

**PUBLIC**

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

**CO-MICI001-2011  
COMPLIANCE REVIEW PHASE DETERMINATION OF ELEGIBILITY  
FOR THE “SAN FRANCISCO–MOCOA ALTERNATE ROAD CONSTRUCTION  
PROJECT – PHASE I”  
(2271/OC-CO)**

**This document was prepared by the Panel Chairperson of the Compliance Review Phase**

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**COMPLIANCE REVIEW PHASE  
ELIGIBILITY DETERMINATION**

**TO:** Requesters, Board of Executive Directors, President of the Bank, the Country Office Representative, Project Team and Executing Agency

**FROM:** Werner Kiene, Panel Chairperson

**REFERENCE:** CO-MICI001-2011 San Francisco-Mocoa Alternate Road Construction Project – Phase 1 (2271/OC-CO/CO-L1019)

**COUNTRY:** Republic of Colombia

**DATE:** August 28, 2013

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**1. Background**

1.1 On July 13, 2011, Ms. Carmenza Tez (“Ms. Tez” or the “representative of the Requesters”) lodged a Request with the Independent Consultation and Investigation Mechanism (the “ICIM” or the “Mechanism”)<sup>1</sup> of the Inter-American Development Bank (the “IDB” or the “Bank”) on her behalf as well as in representation of the leaders of the Inga and Kamentsa Indigenous Communities of Putumayo from the department of Putumayo (the “Requesters”, the “Indigenous Communities” or the “Communities”), Republic of Colombia (“Colombia”). The Request alleges potential adverse environmental and social impacts that the “San Francisco-Mocoa Alternate Road Construction Project – Phase 1” (the “Alternate Road” or the “Program”), a Bank-Financed Operation, may have with respect to the livelihoods and traditions of the Requesters. The Requesters allege that harm might be caused at least in part by the Bank’s non-compliance with some of its Relevant Operational Policies (“ROPs”). The Program’s Executing Agency is the National Institute of Roads (the “Executing Agency”) and the Borrower is the Republic of Colombia (the “Borrower”).

1.2 On July 27, 2011, the Request was forwarded to the Project Ombudsperson who declared it eligible for the Consultation Phase on August 16, 2011. On March 27, 2013, the Project Ombudsperson concluded the Consultation Phase because “... the Project Ombudsperson considered that there are no necessary conditions for the dialogue

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<sup>1</sup> The terms Mechanism, Management, Executive Secretary, Project Ombudsperson, Panel, Mechanism Policies, Eligibility, Consultation Phase, Assessment, and any other relevant term contained in this Eligibility Determination will have the meanings assigned to them in the Policy for the ICIM approved on February 17, 2010, and available at [www.iadb.org/icim](http://www.iadb.org/icim).

process...”<sup>2</sup> On April 5, 2013, the Executive Secretary forwarded the Request to the Chairperson as the Requesters expressed desire for a Compliance Review pursuant to Part D, Section 55 of the ICIM Policy. In April 2013, the Panel contacted Ms. Tez, to request further information to support the Chairperson’s analysis regarding the eligibility of the Request for a Compliance Review. Ms. Tez expressed desire to be allowed additional time beyond the deadline of April 26, 2013, to gather additional information and include the concerns of other Communities who expressed desire to adhere to the original Request. On April 26, 2013, the Chairperson extended<sup>3</sup> the deadline for the eligibility determination to May 13, 2013. On May 20, 2013, the Panel received additional information from Ms. Tez, including an additional Request in which she ratified the concerns expressed during the Consultation Phase and reiterated her desire to request a Compliance Review by the Panel.

1.3 On June 13, 2013, the Panel held a meeting with Management, to discuss the Program and the Requesters’ concerns. At that meeting, the attendees collectively determined that Management and Ms. Tez may not have had sufficient opportunity to discuss and address concerns raised by the Request.<sup>4</sup> The attendees at the meeting discussed the following: (a) to ensure that Management receive the whole/complete Request in order to be certain that Management was fully informed and (b) to grant an additional 45 days so that Management could attempt to address issues raised by the Requesters. Management agreed to contact the Requesters and the Chairperson granted a 45-day extension.

1.4 On July 29, 2013, the Panel contacted Ms. Tez, to request an update of any ongoing legal proceedings related to the Program, in Colombia. Ms. Tez clarified that the “...legal [proceedings] continue... and that [we] have great expectations....”<sup>5</sup>

1.5 On July 31, 2013, the Panel received a written communication from Management, indicating that on July 29, 2013, the task team leader contacted Ms. Tez, who expressed her main concerns about the Program. Management proposed to Ms. Tez holding a meeting with the Requesters, at their earliest convenience. Management reported to the Panel on July 31, 2013, that as of such date, Management had received no response from Ms. Tez.<sup>6</sup>

## **2. The Program**

2.1 On December 14, 2009, the Board approved the financing relating to the Program. The stated purpose of the Program was to improve the efficiency and safety of the Tumaco-Pasto-Mocoa road corridor, located in the Southern part of Colombia. The Program’s objective also includes promoting economic integration of Southern Colombia with the main commercial centers of the Central region of the country.

