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

**FINAL REPORT OF THE CONSULTATION PHASE FOR
LOAN 2271/OC-CO FOR THE “SAN FRANCISCO–MOCOA ALTERNATE
ROAD CONSTRUCTION PROJECT – PHASE I”**

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

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Report of the Consultation Phase San Francisco-Mocoa Alternate Road Case (CO-MICI001/2011)



PROJECT OMBUDSPERSON

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REPORT OF THE CONSULTATION PHASE

I. BACKGROUND: THE PROJECT AND THE REQUEST SUBMITTED TO THE ICIM

1. This report documents the Consultation Phase process conducted in case CO-MICI001-2011.¹ The case originated with a Request received by the Independent Consultation and Investigation Mechanism (Mechanism, or ICIM) on 13 July 2011 from Mrs. Carmenza Tez (Representative), on behalf of authorities of the Inga and Kamentsa² indigenous communities of Putumayo (the Requesters).³ The Request alleges that the San Francisco-Mocoa Alternate Road Construction Project, Phase 1 (the Project)⁴ is having and may continue to have adverse environmental and social impacts on these indigenous communities and their traditions. Among the concerns raised are a failure to acknowledge the presence of indigenous communities in the Project area and a lack of prior consultation regarding construction of the alternate road.⁵

2. Now in its implementation phase, the Project finances construction of the San Francisco-Mocoa alternate road over a total length of 45.6 kilometers, as well as the implementation of mitigation and compensation measures required for its operation. The Project is being executed by the Instituto Nacional de Vías [National Institute of Roads] (INVIAS), and the Borrower is the Republic of Colombia. It has two components: (i) civil works and inspection; and (ii) an Integrated and Sustainable Environmental and Social Management Plan (PMASIS), which includes activities for the protection, management, and conservation of biodiversity in the Protected Forest Reserve of the

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 link: www.iadb.org/mici.

² Although the official definition used by Corpoamazonía and the Organización Zonal Indígena del Putumayo [Regional Indigenous Organization of Putumayo] is “Camentsá,” the form used in the original Request will be used throughout this report.

³ 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 of the Mocoa region. The communities of Inga and Kamentsa in the department of Putumayo have a population of approximately 14,000.

⁴ The project was registered as CO-L1019 and approved by the Board of Executive Directors on 14 December 2009. Loan contract 2271/OC-CO, for an investment loan of US\$53 million, was signed by the Republic of Colombia and the Bank on 3 May 2010. Total financing is US\$203 million. The remaining US\$150 million will be financed by the Government of Colombia. For further information, see <http://www.iadb.org/es/proyectos/project-information-page.1303.html?id=CO%2DL1019>.

⁵ Additional concerns raised by the Requesters, as described in the Request and subsequent communications with the team during the Consultation Phase, include: (i) impact on the self-governance system and cosmology, and accelerated acculturation; and (ii) impact on the indigenous habitat and the environment. Indirect impacts include accelerated changes in land use, illegal deforestation, the spread of monoculture, and a proliferation of mining and oil fields, increasing pressure on the Requesters' territories.

Upper Mocoa River Basin.⁶ Because it is located in a critical habitat, the Project was classified as a category “A” operation under the provisions of the Bank’s Environment and Safeguards Compliance Policy (OP-703).⁷ As a result, an expansion of the Forest Reserve from 34,600 hectares to 65,289 hectares was incorporated into the Project, with a view to minimizing habitat loss and creating and maintaining a larger ecologically protected area. This measure was included in the environmental permit⁸ by the Ministry of Environment, Housing, and Land Development (now known as the Ministry of Environment and Sustainable Development) as part of the Project’s compensation measures.⁹

II. ELIGIBILITY AND ASSESSMENT STAGES

2.1. Eligibility analysis

3. On 27 July 2011, the Request was transferred to the Project Ombudsperson, who initiated the corresponding eligibility analysis in accordance with the eligibility criteria and exclusions set forth in the Policy Establishing the Mechanism.¹⁰ The case was declared eligible on 16 August 2011¹¹ and was registered under code CO-MICI001/2011.

4. In relation to section 37(i) of the exclusions,¹² the Consultation Phase team carried out a *prima facie* examination in keeping with the principle of non-interference.¹³ The applicability of this principle hinges on: (i) the judicial or arbitral nature of the dispute; (ii) whether the parties or the issues that are the object of the judicial proceedings are identical to those in the Request submitted to the Mechanism; (iii) the current stage of these proceedings, in order to avoid interference by the Consultation Phase in the pending dispute and vice versa.¹⁴ Although in November 2010 some members of the indigenous

⁶ Cf. IDB, *San Francisco-Mocoa Alternate Road Construction Project - Phase I (CO-LI019)*, *Loan Proposal*, 17 December 2009, pages 5 to 7.

⁷ As stipulated in the current Environment and Safeguards Compliance Policy (OP-703), “any operation that is likely to cause significant negative environmental and associated social impacts, or have profound implications affecting natural resources, will be classified as Category “A”.”

⁸ The environmental permit for the Project was issued on 5 December 2008 under Resolution 2170. For further information, see http://www.minambiente.gov.co/documentos/res_2170_051208.pdf.

⁹ Cf. *Loan Proposal*, *supra* note 6, page 9.

¹⁰ These criteria are set forth in sections 40 and 37, respectively, of the Policy Establishing the Mechanism.

¹¹ The Eligibility Memorandum for the case can be found at http://iadb.org/es/mici/detalle-de-reclamo,1804.html?id=CO_MICI001/2011.

¹² According to section 37 (i) of the Policy Establishing the Mechanism: “neither the Consultation Phase nor the Compliance Review Phase will be applied to [...] requests that raise issues under arbitral or judicial review by national, supranational, or similar bodies.”

¹³ Given the *prima facie* nature of the eligibility analysis and the short period provided for it, ICIM good practices indicate that arbitral and judicial proceedings that may interfere in the dialogue process should be analyzed in greater depth during the case Assessment.

¹⁴ The implementation guidelines for the Policy Establishing the ICIM set out a number of principles that support the exclusion analysis relating to section 37(i), such as: “whether any issue under review as part of any relevant pending and active judicial or arbitral review (Pending Dispute) and one or more issues raised

communities brought an “*acción popular*” [class action] against INVIAS and other agencies before the Pasto Administrative Court, the Project Ombudsperson concluded that the suit would not interfere with a potential dialogue process.

2.2. Findings of the case Assessment

5. Once the Request was declared eligible, the Ombudsperson and her team launched the Assessment stage,¹⁵ aimed at gathering more information about the Request and the Project, as well as gaining a better understanding of the concerns raised, identifying primary and secondary stakeholders in the case (as well as their positions and interests), and, lastly, exploring the feasibility of initiating a dialogue process to help the parties find a consensus-based solution.

6. Concerning the Requesters’ allegations that the presence of indigenous communities in the Project area had not been acknowledged and that there had been a lack of prior consultation, the ICIM highlighted that:

- (i) The Project’s direct area of influence was determined based on various studies (including an Environmental Impact Assessment, a Basic Environmental and Social Management Plan, a Strategic Regional Environmental Assessment, and the PMASIS) that yielded different conclusions regarding the presence of these communities. Since 2011, during the Project’s design and preparation, the Interior Ministry (as the competent authority for indigenous affairs) has made determinations on this topic on various occasions, confirming and subsequently rejecting the presence of indigenous communities in the Project’s area of influence.¹⁶

by the Request are significantly related or identical;” “whether the parties to a Pending Dispute are identical to the parties of the Request/Case and are performing similar roles;” “whether any action by the Project Ombudsperson, as part of the Consultation Phase exercise, would actually interfere with the Pending Dispute;” and “whether the Pending Dispute is active or inactive or is formally or informally suspended or dormant.” (Implementation guidelines for the Policy Establishing the ICIM, page 17, paragraph 4.25(c-f)). The first version of the guidelines, sent to the IDB’s Board of Executive Directors in February 2012, acknowledges the need to interpret section 37(i) not only in a literal manner, but also in light of the other provisions of the ICIM policy. This version of the guidelines is currently being revised by the Mechanism team based on the Directors’ observations.

¹⁵ The Assessment Report for the case can be found at http://iadb.org/es/mici/detalle-de-reclamo,1804.html?id=CO_MICI001/2011.

¹⁶ The Interior Ministry’s rulings have had significant consequences for the treatment of indigenous issues in connection with the Project. During the Assessment process, the ICIM saw six different certifications issued by the Interior Ministry and the Dirección General de Asuntos Indígenas [Office of Indigenous Affairs] (DGAI): (i) 25 October 2001, issued by the Interior Ministry to INVIAS; (ii) 17 September 2002, issued by the DGAI to the Office of the Attorney General; (iii) 15 November 2002, issued by the DGAI to INVIAS; (iv) 11 September 2008, issued by the Interior Ministry to INVIAS; (v) 9 September 2010, issued by the Interior Ministry to the Office of the Attorney General; and (vi) 20 December 2011, issued by the Interior Ministry. While the Parties were preparing for the dialogue, INVIAS submitted the following documents to the ICIM: (i) Resolution OFI12-0007206-DCP-2500 of the Office for Prior Consultation (submitted to the Pasto court) and Certification 641 of 24 April 2012, certifying that there

- (ii) With regard to the prior consultation, which the Requesters allege did not take place, the project team stated that significant efforts were made to inform and consult indigenous communities and ensure their participation, despite the fact that there are no legally constituted indigenous reserves within the Project's direct area of influence.¹⁷ It should be noted that the Requesters refer to the formal prior consultation procedure provided for under Colombian law.¹⁸

7. During the Assessment, the Consultation Phase team detected differences of opinion regarding the Project among the Requesters in the case. While some declared themselves in favor, others—while not opposed—expressed concerns about the Project's environmental and social performance. Nonetheless, the communities were prepared to join the indigenous cause and present a united front with respect to the Project. The Ombudsperson observed some loss of trust between the communities, INVIAS, and other secondary stakeholders such as Corpoamazonía, resulting from a lack of adequate communication channels and prolonged tensions. However, following several meetings and other encounters, all stakeholders confirmed their willingness to participate in a dialogue process facilitated by the ICIM.

8. As mentioned in the Eligibility Memorandum, there was an opportunity during the Assessment for in-depth analysis of judicial proceedings and the principle of non-interference related to the case. In addition to the class action, the Mechanism was made aware of an *acción de tutela* [action for the protection of fundamental rights] initiated in September 2010 by the San Francisco Inga-Kamentsa governor. Given the current stage of proceedings in both these cases, the Ombudsperson concluded that they would not interfere with the Consultation Phase. However, she emphasized that in the event of any indication of interference by the dialogue process in these cases (or vice versa), the Consultation Phase would be terminated. This issue is discussed in detail below (*infra* paragraphs 25 to 31).

9. The draft Assessment Report for the case was sent to the parties for comment¹⁹ and the final version was issued in December 2011. In it, the Ombudsperson concluded that conditions for dialogue were in place as were the elements for this dialogue to facilitate a consensus-based solution between the parties. In light of gubernatorial elections due to take place in December 2011 for the Putumayo indigenous councils, the parties asked the Mechanism to consider suspending preparatory activities for the dialogue until the beginning of 2012.

were no ethnic communities present in the Project's direct area of influence; and (ii) Interior Ministry certification of the presence of indigenous communities for the prior consultation for expansion of the Reserve.

