC; (ii) field visit; (iii) discussions with the Requesters and their Representative, the executing agency, the project team, Corpoamazonia, indigenous community leaders, and other relevant stakeholders; and (iv) public meetings with indigenous communities.³¹
18. The results of these activities include: (i) mapping of primary and secondary stakeholders, their interests and positions; (ii) review of technical background, Project status, and territorial context; (iii) analysis of the technical characteristics of the impacts alleged by the Requesters and the mitigation measures and plans provided under the Project; and (iv) identification of the next steps for generating a dialogue process aimed at facilitating a consensus-based solution. The findings from these activities are described in detail below.

b) Mapping of stakeholders: positions and relationships

19. For purposes of mapping the stakeholders and their positions, stakeholders have been classified as either primary or secondary. Primary stakeholders are those who are directly affected by the San Francisco-Mocoa alternate road or have direct decision-making influence on the Project's design, implementation, and/or operation, as well as their legitimate representatives.³² Secondary stakeholders include those who are not directly affected but have had or could have an impact on the Project's context and/or decision-making, and/or on the conflict's resolution. Below is a summary of the roles and positions of the primary and secondary stakeholders, and of the observed relationship among the primary stakeholders.

³⁰ According to section 42 of the Policy establishing the Mechanism, the purpose of the assessment is "is to clarify the issues and concerns raised by the Request, identify and gather information from stakeholders, including potentially other parties similarly situated to the Requester, inquire as to the views and incentives of all stakeholders, and help determine whether a resolution to the issues raised can be reached and what is the best process for doing so." www.iadb.org/mici.

³¹ The Mechanism was able to meet with approximately 70 individuals from various ethnic groups, who expressed their concerns regarding the Project's environmental and social impacts.

³² In this context, primary stakeholders may be deemed to include those indigenous peoples which could individually or collectively be affected by the Project's potential direct or indirect impacts on the land, territories, or resources on which they depend (for example, through degradation of the territory's physical integrity or legal status), as well as the entities responsible for designing, executing, and operating the alternate road.

Photos 2 and 3: Mechanism's meetings with institutional stakeholders and indigenous communities

Source: Mechanism

Primary stakeholders

20. **Instituto Nacional de Vías** [National Institute of Roads] (INVIAS) is the Project's executing agency. Created in 1992, INVIAS started to operate in 1994. Its purpose is to execute policies, strategies, plans, programs, and projects for the National Road Network's nonconcessioned infrastructure in accordance with guidelines issued by the Ministry of Transportation. INVIAS considers the Project an example of good practices in the development of infrastructure projects in highly biodiverse and culturally rich areas. According to INVIAS, the indigenous communities were consulted in connection with the Project and their views were included in the PMASIS. Similarly, since consultations and contacts will continue to be conducted with all affected communities during Project implementation, INVIAS believes that there is room to further improve the Project's social and environmental performance.
21. **Corporación para el Desarrollo Sostenible del Sur de la Amazonia** [Corporation for Sustainable Development of Southern Amazonia] (Corpoamazonia) was created under Law 99 of 1993 to serve as the environmental authority in the departments of Amazonas (109,000 km²), Caquetá (91,000 km²), and Putumayo (25,000 km²). This territory accounts for approximately 5% of the total area of the Amazon River watershed, 19% of Colombia's continental territory, and 55% of the entire Colombian Amazon. Corpoamazonia is headquartered in the city of Mocoa and has four other offices. While INVIAS is directly responsible for Project implementation, Corpoamazonia will be in charge of: (i) coordinating the PMASIS's execution with various institutions,³³ and

³³ According to the Institutional Memorandum of Understanding, San Francisco-Mocoa Alternate Road, signed on 14 May 2009.

- (ii) specific PMASIS activities related to environmental management.³⁴ Corpoamazonia has great interest in environmental land use in the territory under its jurisdiction, including the current Forest Reserve and its expansion. Corpoamazonia is open to collaborating and conducting discussions with the Reserve's various current users with a view to encouraging conservation and sustainable development.
22. **Inga and Kamentsa communities:** The Kamentsa people are found in the Sibundoy Valley, department of Putumayo, in the municipios of Sibundoy, San Francisco, Mocoa, and Orito. Their land is located in the flat and upper portions of Sibundoy Valley, as well as in areas set aside as indigenous reserves. The Kamentsa people have an estimated population of 4,773, primarily engaged in agriculture and crafts.³⁵ The Kamentsa are deemed to have broad knowledge of the medicinal plants native to the current Forest Reserve area, and have used Camino de Sachamates as an artery for plant gathering, transportation, and communication.
23. The Inga people are similarly concentrated in the department of Putumayo, home to 62.4% of their population, or some 9,648 individuals. The Inga has traditionally been a traveling and merchant people, using roads such as Camino de Sachamates, which facilitated intercultural communication with other peoples. Like the Kamentsa, they are highly knowledgeable of the medicinal plants in the area.³⁶
24. Both communities have expansion aspirations that territorially coincide³⁷ with the Project's area of influence (see paragraph 40).
25. **Elected representatives of the Inga and Kamentsa peoples.** The indigenous communities located on the Pasto-Mocoa road corridor³⁸ and participating in the Project are divided into seven councils in the Upper Putumayo region and three councils in the Mocoa region. The system of governance of the Inga and Kamentsa communities is essentially comprised of governors, alguaciles and taitas. The form of government is the council, which is presided by a governor and four alguaciles, elected annually. Taita is an honorary title conferred on notable members of the communities and whose primary role is to provide leadership and advice, teach the community's history, and cure diseases.

³⁴ According to the Special Technical, Administrative, and Financial Cooperation Agreement signed on 30 September 2010 between INVIAS and Corpoamazonia for purposes of proceeding on joint execution of the PMASIS by INVIAS and Corpoamazonia in compliance with the environmental permit, resolution 2170 of 2008, for construction of the alternate road.

³⁵ Colombian National Planning Department (2006). *Los pueblos indígenas de Colombia en el umbral del nuevo milenio*, pages 333-334.