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<sup>2</sup> Consultation Phase Report “San Francisco Mocoa Alternate Road Phase I” (CO-MICI001-2011) (MI-17-3), p. 14.

<sup>3</sup> Part D, Section 91 of the ICIM Policy, “Time periods. Any time period referred to in this Policy may be extended by the Project Ombudsperson or Panel Chairperson, as appropriate, for as long as is strictly necessary to ensure the full and proper processing of Requests. The Requester and other relevant parties shall be notified of any extension, and it shall be noted on the Registry.”

<sup>4</sup> The Requesters were in contact with Management during the Consultation Phase.

<sup>5</sup> Copy of the e-mail exchange available in the ICIM physical files and in IDB docs.

<sup>6</sup> Copy of the e-mail available in the ICIM physical files and in IDB docs.

2.2 The Program is a sovereign-guaranteed operation with two components: (i) civil works construction on the San Francisco–Mocoa Alternate Road and supervision and (ii) design of an Integrated and Sustainable Environmental and Social Management Plan (“PMASIS”, in Spanish), which includes activities supporting the protection, management and conservation of the biodiversity of the “Protected Forest Reserve of the Upper Mocoa River Basin (“RFPCARM”, in Spanish).<sup>7</sup> The San Francisco–Mocoa Alternate Road is part of the public initiative “Road Development in Southern Colombia Program”, which includes the road corridors Tumaco-Pasto-Mocoa-Puerto Asís and Airport-Mojarras-Popayán.

2.3 The Bank-Financed Operation is also expected to contribute to improve international transportation between Colombia and Ecuador through the Andean Integration Hub. The Program will further facilitate the road connection with Brazil through the Multimodal Amazon Hub.<sup>8</sup>

### 3. The Request

3.1 The Request alleges potential harm that could be caused by the environmental and social impacts that the Program’s activities may have on the Requesters, as part of the Indigenous Communities owing to the Bank’s alleged non-compliance with certain ROPs. According to the Requesters, the potential or actual direct harm may result from the Program’s failure to: (a) acknowledge the existence of the Indigenous Communities within its area of influence<sup>9</sup>, (b) consult with or properly obtain prior and informed consent of the Indigenous Communities<sup>10</sup> for the design and implementation phases, and (c) recognize that the serious and irreversible environmental and social impacts from the implementation may cause harm to the livelihoods of the Requesters.<sup>11</sup>

3.2 More specifically, the Requesters allege that:

- a. That the Inga and Kamentsa communities are located in the area of influence of the Program was disregarded by the Program’s sponsors. They allege that no appropriate consultation process took place in which the free, prior and informed consent of the affected Communities was sought or obtained. The traditional knowledge of the Indigenous Communities regarding traditional and sustainable land-use was not taken

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<sup>7</sup> Plan de Manejo Ambiental y Social Integrado y Sostenible (PMASIS) para la Región del área de Influencia del Variante San Francisco – Mocoa, July 2008.

<sup>8</sup> Idem.

<sup>9</sup> In this regard, the Requesters allege in the written communication submitted to the ICIM on May 12, 2013, “...the indigenous communities Kamentsa and Inga consider ourselves affected by the Program...given the continuous lack of information of entities such as the IDB and the State, as indigenous peoples settled in ancestral lands and where the Program impacts. Further, we are interested parties in the Program... and we have expressed our concern to the IDB and different institutions of ...Colombia”.

<sup>10</sup> Pursuant to the Indigenous People Policy, the following potential adverse impacts have to be identified within the scope of a Bank Financed-Operation, in the following manner: (i) identify and focus on the beneficiaries indigenous people, (ii) implement sociocultural process of consultation with the indigenous people, (iii) respect the traditional knowledge and the cultural and social heritage, as well as specific systems within the social, economic, linguistic, spiritual and legal frameworks, (iv) adapt services and other activities to facilitate the access to the indigenous beneficiaries, including equal treatment, and (v) design complementary activities through good faith negotiations with the affected indigenous communities.

<sup>11</sup> Consultation Phase Report (MI-17-3), pp. 1 and 2.

into account in the design of the Program. The Requesters allege that the construction and operation activities will affect the special relationship and interdependence that the Communities have traditionally maintained with their land. In addition, the Requesters fear that the Program will have severe and irreversible direct and indirect environmental impacts that would lead to (i) deforestation due to illegal logging and loss of biodiversity as the result of the proliferation of monoculture in Indigenous Community lands, (ii) changes in land use and loss of access to traditional products for medicine and food security, (iii) pollution from mining concessions with their effects on the regional rivers, (iv) additional pressures on endangered species in the local fauna including the spectacled bear, and (v) the lack of analysis of the cumulative impact from all the activities introduced by the Program constitutes a significant threat to this highly vulnerable mountainous area, which is the source of important rivers for the lower Putumayo and the Colombian Amazon region.