¹⁷ Cf. IDB, *Integrated and Sustainable Social and Environmental Management Plan (PMASIS) for the San Francisco-Mocoa alternate road's area of influence*, 15 July 2008, pages 10 and 11 [of the Spanish text].

¹⁸ Prior consultation is understood under Colombian law to be the fundamental right of indigenous and Afro-Colombian peoples to participate in decisions that affect them (Law 21 of 1991, 4 March). It involves a specific process and methodology.

¹⁹ The report was sent by the Project Ombudsperson to the parties for comment on 16 December 2011.

III. CONSULTATION PROCESS

3.1. Preparation for the dialogue

10. After a pause of approximately two months following the Putumayo indigenous council elections,²⁰ the ICIM made several attempts to meet with the Requesters in order to begin preparing the parties for the dialogue.²¹ Issues of logistics, communication, and time meant that the first meeting with the team of local facilitators (“Facilitation Team”) was finally held on 20 April 2012 in the offices of the Kamentsa Biya council in the Sibundoy Valley.

11. Representatives and members of communities in Upper, Central, and Lower Putumayo and others participated in the meeting.²² They reaffirmed their willingness to participate in the ICIM-facilitated dialogue, and agreed to name representatives to participate in the dialogue process on behalf of the Requesters. They also formulated a proposal for principles and rules, and provided a list of documents that they would require in the event of a session to exchange information on the process.

12. On 7 May 2012, the ICIM received the minutes of the meeting to elect the dialogue interlocutors for Central and Lower Putumayo. With respect to the representatives for Upper Putumayo, the ICIM received a communication on 10 May 2012 from the governor of Sibundoy (on behalf of Upper Putumayo) naming three individuals to participate in the process, as it had been impossible to elect interlocutors. To date, the ICIM has not received any response to its request for evidence of the official

²⁰ The council elections were planned for the beginning of December 2011.

²¹ Initial contact following suspension of the process was initiated on 30 January 2012 by the ICIM, which invited the communities to a teleconference aimed at initiating the Consultation Phase. Owing to communication problems, the communities requested that the teleconference be postponed from 6 February to 8 February. In the teleconference, the Requesters agreed to confirm the Requesters framework and to prepare a list of representatives for the dialogue process, based on the results of the recent council elections. Two dates were also set for meetings: (i) from 3 to 5 March in Mocoa; and (ii) 16 February in Bogota. In response to Facilitation Team requests to confirm these meetings, the communities suggested that a videoconference could be organized with the ICIM at the IDB offices to coincide with the visit of the indigenous governors to Bogota on 14 March. Owing to the Inga and Kamentsa traditional festivals in February, the governors requested that a meeting be held in Sibundoy on 12 March. None of the governors then attended the videoconference at the IDB’s Bogota offices on 14 March, explaining afterwards that they had had to attend other meetings. On 15 March, the Ombudsperson sent a communication regarding the governors’ absence from the videoconference, suggesting that another meeting be held with the Facilitation Team in Sibundoy during the week of 16 April. On 12 April, the Requesters’ Representative confirmed the governors’ availability for a meeting with the ICIM on 20 April. (See Consultation Phase team correspondence dated 30 January 2012, 6 February 2012, 8 February 2012, 10 February 2012, 10 to 15 February 2012, 14 March 2012, 15 March 2012, 16 March 2012, and 12 April 2012.)

²² Although the original Request was signed by a number of Upper Putumayo authorities (Inga of Santiago, Kamentsa of Sibundoy, and Inga-Kamentsa of San Francisco) and the Kamentsa Biya council from the Mocoa region, it also includes residents of Central and Lower Putumayo. The following councils were represented at the meeting: Sibundoy, San Francisco, Santiago, Colón, Mocoa, Kamentsa Biya, Puerto Guzmán, San Joaquin, Condagua, Villa María, Los Pastos, La Florida, and Iachaiwasi.

election of these individuals from Upper Putumayo designated to act as interlocutors during the dialogue process; nor has it received clarification of who they will represent.²³

3.2. *Parallel dialogue processes*

13. During the meeting with the ICIM facilitation team on 20 April 2012, the indigenous communities mentioned a set of minutes (dated 13 March 2012) referring to a meeting of the indigenous communities with INVIAS and the Interior Ministry in Bogotá. A number of the signatories indicated their disagreement with these minutes, as the content did not reflect what was discussed in the meeting. The ICIM has received no further information from the Requesters regarding this matter. The executing agency subsequently informed the Consultation Phase team that a number of dialogue processes were apparently ongoing between INVIAS and the indigenous communities of Upper Putumayo, with concrete results on matters related to the alternate road (and, consequently, to the Request to the ICIM).

14. Given the amount of time that had passed, the ICIM met with INVIAS on 16 May 2012 in order to reconfirm the agency's willingness to participate in the dialogue, as well as to seek its input regarding rules and principles for the dialogue process and updates on events since the Assessment. At this meeting, the Facilitation Team was informed of an active process of dialogue between INVIAS and a number of indigenous communities in Putumayo, which began in March 2012. Some of the results are reflected in the minutes signed by the parties on 13 March 2012²⁴—the same minutes that had been criticized by a number of Requesters (*supra* paragraph 13). The executing agency informed the ICIM that it was moving ahead with the procedures to allocate resources for development of the methodology agreed upon at the meeting on 13 March. It also expressed its interest in contacting the communities in Central and Lower Putumayo, with which it had not yet begun a process of dialogue.

15. In response to the Ombudsperson's request for supporting documentation regarding Project- and PMASIS-related agreements signed by INVIAS and the indigenous communities, as well as progress on the prior consultation for the Reserve, on 19 July 2012 the ICIM received a set of minutes dated 15 June 2012. The minutes reflect the signing of an agreement between INVIAS and six Upper Putumayo governors²⁵

²³ Email from the local facilitator to the Requesting Authority for Upper Putumayo, dated 14 May 2012.

²⁴ According to the minutes sent to the ICIM by INVIAS, the agency provided information to the communities about the Project and its scope in a meeting held at the Interior Ministry in Bogotá on 13 March 2012. The following agreements were reached in the meeting: (i) update and revise the PMASIS (to which end the indigenous governors of the Sibundoy Valley and Central and Upper Putumayo designated an indigenous governor from Upper Putumayo to send the methodology and timeline for the PMASIS by 21 March); and (ii) conduct a field review of the presence of ethnic communities in the Project's direct area of influence (to be carried out by the Interior Ministry's Office of Prior Consultation). This agreement is valid for 5 to 6 years, to ensure continuity of the process. Costs will be financed by the executing agency.

²⁵ The following governors signed the agreement: Kamentsa of Sibundoy, Kamentsa-Inga of San Francisco, Inga of Santiago, Inga of Colón, Inga of San Pedro, and Inga of San Andrés (Upper Putumayo).

(including three of the Requesters in the ICIM case) regarding the methodology, budget for review, and adjustment of the PMASIS.

16. In this context, on 25 July 2012 the Facilitation Team wrote to the communities to ascertain whether all the Requesters from Upper, Central, and Lower Putumayo were aware of the active dialogue process between the Upper Putumayo governors and INVIAS, as well as the agreements signed to date.

17. Given the lack of response from Upper Putumayo, and in the face of clear differences in the positions of Requesters from Upper, Central, and Lower Putumayo, on 23 August 2012 the Ombudsperson sent a letter to the governors of Upper Putumayo.²⁶ These governors belonged to the list of original Requesters in the ICIM case and had signed the agreements with INVIAS, but since May 2012 had not expressed an opinion regarding the latest events. In her letter, the Ombudsperson inquired whether the governors wished to continue with their Request to the ICIM, and asked whether the agreements reached with the executing agency were sufficient to satisfy their concerns. To date, the ICIM has received no response.

18. On 2 August 2012, the ICIM held a teleconference with nongovernmental organization (NGO) observers of the case (the Instituto Latinoamericano para una Sociedad y un Derecho Alternativos [Latin American Institute for an Alternative Society and an Alternative Law] (ILSA)²⁷ and the Colombia Support Network²⁸), as well as the Representative for the Requesters. In the teleconference, the Representative stated that the communities of Upper, Central, and Lower Putumayo were not aware of INVIAS's actions, and that the efforts at dialogue by the executing agency were limited to the indigenous governors of Upper Putumayo.²⁹ On 8 August 2012, the Ombudsperson received confirmation from a Requester (the interlocutor for Central and Lower Putumayo) that they wished to continue with the ICIM dialogue process.³⁰

19. In light of the apparent information asymmetries, as well as differing perceptions of the agreements between INVIAS and the communities as well as the dialogue processes already established by this agency, on 9 October 2012 the ICIM invited the Requesters to a meeting with the objective of: (i) providing information on the Project and existing mechanisms for information and participation, as well as gathering

²⁶ The letter was sent via both email and standard mail. The physical correspondence was delivered and received in Sibundoy on 30 August 2012 (Certificate No. RN111170120W4002SF4, 472 Servicios Postales, Bogota, 4 September 2012).

²⁷ The NGO had contacted the Project Ombudsperson on 29 May 2012 for information regarding developments in the process and with the aim of serving as a communications conduit for a number of the indigenous communities in Putumayo.

²⁸ The NGO had shown an interest in the case since the Assessment phase in August 2011, and had engaged in ongoing monitoring of the process.

²⁹ During the teleconference the Representative also stated that the indigenous leaders of Central Putumayo planned to submit a complaint to government agencies, given that the minutes dated 13 March did not reflect the agreements reached in the meeting.

³⁰ Via email, sent at 12:12 p.m. on 8 August 2012.

additional information on the agreements reached by INVIAS with the communities; and (ii) listening to concerns and suggestions on the part of the communities regarding the Request.³¹

20. On 23 October 2012, the Ombudsperson received a reply from the “Comisión Política de la Minga” (Minga Political Commission [*Minga* refers to a traditional gathering or activity for the collective good]), which is comprised in part by a number of the Requesters in the ICIM case. The Commission proposed that the meeting take place within the framework of “the *Gran Minga* of Resistance for Defense of the Rights of the Indigenous Peoples of Putumayo, Upper, Central, and Lower Bota Caucana, and the Jardines de Sucumbíos *corregimiento* (Ipiales-Nariño)” (“the *Minga*” or “*Gran Minga*”).

21. The *Minga*—a traditional form of indigenous work—was proposed as a forum for dialogue between indigenous communities and the Government of Colombia in four focal areas: (i) armed conflict in indigenous territories; (ii) a failure to comply with national and international regulations governing the creation, expansion, and regularization of indigenous *resguardos* [legally protected indigenous lands]; (iii) the presence in indigenous territories of multinationals involved in mining, hydrocarbons, and other natural resources; and (iv) construction of the San Francisco-Mocoa alternate road segment.³²

22. To seek further information regarding the position and expectations of the Requesters with regard to the *Minga* and the ICIM’s role therein, on 26 October 2012 the ICIM held a videoconference with ILSA, the Colombia Support Network, and two case Requesters belonging to the Minga Political Commission. The Representative for the Requesters, after reaffirming her willingness to participate in the dialogue, stated that the topic of the San Francisco-Mocoa alternate road could be discussed with the government using the forum for dialogue created by the *Minga*. This would also be suitable temporarily, given that in December 2012 new council elections would be held, meaning that all activity related to the information exchange session would need to be postponed, possibly until February 2013. In view of the foregoing, the Ombudsperson reaffirmed her desire to avoid duplicating existing dialogue initiatives, and accepted the suggestion that local facilitators act as independent observers as long as all parties were in agreement. However, the ICIM did not receive any formal invitation to participate as an observer in this dialogue with the government.