³⁶ *Idem*, pages 330-331.

³⁷ The boundaries of the indigenous reserves have not been officially established and vary according to the source. Nevertheless, the general territorial aspirations match the Forest Reserve area and, according to some measurements, come within a few hundred meters of the alternate route.

³⁸ PMASIS, page 159 and ESMR, page 201.

26. The indigenous communities and their representatives have differing views of the Project: some support it while others, without opposing it, are ambivalent about its environmental and social performance. This disparity is evidenced by the fact that representatives (governors and taitas) of four councils signed the Request to the Mechanism, while representatives of other councils actively participated in certain Project activities (such as those provided in the Support Plan) and the Mechanism received verbal support during the visit to the area (see Table 2). However, the communities are inclined to unify behind the indigenous cause and present a united front vis-à-vis the Project.
27. Below is a list of the councils, the representatives who signed the Request to the Mechanism, the governors interviewed by the Mechanism and actively participating in the Project, and the Support Plan's current and future beneficiaries, according to the project team.

Table 2: Indigenous organization in the Project area³⁹

Region	Council	Requesters	Active Project participants	Indigenous Support Plan beneficiaries
Upper Putumayo	Inga of Santiago	Governor		✓
	Inga of Colón		Governor	✓
	Inga of San Pedro		Governor	✓
	Inga of San Andrés		Governor	✓
	Kamentsa of Sibundoy	Taita (2)	Governor	✓
	Inga Kamentsa of San Francisco	Governor, Taita (2)		✓
	Quillancilla			✓
Mocoa	Inga			✓
	Kamentsa Biya	Taita, alguacil		✓
	Inga Kamentsa			✓

³⁹ The table is based on: (i) in columns 1 and 2, the indigenous groups listed in the ESMR, page 201, and the PMASIS, page 159, "as the indigenous communities located on the Pasto-Mocoa road corridor;" (ii) in column 3, signers of the Request to the Mechanism dated July 2011; (iii) in column 4, participants at the meeting with the Mechanism held in October 2011; (iv) in column 5, the PMASIS and the ESMR fail to consistently specify the beneficiaries of each Indigenous Community Support Plan activity. For example, only the Upper Putumayo councils are included as beneficiaries of the council strengthening project. Similarly, the beneficiaries of other activities associated with life plan support are not specified even though, according to the Project team, all indigenous communities benefit or will benefit from the support of life plans. Furthermore, according to the Requesters, Support Plan activities are not inclusive and have not been based on the inputs of consultation with all indigenous communities.

Secondary stakeholders

28. **National institutions associated with the indigenous communities**, which play various roles promoting, protecting, and supporting the indigenous peoples. These institutions include: (i) the Office of the Attorney General of Colombia; (ii) the Ombudsman for Indigenous Peoples and Ethnic Minorities; (iii) the High Commissioner for Indigenous Affairs; (iv) the Presidential Program for Indigenous Affairs; and (v) the Ministry of the Interior's Prior Consultation Group and Office of Indigenous, Minority, and Roma Affairs. The Ombudsman and the High Commissioner for Indigenous Affairs have indicated their willingness to provide support and cooperation in the consultation process and in any future dialogue.
29. **Instituto Colombiano de Desarrollo Rural** [Colombian Rural Development Institute] (INCODER) is responsible for examining the land needs of indigenous communities and creating, expanding, or regularizing ownership of indigenous reserves.⁴⁰ According to the Requesters, the petitions for expanding the indigenous reserves in the Project's area of influence are currently under review by INCODER, but the Requesters are not aware of their petition's status (see paragraph 40).
30. **The Ministry of Environment and Sustainable Development** is the highest governing body for management of the environment and natural resources, and is also responsible for issuing and overseeing environmental permits.⁴¹ In discussions with the Mechanism, representatives of the Ministry's Office of Environmental Licenses, Permits, and Procedures showed willingness to review the concerns expressed by the indigenous communities, with a view to adopting any necessary measures not previously considered in the context of the environmental permitting process.
31. The Project's **Independent Technical Advisory Committee** (ITAC) was formed in November 2010.⁴² Its basic role is to ensure that the Project is executed in line with the highest technical, economic, social, and environmental standards. To this end, the ITAC offers independent technical views on compliance with and progress on executing the PMASIS. The ITAC consists of three independent experts and prepares semiannual reports for the Project.
32. **The IDB project team and Country Office** have supported and collaborated with the consultation process. The IDB project team has facilitated and participated in meetings

⁴⁰ The scope of INCODER's responsibilities is determined by Article 330 of the 1991 Constitution and further developed by Articles 85 and 86 of Law 160 of 1994 and Law 812 of 2003 and by Decree-Law 1300 of 2003.

⁴¹ See <http://www.minambiente.gov.co/>.

⁴² According to Operational Policy OP-703, "For some high safeguard risk operations that, in the Bank's opinion, raise complex and sensitive environmental, social, or health and safety concerns, the borrower should normally establish an advisory panel of experts to provide guidance for the design and/or execution of the operation on issues relevant to the EA process, including health and safety."

and visits during the assessment and has provided the Mechanism with copious information on the Project's performance.