- b. Building and operating the Program will increase competition for and pressure on indigenous community lands by parties not members of the communities, jeopardizing traditional livelihoods; it will fragment the land and undermine the self-governance systems of the Communities. The Requesters allege that the Program will disrupt existing social and economic activities by negatively impacting on natural resources that are essential for the survival of the Indigenous Communities, such as water, forest, and biodiversity in the Program's area of influence. In addition, the Requesters allege that the Program will alter the way of life, cultural integrity and traditional knowledge of the Indigenous Communities because of the disturbances that the construction of the Alternate Road will cause to religious sites and traditional mountain routes that are important components of the cultural and spiritual heritage of these Communities.
- c. The Program is located in an area that is subject to natural hazards related to active geological faults that, associated with unusual rainfall over the last years and instability of the mountainous terrain, have triggered catastrophic landslides, which resulted in closures of the existing road in Communities of the San Francisco municipality. The Requesters fear that the Program may exacerbate this situation.

3.3 The Requesters' allegations suggest that the negative impacts described by them involve potential non-compliance with the Environmental and Safeguards Compliance Policy (OP-703) (the "Environmental and Safeguards Policy"), the Operational Policy on Indigenous Peoples (OP-765) (the "Indigenous Peoples Policy") and the Natural Disasters Risk Management Policy (OP-704) (the "Natural Disasters Policy") of the IDB.<sup>12</sup> *This statement does not signify, and should not be interpreted to imply, the Panel has undertaken a Compliance Review as part of which an appropriate analysis of the merits of the issues presented by the Request has been undertaken, as limited information is available to the*

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12 The Panel adopted relevant excerpts of the Consultation Phase Report, (MI-17-3) issued on March 27, 2013.

*Panel at this time.<sup>13</sup> Nor has the Panel made any inference or reached any conclusions as to whether any action or omission by the Bank that may not comply with any applicable ROP has occurred or will occur. This statement merely reflects that “the Requesters ha[ve] reasonably asserted that [they have] 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 [have] described in at least general terms the direct and material harm caused or likely to be caused by such action or omission....”<sup>14</sup>*

#### **4. The Bank-Financed Operation**

##### ***Loan operation***

4.1 The Program involves aggregate financing of USD203 million, of which USD53 million will be financed by the Bank and the remainder, USD150 million, will be financed by the Government of Colombia. The Loan Agreement was signed on May 3, 2010, and thus far approximately 71.6 percent has been disbursed.<sup>15</sup>

##### ***Environmental and social due diligence undertaken by the Bank***

4.2 The Program is classified by the Bank as a Category A operation, owing to its potential impacts on critical natural habitats.<sup>16</sup> The Program would be implemented in the Amazon foothills and most of it would cross the RFPCARM. It would also by-pass some of the so-called “camino real” used as an overland route by indigenous communities since ancestral times. The Loan Proposal indicates that “[w]hile there are no indigenous communities in the area of the [proposed] alternate road, they have a close sociocultural relationship with the RFPCARM.”<sup>17</sup>

4.3 The existing Program documentation includes a number of environmental and social assessments that have been undertaken in light of the Program’s classification as a Category A operation, such as: (i) updating and supplementing the environmental impact study and preparing an environmental and social management plan for the Alternate Road, (ii) a regional environmental assessment for the Pasto-Mocoa corridor, (iii) a Basic Environmental and Social Management Plan for the Forest Reserve of the Upper Mocoa River Basin, (iv) institutional strengthening of INVIAS and Corpoamazonia, and (v) implementation of a socio and environmental monitoring and control system for the Alternate Road’s construction and operation.<sup>18</sup>

##### ***Potential environmental and social impacts and risks***

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<sup>13</sup> The standard required to be achieved by Requesters is set forth in Part D, Section 58 (last sentence) of the ICIM Policy and is described below in paragraph 6.4 of this document.

<sup>14</sup> Part D, Section 56 f of the ICIM Policy.

<sup>15</sup> Executive Financial Summary for the Program; last seen on August 26, 2013, at 11am. <http://edwbip.iadb.org/cognos8/cgi-bin>

<sup>16</sup> Environmental and Social Report, Colombia, Corredor Vial Pasto-Mocoa Variante San Francisco Mocoa (CO-L1019), October 2009.

<sup>17</sup> San Francisco-Mocoa Alternate Road Construction Project – Phase 1 Loan Proposal, p. 2.

<sup>18</sup> Consultation Phase Eligibility Determination Memorandum (MI-17), August 16, 2011, p. 3.

4.4 The environmental assessment of the Program indicated that given its Category A status, certain environmental and social impacts and risks would be associated with its implementation. Therefore, the expansion of the RFPCARM was considered in the Environmental License as a compensatory measure to preserve the ecologic condition and the eco-systems in the protected area in order to maintain and improve environmental services and offset the direct and indirect impacts of the Program.

### ***Public consultations***

4.5 The ESMR<sup>19</sup> indicates that since July 2007, approximately 1,844 local stakeholders including indigenous governors Inga and Kamentza attended 35 workshops to discuss the Program's design and activities. According to the ESMR, the local stakeholders support the Program's activities<sup>20</sup> and the Executing Agency sends periodic reports to the local stakeholder institutions and non-governmental organizations operating in the area, to keep them informed about the Program's progress in the area.