³¹ The proposal for this information exchange between the parties was developed based on the ICIM meeting with INVIAS on 12 September 2012, and made use of inputs from the executing agency and the minutes of the meeting of the Facilitation Team with the Requesting communities on 20 April 2012.

³² According to a statement by, among others, the indigenous peoples of Putumayo, the “*Gran Minga*” was launched on 22 July 2012 by “the indigenous peoples of Putumayo, Nariño, and Upper, Central, and Lower Bota Caucana, [who, due to] the difficult economic, political, and social situation [...], and out of solidarity with the position of [the] indigenous people of Cauca, [decided to] protest against the policies of national, departmental, and municipal governments, against private sector policies and the various actors that have established interests in [their] territories, [through] roundtable discussions with the communities, their indigenous authorities, and national, departmental, and local governments.” See <http://mingaderesistenciaputumayo.blogspot.com/p/declaratorias.html>.

23. The Consultation Phase team organized another teleconference for 8 November 2012—this time with INVIAS—in which it was confirmed that the ICIM would not participate in the *Minga* due to: (i) the audience involved, which exceeded the framework of the Requesting communities in the ICIM case; (ii) the issues to be discussed in the *Minga*; and (iii) the political nature of the *Minga*. In the teleconference, INVIAS reiterated its commitment to a process of dialogue and expressed its intention to begin a dialogue with Central and Lower Putumayo at the beginning of 2013.

24. In view of the indigenous gubernatorial elections to be held in December 2012, the Ombudsperson had to wait once more for the councils to position themselves. Despite several attempts by the Consultation Phase team,³³ the ICIM has not received any official notification to date regarding the newly-elected governors or their positions on the ICIM-facilitated dialogue process.³⁴

3.3. Judicial proceedings

25. As stated in the Assessment Report (*supra* paragraph 8), the Ombudsperson was to monitor the development and status of judicial proceedings related to the case, to ascertain whether these disputes might interfere in the dialogue process (or vice versa). In this regard, the Consultation Phase team depended in large part on a proactive stance by the parties, from whom it expected to receive all relevant information regarding progress in these proceedings and/or the emergence of new disputes that might be related to the Project. Information gathered by the ICIM has revealed three disputes that are relevant to the current case: (i) the *acción de tutela* and the *acción popular*, both of which were examined during the Assessment phase, and (ii) the recently brought *acción de nulidad*.

26. ***Acción de tutela*** [action for the protection of fundamental rights]. This case was brought before the Criminal Chamber of the Superior Court for the Judicial District of Pasto in September 2010, by the then governor of the Inga-Kamentsa of San Francisco, who is also one of the Requesters in the ICIM case. The aim of the case was to protect the fundamental rights of the Inga-Kamentsa indigenous peoples of Putumayo to due process, life, ethnic diversity, and a healthy environment, among other things.³⁵ The petitioner requested that the following administrative acts be suspended: (i) Certification 3868, issued on 25 October 2001 by the then Ministry of the Interior and Justice (now the Interior Ministry), which disavows the presence of Inga and Kamentsa groups in the Project area, and (ii) Resolution 2170, issued in December 2008 by the then Ministry of Environment, Housing, and Territorial Development (MAVDT), which grants the environmental permit for the Project.³⁶ This required the court to initiate, develop, and execute all measures, activities, and procedures necessary to implement the consultation process prior to the environmental and sociocultural impact studies with the communities

³³ Emails sent by the ICIM: to the Requesters on 8 January; to the Representative on 15 and 23 January.

³⁴ Both emails (from Aureliano Garreta on 25 January and Carmenza Tez on 14 February 2013) contain a partial list of the new governors, but do not provide complete contact details.

³⁵ Ruling handed down in the Criminal Appeals Division of the Supreme Court of Justice on 11 November 2010. Presiding judge: Jorge Luis Quintero Milanés (page 3).

³⁶ *Idem*.

potentially affected by the road project. Decisions were handed down in the case in the lower and appellate courts on 29 September 2010 and 11 November 2010, respectively. Both decisions rejected the petitioner's request on procedural grounds, without the merits of the case being judged.³⁷ Following the appellate decision by the Criminal Appellate Division of the Supreme Court of Justice, the case file was sent to the Constitutional Court for review. The case was not among those selected for review on 10 December 2010.³⁸ Based on the information currently available to the Mechanism, it seems that the *acción de tutela* is no longer active in the domestic courts and is therefore unlikely to interfere in the dialogue process (or vice versa).

27. ***Acción popular*** [class action]. This case was brought against the Ministry of the Interior and Justice, the MAVDT, and INVIAS by Carmenza Tez and other petitioners, before the Nariño Administrative Court in November 2010. The objective of the petition was to secure protection for collective rights to “a healthy environment, ecological equilibrium and the rational management of natural resources, conservation of animal and plant species, defense of public assets, and defense of cultural heritage.”³⁹ The petitioners requested, among other things, that: (i) MAVDT Resolution 2170/2008 (*supra* paragraph 26) not be applied, and (ii) the start of construction of the alternate road be suspended once and for all.

28. On 19 June 2012, the court issued its decision based on the merits of the case, setting aside the claims. The ruling stated, among other things, that “the petitioner failed to demonstrate that the territories in which the Project will be executed qualified as

³⁷ From the lower court decision: “a protection order is unwarranted where the petition is brought after a considerable period has passed since the original date of events or since the omission occurred that has hypothetically affected the fundamental rights of the petitioner [...] the action for protection was brought almost eight years after the Office for Indigenous Affairs issued the certificate (15 November 2002)—a document that is subject to presumption of legality. Moreover, the environmental permit was issued via Resolution 2170 on 5 December 2008, without the respective appeals having been filed, leading to an attempt at this excessively late stage to reverse this administrative act by means of legal action grounded in the constitution.” Ruling handed down in the Criminal Chamber of the Judicial District Superior Court on 29 September 2010. Presiding judge: Jesús Ángel Bobadilla Moreno, Protection Order 520012204000-20100191-00 (page 9). The appellate court decision “confirm[ed] the contested ruling of the Criminal Chamber of the Superior Court of the Judicial District of Pasto on 29 September 2010, and referred the case file to the Constitutional Court for review.” Ruling handed down in the Criminal Appellate Division of the Supreme Court of Justice on 11 November 2010. Presiding judge: Jorge Luis Quintero Milanés (page 13).

³⁸ See Constitutional Court Case T2906069, Case Proceedings. See www.corteconstitucional.gov.co.

³⁹ According to the lawsuit, the petitioner requested “protection, avoidance of contingent damage, and the cessation of grave danger and threats to collective rights to A HEALTHY ENVIRONMENT, ECOLOGICAL EQUILIBRIUM AND THE RATIONAL MANAGEMENT OF NATURAL RESOURCES, CONSERVATION OF ANIMAL AND PLANT SPECIES, DEFENSE OF PUBLIC ASSETS, AND DEFENSE OF CULTURAL HERITAGE, the latter two having been violated by actions of the MINISTRY OF THE INTERIOR AND JUSTICE, MINISTRY OF ENVIRONMENT, HOUSING, AND TERRITORIAL DEVELOPMENT [now the Interior Ministry and the Ministry of Environment and Sustainable Development], THE NATIONAL INSTITUTE OF ROADS (INVIAS) (...)”. Class action brought against the Ministry of Environment, Housing, and Territorial Development, the Ministry of the Interior and Justice, and INVIAS, by Carmenza Tez Juagibioy, Henry Mavisoy Muchavisoy, Taita Clemente Arturo Jacanemjoy before the Nariño Administrative Court on 8 November 2010 (page 1).

indigenous territories or non-titled areas regularly and permanently inhabited by indigenous groups.” Under Colombian law this removes the obligation of prior consultation for the Project. The court concluded that “there is no evidence that the actions or omissions of the defendant agencies caused contingent damage, danger, or threat to, or violation or breach of the collective interests and rights to a healthy environment, public assets, and cultural heritage invoked in the lawsuit, and that in this specific case there was no need to engage in consultations with the Inga and Kamentsa indigenous communities prior to issuing the environmental permit for the Mocoa-San Francisco Alternate Road Project.”⁴⁰ This decision was communicated to the Mechanism by the executing agency on 30 July 2012, without clarification as to whether this was a final decision.

29. The Ombudsperson recognized that the decision in the class action could potentially interfere in the Consultation Phase process, as it involved crucial issues for the future dialogue: (i) the existence—or not—of indigenous communities in the Project’s area of influence, and (ii) the need to engage in prior consultation regarding the Project or not. However, the criterion used in the decision, which is framed under national legislation, appears to be stricter than the concept of “territories, lands, and natural resources” used in the IDB’s Operational Policy on Indigenous Peoples (OP-765). The Ombudsperson therefore considered the presence of indigenous communities in the Project’s area of influence (as stipulated in OP-765) to continue to be a relevant issue for the dialogue. In fact, the Ombudsperson observed that despite the Administrative Court’s finding, the ruling recognized, for example, the traditional use of the Sachamates trail and its importance for the Inga and Kamentsa indigenous peoples.

30. Given that the parties had reaffirmed their willingness to participate in the dialogue subsequent to this ruling (*supra* paragraph 28), the Ombudsperson concluded that the best course of action was to organize the information exchange session and draw up an agenda for dialogue. In this way, the parties would decide jointly whether to include issues related to “the possession or management of the territories, lands, or natural resources traditionally occupied or used by indigenous peoples”⁴¹ in the Project’s area of influence, as well as the need for and existence of prior consultation, among other concerns raised in the Request. In the joint meetings, the parties would be able to discuss the indigenous communities’ traditional use of the lands, as well as the Requesters’ other concerns, which are not limited to the issues examined in the aforementioned court case.

31. The Consultation Phase team was later informed that the parties to the class action had been notified on 4 December 2012 that an appeal submitted to the Council of State

⁴⁰ Nariño Administrative Court decision on the class action, handed down on 19 June 2012. Presiding judge: Ana Beel Bastidas Pantoja, Filing 2010 – 00680, page 54, folio 1389.

⁴¹ In the case of the current Policy on Indigenous Peoples (OP-765), “Operations that directly or indirectly affect the legal status, possession, or management of territories, lands, or natural resources traditionally occupied or used by indigenous peoples will include specific safeguards, consistent with the applicable legal norms and the normative framework regarding ecosystem and land protection.”

by Carmenza Tez, “as a member of the Kamentsa indigenous people,”⁴² had been granted. The Ombudsperson does not have any information regarding the content of the appeal or its current status, as none has been provided by the parties to the case. However, it can be inferred that even as the Requesters were reaffirming their willingness to participate in the dialogue, they were also resorting to law to resolve Project-related disputes. In contrast to the situation during the Assessment phase, when the parties had already completed all court proceedings prior to submitting the Request to the ICIM and were only awaiting the ruling, the Requesters this time took clear and active steps to move ahead with the class action via an appeal.

32. Similarly, the Ombudsperson was made aware of a third judicial process related to the Project, as explained in the following paragraph.