Relationship among the primary stakeholders

33. There has been a marked breakdown in trust among the primary stakeholders, resulting from a lack of communication and longstanding tension. According to the project team, the annual changes in the institutional structure of the indigenous communities have made it difficult to maintain a free flow of communication with them. The project team is in the process of designing a communications strategy with the communities aimed at facilitating better dissemination of the Project's characteristics. According to the Requesters, the lack of proper communications violates their rights and has led to a feeling of mistrust regarding the Project's characteristics and performance. This is so much the case that some Requesters have asked to freeze the Project's disbursements despite the fact that the first disbursements can be instrumental in improving the Project's environmental and social performance.

c) Territorial context

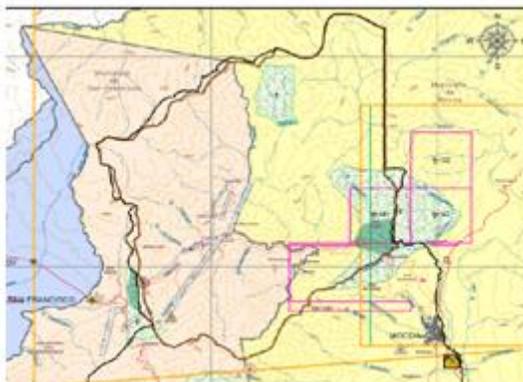
Expansion of the Forest Reserve

34. The San Francisco-Mocoa alternate road crosses the Forest Reserve in the Upper Mocoa River Basin. The Forest Reserve is part of the Andean-Amazon strategic corridor and is biologically fragile and diverse. While the 34,600-hectare Forest Reserve was established in 1984, it never had the resources to develop a management plan and implement it on the ground. According to the BESMP, "construction of the San Francisco-Mocoa alternate road has become an opportunity for the Reserve to prepare and, moreover, implement a management plan."⁴³
35. According to the BESMP, a series of activities currently exert pressure on the Forest Reserve, including: (i) the laying of power transmission lines; (ii) land use change to livestock farming, generally around roadways such as Camino Sachamates and the communities of San Pablo and Minchay; (iii) forest development for commercial purposes or for fuel production; and lastly (iv) the development of mining resources (precious minerals, basic metals, limestone, coal, and construction materials).⁴⁴

⁴³ BESMP, page 5.

⁴⁴ BESMP, pages 8-10.

Map 2: Forest Reserve (brown line) and mining concessions (fuchsia boxes)

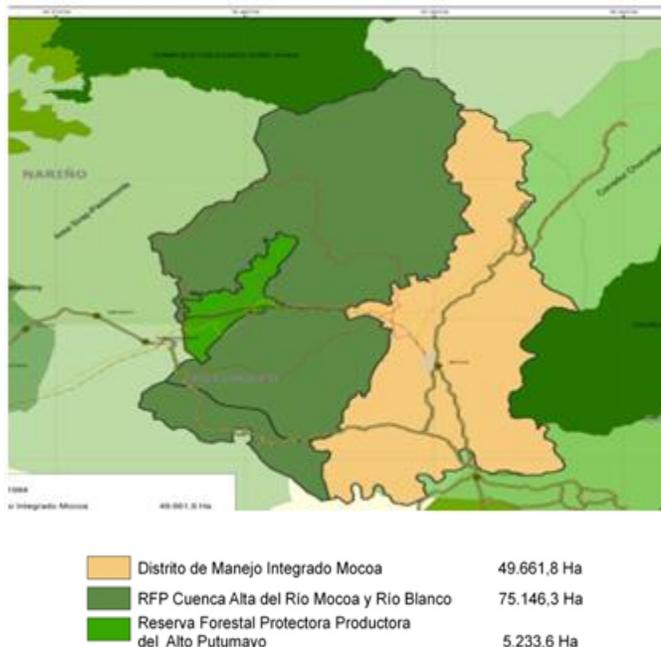


Source: BESMP

36. According to the PMASIS, the Forest Reserve expansion was informed by an ecosystemic criterion based on three core strategies (shown on Map 3 below):
- Connectivity with neighboring ecosystems.** The Forest Reserve's expansion to the north to connect with the Doña Juana Park and to the south to connect with the Amazonia forest reserve will allow the development of true ecological corridors.⁴⁵
 - Expansion of the Protected Forest Reserve in the Upper Mocoa River Basin.** While the land located directly to the north and south of the Reserve is not under any type of territorial protection, the steep topography has allowed it to preserve its physical and biotic characteristics.
 - Linkage with the neighboring community.** The area covered by the Reserve's expansion toward the southeast through the Churumbelos Park coincides with the city of Mocoa; consequently, this area is protected as an Integrated Management District, providing the lowest land-use restrictions (see map below).

⁴⁵ PMASIS, page 73.

Map 3: Proposed management areas for the Forest Reserve expansion



Source: Corpoamazonia

Demarcation of the Project’s Area of Influence and Areas of Study

37. The Project has established a complex network defining direct and indirect areas of influence and areas of study for the various environmental assessments and management plans carried out in connection with the Project. As indicated above (see paragraph 9), demarcating the areas of influence and areas of study has specific consequences in terms of identification and management of impacts, mitigation measures, and consultations with the Project beneficiaries. These demarcations and areas of study are as follows:

EIS	
Direct area of influence	A 30-meter-wide strip of land (15 meters on each side of the roadway) constituting the required right of way for construction of the alternate road. This corridor includes the areas set aside for embankments exceeding 15 meters, access roads to the works, and areas in which construction-related activities will be carried out, for an estimated total area of 446.46 hectares.
Indirect area of influence	Encompasses the political-administrative division of the San Francisco and Mocoa municipios. Within this perimeter there is a local indirect area of influence, which covers the rural area in the upper basins of the Mocoa and Putumayo rivers, where the Protected Forest Reserve of the Upper Mocoa River Basin is located, with a total surface area of 96,305.70 hectares. ⁴⁶

⁴⁶ EIS, page 39.

BESMP	
Forest Reserve area	Area of approximately 34,600 hectares located in the Andean-Amazonian region, within the jurisdiction of the Mocoa and San Francisco municipios. ⁴⁷
Area outside the Forest Reserve	“Outside the Reserve and its communities [...] there is a noteworthy presence of Inga and Kamentsa indigenous peoples, ⁴⁸ who have traversed the Reserve’s current territory since pre-Columbian times along the so-called Camino de Sachamates without establishing any settlements.” ⁴⁹

REA	
Area of study ⁵⁰	Municipios of Pasto, Santa Rosa, Mocoa, Colón, Santiago, Sibundoy, San Francisco, Villa Garzón, Orito, Puerto Caicedo, Valle de Guamuez, San Miguel, and Puerto Asís, covering an area of 14,586 km ² . Seventy-two percent of this area is located in the department of Putumayo; 21% in the municipio of Santa Rosa, department of Cauca; and 7% in the municipio of Nariño, department of Nariño.