4.6 The ESMR informs that there are no "legally recognized" indigenous settlements<sup>21</sup> within the area of the RFPCARM through which the Alternate Road will pass. According to the ESMR, the existing indigenous communities located in Mocoa and the Sibundoy valley in the area of influence of the Alternate Road believe that the changes may be beneficial to their Communities. The ESMR further states that during the Program's preparation, there were consultations with the local indigenous communities and the PMASIS included measures to protect their cultural identity.

4.7 The Requesters disagree with these assertions from the ESMR. They allege that they were not invited to participate in the consultation process because the Ministry of the Interior and Justice did not officially certify their presence in the Program area, therefore preventing them from participating. However, according to the Request, members of the indigenous communities, after learning through other sources about the meetings, decided to attend "unofficially" to learn about the Program, to develop a strategy to preserve their rights.

## **5. Safeguards Required by the Bank**

5.1 According to the ESMR assessment, the Program complies with the Bank's Environmental and Safeguards Policy, the Disclosure of Information Policy<sup>22</sup> as well as the Policy on Involuntary Resettlement. Among other general requirements, the Bank requires the Borrower and all Program components to comply with: (a) the existing environmental, social, labor, health and safety regulatory requirements, including those relating to permits, authorizations, and licenses necessary for the Program, (b) the environmental and social

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<sup>19</sup> "Informe de Gestión Ambiental y Social, Corredor Vial Pasto-Mocoa Variante San Francisco-Mocoa (CO-L1019)", October 2009, p. 41.

<sup>20</sup> ESMR, pp. 9 and 10.

<sup>21</sup> The Requesters recognize that they have no settlements within the RFPCARM. They only use it for spiritual and medicinal purposes.

<sup>22</sup> The Board approved the Program on December 14, 2009. As per Part A, Section 26 of the ICIM Policy, the applicable policy in this Request is the Disclosure of Information Policy au lieu de Access to Information Policy (OP-102), approved by the Board in 2010.



aspects and components of the Operation's environmental, labor, social, and health and safety aspects documents, and (c) ongoing information disclosure and consultation activities related to environmental, labor, social, and health and safety aspects of the Program.<sup>23</sup>

5.2 However, notwithstanding the above, the Requesters allege that the Bank failed and continues to fail to undertake meaningful and timely consultations with the affected population, in this case indigenous people, disregarding its own Environment and Safeguards Policy, Disclosure of Information Policy, Natural Disasters Policy and the Indigenous Peoples Policy. The Requesters believe that the Program has neglected the existence of indigenous peoples in the area, has failed to undertake adequate consultations and has failed to recognize the serious and irreversible environmental and social impacts on their livelihoods. If a Compliance Review were to be authorized by the Board, the Panel would analyze the Bank's compliance with its relevant ROPs.

## **6. Eligibility Analysis**

6.1 The ICIM Policy states that a Request proceeds from the Consultation Phase to consideration under the Compliance Review Phase if the Requester has expressed a desire for a Compliance Review and if:

a. the Consultation Phase has been terminated or concluded for any reason or

b. the Request was deemed ineligible under the Consultation Phase<sup>24</sup>

6.2 Once a Request is forwarded to the Panel, the Chairperson is required pursuant to Part D, Section 55 of the ICIM Policy<sup>25</sup> to make an independent determination as to whether the Request is eligible for a Compliance Review. The Chairperson makes an analysis of whether the Request meets the eligibility criteria (Part D, Section 56 of the ICIM Policy)<sup>26</sup> and whether any of the exclusions from eligibility (Part D, Section 37, of the ICIM Policy) is applicable to the Request, all based on a prima facie review of the Request and documents and information made available to the Chairperson, and on any communications or meetings held with Management, the Requesters(s) or other parties.<sup>27</sup>

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<sup>23</sup> The Bank also requires the Borrower, under the Loan Contract, to comply with the activities and timeline in the Environmental and Social Action Plan (the "ESAP"), which was finalized by the Program team in February 2009. The ESAP identifies environmental and social aspects of the Program that must be corrected or improved by the Borrower.

<sup>24</sup> Part D, Section 54 of the ICIM Policy.

<sup>25</sup> Part D, Section 55 of the ICIM Policy "Eligibility review by the Chairperson... The Panel Chairperson will review the Request for eligibility, independently of the determination of the Project Ombudsperson..."

<sup>26</sup> Part D, Section 56 of the ICIM Policy. Eligibility criteria for the Compliance Review Phase.

<sup>27</sup> Part B, Section 37 of the ICIM Policy... Exclusions for the application of the Consultation and the Compliance Review Phases.

6.3 Based on the above-described review, the Chairperson has determined that the Request meets the requirements of Part D, Section 56 of the ICIM Policy, paragraphs (a), (b), (c) and (d)<sup>28</sup>.

