



INDEPENDENT CONSULTATION
AND INVESTIGATION MECHANISM

MEMORANDUM

CONSULTATION PHASE ELIGIBILITY DETERMINATION

FROM: Isabel Lavadenz-Paccieri, Project Ombudsperson
TO: Executive Secretary
CC: MICI
REFERENCE: Case "Ruta 10 – Finca 470"
RELATED PROJECT: PR-0035, "Program to Improve Highway Corridors in Paraguay", Loan 933/OC-PR
COUNTRY: Paraguay
TODAY'S DATE: December 16, 2010

Summary of Request and Determination:

Professors Kim Hill and Magdalena Hurtado (the "Requesters") submitted, on November 10, 2010 for consideration of the Independent Consultation and Investigation Mechanism ("ICIM") of the Inter-American Development Bank ("IADB") a request with observations and complaints regarding the transfer and land titling of Finca 470 to the Ache Community in Paraguay. They requested **compliance with the loan conditions and the ILO 169 Convention** (collectively, the "Request").

The Requesters alleged that one of the IADB conditions of the Loan Agreement was the "establishment of a minimal number of **forest and indigenous reserves**". The Request specifically noted that the Government – backed by the Bank Project, in order to comply with this condition, purchased a 4,600 ha property referred to as Finca 470, that is located in the area of influence of Route 10, paved with funding from the loan. Apparently, this action blocked the indigenous community's aspirations to be granted those lands, whose owner had already agreed several months earlier to sell this property to the Foundation Moises Bertoni (FMB)¹ who intended to transfer these lands to its traditional occupants, the Ache Community.

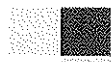
After reviewing the request, and providing the Requester with a reasonable opportunity to clarify, complete or correct the Request, this Project Ombudsperson hereby determines that the Request is **not eligible for the Consultation Phase** under the ICIM for the reasons described below².

¹ The FMB is a local NGO in Paraguay for sustainable development through conservation of nature and social responsibility and active participation of the population. See www.mbertoni.org.py

² The terms: Mechanism, Management, Executive Secretariat, Project Ombudsperson, Panel, Mechanism Policy, Eligibility, Consultation Phase, Assessment and any other relevant term in this memorandum shall have the meaning assigned to them in the Independent Consultation and Investigation Mechanism (ICIM) Policy approved on February 17, 2010 and available at www.iadb.org/mici

Project Ombudsperson

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I. Background

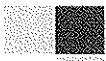
1. The Project subject of this request is the “Program to Improve Highway Corridors in Paraguay”, which was approved by the Board in **June 1996** and disbursed a total of 98.31% of the loan.
2. Given that one of the Project specific objectives was to “set aside approximately 20,000 ha as forest reserves and some 11,000 ha of land for indigenous settlements in the area of influence of Route 10”, the issue of the Ache lands was raised repeatedly by this community and some local and international NGOs throughout the implementation of the project. According to the Requesters, the IADB did not follow through with its promises to aid the Ache to title their lands.
3. In December 2002 the Ministry of Public Works (MOPC) decided to buy Finca 470, in order to meet the conditions of Loan 933/OC-PR and establish a forest reserve. In July 2003, the Finca 470 was titled in the name of the Secretary of the Environment (SEAM). The Requesters claim that the Minister of SEAM agreed to title Finca 470 in favor of the Ache if, and only if, the IADB would agree to change the legal status of the lands from forestry reserve to indigenous lands, and if this action still allowed the Government to meet its contractual obligation (with the Bank) of establishing indigenous and forestry reserves along Route 10. The IADB requested a Management Plan to agree to this change. The Ache community provided such a Management Plan. According to the Requester and a number of communications from the Bank, IADB agreed to support the titling of Finca 470 to the Ache. According to the requesters, the IADB team communicated this fact to SEAM who agreed to change the category of these lands from forestry reserve to indigenous reserve.
4. According the Requester, there is “evidence” that the Ache Community were forceably extracted from Finca 470, their ancestral lands, on March and April, 1972. For SEAM to be able to transfer a Government property to the Ache Community, a law was needed. In order to move forward however, in the meantime, SEAM apparently approved an agreement with the Ache that allowed them to begin a forestry inventory; obtain funds from Conservation International and be the beneficiaries of a usufruct agreement between the National Indigenous Institute (INDI) and SEAM, signed for the first time in 2004. The Requesters also state that the Ache met with IADB officials in Asuncion at least a half dozen times from 2001 to 2007 and initially received full support for their claim.
5. On September 8, 2009 Professor Magdalena Hurtado submitted a request via electronic mail to the Office of Institutional Integrity (OII) of the IDB complaining that in the case of Loan