PMASIS		
Areas of influence by	Geographic/methodological demarcation	Definition
1. Ecosystems	Forest Reserve	Reserve territory (see Forest Reserve area described in the BESMP box above) ⁵¹
	Regional protected areas	Protected areas surrounding the Reserve ⁵²
2. Communities	Region of influence of the Pasto-Mocoa road corridor	Includes approximately 580,000 inhabitants distributed in five main settlements: Pasto, Puerto Asís, Valle de Guamuez, Orito, and Mocoa. These inhabitants include indigenous peoples and settlers. ⁵³
	Forest Reserve	Campesino families that arrived over time through migrations, forming communities. Outside the Forest Reserve, the PMASIS notes the presence of Inga and Kamentsa

⁴⁷ BESMP, page 7.

⁴⁸ The BESMP acknowledges that the interest expressed by certain indigenous communities, specifically in connection with the requests to expand and/or create indigenous reserves, could encompass the area of the Upper Mocoa River Basin Reserve.

⁴⁹ BESMP, page 38.

⁵⁰ REA, page 6: “Physical space or area where the effects of the improvement project for the Pasto-Mocoa connection will be manifest.”

⁵¹ PMASIS, page 77.

⁵² Idem, page 74.

⁵³ Idem, page 89.

		indigenous peoples from the Sibundoy Valley and Mocoa. ⁵⁴
	Alternate road's direct area of influence	Located in the municipios of Mocoa and San Francisco, where no lawfully established territories belonging to ethnic minorities have been identified. ⁵⁵

Recognition of Indigenous Presence by the National Authorities

38. During the Project's design and preparation, the Ministry of Interior, as the relevant authority for indigenous affairs, issued several rulings regarding the presence of indigenous communities in the Project's area of influence. These rulings, issued in response to consultations at various Project development stages, have had and continue to have significant consequences on the treatment of indigenous issues in connection with the Project. Below is a summary of the rulings to which the Mechanism has had access:

Date	Issuing authority	Receiving authority	Ruling
25 October 2001	Office of Indigenous Affairs	INVIAS	There are Inga and Kamentsa indigenous communities in the municipios of Mocoa and San Francisco, and prior consultation is required.
17 September 2002	Ministry of Interior	Office of the Attorney General	There are no indigenous villages in the area adjacent to the alternate road; only settler communities exist there. The nearest indigenous community is in the area known as Paraíso, a one-day hike through the mountains. The report is not considered final.
15 November 2002	Office of Indigenous Affairs	INVIAS	There are no indigenous communities on the Project's alternate route.
11 September 2008	Ministry of Interior	INVIAS	There is no record of any indigenous communities in the Project area. However, if in the course of the activities a community is found to exist, the Office of Indigenous Affairs is to be notified.
9 September 2010	Ministry of Interior	Office of the Attorney General	There are Inga and Kamentsa communities within the jurisdiction of the San Francisco and Mocoa municipios. An ethnological study of land occupation by the Inga and Kamentsa peoples of Putumayo is commissioned.

⁵⁴ Similarly to the BESMP, the PMASIS also highlights the use of Camino de Sachamates by these communities as a thoroughfare and provision route when gathering medicinal plants, but without leading to the establishment of settlements (see footnotes 35-37).

⁵⁵ PMASIS, page 90.

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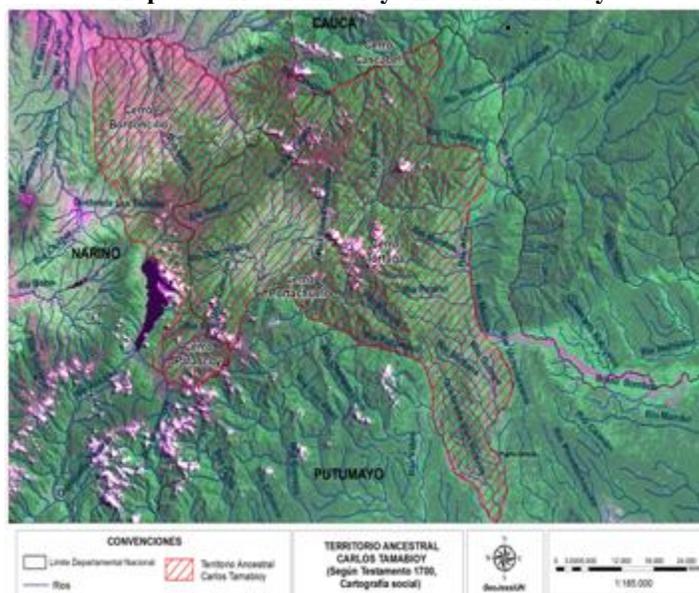
Ministry of Interior

The indigenous reserves of Kamentsa Biya, Inga of Condagua, Sibundoy de la Parte Alta, and San José are present in the direct area of influence of the project Expansion of the Protected Forest Reserve in the Upper Mocoa River Basin.

Indigenous Territorial Aspirations

39. One of the main concerns of the indigenous peoples in the upper Putumayo is holding and managing their ancestral territories. The challenges revolve around legal recognition and possession of the land and natural resources, regularization of the existing reserves, and legal recognition of the reserves' expansion.
40. The area's indigenous peoples have two main territorial aspirations, expressed in the form of petitions. According to the Requesters, these petitions are under review by INCODER, with no official word yet on their status. They include:
- A petition by six councils of the Inga and Kamentsa indigenous peoples of the Upper Putumayo, seeking recognition of the colonial-era will of taita Carlos Tamabioy, executed on 15 March 1700. This territory covers an area of 12,000 hectares.⁵⁶ The Requesters provided the Mechanism with the following graphic representation of their aspirations based on this will.