6.4 The Chairperson has also determined that the Requesters have alleged in reasonable detail that they could be directly, materially adversely affected and harmed by an action or omission of the IDB in violation of one or more ROPs in the context of the Program. Furthermore, the Chairperson determined that a Compliance Review may assist in determining whether there were Bank actions or omission that may have resulted in non-compliance with ROP and resulted in direct, material adverse impacts (potential or actual) to the Requesters. Based on the foregoing, the Chairperson has determined that the requirements of Part D, Section 56, paragraphs (f) and (g) of the ICIM Policy have been met.<sup>29</sup>

6.5 As for Part D, Section 56(h)<sup>30</sup> of the ICIM Policy, the Requesters have had an opportunity to contact Management. Thus, the Chairperson considers that Part D, Section 56(h) of the ICIM Policy has also been fulfilled.<sup>31</sup>

## **7. Analysis of Applicability of Part D, Section 56(e), including Part B, Section 37(i) of the ICIM Policy**

7.1 Part D, Section 56, paragraph (e)<sup>32</sup> of the ICIM Policy requires the Chairperson to analyze whether any of the exclusions provided in Part B, Section 37 of the ICIM Policy apply to the Request. Accordingly, based on the information provided by Requesters and the

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<sup>28</sup> “Part D, Section 56 of the ICIM Policy. Eligibility criteria for the Compliance Review Phase. Requests shall be deemed eligible for the Compliance Review Phase if the Panel Chairperson determines the following, either via the Request or via IDB records: a. the names and contact information for the Requester are available; b. the names and contact information for the Representative, if any, and proof of the authorization are available; c. the Bank-Financed Operation(s) at issue has been identified; 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)”.

<sup>29</sup> “Section 56... 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; 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.”

<sup>30</sup> “Section 56... 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.”

<sup>31</sup> “Section 56... 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; 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.”

<sup>32</sup> “Section 56...e. none of the exclusions set forth in Section 37 applies; and h. the Requester has taken steps to bring the issue to the attention of Management.”

Bank's documentation of the Bank-Financed Operation, the Chairperson considers that Part B, Section 37, paragraphs (a) to (h) are not applicable.<sup>33</sup>

7.2 However, it is useful to discuss the application of Part B, Section 37(i) of the ICIM Policy, since the Panel Chairperson is aware of three legal proceedings that could relate to the Request.<sup>34</sup>

7.3 The **“Acción de Tutela”** (Legal Action N° 1): In September 2010, Mr. Clemente Arturo Jacanamejoy Mavisoy, the former Governor of the Inga Kamentsa of San Francisco filed Legal Action N° 1 before the Superior Tribunal of the Judicial District of Pasto against some of the Colombian public agencies involved in the Program's activities. The Requester seeks through Legal Action N° 1 to nullify the following administrative acts: (i) Certification N° 3868 of October 25, 2001, of the Department of Interior and Justice (“MIJ”)<sup>35</sup>, which does not acknowledge the existence of the indigenous communities Inga Kamentsa within the Program's area and (ii) Resolution N° 2170 of December 2008, through which the Department of Environment, Livelihoods and Territorial Development (“MAVDT”), granted an Environmental License to the Program's activities. The Requester believes that Legal Action N° 1 would protect fundamental rights of the indigenous communities, such as the right to life and ethnical diversity among others.

7.4 According to the information presented by the Requesters the “Acción de Tutela” was rejected in first and second instances and the Constitutional Court did not select it for review on December 10, 2010, meaning that the “Acción de Tutela” is no longer active in domestic courts. Hence, Legal Action N° 1 is no longer pending. Based on the foregoing, the Chairperson has determined that, Legal Action N° 1 against the Colombian public agencies involved in the Program's activities does not comprise arbitral or judicial review of an issue raised by the Request by a national, supranational or similar body within the meaning of Part B, Section 37(i) of the ICIM Policy.

7.5 **The Class Action** (Legal Action N° 2): The Representative of the Requesters, Ms. Tez, and others filed a class action before the Administrative Tribunal of Nariño (the “Tribunal”) in November 2010, against MIJ, MAVDT and the Executing Agency. The

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<sup>33</sup> “Section 37... Exclusions. Neither the Consultation Phase nor the Compliance Review Phase will be applied to: a. actions that are the responsibility of parties other than the Bank, such as a borrower/recipient, technical cooperation beneficiary, or executing agency, and that do not involve any action or omission on the part of the Bank; b. Requests related exclusively to the laws, policies or regulations of the host country(ies), borrower/recipient or the executing agency; c. actions or activities that do not relate to a Bank-Financed Operation or that are not subject to the Bank's Relevant Operational Policies; d. procurement decisions or processes (in which case the Executive Secretary shall redirect the Request to the appropriate office within the Bank); e. a particular matter or matters that have already been reviewed pursuant to the Mechanism, or its predecessor, unless justified by new evidence or circumstances not available at the time of the initial Request; f. Requests dealing with a Bank-Financed Operation that are filed after twenty-four (24) months of the last disbursement; g. ethics or fraud questions, specific actions of Bank employees, nonoperational matters such as internal finance or administration, allegations of corrupt practices, or other matters subject to review by other bodies established by the Bank (in which case the Executive Secretary shall redirect the Request to the appropriate office within the Bank); h. any Request that on its face (i) is without substance, or (ii) has been submitted to gain a competitive business advantage.”