33. *Acción de nulidad* [motion to vacate]. According to information on the Judicial Branch website, on 13 February 2013 a motion to vacate MAVDT Resolution 2170/2008 was filed with the Council of State. The claim was filed by a member of the Inga-Kamentsa authorities of San Francisco, Upper Putumayo, who had participated in the meeting with local facilitators in April 2012 (*supra* paragraphs 10 and 11). In addition to the motion to vacate, the petitioner requested that the administrative act in question (the environmental permit) be provisionally suspended.⁴³ To date, the parties have not submitted any information regarding this case to the ICIM. As a result, the Consultation Phase team does not have any detailed information concerning the parties to the action (particularly whether other Requesters are involved in the claim),⁴⁴ or the issues that motivated it. Consequently, it is impossible to determine whether the case would interfere directly with the dialogue process (or vice versa).

34. Beyond the fact that the motion to vacate seeks to reverse the contested administrative act, it can be inferred that some representatives of the indigenous communities have preferred to use the judicial system to resolve their concerns regarding the Project. For the Ombudsperson, the decision to initiate a new judicial action, brought while the parties were preparing for the dialogue, constitutes convincing evidence of the lack of a unified position among the communities in relation to the Consultation Phase process. It could, moreover, reflect an unwillingness to move forward with the dialogue if it is confirmed that they are also the petitioners in the aforementioned case.

⁴² The parties were notified on 4 December 2012. Since 22 January 2013, the case file has been in the presiding judge’s office. See Case 52001233100020100068001. Presiding judge: Marco Antonio Velilla Moreno, Council of State. <http://190.24.134.67/pce/consultaproceso3.asp?numero=52001233100020100068001> (last accessed on 18 March 2013).

⁴³ On 20 February, the case file was transferred to the office of the presiding judge, Maria Claudia Rojas Lasso. Case 52001233100020100068001. See <http://www.consejodeestado.gov.co>.

⁴⁴ Information available on the Council of State website indicates that there is only one petitioner in this case.

IV. CONCLUSIONS OF THE CONSULTATION PHASE

35. The case has been subject to the following determining circumstances:
- a. **Scant information flows and delays.** The Consultation Phase process depends in large part on the flow of existing information among the parties and between these and the Consultation Phase team. In the current case, the process has been hindered by a lack of timely information regarding positions and, particularly, developments in related areas such as agreements with the Government of Colombia and suits brought by the Requesters. As a result, and despite repeated assurances by some of the Requesters that they are willing to participate in the dialogue process, the level of commitment necessary to achieve concrete actions and progress has not been obtained.
 - b. **Lack of a unified position among the Requesters.** As observed during the case Assessment, in light of apparent differences of opinion regarding the Project, indigenous communities and their representatives may have decided to unite around a single cause and present a united front vis-à-vis the Project. Nonetheless, the level of difficulty was underlined by news of an apparent parallel dialogue process between a number of Upper Putumayo authorities and INVIAS, of which the other Requesters from Central and Lower Putumayo, as well as the Representative, claimed to be unaware. The ICIM's attempts to engage in order to receive information and clarify the position of the Upper Putumayo authorities met with no response (*supra* paragraph 17). This lack of a unified position among the Requesters affects the conditions for carrying out a fruitful ICIM-facilitated dialogue process.
 - c. **Pending judicial proceedings.** The use of the judicial system by a number of the Requesters as a strategy for resolving their concerns in relation to the Project fundamentally affects the feasibility of initiating a dialogue between the parties.
36. Based on the above, the Ombudsperson considers that **the conditions necessary for a process of dialogue do not exist**. The **Consultation Phase for the present case is therefore terminated**,⁴⁵ and the case file is to be transferred to the Office of the Executive Secretary.
37. Upon completion of this report, the Ombudsperson received correspondence from one of the complainants⁴⁶ requesting that the case no longer be processed under the Consultation Phase and that it therefore be transferred to the ICIM's Compliance Review Panel. This request is unaccompanied by any records that would demonstrate that this decision was made by mutual agreement among all the Requesters. Nonetheless, the Requesters will have the opportunity to reiterate the request once the file has been transferred to the Office of the Executive Secretary.

⁴⁵ Policy Establishing the ICIM, section 47.

⁴⁶ Email dated 21 March 2012.

V. ACHIEVEMENTS OF THE CONSULTATION PHASE

38. This section describes some of the achievements of the Consultation Phase, resulting from the process undertaken from the Eligibility phase onward.

39. Issues of concern for the Inga-Kamentsa indigenous communities of Putumayo were expressed through the Request to the ICIM, the Determination of Eligibility, and the Case Assessment Report. These issues were said to have the potential not only to place project execution at risk, but in particular to endanger its social and environmental sustainability (i.e. definition of the Project's direct area of influence, prior consultation, etc.). The timely response and ongoing efforts of the project team facilitated coordinated action and openness with the executing agency.

40. All of the parties involved in the process (indigenous communities, INVIAS, the IDB, the ICIM, and the observer NGOs) now have greater familiarity with and understanding of the Project and the context in which it is being developed. This will be critical for project execution, particularly in relation to the Integrated and Sustainable Environmental and Social Management Plan (PMASIS) component. The project team and the executing agency appear to be working with renewed energy on activities to ensure the optimal implementation of the PMASIS.

41. Irrespective of differing points of view regarding the presence of indigenous communities in the Project's direct area of influence, as expressed in often contradictory fashion by Colombian government authorities, the project team and the executing agency have treated the issue with the importance that it deserves and have shown themselves to be proactive in their interactions with the Putumayo communities. The Project intends to persist with this approach, including the entire region in its dissemination, inclusion, and community participation activities, throughout the entire project cycle. Against this backdrop, the executing agency now appears to place more emphasis on mechanisms for community participation and attention, including the possible establishment of *veedurías* (oversight committees) in project areas to improve management of the PMASIS.

42. The Consultation Phase has served as a preparatory tool to reorient the dialogue with the communities and appreciate their holistic vision of the territory, which can be put into practice beyond the area surrounding the Alternate Road Project and given a broader forum.

VI. LESSONS LEARNED

43. The specific characteristics of the current case and the dynamic of the dialogue process results have yielded a number of lessons learned about the ICIM process and the operational profile. These are summarized below.

A. Process-based

44. *Constant verification of representativeness and identification of interlocutors.* As this is a dynamic and flexible process, the representativeness of the requesters, their representatives, and their interlocutors should be constantly reconfirmed during the

Consultation Phase, while maintaining the appropriate level of care and respect for the internal governance characteristics of the community/organization/entity concerned. In the current case, the indigenous communities of Putumayo hold council elections each year. The executing agency has also experienced a high level of turnover among the team members responsible for the Project.

45. ***Understanding temporality within the context of the world view and governance of indigenous communities.*** In cases like this one, particular attention must be paid to the specific cultural and ethnic characteristics of the indigenous communities involved in the ICIM process. The process should be adapted to their sociocultural and political perspectives and characteristics. To this end, it is essential to have technical support available for the duration of the case and to bear in mind that timelines are not the same as for any other group with greater access to technology and communications.

46. ***Interpretation of the “judicial clause”.*** The intention of exclusion clause 37(i) is to avoid Consultation Phase interference with issues under consideration by judicial and arbitral institutions (and vice versa). Taken literally, this clause runs the risk of creating not always reasonable barriers to the submission of Requests to the ICIM. The exclusion criterion should thus be interpreted broadly—considering the spirit and not the letter of the Policy—and in accordance with the objectives and functions of the Consultation Phase itself. Moreover, given the nature of the Consultation Phase process, the principle of non-interference and confirmation of the willingness to engage in dialogue should be in place throughout the process, and not only at the moment of determining eligibility.

47. ***Verification of the willingness to engage in dialogue and the principle of non-interference.*** Although the circumstances of the current case led the Consultation Phase team to repeatedly verify the willingness of the parties to engage in dialogue, such willingness needs to be expressed through concrete actions such as the timely designation of representative interlocutors, timely sharing of information relevant to the case and the process, and availability for participation in meetings, teleconferences, etc. Moreover, in cases similar to this one, sections 37(i) and 40(g) of the Policy Establishing the ICIM should be treated as complementary, inasmuch as initiation of suits during the dialogue process (or preparation therefor)—depending on the motives for them—could indicate a lack of interest in participating in the ICIM process.

48. ***The role of the project team and the Environmental Safeguards Unit.*** Given their influence over the different stakeholders involved in the Project, as well as in its design and execution, the role of the project team and the Environmental Safeguards Unit is a critical one—albeit complementary to the efforts of the executing agencies. In the case of infrastructure projects in particular, where there is the possibility of substantial environmental and social impact, ongoing analysis during project execution, as well as timely consultations, as provided for in OP-703, are important. The Consultation Phase process can represent a great opportunity for the project team and the executing units to promote methods that can replicate positive experiences, through effective participation and access to information. However, these tools should ideally be established as part of the project.

49. ***Country context.*** It is essential to understand the country context, in terms of own measures, mechanisms, and scenarios or those regulated by general and/or special indigenous legislation, in which the requesters and the type of request can have sufficient space and development within a context of overall public policy on the subject. Clarity regarding the local context allows the ICIM to determine the potential scope of its intervention in the Consultation Phase. In view of the difficulties in isolating or delineating the Request within a complex context of different infrastructure, hydrocarbons, mining, and agroindustrial projects, all with potential environmental, social, and cultural consequences for indigenous communities, as is the case in Putumayo, it is essential to adopt a comprehensive approach to dealing with the case, with the full commitment of all stakeholders.

50. ***The role of NGOs.*** The role of some organizations during this case was highly positive in terms of understanding the political and sociocultural environment. Thanks to their ability to communicate with and work alongside the indigenous communities, these organizations or processes can help to support a strategic vision of progress and developments in the dialogue process.

B. Operational

51. ***Environmental and social impact.*** In the case of projects that are implemented in very complex areas with high levels of biodiversity, the various environmental impact assessment manuals indicate that the direct area of influence of a project is that in which the impact of its activities can be observed. The *a priori* delineation of the direct area of influence should therefore take into account the spatial manifestation of the impact of works in a sensitive and strategic area, given that the restrictions and/or permits associated with this delineation may be interpreted in different ways. At the same time, in light of the characteristics of this particular road and the complex sociocultural realities of the project area, it is essential to identify at an early stage of the process the social liabilities that are created in the communities involved.

52. ***Avoiding social tensions through broad communication strategies and community participation.*** Beyond the identification of the Project's areas of direct and indirect influence, a broad strategy of communication and participation with the indigenous communities is fruitful. This could avoid a feeling in certain communities that they are being excluded from the Project, which could lead to social tensions and conflict among these same communities. In addition, in projects where the design may be subject to change, tools that facilitate constant communication and community participation can potentially lead to greater acceptance of the Project and its components, thus avoiding the spread of rumors about negative impacts that are inexistent or minimal in the area as well as the radicalization of positions and reputational costs. These can increase opposition to the Project and, ultimately, cause greater dissatisfaction and unnecessary social tensions. This risk can be managed by using broad and timely communication and participation strategies and maintaining a constant presence in the project area.

53. ***Strategies and methods for the mitigation and compensation for impacts.*** Although these have been identified since the project design phase, they can become

more or less relevant during project execution. The dialogue process should therefore be employed in the event of a readjustment or redefinition of the strategies. The ongoing active, united, and harmonious participation of the indigenous communities is essential for the Project's coexistence with these communities in the medium and long term.