Map 4: Carlos Tamabioy ancestral territory

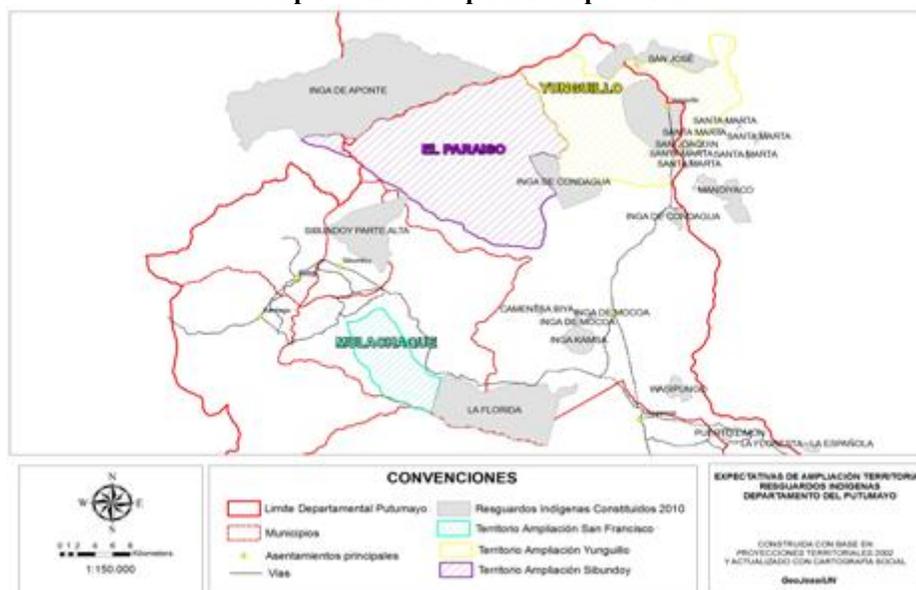


Source: Map provided by the Requesters and prepared on the basis of the community's traditional knowledge, the will, and theoretical reference points.

⁵⁶ Report on the Pasto-Mocoa road corridor, San Francisco-Mocoa alternate road: "The public information and participation process," page 17.

- A request for expansion of the area known as Paraíso, submitted to INCODER by the San Francisco Inga-Kamentsa⁵⁷ and Sibundoy Kamentsa⁵⁸ councils in 1984, and a request for expansion of the territory known as Mulachaque, submitted by the Inga-Kamentsa council of San Francisco.⁵⁹

Map 6: Reserve expansion aspirations



Source: Map provided by the Requesters

41. According to the Requesters, certain sites in this territory are considered sacred; therefore, the communities do not occupy them and have absolute respect for them and their natural resources. For this reason, according to the Requesters, the communities have taken possession of strategic areas far from these sacred sites but continue to have direct contact with them.

d) ITAC report recommendations

42. The first ITAC report, completed in December 2010, contains a series of recommendations for improving the Project's environmental and social performance. Below is a brief description of some of these recommendations, which the Mechanism believes could have a bearing on the issues discussed in the Request:

⁵⁷ Idem, page 18: "who currently possess the Sauce Grande reserve."

⁵⁸ Idem, page 18: "who currently possess the Sibundoy de la Parte Alta reserve."

⁵⁹ Idem, page 18.

- a. The PMASIS should have a more detailed action plan, including the tasks to be completed during the first year of Project implementation.⁶⁰
 - b. INVIAS should initiate a communications strategy aimed at widely disseminating the Project's official and verifiable information, emphasizing the agreements reached with the indigenous authorities and the communities they represent.⁶¹
 - c. A detailed and updated description of Camino Sachamates should be prepared, including:
 - (i) Current usage by the indigenous communities and other communities;
 - (ii) Specific, quantified portion of Camino Sachamates earmarked for the Project;
 - (iii) Anthropological valuation of the Camino's significance and description of archeological assets in the area to be directed impacted by the alternate road.⁶²
 - d. It must be confirmed that the legal context relating to the indigenous peoples has not undergone any changes during the Project's design, or in any event prior to the start of construction activities. It is therefore advisable to gather the relevant information and perform the necessary consultations and research.⁶³
 - e. The indigenous reserves of Alto Sibundoy, Yunguillo, and Condagua and their expansion requests should be strengthened by the Project, based on the legal notion of overlapping indigenous reserves and protected areas.⁶⁴
43. The second ITAC report, completed in November 2011, follows up on the recommendations contained in the first report. According to the ITAC, the Project has not yet started or is only now beginning to address the first report's recommendations. Consequently, the ITAC continues to keep these recommendations in effect, while adding a series of further recommendations, notably including:
- a. Advancing on the implementation of a prior consultation process with the indigenous communities affected by the Project's direct⁶⁵ or indirect impacts. The ITAC advocates a single prior consultation process led by INVIAS to address not only issues associated with the Forest Reserve expansion but also the alternate route's indirect impacts;

⁶⁰ First semiannual verification report of the Independent Technical Advisory Committee (December 2010), page 9.

⁶¹ *Idem*, pages 9-10.

⁶² *Idem*, page 11.

⁶³ *Idem*, pages 11-12.

⁶⁴ *Idem*, pages 13-14.

⁶⁵ Second verification report of the Independent Technical Advisory Committee (ITAC), page 13, "[direct impacts] in the event that some type of intervention is required in the future in their territories due to the effects of the road's construction."

- b. Creating a permanent socioenvironmental dispute resolution strategy within the PMASIS framework; this would require appointing a specialized team.⁶⁶

⁶⁶ Idem, page 12.

C. Conclusions

3.1. The Request and the Relevant Operational Policies

44. The Requesters' concerns may be summarized as follows: (i) the Project's failure to acknowledge the presence of indigenous communities in the area; (ii) the Project's impact on indigenous culture by its failure to use the indigenous self-governance and decision-making system, and its increased pressure on the social and productive mores and customs of the indigenous communities; (iii) the failure to engage in prior informed consultation before and during Project execution; and (iv) the impacts on the indigenous communities' habitat and environment (described in Annex 1).
45. The parties differ as to the scope and intensity of the Project's impacts on the indigenous communities. The following table examines the Requesters' concerns in light of the Environment and Safeguards Compliance Policy (Operational Policy OP-703) and the Indigenous Peoples Policy (Operational Policy OP-765); the measures provided under the Project; and the findings of the consultation process assessment. This analysis is merely indicative and reflects the information available to the Mechanism before and during the assessment.