<sup>34</sup> For reasons of efficiency, the Panel has adopted excerpts of the “The Consultation Process” Section of the Consultation Phase Report, (MI-17-3).

<sup>35</sup> The MIJ is currently the Department of Interior.

purpose of Legal Action N° 2 is to challenge the grant by MAVDT of the environmental license<sup>36</sup> for the construction of the Alternate Road and to obtain a preliminary injunction to prevent the construction work for the Alternate Road. The plaintiffs also challenge the construction of the Alternate Road as they believe that improving the current San Francisco--Mocoa road would be a more beneficial alternative for local people. The main basis for the challenge is that appropriate prior consultations were not conducted because the Ministry of the Interior determined that indigenous communities did not occupy lands in the area of influence of the Program.

7.6 On June 19, 2012, the Tribunal rejected the class action, because the plaintiff failed to prove that the Program's area encompasses indigenous land or a territory occupied by indigenous communities on a permanent basis. As such, prior consultations are not deemed necessary under the Colombian Law, according to the Tribunal, because requesters of Legal Action N° 2 do not occupy the Program area.<sup>37</sup> The Executing Agency provided this information to the Project Ombudsperson in July 2012.<sup>38</sup>

7.7 In December 2012, Ms. Tez filed an appeal before the "Consejo de Estado" against the decision of the Tribunal.<sup>39</sup> The Project Ombudsperson notes in her Report that the requesters of Legal Action N° 2 were seeking to undertake a dialogue exercise with the Consultation Phase while also trying to address their concerns about the Program impacts in domestic courts.<sup>40</sup> This was one of the reasons the Project Ombudsperson decided to terminate the Consultation Phase.

7.8 Upon receipt of the Request, the Panel contacted the Requesters to verify the status of Legal Action N° 2. In a written communication submitted to the ICIM on May 20, 2013, Ms. Tez informed the Panel that "...the class action is still under process..."<sup>41</sup> and in July 2013, Ms. Tez informed the Panel that "...legal [procedures] continue... and that [we] have great expectations..."<sup>42</sup> Hence, based on the existing information, it seems that the Requesters are pursuing a domestic remedy and, at the same time, continue to seek a Compliance Review by the Panel. Specifically, the Requesters seek from the "Consejo de Estado" a domestic remedy that involves rights and guarantees granted to legally-recognized indigenous communities in Colombia, which includes prior consultation and informed consent from the communities when proposed projects will affect their territories.<sup>43</sup> At the same time, they state in their Request to ICIM that they seek a Compliance Review by the Panel based on their allegation that Program activities do not recognize their presence as indigenous communities in the area of influence of the Program.

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<sup>36</sup> Resolution number 2170 of December 5, 2008, granting the environmental license issued by the MAVDT.

<sup>37</sup> The Colombian Law 21 of March 4, 1991, ensures the right to prior and informed consultation to indigenous peoples and afrocolombians in case they have asserted a potential impact in their livelihoods.

<sup>38</sup> Consultation Phase Report (MI-17-3), p. 13.

<sup>39</sup> Consultation Phase Report (MI-17-3), pp. 12 and 13.

<sup>40</sup> Consultation Phase Report (MI-17-3), p. 12.

<sup>41</sup> E-mail from Ms. Carmenza Tez to the ICIM/Panel received on May 20, 2013. A physical copy is available in the ICIM's files and a digital copy in IDB docs.

<sup>42</sup> Copy of the e-mail exchange available in the ICIM physical files and in IDB docs.

<sup>43</sup> The Ministry of the Interior and Justice does not recognize the existence of indigenous settlements in the direct area of influence of the Program. The Bank's official position according to its documents: Loan Proposal and the ESMR are consistent with the Ministry's.

7.9 Based on the available information, the Chairperson has determined that Legal Action N° 2 comprises a judicial review of an issue raised by the Request brought before a national, supranational or similar body within the meaning of Part B, Section 37(i) of the ICIM Policy. Thus, the Eligibility Exclusion of Part B, Section 37 (i) is applicable.

7.10 The “**Acción de Nulidad**” (Legal Action N° 3): On February 13, 2013, Mr. Juan Manuel Sigindioy, an authority of the Inga Kamentsa de San Francisco del Alto Putumayo filed Legal Action N° 3 before the “Consejo de Estado” (an administrative body that has jurisdiction over specific actions like this one, which seeks to nullify an administrative act of a governmental agency) requesting the “Consejo de Estado” to nullify Resolution N° 2170/2008, an environmental license granted under an administrative act<sup>44</sup> of the MAVDT. The Project Ombudsperson notes in the Report of the Consultation Phase that the Requesters did not present additional information on Legal Action N° 3 and that the petitioner of Legal Action N°3 attended meetings<sup>45</sup> with the local facilitators in April 2012<sup>46</sup>, while pursuing domestic remedies to address concerns raised by the Request.<sup>47</sup> This is confirmed on the webpage of the “Consejo de Estado”, where Mr. Juan Manuel Sigindioy is listed as the only plaintiff of Legal Action N° 3.<sup>48</sup>