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933/OC-PR, the Paraguayan Government failed to comply with the conditions of the loan. The communication was then forwarded to the Independent Investigation Mechanism (IIM, the "Prior Mechanism"). On October 16, 2009, the IIM declared the request ineligible pursuant to Section 1.5 (D) of the former policy that excluded from the scope of the mechanism requests submitted after the entire loan was disbursed. The last disbursement was on August 31, 2009. The requesters were notified the same day by the IIM.

6. According to the Requesters, have been trained and complied with all requirements by the Project, and have been managing Finca 470 as a reserve for almost 10 years.
7. On June 21, 2010 the Minister of SEAM issued an internal notice stating that the property (Finca 470) would be split between the Ache and Ava Guarani Communities, and would be titled. This decision constitutes a change in circumstances and a new event- triggering this Request before the ICIM. The Requesters consider this decision as a serious violation of the terms of Loan 933/OC-PR and the ILO 169 Convention that was ratified by Paraguay in 1993 (Law 234/93). According to the Requesters, "the SEAM is instead suggesting splitting the property with another outside indigenous group (not native to the area) that is working with logging companies to deforest the land as quickly as possible (and we have provided ample evidence of this through photographs and legal documents signed by local Fiscales in Curuguaty). The SEAM is not maintaining the property as a reserve in direct violation of the conditions of the loan, and IADB can and should take action against this failure of compliance".

II. Eligibility Analysis

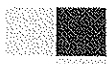
8. The consultation process starts with the Eligibility Determination to then move to the Assessment phase, and finally to the Consultation and Mediation phases, if so agreed by all parties. According to the ICIM Policy, specifically Article 38, the purpose of the Consultation Phase is to provide an opportunity for applying consensual and flexible approaches to address the concerns of a party that believes it has been adversely affected by an IDB-funded operational Loan.
9. As part of the process of determining whether any request is eligible for the Consultation Phase, requests must comply with the ICIM Policy, in particular Sections 40 and 37 thereof (Eligibility Criteria and Exclusions).
10. According to section 37, I, the Requesters are currently not part of any judicial or arbitral process, but they are aware that some local NGOs are demanding the nullification of the Internal Notice of SEAM 2010, defending the Ache rights. They also clarified that their request goes beyond this latest action by SEAM, to the origins of the entire situation.

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11. One of the Eligibility Criteria of Art 40, g, of the ICIM Policy is the need for amenability and commitment of the parties towards the dialogue process. The ICIM Policy states that "...the parties are amenable to a Consultation Phase exerciseand the Consultation Phase exercise may assist in addressing a concern or resolving a dispute or is likely to have a positive result...." According to conversations between the Project Ombudsperson and the Requesters, and exchange of electronic mails on date December 15, 2010, the Requesters expressed their lack of trust after "10 years of negotiations and broken promises towards any dialogue process with the agencies of the Government that are threatening the Ache Community land rights", and reiterated their request to take their case **to the Compliance Review process**.
12. Given this explicit focus on compliance and the Requester's reluctance to participate in the Consultation Phase, the Project Ombudsperson has determined that the Request described herein presented by the Requesters **is not eligible for the Consultation Phase**.
13. The issues raised in the request are environmental and about indigenous peoples' land rights. According to Art 26 of ICIM Policy the Relevant Operational Policies that shall be applicable shall be the version in effect at the time of Board approval of the operation (for this case June 1996). In the Bank's Eighth Replenishment Report, adopted in 1994, the systematic inclusion of indigenous issues in Bank policies and projects was required (document AB-1704, paragraph 2.27), such as a number of specific environmental mandates³. In addition, the IDB was the first Multilateral Development Bank to adopt an Environment Policy in 1979 (OP-703). Both policies aimed at avoiding or mitigating the adverse impacts of Bank projects on indigenous peoples and the environment.
14. A summary of the results of this analysis is presented in the table below.