Concerns	Relevant Operational Policy	Project response	Assessment findings
Failure to acknowledge the presence of indigenous communities	OP-765. Where legal or administrative protection is insufficient to ensure that the project will not directly or indirectly cause the deterioration of the physical integrity or legal status of the affected lands, territories, or resources, the project will include the pertinent restrictions or corrective or compensatory measures.	According to the Project, the competent authorities reported the nonexistence of lawfully established indigenous communities in the Project's direct area of influence, understood to refer to the direct areas of influence of both the alternate road and the Forest Reserve (see paragraph 37). The Project acknowledges the existence of indigenous reserves in the Forest Reserve's indirect area of influence. ⁶⁷	1. The presence of indigenous communities is not limited to the lawfully recognized territories (reserves), but also encompasses <i>lands and territories</i> . ⁶⁹ The Requesters argue the existence of <i>territories</i> in the Project area as follows: ⁷⁰ (i) in the alternate route's direct area of influence, due to the role of Camino Sachamates for indigenous peoples as a traditional place for barter and commerce

⁶⁷ BESMP, page 4.

		<p>Despite this, “<i>the indigenous communities in the Mocoa sector and those in the Sibundoy Valley within the Project’s area of influence recognize a benefit in the alternate road’s construction.</i>”⁶⁸</p> <p>Consequently, the Project carried out a consultation process with these communities in the framework of the environmental studies conducted for the Project (BESMP, EIS, REA), which made it possible to include an Indigenous Community Support Plan as part of the PMAIS.</p>	<p>and for gathering medicinal plants; and (ii) in the Forest Reserve’s direct area of influence, due to the communities’ traditional use of the area for storing and gathering products and the aspirations for expansion of the indigenous reserves.</p> <p>2. The competent authority has repeatedly modified its assessment as to whether there is an indigenous presence in the area, the most recent one being affirmative.</p>
<p>Impact on the self-governance system and increased pressure on social and productive mores and customs</p>	<p>OP-765. Development with identity of indigenous peoples refers to a process that includes the strengthening of indigenous peoples, harmony with their environment, sound management of territories and natural resources, the generation and exercise of authority, and respect for the values and rights of indigenous peoples in accordance with their own worldview and governance.</p>	<p>According to the REA, the Project’s impacts on indigenous cosmology are considered of low intensity, since these impacts would occur with or without the alternate road.⁷¹</p> <p>Nonetheless, the Project includes an Indigenous Community Support Plan that will provide: (i) support for priority projects (mining area, roundtables with the Ministry of Interior, and strengthening of indigenous councils); and (ii) support for integrated life plans (coordination with municipios and ethnoeducation and ethnohealth services).</p>	<p>3. Project documents appear not to fully describe the extent to which the participation of all indigenous communities in: (i) the consultation processes carried out in connection with the Project; (ii) the design of the Support Plan; and (iii) the determination of activities and beneficiaries has been inclusive and socioculturally appropriate.</p> <p>4. Regarding the generic argument that the alternate road could create more pressure on indigenous resources, ways of life, culture, and land use, the Project calls for a</p>

⁶⁹ Definitions included in Operational Policy OP-765: Lands are traditionally occupied by indigenous peoples and such peoples have (consolidated or putative) rights on them, while territories are the habitat of the indigenous peoples, including not only regularly or permanently held areas but also areas which, while not held on a regular or permanente basis, constitute the space where the indigenous peoples carry out their social, economic, and traditional activities (sacred sites, places of protection, hunting, fishing, and gathering sites, and itinerant agriculture reserve areas, among others) and provide the necessary geographic space for the group’s cultural and social reproduction.

⁶⁴ For ease of comparison, the Mechanism presents the Requesters’ arguments using the Project’s terminology.

⁶⁸ ESMR, page 41.

⁴⁴ Idem, page 41.

⁷¹ REA, page 52.

			series of actions within the PMASIS in general and the Support Plan in particular that would potentially mitigate these impacts if, and only if, all indigenous communities participate and are represented.
No prior consultation	<p>OP-765. The Bank will implement mechanisms that ensure the early and effective participation of indigenous peoples in the relevant stages of Bank operations and activities that may potentially and significantly impact them. Additionally, measures will be taken to ensure that these peoples are not intentionally or involuntarily excluded [...]. Accordingly, the Bank will:</p> <ul style="list-style-type: none"> (a) Require assessments [...] and early consultation and good faith negotiation processes designed to identify the indigenous peoples affected, their genuine representatives, and the potential impacts; (b) Promote the inclusion of indigenous representatives in consultations during the early stages of the project; (c) Depending on the nature and intensity of the potential benefits or impacts, 	<p>Given the absence of any lawfully established indigenous territories in the Project's direct area of influence,⁷² there was no need for <i>prior consultation</i>⁷³ under Colombian legislation. Nonetheless, the Project consulted with the indigenous communities in the context of the BESMP, REA, and EIS, using the consultation methods provided under OP-765 for projects with no identifiable significant direct impacts;⁷⁴ and the development priorities were included in the Support Plan.⁷⁵ Moreover, the Project provides mechanisms for communicating with the communities, including: (i) prior consultation under Colombian legislation, in connection with the Forest Reserve expansion; (ii) consultations during the PMASIS updating and implementation; (iii) through the Presidential Program for the</p>	<p>5. Apparently there are new elements that could support an update of future consultations with the indigenous peoples in line with OP-765. For example: (i) the presence of indigenous peoples in the Project area has recently been confirmed by the relevant authority; (ii) the aspirations for an expansion of indigenous territories could coincide with the Project's area of influence; (iii) the Requesters allege significant adverse future impacts that do not match the Project's projections; and (iv) the Project fails to provide a detailed description of the beneficiaries of each mitigation and compensation measure. These elements could be reinforced by the potential results of the anthropological study of Camino Sachamates recommended by the ITAC.</p>

⁷² ESMR, page 136: *no lawfully established territories belonging to ethnic minorities were identified in the alternate road's direct area of influence.*

⁷³ See characteristics of prior consultation according to Colombian constitutional jurisprudence in Annex 2.