Report of the Consultation Phase San Francisco-Mocoa Alternate Road Case (CO-MICI001/2011)



PROJECT OMBUDSPERSON

27 March 2013

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REPORT OF THE CONSULTATION PHASE

I. BACKGROUND: THE PROJECT AND THE REQUEST SUBMITTED TO THE ICIM

1. This report documents the Consultation Phase process conducted in case CO-MICI001-2011.¹ The case originated with a Request received by the Independent Consultation and Investigation Mechanism (Mechanism, or ICIM) on 13 July 2011 from Mrs. Carmenza Tez (Representative), on behalf of authorities of the Inga and Kamentsa² indigenous communities of Putumayo (the Requesters).³ The Request alleges that the San Francisco-Mocoa Alternate Road Construction Project, Phase 1 (the Project)⁴ is having and may continue to have adverse environmental and social impacts on these indigenous communities and their traditions. Among the concerns raised are a failure to acknowledge the presence of indigenous communities in the Project area and a lack of prior consultation regarding construction of the alternate road.⁵

2. Now in its implementation phase, the Project finances construction of the San Francisco-Mocoa alternate road over a total length of 45.6 kilometers, as well as the implementation of mitigation and compensation measures required for its operation. The Project is being executed by the Instituto Nacional de Vías [National Institute of Roads] (INVIAS), and the Borrower is the Republic of Colombia. It has two components: (i) civil works and inspection; and (ii) an Integrated and Sustainable Environmental and Social Management Plan (PMASIS), which includes activities for the protection, management, and conservation of biodiversity in the Protected Forest Reserve of the

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 link: www.iadb.org/mici.

² Although the official definition used by Corpoamazonía and the Organización Zonal Indígena del Putumayo [Regional Indigenous Organization of Putumayo] is “Camentsá,” the form used in the original Request will be used throughout this report.

³ 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 of the Mocoa region. The communities of Inga and Kamentsa in the department of Putumayo have a population of approximately 14,000.

⁴ The project was registered as CO-L1019 and approved by the Board of Executive Directors on 14 December 2009. Loan contract 2271/OC-CO, for an investment loan of US\$53 million, was signed by the Republic of Colombia and the Bank on 3 May 2010. Total financing is US\$203 million. The remaining US\$150 million will be financed by the Government of Colombia. For further information, see <http://www.iadb.org/es/proyectos/project-information-page.1303.html?id=CO%2DL1019>.

⁵ Additional concerns raised by the Requesters, as described in the Request and subsequent communications with the team during the Consultation Phase, include: (i) impact on the self-governance system and cosmology, and accelerated acculturation; and (ii) impact on the indigenous habitat and the environment. Indirect impacts include accelerated changes in land use, illegal deforestation, the spread of monoculture, and a proliferation of mining and oil fields, increasing pressure on the Requesters' territories.

Upper Mocoa River Basin.⁶ Because it is located in a critical habitat, the Project was classified as a category “A” operation under the provisions of the Bank’s Environment and Safeguards Compliance Policy (OP-703).⁷ As a result, an expansion of the Forest Reserve from 34,600 hectares to 65,289 hectares was incorporated into the Project, with a view to minimizing habitat loss and creating and maintaining a larger ecologically protected area. This measure was included in the environmental permit⁸ by the Ministry of Environment, Housing, and Land Development (now known as the Ministry of Environment and Sustainable Development) as part of the Project’s compensation measures.⁹

II. ELIGIBILITY AND ASSESSMENT STAGES

2.1. Eligibility analysis

3. On 27 July 2011, the Request was transferred to the Project Ombudsperson, who initiated the corresponding eligibility analysis in accordance with the eligibility criteria and exclusions set forth in the Policy Establishing the Mechanism.¹⁰ The case was declared eligible on 16 August 2011¹¹ and was registered under code CO-MICI001/2011.

4. In relation to section 37(i) of the exclusions,¹² the Consultation Phase team carried out a *prima facie* examination in keeping with the principle of non-interference.¹³ The applicability of this principle hinges on: (i) the judicial or arbitral nature of the dispute; (ii) whether the parties or the issues that are the object of the judicial proceedings are identical to those in the Request submitted to the Mechanism; (iii) the current stage of these proceedings, in order to avoid interference by the Consultation Phase in the pending dispute and vice versa.¹⁴ Although in November 2010 some members of the indigenous

⁶ Cf. IDB, *San Francisco-Mocoa Alternate Road Construction Project - Phase I (CO-LI019)*, *Loan Proposal*, 17 December 2009, pages 5 to 7.

⁷ As stipulated in the current Environment and Safeguards Compliance Policy (OP-703), “any operation that is likely to cause significant negative environmental and associated social impacts, or have profound implications affecting natural resources, will be classified as Category “A”.”

⁸ The environmental permit for the Project was issued on 5 December 2008 under Resolution 2170. For further information, see http://www.minambiente.gov.co/documentos/res_2170_051208.pdf.

⁹ Cf. *Loan Proposal*, *supra* note 6, page 9.

¹⁰ These criteria are set forth in sections 40 and 37, respectively, of the Policy Establishing the Mechanism.

¹¹ The Eligibility Memorandum for the case can be found at http://iadb.org/es/mici/detalle-de-reclamo,1804.html?id=CO_MICI001/2011.

¹² According to section 37 (i) of the Policy Establishing the Mechanism: “neither the Consultation Phase nor the Compliance Review Phase will be applied to [...] requests that raise issues under arbitral or judicial review by national, supranational, or similar bodies.”

¹³ Given the *prima facie* nature of the eligibility analysis and the short period provided for it, ICIM good practices indicate that arbitral and judicial proceedings that may interfere in the dialogue process should be analyzed in greater depth during the case Assessment.

¹⁴ The implementation guidelines for the Policy Establishing the ICIM set out a number of principles that support the exclusion analysis relating to section 37(i), such as: “whether any issue under review as part of any relevant pending and active judicial or arbitral review (Pending Dispute) and one or more issues raised

communities brought an “*acción popular*” [class action] against INVIAS and other agencies before the Pasto Administrative Court, the Project Ombudsperson concluded that the suit would not interfere with a potential dialogue process.

2.2. Findings of the case Assessment

5. Once the Request was declared eligible, the Ombudsperson and her team launched the Assessment stage,¹⁵ aimed at gathering more information about the Request and the Project, as well as gaining a better understanding of the concerns raised, identifying primary and secondary stakeholders in the case (as well as their positions and interests), and, lastly, exploring the feasibility of initiating a dialogue process to help the parties find a consensus-based solution.

6. Concerning the Requesters’ allegations that the presence of indigenous communities in the Project area had not been acknowledged and that there had been a lack of prior consultation, the ICIM highlighted that:

- (i) The Project’s direct area of influence was determined based on various studies (including an Environmental Impact Assessment, a Basic Environmental and Social Management Plan, a Strategic Regional Environmental Assessment, and the PMASIS) that yielded different conclusions regarding the presence of these communities. Since 2011, during the Project’s design and preparation, the Interior Ministry (as the competent authority for indigenous affairs) has made determinations on this topic on various occasions, confirming and subsequently rejecting the presence of indigenous communities in the Project’s area of influence.¹⁶

by the Request are significantly related or identical;” “whether the parties to a Pending Dispute are identical to the parties of the Request/Case and are performing similar roles;” “whether any action by the Project Ombudsperson, as part of the Consultation Phase exercise, would actually interfere with the Pending Dispute;” and “whether the Pending Dispute is active or inactive or is formally or informally suspended or dormant.” (Implementation guidelines for the Policy Establishing the ICIM, page 17, paragraph 4.25(c-f)). The first version of the guidelines, sent to the IDB’s Board of Executive Directors in February 2012, acknowledges the need to interpret section 37(i) not only in a literal manner, but also in light of the other provisions of the ICIM policy. This version of the guidelines is currently being revised by the Mechanism team based on the Directors’ observations.

¹⁵ The Assessment Report for the case can be found at http://iadb.org/es/mici/detalle-de-reclamo,1804.html?id=CO_MICI001/2011.

¹⁶ The Interior Ministry’s rulings have had significant consequences for the treatment of indigenous issues in connection with the Project. During the Assessment process, the ICIM saw six different certifications issued by the Interior Ministry and the Dirección General de Asuntos Indígenas [Office of Indigenous Affairs] (DGAI): (i) 25 October 2001, issued by the Interior Ministry to INVIAS; (ii) 17 September 2002, issued by the DGAI to the Office of the Attorney General; (iii) 15 November 2002, issued by the DGAI to INVIAS; (iv) 11 September 2008, issued by the Interior Ministry to INVIAS; (v) 9 September 2010, issued by the Interior Ministry to the Office of the Attorney General; and (vi) 20 December 2011, issued by the Interior Ministry. While the Parties were preparing for the dialogue, INVIAS submitted the following documents to the ICIM: (i) Resolution OFI12-0007206-DCP-2500 of the Office for Prior Consultation (submitted to the Pasto court) and Certification 641 of 24 April 2012, certifying that there

- (ii) With regard to the prior consultation, which the Requesters allege did not take place, the project team stated that significant efforts were made to inform and consult indigenous communities and ensure their participation, despite the fact that there are no legally constituted indigenous reserves within the Project's direct area of influence.¹⁷ It should be noted that the Requesters refer to the formal prior consultation procedure provided for under Colombian law.¹⁸

7. During the Assessment, the Consultation Phase team detected differences of opinion regarding the Project among the Requesters in the case. While some declared themselves in favor, others—while not opposed—expressed concerns about the Project's environmental and social performance. Nonetheless, the communities were prepared to join the indigenous cause and present a united front with respect to the Project. The Ombudsperson observed some loss of trust between the communities, INVIAS, and other secondary stakeholders such as Corpoamazonía, resulting from a lack of adequate communication channels and prolonged tensions. However, following several meetings and other encounters, all stakeholders confirmed their willingness to participate in a dialogue process facilitated by the ICIM.

8. As mentioned in the Eligibility Memorandum, there was an opportunity during the Assessment for in-depth analysis of judicial proceedings and the principle of non-interference related to the case. In addition to the class action, the Mechanism was made aware of an *acción de tutela* [action for the protection of fundamental rights] initiated in September 2010 by the San Francisco Inga-Kamentsa governor. Given the current stage of proceedings in both these cases, the Ombudsperson concluded that they would not interfere with the Consultation Phase. However, she emphasized that in the event of any indication of interference by the dialogue process in these cases (or vice versa), the Consultation Phase would be terminated. This issue is discussed in detail below (*infra* paragraphs 25 to 31).

9. The draft Assessment Report for the case was sent to the parties for comment¹⁹ and the final version was issued in December 2011. In it, the Ombudsperson concluded that conditions for dialogue were in place as were the elements for this dialogue to facilitate a consensus-based solution between the parties. In light of gubernatorial elections due to take place in December 2011 for the Putumayo indigenous councils, the parties asked the Mechanism to consider suspending preparatory activities for the dialogue until the beginning of 2012.

were no ethnic communities present in the Project's direct area of influence; and (ii) Interior Ministry certification of the presence of indigenous communities for the prior consultation for expansion of the Reserve.