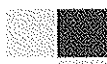
³ These mandates included provisions for: (i) strengthening environmental legal and regulatory frameworks; (ii) strengthening environmental institutions; (iii) improving the environmental quality of operations financed by the Bank; (iv) promoting the conservation and efficient use of energy in the Bank's projects; (v) improving the urban environment; (vi) promoting sustainable management of natural resources with specific references to environmentally sustainable practices for water resources, forestry, biological diversity, marine resources, and agriculture; (vii) addressing issues of transparency and access to environmental information, and stakeholder consultation; (viii) quality control and environmental impact assessments (EIAs); and (xi) fostering environmental education and training. See this at Environmental and Safeguards' Policy Ops in Introduction

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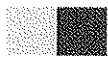
ELIGIBILITY CRITERIA	OMBI'S DETERMINATION	COMMENTS
Names and contact information available	YES	Professors Kim Hill and Magdalena Hurtado on behalf of the Ache Community have presented the request.
Bank-financed operation identified	YES	PR-0035 "Program to Improve Highway Corridors in Paraguay", Loan 933/OC-PR
Requesters reside in Project Area	YES	Paraguay
None of the exclusions of the policy applies	NO	
Requesters have asserted that they have been or could be directly, materially affected by the Project, and they have described the direct and material harm by an act carried out or omitted to be carried out by the Borrower in relation to the Project <u>in violation of a Relevant Operational Policy.</u>	YES	In the Bank's Eighth Replenishment Report, adopted in 1994, the systematic inclusion of indigenous issues in Bank policies and projects was required (document AB-1704, paragraph 2.27). Regarding Environment Policies, the first one was adopted in 1979 (OP-703), and the Eighth Replenishment of Resources of 1994, declared the Environment as a priority area for the Bank to support and included a number of specific environmental mandates
Parties are amenable to a Consultation Phase and dialogue	NO	The Requesters are not amenable to a dialogue with the Government.
Requesters have taken steps to bring the issue to the attention of Management and/or project team	YES	The Requesters have approached IADB on several occasions. They also confirmed that they have approached IADB in recent months, but did not receive any response.

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III. Contacting the Requester and Management

15. This project Ombudsperson has contacted the Requesters and the Project Team in order to gather more information and to ensure a proper understanding of its decision of ineligibility. The Project Team has been very collaborative as well as the Country Office.
16. The Requesters would like to pursue an avenue that ensures that IADB recognizes the violations of its Loan Agreement and its relevant indigenous peoples' policies, and withhold further disbursements for any other operation related to the regularization of Finca 470 and paving of Route 10⁴.

IV. Conclusion

17. The Project Ombudsperson has determined that the Request described herein presented by the requesters **is not eligible for the Consultation Phase**. According to Section 54 of the ICIM Policy, the Requesters are entitled to request a Compliance Review by the Independent Review Panel. As per the Requesters' demand, the ICIM Executive Secretary shall cause **this case to be submitted to the Independent Review Panel for their perusal**.
18. This determination **does not imply any judgment** on the part of the Mechanism of the merit of the issues raised in the Request. According to Section 54 of the ICIM Policy, the requesters are entitled to request a Compliance Review by the Independent Review Panel.
19. According to section 41, the Project Ombudsperson through the ICIM Executive Secretariat, shall, in writing, notify of this decision to the Requesters, the Board, the President, the Borrower/Recipient and/or Executing agency and the public.

Isabel Lavadenz Paccieri

Project Ombudsperson

Independent Consultation and Investigation Mechanism

⁴ Some other relevant operations that were implemented simultaneously to Loan 933 are Loan 1230/OC-PR1 of 1999 "Rural Roads National Program II", Loan 1300 of 2000 "National Support Program for the National Environmental System".

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