⁷⁴ Operating Guidelines for the Indigenous Peoples Policy (Operational Policy OP-765), pages 16-17: "As a result of the preliminary impact evaluation, the project team determines the actions [...] to prevent or mitigate direct or indirect adverse impacts on indigenous peoples or their individual or collective rights or assets. These actions must be commensurate with the nature, scope, and intensity of the impacts identified [and] are to include: (a) sociocultural impact evaluations; (b) consultation processes (all adverse impacts); (c) mitigation measures, monitoring, and fair compensation (all adverse impacts); (d) good faith negotiation processes (moderate and significant adverse impacts); (e) agreements (significant adverse impacts)."

⁷⁵ The public information and participation process, page 21: "Some indigenous initiatives described in these three studies were not included in the PMASIS but continue to be in effect and may be taken up again during the prior consultation processes expected to take place during the Forest Reserve expansion process."

	<p>use the appropriate consultation, good faith negotiation, agreement or consent, and participation procedures in subsequent project development stages.</p>	<p>Formulation of Strategies and Actions for Comprehensive Development of Indigenous Peoples; (iv) through the Putumayo Ethnic Roundtable for Dialogue and Consensus; (v) on a continuous basis through the INVIAS Conflict Resolution Mechanism.⁷⁶</p>	
<p>Impact on the indigenous habitat and the environment:</p>	<p>OP-703. The safeguards are applied throughout the Project cycle to ensure environmental sustainability. The Bank favors avoiding negative environmental impacts. When these are unavoidable, Bank-financed operations require mitigation measures. For impacts that cannot be fully mitigated, compensation or offsets should be implemented.</p> <p>Category “A” [...] operations will require an environmental assessment (EA), normally an Environmental Impact Assessment (EIA) for investment operations, or other environmental assessments such as a Strategic Environmental Assessment (SEA) for programs and other financial operations that involve plans and policies.</p>	<p>The Project has made an intense analytical effort, suitable for a Category “A” project, to determine the environmental impacts by means of an REA, an EIS, and BESMP support. The results of this analytical effort are set forth in the PMASIS. For the Project, the responsibility for implementing the PMASIS falls on INVIAS, which has entered into an implementation agreement with Corpoamazonia.</p>	<p>6. The generic environmental impacts alleged by the Requesters could be addressed within the Project framework: (i) through specific mitigation measures and (ii) through an environmental management plan that provides for monitoring of impacts and readjustment of mitigation measures (see Annex 1). The Project provides for the inclusion of key stakeholders in the various land-use plans and sustainable conservation and development strategies. These venues may enable the indigenous communities to find concrete answers to specific concerns raised by the Project. Creating the PMASIS under one of the Project’s components is good practice and will give the Project and its potential beneficiaries the opportunity to expand and/or improve the established mitigation methods.</p>

⁷⁶ According to the project team reporting to the Mechanism.

Noninterference with Judicial Cases

46. During the assessment, the Mechanism has become aware of two court cases that might be relevant for the development of the Consultation Phase. The Mechanism has examined a possible interference by the consultation process in these two cases, and vice versa, under the noninterference principle.⁷⁷ The applicability of this noninterference principle hinges on whether the subject or purpose of the administrative or judicial proceedings and of the Request submitted to the Mechanism are equivalent, and on the current stage of these proceedings.
47. Below is a brief analysis of the pending court cases:
- a. *Acción popular* [class action]: This action was brought in November 2010 by the Requesters' Representative, Carmenza Tez, and others for the primary purpose of challenging the environmental permit, preventing the start of construction of the alternate road, and obtaining a court order requiring INVIAS to rebuild the current road. This action is awaiting a decision by the Nariño Administrative Court.
 - b. *Acción de tutela* [action for protection of fundamental rights]: This action was brought in September 2010 by the San Francisco Inga Kamentsa governor for the primary purpose of challenging the environmental permit and arguing the inadmissibility of the certificate issued by the Ministry of Interior not recognizing the presence of indigenous communities in the Project area, as well as for requesting a prior consultation as provided in Colombian legislation. This *acción de tutela* has to date resulted in a decision from a lower court, upheld on first appeal, denying the claimant's petitions. The first appeal decision was forwarded by operation of law to the Constitutional Court for review and is currently pending resolution by the Constitutional Court.
48. Based on the aforementioned criteria, the Project Ombudsperson has determined that the pending court cases do not interfere⁷⁸ for the time being with the implementation of the Consultation Phase. Both cases are pending judgment; both parties have taken all pertinent action within the proceedings, and the final outcome is out of their hands. However, the decisions in these actions could potentially interfere with the dialogue. Therefore, they will be monitored during the Consultation Phase to determine the most appropriate course of action in order to prevent the dialogue process from interfering with the judicial proceedings and vice versa. If at any time during the Consultation Phase any indication is found of interference between the dialogue process and the aforementioned actions or any other similar judicial, arbitral, or administrative action initiated by the

⁷⁷ Policy establishing the Mechanism, section 37 (i): “[t]he Consultation Phase [...] will” not “be applied to requests that raise issues under arbitral or judicial review by national, supranational or similar bodies.”

⁷⁸ Given the nature of the consultation process, the principle of noninterference with judicial proceedings remains in effect throughout the process.

Requesters or any of the main parties, the Project Ombudsperson will terminate the Consultation Phase.