¹⁷ Cf. IDB, *Integrated and Sustainable Social and Environmental Management Plan (PMASIS) for the San Francisco-Mocoa alternate road's area of influence*, 15 July 2008, pages 10 and 11 [of the Spanish text].

¹⁸ Prior consultation is understood under Colombian law to be the fundamental right of indigenous and Afro-Colombian peoples to participate in decisions that affect them (Law 21 of 1991, 4 March). It involves a specific process and methodology.

¹⁹ The report was sent by the Project Ombudsperson to the parties for comment on 16 December 2011.

III. CONSULTATION PROCESS

3.1. Preparation for the dialogue

10. After a pause of approximately two months following the Putumayo indigenous council elections,²⁰ the ICIM made several attempts to meet with the Requesters in order to begin preparing the parties for the dialogue.²¹ Issues of logistics, communication, and time meant that the first meeting with the team of local facilitators (“Facilitation Team”) was finally held on 20 April 2012 in the offices of the Kamentsa Biya council in the Sibundoy Valley.

11. Representatives and members of communities in Upper, Central, and Lower Putumayo and others participated in the meeting.²² They reaffirmed their willingness to participate in the ICIM-facilitated dialogue, and agreed to name representatives to participate in the dialogue process on behalf of the Requesters. They also formulated a proposal for principles and rules, and provided a list of documents that they would require in the event of a session to exchange information on the process.

12. On 7 May 2012, the ICIM received the minutes of the meeting to elect the dialogue interlocutors for Central and Lower Putumayo. With respect to the representatives for Upper Putumayo, the ICIM received a communication on 10 May 2012 from the governor of Sibundoy (on behalf of Upper Putumayo) naming three individuals to participate in the process, as it had been impossible to elect interlocutors. To date, the ICIM has not received any response to its request for evidence of the official

²⁰ The council elections were planned for the beginning of December 2011.

²¹ Initial contact following suspension of the process was initiated on 30 January 2012 by the ICIM, which invited the communities to a teleconference aimed at initiating the Consultation Phase. Owing to communication problems, the communities requested that the teleconference be postponed from 6 February to 8 February. In the teleconference, the Requesters agreed to confirm the Requesters framework and to prepare a list of representatives for the dialogue process, based on the results of the recent council elections. Two dates were also set for meetings: (i) from 3 to 5 March in Mocoa; and (ii) 16 February in Bogota. In response to Facilitation Team requests to confirm these meetings, the communities suggested that a videoconference could be organized with the ICIM at the IDB offices to coincide with the visit of the indigenous governors to Bogota on 14 March. Owing to the Inga and Kamentsa traditional festivals in February, the governors requested that a meeting be held in Sibundoy on 12 March. None of the governors then attended the videoconference at the IDB’s Bogota offices on 14 March, explaining afterwards that they had had to attend other meetings. On 15 March, the Ombudsperson sent a communication regarding the governors’ absence from the videoconference, suggesting that another meeting be held with the Facilitation Team in Sibundoy during the week of 16 April. On 12 April, the Requesters’ Representative confirmed the governors’ availability for a meeting with the ICIM on 20 April. (See Consultation Phase team correspondence dated 30 January 2012, 6 February 2012, 8 February 2012, 10 February 2012, 10 to 15 February 2012, 14 March 2012, 15 March 2012, 16 March 2012, and 12 April 2012.)

²² Although the original Request was signed by a number of Upper Putumayo authorities (Inga of Santiago, Kamentsa of Sibundoy, and Inga-Kamentsa of San Francisco) and the Kamentsa Biya council from the Mocoa region, it also includes residents of Central and Lower Putumayo. The following councils were represented at the meeting: Sibundoy, San Francisco, Santiago, Colón, Mocoa, Kamentsa Biya, Puerto Guzmán, San Joaquin, Condagua, Villa María, Los Pastos, La Florida, and Iachaiwasi.

election of these individuals from Upper Putumayo designated to act as interlocutors during the dialogue process; nor has it received clarification of who they will represent.²³

3.2. *Parallel dialogue processes*

13. During the meeting with the ICIM facilitation team on 20 April 2012, the indigenous communities mentioned a set of minutes (dated 13 March 2012) referring to a meeting of the indigenous communities with INVIAS and the Interior Ministry in Bogotá. A number of the signatories indicated their disagreement with these minutes, as the content did not reflect what was discussed in the meeting. The ICIM has received no further information from the Requesters regarding this matter. The executing agency subsequently informed the Consultation Phase team that a number of dialogue processes were apparently ongoing between INVIAS and the indigenous communities of Upper Putumayo, with concrete results on matters related to the alternate road (and, consequently, to the Request to the ICIM).

14. Given the amount of time that had passed, the ICIM met with INVIAS on 16 May 2012 in order to reconfirm the agency's willingness to participate in the dialogue, as well as to seek its input regarding rules and principles for the dialogue process and updates on events since the Assessment. At this meeting, the Facilitation Team was informed of an active process of dialogue between INVIAS and a number of indigenous communities in Putumayo, which began in March 2012. Some of the results are reflected in the minutes signed by the parties on 13 March 2012²⁴—the same minutes that had been criticized by a number of Requesters (*supra* paragraph 13). The executing agency informed the ICIM that it was moving ahead with the procedures to allocate resources for development of the methodology agreed upon at the meeting on 13 March. It also expressed its interest in contacting the communities in Central and Lower Putumayo, with which it had not yet begun a process of dialogue.

15. In response to the Ombudsperson's request for supporting documentation regarding Project- and PMASIS-related agreements signed by INVIAS and the indigenous communities, as well as progress on the prior consultation for the Reserve, on 19 July 2012 the ICIM received a set of minutes dated 15 June 2012. The minutes reflect the signing of an agreement between INVIAS and six Upper Putumayo governors²⁵

²³ Email from the local facilitator to the Requesting Authority for Upper Putumayo, dated 14 May 2012.

²⁴ According to the minutes sent to the ICIM by INVIAS, the agency provided information to the communities about the Project and its scope in a meeting held at the Interior Ministry in Bogotá on 13 March 2012. The following agreements were reached in the meeting: (i) update and revise the PMASIS (to which end the indigenous governors of the Sibundoy Valley and Central and Upper Putumayo designated an indigenous governor from Upper Putumayo to send the methodology and timeline for the PMASIS by 21 March); and (ii) conduct a field review of the presence of ethnic communities in the Project's direct area of influence (to be carried out by the Interior Ministry's Office of Prior Consultation). This agreement is valid for 5 to 6 years, to ensure continuity of the process. Costs will be financed by the executing agency.

²⁵ The following governors signed the agreement: Kamentsa of Sibundoy, Kamentsa-Inga of San Francisco, Inga of Santiago, Inga of Colón, Inga of San Pedro, and Inga of San Andrés (Upper Putumayo).

(including three of the Requesters in the ICIM case) regarding the methodology, budget for review, and adjustment of the PMASIS.

16. In this context, on 25 July 2012 the Facilitation Team wrote to the communities to ascertain whether all the Requesters from Upper, Central, and Lower Putumayo were aware of the active dialogue process between the Upper Putumayo governors and INVIAS, as well as the agreements signed to date.

17. Given the lack of response from Upper Putumayo, and in the face of clear differences in the positions of Requesters from Upper, Central, and Lower Putumayo, on 23 August 2012 the Ombudsperson sent a letter to the governors of Upper Putumayo.²⁶ These governors belonged to the list of original Requesters in the ICIM case and had signed the agreements with INVIAS, but since May 2012 had not expressed an opinion regarding the latest events. In her letter, the Ombudsperson inquired whether the governors wished to continue with their Request to the ICIM, and asked whether the agreements reached with the executing agency were sufficient to satisfy their concerns. To date, the ICIM has received no response.

18. On 2 August 2012, the ICIM held a teleconference with nongovernmental organization (NGO) observers of the case (the Instituto Latinoamericano para una Sociedad y un Derecho Alternativos [Latin American Institute for an Alternative Society and an Alternative Law] (ILSA)²⁷ and the Colombia Support Network²⁸), as well as the Representative for the Requesters. In the teleconference, the Representative stated that the communities of Upper, Central, and Lower Putumayo were not aware of INVIAS's actions, and that the efforts at dialogue by the executing agency were limited to the indigenous governors of Upper Putumayo.²⁹ On 8 August 2012, the Ombudsperson received confirmation from a Requester (the interlocutor for Central and Lower Putumayo) that they wished to continue with the ICIM dialogue process.³⁰

19. In light of the apparent information asymmetries, as well as differing perceptions of the agreements between INVIAS and the communities as well as the dialogue processes already established by this agency, on 9 October 2012 the ICIM invited the Requesters to a meeting with the objective of: (i) providing information on the Project and existing mechanisms for information and participation, as well as gathering

²⁶ The letter was sent via both email and standard mail. The physical correspondence was delivered and received in Sibundoy on 30 August 2012 (Certificate No. RN111170120W4002SF4, 472 Servicios Postales, Bogota, 4 September 2012).

²⁷ The NGO had contacted the Project Ombudsperson on 29 May 2012 for information regarding developments in the process and with the aim of serving as a communications conduit for a number of the indigenous communities in Putumayo.

²⁸ The NGO had shown an interest in the case since the Assessment phase in August 2011, and had engaged in ongoing monitoring of the process.

²⁹ During the teleconference the Representative also stated that the indigenous leaders of Central Putumayo planned to submit a complaint to government agencies, given that the minutes dated 13 March did not reflect the agreements reached in the meeting.

³⁰ Via email, sent at 12:12 p.m. on 8 August 2012.

additional information on the agreements reached by INVIAS with the communities; and (ii) listening to concerns and suggestions on the part of the communities regarding the Request.³¹

20. On 23 October 2012, the Ombudsperson received a reply from the “Comisión Política de la Minga” (Minga Political Commission [*Minga* refers to a traditional gathering or activity for the collective good]), which is comprised in part by a number of the Requesters in the ICIM case. The Commission proposed that the meeting take place within the framework of “the *Gran Minga* of Resistance for Defense of the Rights of the Indigenous Peoples of Putumayo, Upper, Central, and Lower Bota Caucana, and the Jardines de Sucumbíos *corregimiento* (Ipiales-Nariño)” (“the *Minga*” or “*Gran Minga*”).

21. The *Minga*—a traditional form of indigenous work—was proposed as a forum for dialogue between indigenous communities and the Government of Colombia in four focal areas: (i) armed conflict in indigenous territories; (ii) a failure to comply with national and international regulations governing the creation, expansion, and regularization of indigenous *resguardos* [legally protected indigenous lands]; (iii) the presence in indigenous territories of multinationals involved in mining, hydrocarbons, and other natural resources; and (iv) construction of the San Francisco-Mocoa alternate road segment.³²

22. To seek further information regarding the position and expectations of the Requesters with regard to the *Minga* and the ICIM’s role therein, on 26 October 2012 the ICIM held a videoconference with ILSA, the Colombia Support Network, and two case Requesters belonging to the Minga Political Commission. The Representative for the Requesters, after reaffirming her willingness to participate in the dialogue, stated that the topic of the San Francisco-Mocoa alternate road could be discussed with the government using the forum for dialogue created by the *Minga*. This would also be suitable temporarily, given that in December 2012 new council elections would be held, meaning that all activity related to the information exchange session would need to be postponed, possibly until February 2013. In view of the foregoing, the Ombudsperson reaffirmed her desire to avoid duplicating existing dialogue initiatives, and accepted the suggestion that local facilitators act as independent observers as long as all parties were in agreement. However, the ICIM did not receive any formal invitation to participate as an observer in this dialogue with the government.