7.11 The Chairperson requested information from the Requesters about the status of Legal Action N° 3 and received a written communication from Ms. Tez on May 20, 2013, informing the Chairperson that there was no additional information about the status of Legal Action N° 3.<sup>49</sup> On July 31, 2013, Management informed the Panel that on July 24 2013, the party that commenced Legal Action N° 3 had submitted his “memorial de respuesta” before the pertinent Colombian administrative body.<sup>50</sup> According to Management, Legal Action N° 3 is still active.<sup>51</sup>

7.12 Although it appears that the administrative proceedings before the “Consejo de Estado” are still pending and may be active, the Panel Chairperson has determined that we do not have sufficient information about Legal Action N° 3 in order to make a clear determination as to whether the eligibility exclusion of Part B, Section 37 (i) is applicable to Legal Action N° 3.

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<sup>44</sup> Colombian webpage “Rama Judicial”.

<sup>45</sup> Aide-memoire of the meeting available in the ICIM physical files, documents 178 and 179, volume II of the Program.

<sup>46</sup> Consultation Phase Report (MI-17-3), pp. 7, 8 and 13.

<sup>47</sup> Consultation Phase Report (MI-17-3), pp. 13 and 14.

<sup>48</sup> Colombian webpage of the Consejo de Estado, last seen on August 26, 2013, at 10am.

<sup>49</sup> E-mail from Ms. Carmenza Tez to the ICIM/Panel received on May 20, 2013. A physical copy is available on the ICIM’s files and a digital copy in IDB docs.

<sup>50</sup> Information available on the Consejo de Estado’s webpage.

<sup>51</sup> Management submitted to the Panel an e-mail and an annex (a PDF file) with information about the Program as well as updated information on the ongoing legal procedures, in Colombia. Copy available in the ICIM’s physical folders, in IDB docs.

7.13 The results of the Chairperson's eligibility review are summarized in this table:

<b>Summary of the Eligibility Analysis</b>		
<b>Eligibility Criteria Pursuant to Part D, Section 56 and Exclusions from Eligibility Pursuant to Part B, Section 37 of the ICIM Policy</b>	<b>Determination by the Chairperson</b>	<b>Comments</b>
<b>56 (a) Name and contact information of the Requester</b>	Meets the criteria	The names and contact information of the Requesters are recorded in the ICIM's files.
<b>56 (b) Names and contact information of the Representative, if any, and proof of the authorization</b>	Meets the criteria	The name, contact information and authorization of the Representative of the Requesters are recorded in the ICIM's files.
<b>56 (c) Program at issue identified as a Bank-Financed Operation</b>	Meets the criteria	San Francisco-Mocoa Alternate Road Construction Project – Phase 1 (Operation Number 2271/OC-CO and Project Number CO-L1019).
<b>56 (d) The Requester resides in the country where the operation is or will be implemented (or a qualified Representative has been appointed)</b>	Meets the criteria	The Requesters reside in Colombia.
<b>56 (e) None of the exclusions set forth in Part B, Section 37 applies</b>	Does not meet the criteria	Section 37 (i) applies to the Request by virtue of Legal Action N° 2.
<b>56 (f) The Requester has reasonably asserted that it could be expected to be directly, materially adversely affected by an action or omission of the IDB in violation of a ROP</b>	Meets the criteria	The Requesters have sufficiently described the environmental and social impacts and the direct materially adverse effects on Requesters that, in their view, could have resulted from potential actions or omissions of the IDB with respect to the application of the Bank's ROPs.
<b>56 (g) A Compliance Review could assist in determining whether the Bank's action or omission, with respect to a Bank-Financed Operation has resulted in non-compliance with a ROP and affect the Requesters</b>	Meets the criteria	The Requesters have described their concerns and stated that they remain fearful of the potential negative impacts of the Program on their land and livelihoods. Their concerns and fears of potential or actual direct, material harm persist. Management has described the actions it has undertaken to avoid or mitigate the alleged harm. A Compliance Review may assist in clarifying the allegations and the conflicting assertions.
<b>56 (h) The Requester has taken steps to bring the issue to the attention of Management</b>	Meets the criteria	The Requesters and Management have held meetings to address the concerns raised in the Request.

## **8. Processing of the Eligibility Determination**

8.1 The Chairperson, in the exercise of his duties and under the authority granted him by the ICIM Policy, determines that the Request described herein is **INELIGIBLE** for a Compliance Review because aspects that are essential for the implementation of the Program's activities are subject to judicial challenges by the same Requesters who seek a Compliance Review from the ICIM.

8.2 As per Part D, Section 55 of the ICIM Policy the Requesters, the Board of Executive Directors, the President, Management as well as the Borrower will be informed about this Eligibility Report. A notice will be posted in the ICIM Registry within five business days of distribution to the Board.