Positive Conditions and Openness to Dialogue

49. The Project Ombudsperson believes that conditions favor dialogue and that the elements are in place for this dialogue to facilitate a consensus-based solution between the parties.
50. The primary stakeholders identified during the assessment have shown their willingness to take part in a dialogue sponsored by the Mechanism. The indigenous communities have stated their intentions of managing their differences and working to present a united front ahead of a dialogue following the council elections (see paragraph 25). For their part, INVIAS and Corpoamazonia have stated their intentions of actively participating in the dialogue. In addition, secondary stakeholders such as Colombian institutions with various types of authority over indigenous affairs have expressed their willingness to support the dialogue process and the search for solutions.

Postponement of Dialogue

51. The parties have asked the Mechanism to postpone any activity related to the preparations for dialogue until after the gubernatorial elections in the indigenous councils.⁷⁹ Since the position of the current elected representatives regarding dialogue could undergo changes following the election of new governors, the Mechanism decided to agree to the parties' request. The characteristics of the consultation process are not predetermined by the Mechanism but are rather the result of the parties' collective participation and efforts. Therefore, starting in January 2012, the Mechanism will start work with the parties to design the dialogue (scope, methodology, timetable, agenda, etc.) and appoint dialogue participants and representatives of the parties (see paragraph 52).

D. Next Steps

52. The next steps in the Consultation Phase will include: (i) confirming the willingness of the parties to start a dialogue process and search for solutions and compiling dialogue guidelines;⁸⁰ (ii) appointing the parties' representatives who will participate in the dialogue; (iii) participative dialogue design⁸¹ and information exchange; (iv) facilitating a

⁷⁹ Held in early December 2011.

⁸⁰ The dialogue guidelines are initial references which the parties mention during the assessment as possible (and favorable) issues for building a dialogue agenda during the consultation process. The guidelines normally reflect the positions of the parties on a specific issue. The collective analysis of the guidelines provided by the parties is useful for determining whether the necessary conditions and circumstances are in place for a constructive and productive dialogue. If the guidelines provided by the parties describe issues, positions, or terms which are irreconcilable or incompatible with a dialogue, the Project Ombudsperson will normally determine that the necessary conditions for such dialogue are not in place.

⁸¹ The parties will jointly decide whether they prefer to build a dialogue using the systems and venues available under the Project or whether they require an independent process.

dialogue aimed at a search for solutions; and (v) participative design of arrangements for monitoring the agreements reached. Below is a fuller description of some of these steps.

53. *Confirming the willingness of the parties to start a dialogue process and search for solutions and compiling dialogue guidelines.* The Mechanism will make contact with the newly elected representatives of the Sibundoy Valley and Mocoa councils in early 2012 with a view to acquainting them with the characteristics of the Mechanism and its Consultation Phase, showing the assessment results, and mapping the new governors' predisposition and guidelines for dialogue.
54. In addition, during the assessment, the Mechanism confirmed INVIAS's institutional willingness to participate in the dialogue. The Mechanism will compile INVIAS's dialogue guidelines in early 2012.
55. *Appointment of representatives to participate in the dialogue.* Ideally, these representatives should have the following characteristics:
 - a. Direct representation of the parties and all their positions. This is particularly relevant in the case of the indigenous communities, where there are differences in positions regarding the Project's interaction, characteristics, and performance.
 - b. Decision-making capacity or direct access to decision-makers. In the interest of holding a robust dialogue that facilitates the search for solutions, the parties should ideally make decisions at the dialogue roundtable, have direct access to decision-makers, or be able to activate quick decision-making processes with their constituents.
 - c. Compact and multidisciplinary group. Respecting the parties' internal decision-making processes and the selection of representatives, the dialogue roundtable would ideally be comprised of the smallest possible group that can maintain the characteristics and integrity required for an effective search for solutions.⁸²
56. *Participative dialogue design and facilitation of an information exchange process.* For orientation purposes, below are some of the common steps in dialogues facilitated by the Mechanism:
 - ✓ The parties jointly select a local facilitator/mediator (normally nominated by the Project Ombudsperson) to continuously monitor the process;
 - ✓ The parties individually and/or jointly prepare a list of required information for informed decision-making, specifying the process of obtaining this information: for example, whether the information exists and is held by one of

⁸² In previous dialogues sponsored by the Mechanism, the communities put forth a representative group consisting of approximately 8-12 participants.

the parties or must be generated, or whether it needs to be presented/explained;

- ✓ The Mechanism facilitates the exchange of information among the parties as a continuous process. To this end, the Mechanism will facilitate specific meetings prior to the dialogue, although there is always the possibility of generating or exchanging information at any point in the process if it is believed that new information is needed for informed decision-making;
- ✓ The parties jointly develop the following elements for the dialogue:
 - Methodology, timetable
 - Dialogue rules, principles, and guidelines
 - Dialogue agenda

57. *Completion of the dialogue based on a design agreed upon by the parties.* The results of the dialogue may be in the form of: (i) a preliminary agreement, in which the parties consent to follow an action plan leading to a final agreement; (ii) a simple agreement, in which the parties reach a common decision on specific actions; (iii) a complex agreement, in which the parties reach a simple agreement on certain points and a preliminary agreement on others; or (iv) any other type of suitable agreement in view of the specific characteristics of the particular case.
58. *Once an agreement is reached* in any of its forms, the parties will jointly decide on the arrangements for monitoring it. These arrangements may include a monitoring timetable, responsible parties, reporting methods, etc.

Annex 1: Environmental impacts alleged by the Requesters and mitigation measures

Negative generic environmental impacts	Mitigation measure
On water resources	Conservation (95 hectares) and reforestation (1,060 hectares) project to reduce erosion-based contamination, formulation of a watershed management and use plan (POMCA).
On forest resources	Conservation and reforestation project (see above), land use strategies to reduce deforestation, expansion of the Forest Reserve from 34,600 hectares to 65,288 hectares.
On biodiversity	Program for species rescue and relocation from the right of way, ban on hunting, ⁸³ and project for research on and propagation of plant and animal species.
Due to accelerated changes in land use	Environmental land-use strategy, Forest Reserve sustainable conservation and development strategy.

⁸³ The PMASIS, page 85, includes the tapir as a species under pressure from hunting.