³¹ The proposal for this information exchange between the parties was developed based on the ICIM meeting with INVIAS on 12 September 2012, and made use of inputs from the executing agency and the minutes of the meeting of the Facilitation Team with the Requesting communities on 20 April 2012.

³² According to a statement by, among others, the indigenous peoples of Putumayo, the “*Gran Minga*” was launched on 22 July 2012 by “the indigenous peoples of Putumayo, Nariño, and Upper, Central, and Lower Bota Caucana, [who, due to] the difficult economic, political, and social situation [...], and out of solidarity with the position of [the] indigenous people of Cauca, [decided to] protest against the policies of national, departmental, and municipal governments, against private sector policies and the various actors that have established interests in [their] territories, [through] roundtable discussions with the communities, their indigenous authorities, and national, departmental, and local governments.” See <http://mingaderesistenciaputumayo.blogspot.com/p/declaratorias.html>.

23. The Consultation Phase team organized another teleconference for 8 November 2012—this time with INVIAS—in which it was confirmed that the ICIM would not participate in the *Minga* due to: (i) the audience involved, which exceeded the framework of the Requesting communities in the ICIM case; (ii) the issues to be discussed in the *Minga*; and (iii) the political nature of the *Minga*. In the teleconference, INVIAS reiterated its commitment to a process of dialogue and expressed its intention to begin a dialogue with Central and Lower Putumayo at the beginning of 2013.

24. In view of the indigenous gubernatorial elections to be held in December 2012, the Ombudsperson had to wait once more for the councils to position themselves. Despite several attempts by the Consultation Phase team,³³ the ICIM has not received any official notification to date regarding the newly-elected governors or their positions on the ICIM-facilitated dialogue process.³⁴

3.3. Judicial proceedings

25. As stated in the Assessment Report (*supra* paragraph 8), the Ombudsperson was to monitor the development and status of judicial proceedings related to the case, to ascertain whether these disputes might interfere in the dialogue process (or vice versa). In this regard, the Consultation Phase team depended in large part on a proactive stance by the parties, from whom it expected to receive all relevant information regarding progress in these proceedings and/or the emergence of new disputes that might be related to the Project. Information gathered by the ICIM has revealed three disputes that are relevant to the current case: (i) the *acción de tutela* and the *acción popular*, both of which were examined during the Assessment phase, and (ii) the recently brought *acción de nulidad*.

26. ***Acción de tutela*** [action for the protection of fundamental rights]. This case was brought before the Criminal Chamber of the Superior Court for the Judicial District of Pasto in September 2010, by the then governor of the Inga-Kamentsa of San Francisco, who is also one of the Requesters in the ICIM case. The aim of the case was to protect the fundamental rights of the Inga-Kamentsa indigenous peoples of Putumayo to due process, life, ethnic diversity, and a healthy environment, among other things.³⁵ The petitioner requested that the following administrative acts be suspended: (i) Certification 3868, issued on 25 October 2001 by the then Ministry of the Interior and Justice (now the Interior Ministry), which disavows the presence of Inga and Kamentsa groups in the Project area, and (ii) Resolution 2170, issued in December 2008 by the then Ministry of Environment, Housing, and Territorial Development (MAVDT), which grants the environmental permit for the Project.³⁶ This required the court to initiate, develop, and execute all measures, activities, and procedures necessary to implement the consultation process prior to the environmental and sociocultural impact studies with the communities

³³ Emails sent by the ICIM: to the Requesters on 8 January; to the Representative on 15 and 23 January.

³⁴ Both emails (from Aureliano Garreta on 25 January and Carmenza Tez on 14 February 2013) contain a partial list of the new governors, but do not provide complete contact details.

³⁵ Ruling handed down in the Criminal Appeals Division of the Supreme Court of Justice on 11 November 2010. Presiding judge: Jorge Luis Quintero Milanés (page 3).

³⁶ *Idem*.

potentially affected by the road project. Decisions were handed down in the case in the lower and appellate courts on 29 September 2010 and 11 November 2010, respectively. Both decisions rejected the petitioner's request on procedural grounds, without the merits of the case being judged.³⁷ Following the appellate decision by the Criminal Appellate Division of the Supreme Court of Justice, the case file was sent to the Constitutional Court for review. The case was not among those selected for review on 10 December 2010.³⁸ Based on the information currently available to the Mechanism, it seems that the *acción de tutela* is no longer active in the domestic courts and is therefore unlikely to interfere in the dialogue process (or vice versa).

27. ***Acción popular*** [class action]. This case was brought against the Ministry of the Interior and Justice, the MAVDT, and INVIAS by Carmenza Tez and other petitioners, before the Nariño Administrative Court in November 2010. The objective of the petition was to secure protection for collective rights to “a healthy environment, ecological equilibrium and the rational management of natural resources, conservation of animal and plant species, defense of public assets, and defense of cultural heritage.”³⁹ The petitioners requested, among other things, that: (i) MAVDT Resolution 2170/2008 (*supra* paragraph 26) not be applied, and (ii) the start of construction of the alternate road be suspended once and for all.

28. On 19 June 2012, the court issued its decision based on the merits of the case, setting aside the claims. The ruling stated, among other things, that “the petitioner failed to demonstrate that the territories in which the Project will be executed qualified as

³⁷ From the lower court decision: “a protection order is unwarranted where the petition is brought after a considerable period has passed since the original date of events or since the omission occurred that has hypothetically affected the fundamental rights of the petitioner [...] the action for protection was brought almost eight years after the Office for Indigenous Affairs issued the certificate (15 November 2002)—a document that is subject to presumption of legality. Moreover, the environmental permit was issued via Resolution 2170 on 5 December 2008, without the respective appeals having been filed, leading to an attempt at this excessively late stage to reverse this administrative act by means of legal action grounded in the constitution.” Ruling handed down in the Criminal Chamber of the Judicial District Superior Court on 29 September 2010. Presiding judge: Jesús Ángel Bobadilla Moreno, Protection Order 520012204000-20100191-00 (page 9). The appellate court decision “confirm[ed] the contested ruling of the Criminal Chamber of the Superior Court of the Judicial District of Pasto on 29 September 2010, and referred the case file to the Constitutional Court for review.” Ruling handed down in the Criminal Appellate Division of the Supreme Court of Justice on 11 November 2010. Presiding judge: Jorge Luis Quintero Milanés (page 13).

³⁸ See Constitutional Court Case T2906069, Case Proceedings. See www.corteconstitucional.gov.co.

³⁹ According to the lawsuit, the petitioner requested “protection, avoidance of contingent damage, and the cessation of grave danger and threats to collective rights to A HEALTHY ENVIRONMENT, ECOLOGICAL EQUILIBRIUM AND THE RATIONAL MANAGEMENT OF NATURAL RESOURCES, CONSERVATION OF ANIMAL AND PLANT SPECIES, DEFENSE OF PUBLIC ASSETS, AND DEFENSE OF CULTURAL HERITAGE, the latter two having been violated by actions of the MINISTRY OF THE INTERIOR AND JUSTICE, MINISTRY OF ENVIRONMENT, HOUSING, AND TERRITORIAL DEVELOPMENT [now the Interior Ministry and the Ministry of Environment and Sustainable Development], THE NATIONAL INSTITUTE OF ROADS (INVIAS) (...)”. Class action brought against the Ministry of Environment, Housing, and Territorial Development, the Ministry of the Interior and Justice, and INVIAS, by Carmenza Tez Juagibioy, Henry Mavisoy Muchavisoy, Taita Clemente Arturo Jacanemjoy before the Nariño Administrative Court on 8 November 2010 (page 1).

indigenous territories or non-titled areas regularly and permanently inhabited by indigenous groups.” Under Colombian law this removes the obligation of prior consultation for the Project. The court concluded that “there is no evidence that the actions or omissions of the defendant agencies caused contingent damage, danger, or threat to, or violation or breach of the collective interests and rights to a healthy environment, public assets, and cultural heritage invoked in the lawsuit, and that in this specific case there was no need to engage in consultations with the Inga and Kamentsa indigenous communities prior to issuing the environmental permit for the Mocoa-San Francisco Alternate Road Project.”⁴⁰ This decision was communicated to the Mechanism by the executing agency on 30 July 2012, without clarification as to whether this was a final decision.

29. The Ombudsperson recognized that the decision in the class action could potentially interfere in the Consultation Phase process, as it involved crucial issues for the future dialogue: (i) the existence—or not—of indigenous communities in the Project’s area of influence, and (ii) the need to engage in prior consultation regarding the Project or not. However, the criterion used in the decision, which is framed under national legislation, appears to be stricter than the concept of “territories, lands, and natural resources” used in the IDB’s Operational Policy on Indigenous Peoples (OP-765). The Ombudsperson therefore considered the presence of indigenous communities in the Project’s area of influence (as stipulated in OP-765) to continue to be a relevant issue for the dialogue. In fact, the Ombudsperson observed that despite the Administrative Court’s finding, the ruling recognized, for example, the traditional use of the Sachamates trail and its importance for the Inga and Kamentsa indigenous peoples.

30. Given that the parties had reaffirmed their willingness to participate in the dialogue subsequent to this ruling (*supra* paragraph 28), the Ombudsperson concluded that the best course of action was to organize the information exchange session and draw up an agenda for dialogue. In this way, the parties would decide jointly whether to include issues related to “the possession or management of the territories, lands, or natural resources traditionally occupied or used by indigenous peoples”⁴¹ in the Project’s area of influence, as well as the need for and existence of prior consultation, among other concerns raised in the Request. In the joint meetings, the parties would be able to discuss the indigenous communities’ traditional use of the lands, as well as the Requesters’ other concerns, which are not limited to the issues examined in the aforementioned court case.

31. The Consultation Phase team was later informed that the parties to the class action had been notified on 4 December 2012 that an appeal submitted to the Council of State

⁴⁰ Nariño Administrative Court decision on the class action, handed down on 19 June 2012. Presiding judge: Ana Beel Bastidas Pantoja, Filing 2010 – 00680, page 54, folio 1389.

⁴¹ In the case of the current Policy on Indigenous Peoples (OP-765), “Operations that directly or indirectly affect the legal status, possession, or management of territories, lands, or natural resources traditionally occupied or used by indigenous peoples will include specific safeguards, consistent with the applicable legal norms and the normative framework regarding ecosystem and land protection.”

by Carmenza Tez, “as a member of the Kamentsa indigenous people,”⁴² had been granted. The Ombudsperson does not have any information regarding the content of the appeal or its current status, as none has been provided by the parties to the case. However, it can be inferred that even as the Requesters were reaffirming their willingness to participate in the dialogue, they were also resorting to law to resolve Project-related disputes. In contrast to the situation during the Assessment phase, when the parties had already completed all court proceedings prior to submitting the Request to the ICIM and were only awaiting the ruling, the Requesters this time took clear and active steps to move ahead with the class action via an appeal.

32. Similarly, the Ombudsperson was made aware of a third judicial process related to the Project, as explained in the following paragraph.