PDF file with updated information on legal proceedings (page 15) related to the Program received on July 31, 2013

Acción Judicial	Partes	Objeto	Estado
<b>Tutela</b>			<b>Caso Cerrado</b>
Radicación No. 520012204000-201000191-00 Mecanismo previsto en el artículo 86 de la Constitución Política de Colombia, que busca proteger los Derechos constitucionales fundamentales de los individuos "cuando quiera que éstos resulten vulnerados o amenazados por la acción o la omisión de cualquier autoridad pública", es decir al no haber otro recurso para hacerlos cumplir o en el caso de que exista peligro inminente.	CLEMENTE ARTURO JACANAMEJOY, en su calidad de representante de la comunidad KAMETSA e INGA vs. el Ministerio del Interior y de Justicia, y el Ministerio Ambiente, Vivienda y Desarrollo Territorial, el Instituto Nacional de Vías (INVIAS) y el Instituto Colombiano de Desarrollo Rural (INCODER)	Reconocer derecho a la consulta previa de los estudios de Impacto ambiental y sociocultural con los pueblo INGA y Kametsa, asentados en el territorio Carlos Tamoabioy que comprende los cabildos de Santiago, Colón, San Pedro, Sibundoy, San Francisco, Mocoa, Orto, Villagarzón, Condagua, Yungillo, Aponte y demás pueblos indígenas de habitan esta región en vista de su afectación por el proyecto de la Variante	El Tribunal Superior del Distrito Judicial - Sala de Decisión Penal, mediante sentencia del 29 de septiembre de 2010, negó por improcedente, el amparo solicitado por el señor CLEMENTE ARTURO JACANAMEJOY. Fallo que fué confirmado por la Sala de Casación Penal de la Corte Suprema de Justicia, el 11 de octubre de 2010, mediante Sentencia T 50910 de noviembre 11 de 2010. La Corte Constitucional no consideró procedente revisar los fallos y la Acción de Tutela fué archivada.
<b>Acción Popular</b>			<b>Caso Abierto</b>
Radicación 2010 – 6080 Sala Quinta de Decisión del TRIBUNAL ADMINISTRATIVO DE NARIÑO. Medio procesal para la protección de los derechos intereses colectivos. Su objetivo es evitar el daño contingente, hacer cesar el peligro, la amenaza, la vulneración o agravio sobre los derechos e intereses colectivos, restituir las cosas a su estado anterior, cuando es posible.	CARMENZA TEZ JUAGIBIOY Y OTROS vs. Ministerio del Interior	Emisión de una certificación pormenorizada y actualizada sobre la presencia o no de grupos étnicos en el área de influencia directa del proyecto vial: "Construcción Variante San Francisco - Mocoa", localizado en jurisdicción de los municipios de San Francisco y Mocoa, en el departamento del Putumayo.  El INCODER revisó las bases de datos y realizó una visita de verificación y emitió un informe el 29 de marzo de 2012 confirmando que no existe presencia regular y permanente de grupos étnicos que puedan verse afectados por el desarrollo de las actividades	El Tribunal Administrativo de Nariño mediante sentencia del 19 de junio de 2012, negó las pretensiones de los accionantes. El Fallo fue apelado por los demandantes y enviado al Consejo de Estado con oficio No. 3016 del 27 de julio de 2012. El Consejo de Estado como primer paso del trámite solicitó a los demandados presentar sus alegatos frente a las demandas y posteriormente remitió el expediente a la Procuraduría General de la Nación para adelantar un proceso de conciliación entre los demandados y los demandantes. A la fecha no se ha citado a las partes.

		concomitantes a la construcción del corredor vial. (Ratificado por Oficio 2400 del INCODER de 29 de mayo de 2012).	
<b>Acción de Nulidad</b>			<b>Caso Abierto</b>
Radicación del Consejo de Estado No. 11001033400020130002300  Acción contencioso administrativa dirigida a obtener la declaración de nulidad de un acto administrativo. El Consejo de Estado en Sala Plena de lo Contencioso Administrativo, conocerá en única instancia los de nulidad de los actos administrativos expedidos por las autoridades del orden nacional.	Juan Manuel Sigindioy Jamioy vs. Ministerio de Ambiente, Vivienda y Desarrollo Territorial (hoy Ministerio de Ambiente)	Solicita la nulidad y suspensión de la Licencia Ambiental Resolución No. 2170 del 5 de Diciembre de 2008, de la Variante "Mocoa - San Francisco", otorgada por el Ministerio de Ambiente, Vivienda y Desarrollo Territorial	El Ministerio de Ambiente, Vivienda y Desarrollo Territorial, a la fecha no ha sido notificado de dicha acción. El 11 de julio de 2013, la Consejera de Estado asignada al caso expidió un Auto inadmitiendo la demanda para que en un plazo de 10 días los demandantes subsanen defectos formales relacionados con el poder para representar a los supuestos demandante; el 24 de julio de 2013 los demandantes presentaron un memorial de respuesta, por lo tanto el proceso continúa abierto.

[END OF DOCUMENT]