33. *Acción de nulidad* [motion to vacate]. According to information on the Judicial Branch website, on 13 February 2013 a motion to vacate MAVDT Resolution 2170/2008 was filed with the Council of State. The claim was filed by a member of the Inga-Kamentsa authorities of San Francisco, Upper Putumayo, who had participated in the meeting with local facilitators in April 2012 (*supra* paragraphs 10 and 11). In addition to the motion to vacate, the petitioner requested that the administrative act in question (the environmental permit) be provisionally suspended.⁴³ To date, the parties have not submitted any information regarding this case to the ICIM. As a result, the Consultation Phase team does not have any detailed information concerning the parties to the action (particularly whether other Requesters are involved in the claim),⁴⁴ or the issues that motivated it. Consequently, it is impossible to determine whether the case would interfere directly with the dialogue process (or vice versa).

34. Beyond the fact that the motion to vacate seeks to reverse the contested administrative act, it can be inferred that some representatives of the indigenous communities have preferred to use the judicial system to resolve their concerns regarding the Project. For the Ombudsperson, the decision to initiate a new judicial action, brought while the parties were preparing for the dialogue, constitutes convincing evidence of the lack of a unified position among the communities in relation to the Consultation Phase process. It could, moreover, reflect an unwillingness to move forward with the dialogue if it is confirmed that they are also the petitioners in the aforementioned case.

⁴² The parties were notified on 4 December 2012. Since 22 January 2013, the case file has been in the presiding judge’s office. See Case 52001233100020100068001. Presiding judge: Marco Antonio Velilla Moreno, Council of State. <http://190.24.134.67/pce/consultaproceso3.asp?numero=52001233100020100068001> (last accessed on 18 March 2013).

⁴³ On 20 February, the case file was transferred to the office of the presiding judge, Maria Claudia Rojas Lasso. Case 52001233100020100068001. See <http://www.consejodeestado.gov.co>.

⁴⁴ Information available on the Council of State website indicates that there is only one petitioner in this case.

IV. CONCLUSIONS OF THE CONSULTATION PHASE

35. The case has been subject to the following determining circumstances:
- a. **Scant information flows and delays.** The Consultation Phase process depends in large part on the flow of existing information among the parties and between these and the Consultation Phase team. In the current case, the process has been hindered by a lack of timely information regarding positions and, particularly, developments in related areas such as agreements with the Government of Colombia and suits brought by the Requesters. As a result, and despite repeated assurances by some of the Requesters that they are willing to participate in the dialogue process, the level of commitment necessary to achieve concrete actions and progress has not been obtained.
 - b. **Lack of a unified position among the Requesters.** As observed during the case Assessment, in light of apparent differences of opinion regarding the Project, indigenous communities and their representatives may have decided to unite around a single cause and present a united front vis-à-vis the Project. Nonetheless, the level of difficulty was underlined by news of an apparent parallel dialogue process between a number of Upper Putumayo authorities and INVIAS, of which the other Requesters from Central and Lower Putumayo, as well as the Representative, claimed to be unaware. The ICIM's attempts to engage in order to receive information and clarify the position of the Upper Putumayo authorities met with no response (*supra* paragraph 17). This lack of a unified position among the Requesters affects the conditions for carrying out a fruitful ICIM-facilitated dialogue process.
 - c. **Pending judicial proceedings.** The use of the judicial system by a number of the Requesters as a strategy for resolving their concerns in relation to the Project fundamentally affects the feasibility of initiating a dialogue between the parties.
36. Based on the above, the Ombudsperson considers that **the conditions necessary for a process of dialogue do not exist**. The **Consultation Phase for the present case is therefore terminated**,⁴⁵ and the case file is to be transferred to the Office of the Executive Secretary.
37. Upon completion of this report, the Ombudsperson received correspondence from one of the complainants⁴⁶ requesting that the case no longer be processed under the Consultation Phase and that it therefore be transferred to the ICIM's Compliance Review Panel. This request is unaccompanied by any records that would demonstrate that this decision was made by mutual agreement among all the Requesters. Nonetheless, the Requesters will have the opportunity to reiterate the request once the file has been transferred to the Office of the Executive Secretary.

⁴⁵ Policy Establishing the ICIM, section 47.

⁴⁶ Email dated 21 March 2012.

V. ACHIEVEMENTS OF THE CONSULTATION PHASE

38. This section describes some of the achievements of the Consultation Phase, resulting from the process undertaken from the Eligibility phase onward.

39. Issues of concern for the Inga-Kamentsa indigenous communities of Putumayo were expressed through the Request to the ICIM, the Determination of Eligibility, and the Case Assessment Report. These issues were said to have the potential not only to place project execution at risk, but in particular to endanger its social and environmental sustainability (i.e. definition of the Project's direct area of influence, prior consultation, etc.). The timely response and ongoing efforts of the project team facilitated coordinated action and openness with the executing agency.

40. All of the parties involved in the process (indigenous communities, INVIAS, the IDB, the ICIM, and the observer NGOs) now have greater familiarity with and understanding of the Project and the context in which it is being developed. This will be critical for project execution, particularly in relation to the Integrated and Sustainable Environmental and Social Management Plan (PMASIS) component. The project team and the executing agency appear to be working with renewed energy on activities to ensure the optimal implementation of the PMASIS.

41. Irrespective of differing points of view regarding the presence of indigenous communities in the Project's direct area of influence, as expressed in often contradictory fashion by Colombian government authorities, the project team and the executing agency have treated the issue with the importance that it deserves and have shown themselves to be proactive in their interactions with the Putumayo communities. The Project intends to persist with this approach, including the entire region in its dissemination, inclusion, and community participation activities, throughout the entire project cycle. Against this backdrop, the executing agency now appears to place more emphasis on mechanisms for community participation and attention, including the possible establishment of *veedurías* (oversight committees) in project areas to improve management of the PMASIS.

42. The Consultation Phase has served as a preparatory tool to reorient the dialogue with the communities and appreciate their holistic vision of the territory, which can be put into practice beyond the area surrounding the Alternate Road Project and given a broader forum.

VI. LESSONS LEARNED

43. The specific characteristics of the current case and the dynamic of the dialogue process results have yielded a number of lessons learned about the ICIM process and the operational profile. These are summarized below.

A. Process-based

44. *Constant verification of representativeness and identification of interlocutors.* As this is a dynamic and flexible process, the representativeness of the requesters, their representatives, and their interlocutors should be constantly reconfirmed during the

Consultation Phase, while maintaining the appropriate level of care and respect for the internal governance characteristics of the community/organization/entity concerned. In the current case, the indigenous communities of Putumayo hold council elections each year. The executing agency has also experienced a high level of turnover among the team members responsible for the Project.

45. ***Understanding temporality within the context of the world view and governance of indigenous communities.*** In cases like this one, particular attention must be paid to the specific cultural and ethnic characteristics of the indigenous communities involved in the ICIM process. The process should be adapted to their sociocultural and political perspectives and characteristics. To this end, it is essential to have technical support available for the duration of the case and to bear in mind that timelines are not the same as for any other group with greater access to technology and communications.

46. ***Interpretation of the “judicial clause”.*** The intention of exclusion clause 37(i) is to avoid Consultation Phase interference with issues under consideration by judicial and arbitral institutions (and vice versa). Taken literally, this clause runs the risk of creating not always reasonable barriers to the submission of Requests to the ICIM. The exclusion criterion should thus be interpreted broadly—considering the spirit and not the letter of the Policy—and in accordance with the objectives and functions of the Consultation Phase itself. Moreover, given the nature of the Consultation Phase process, the principle of non-interference and confirmation of the willingness to engage in dialogue should be in place throughout the process, and not only at the moment of determining eligibility.

47. ***Verification of the willingness to engage in dialogue and the principle of non-interference.*** Although the circumstances of the current case led the Consultation Phase team to repeatedly verify the willingness of the parties to engage in dialogue, such willingness needs to be expressed through concrete actions such as the timely designation of representative interlocutors, timely sharing of information relevant to the case and the process, and availability for participation in meetings, teleconferences, etc. Moreover, in cases similar to this one, sections 37(i) and 40(g) of the Policy Establishing the ICIM should be treated as complementary, inasmuch as initiation of suits during the dialogue process (or preparation therefor)—depending on the motives for them—could indicate a lack of interest in participating in the ICIM process.

48. ***The role of the project team and the Environmental Safeguards Unit.*** Given their influence over the different stakeholders involved in the Project, as well as in its design and execution, the role of the project team and the Environmental Safeguards Unit is a critical one—albeit complementary to the efforts of the executing agencies. In the case of infrastructure projects in particular, where there is the possibility of substantial environmental and social impact, ongoing analysis during project execution, as well as timely consultations, as provided for in OP-703, are important. The Consultation Phase process can represent a great opportunity for the project team and the executing units to promote methods that can replicate positive experiences, through effective participation and access to information. However, these tools should ideally be established as part of the project.

49. ***Country context.*** It is essential to understand the country context, in terms of own measures, mechanisms, and scenarios or those regulated by general and/or special indigenous legislation, in which the requesters and the type of request can have sufficient space and development within a context of overall public policy on the subject. Clarity regarding the local context allows the ICIM to determine the potential scope of its intervention in the Consultation Phase. In view of the difficulties in isolating or delineating the Request within a complex context of different infrastructure, hydrocarbons, mining, and agroindustrial projects, all with potential environmental, social, and cultural consequences for indigenous communities, as is the case in Putumayo, it is essential to adopt a comprehensive approach to dealing with the case, with the full commitment of all stakeholders.

50. ***The role of NGOs.*** The role of some organizations during this case was highly positive in terms of understanding the political and sociocultural environment. Thanks to their ability to communicate with and work alongside the indigenous communities, these organizations or processes can help to support a strategic vision of progress and developments in the dialogue process.

B. Operational

51. ***Environmental and social impact.*** In the case of projects that are implemented in very complex areas with high levels of biodiversity, the various environmental impact assessment manuals indicate that the direct area of influence of a project is that in which the impact of its activities can be observed. The *a priori* delineation of the direct area of influence should therefore take into account the spatial manifestation of the impact of works in a sensitive and strategic area, given that the restrictions and/or permits associated with this delineation may be interpreted in different ways. At the same time, in light of the characteristics of this particular road and the complex sociocultural realities of the project area, it is essential to identify at an early stage of the process the social liabilities that are created in the communities involved.

52. ***Avoiding social tensions through broad communication strategies and community participation.*** Beyond the identification of the Project's areas of direct and indirect influence, a broad strategy of communication and participation with the indigenous communities is fruitful. This could avoid a feeling in certain communities that they are being excluded from the Project, which could lead to social tensions and conflict among these same communities. In addition, in projects where the design may be subject to change, tools that facilitate constant communication and community participation can potentially lead to greater acceptance of the Project and its components, thus avoiding the spread of rumors about negative impacts that are inexistent or minimal in the area as well as the radicalization of positions and reputational costs. These can increase opposition to the Project and, ultimately, cause greater dissatisfaction and unnecessary social tensions. This risk can be managed by using broad and timely communication and participation strategies and maintaining a constant presence in the project area.

53. ***Strategies and methods for the mitigation and compensation for impacts.*** Although these have been identified since the project design phase, they can become

more or less relevant during project execution. The dialogue process should therefore be employed in the event of a readjustment or redefinition of the strategies. The ongoing active, united, and harmonious participation of the indigenous communities is essential for the Project's coexistence with these communities in the medium and long term.