



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

**PN-MICI002-2011  
RECOMMENDATION FOR A COMPLIANCE REVIEW FOR LOAN 2027/OC-PN  
PANAMA CANAL EXPANSION  
APPROVED VERSION**

**This document was prepared by the Compliance Review Panel members.**

**This document contains confidential information relating to one or more of the ten exceptions of the Access to Information Policy and, therefore, shall not be disclosed to external Bank audiences. It is available only to Bank employees.**





**FROM:** Werner Kiene, Chairperson of the Compliance Review Panel  
**TO:** Members of the Board of Executive Directors  
**SUBJECT:** Recommendation to Conduct a Compliance Review and Terms of Reference. Approved Version

**REFERENCE:** PN-MICI002-2011- Panama Canal Expansion Program - PN-L1032 - Loan 2027/OC-PN

**DATE:** August 15, 2013

---

In accordance with Part D, Section 59 of the Policy Establishing the Independent Consultation and Investigation Mechanism (GN-1830-49) (the “ICIM Policy”), the Panel recommends that the Board approves a Compliance Review with respect to the ICIM case as PN-MICI002-2011- Panama Canal Expansion Program - PN-L1032 - Loan 2027/OC-PN, a Bank-Financed Operation (the “Panama Canal Expansion Program”, the “Program” or the “Project”). The revised version of the Terms of Reference for the proposed Compliance Review is set forth below as part of this Recommendation for a Compliance Review (this “Recommendation”).

In line with Part D, Section 53 of the ICIM Policy, the purpose of the proposed Compliance Review is to investigate allegations expressed by the Requesters that their rights or interests have been, or could be expected to be directly, materially adversely affected by actions or omissions of the Inter-American Development Bank (the “Bank” or the “IDB”) that the Requesters allege constitute the failure by the Bank to follow one or more of its Relevant Operational Policies (“ROPs”) in connection with the Program. The objective of the proposed Compliance Review investigation is to establish whether (and if so, how and why) any Bank action or omission in respect to the Program has resulted in non-compliance with its ROP.

A Compliance Review is a fact-finding exercise. Part D, Section 65 of the ICIM Policy provides that a Compliance Review is not a judicial process designed to establish guilt or innocence or to adjudicate fault or apportion blame. In addition, a Compliance Review does not involve any investigation of the actions of any party other than the Bank in connection with the relevant Bank-Financed Operation. Thus, if the Panel undertakes a Compliance Review, there would be no investigation of the actions of any governmental authority, the Borrower/Recipient/Executing Agency, any other lender or investor, the sponsor(s) or the developer(s).

We are at your disposal in case the Board needs further information.

Werner Kiene  
Chairperson of the Compliance Review Panel  
Independent Consultation and Investigation Mechanism  
Inter-American Development Bank

**Recommendation to Conduct a Compliance Review and Terms of Reference**  
**Panama Canal Expansion Program**  
**Approved Version**

**Abstract**

This Recommendation is in response to a Request for a Compliance Review lodged with the Independent Consultation and Investigation Mechanism (the “ICIM”) by the Requesters (defined below) alleging that the implementation of the Program as currently designed could cause direct, material adverse impacts (sometimes referred to herein as “harm”) to them. The Request focuses, among other issues, on whether seismic risks and risks to the use of available water resources were adequately dealt with in the Program’s design, and on the quality and timing of disclosure of information to the Requesters. The Requesters allege that the Bank did not comply with its own ROPs relating to the Program. Management has stated that its risk assessment and the management of identified risks are adequately dealt with in the Program’s design and implementation and that the Bank complied with all relevant ROPs, as more fully described in Section 4 below. The Panel believes that the Requesters’ issues and the position of Management vis-à-vis “harm” and the relationship to compliance with certain ROPs warrant a Compliance Review. A Compliance Review should shed light on the conflicting views brought forward to the ICIM by the Requesters and Management. Based on currently available information, the proposed Compliance Review would include but not be limited to addressing the Bank’s compliance with the following ROPs: the Environment and Safeguards Compliance Policy (OP-703), the Disaster Risk Management Policy (OP-704) and the Operational Policy on Indigenous Peoples (OP-765).

## PART I

### Recommendation for a Compliance Review

#### 1. Background Information

1.1 On October 10, 2011, Ms. Leila Shelton, Director of the “Gatún Lake Defense Committee,” (a group of scientists and other citizens) submitted a Request before the ICIM<sup>1</sup> expressing concern about the operations partially financed by the Bank in the context of the Panama Canal Expansion Program. The Request was originally submitted under Ms. Shelton’s name, but later she identified herself as a representative of the citizen-action coalition “Alianza Pro-Panamá.”<sup>2</sup> On October 17, 2011, the Executive Secretary transferred the Request to the Project Ombudsperson and a Consultation Phase exercise was commenced.

1.2 On October 20, 2011, the ICIM received a written communication from representatives of a Panamanian umbrella non-governmental organization (“NGO”), Colectivo Voces Ecológicas (“COVEC”), acknowledging Ms. Shelton as a representative of Alianza Pro-Panamá. The COVEC representatives endorsed the concerns presented to the ICIM in the Request. In this Recommendation the term “Requesters” shall refer to Ms. Shelton as well as the NGOs and their members that recognize Ms. Shelton as their legitimate representative. The Requesters were particularly concerned about the Program’s potential material and direct harm to them due to the its impact on water resources and access to safe drinking water, increased risk of flooding and earthquakes, as well its potential as negative impacts on traditional livelihoods of the Requesters and others in their communities.

1.3 On December 20, 2011, in line with Part C, Section 40(h) of the ICIM Policy, Management and the Executing Agency, the Panama Canal Authority (the “ACP” or the “Executing Agency”) held a meeting with the Requesters to address their concerns.<sup>3</sup> The Requesters asked for copies of the following documentation: (i) studies of salinization impacts of the selected lock design and configuration, (ii) application of earthquake design criteria to the upgraded Canal system, (iii) a copy of the Program’s design basis, (iv) copies of comparative studies made of lock options and configurations prior to selection and (v) reports of due diligence experts with respect to the foregoing documents and the subjects dealt with by them. Based on information available to the Panel, it appears that the concerns of the Requesters were neither resolved in this meeting nor in follow-up exchanges among the parties involved.<sup>4</sup>

1.4 In January 2012, the Requesters sent a communication to the ICIM stating that they “...[were] not satisfied with the outcome of the Management response...[and] reiterated...concerns about the long-term

<sup>1</sup> Unless otherwise defined in this Recommendation terms shall have the meanings assigned to them in the ICIM Policy.

<sup>2</sup> On September 19, 2012, the Alianza Pro-Panama sent a written communication to the Panel, stating that the organization is a citizen-action coalition that Ms. Shelton represents and that the organization includes individual members, other organizations and grassroots groups. A copy of this written communication is available in the ICIM’s physical files as well as in IDB docs. Part B, Section 30 of the ICIM Policy states that “[a] Request may be presented by a representative located in the project host country or elsewhere, but any such Request must identify the persons(s) on whose behalf the representative is acting and provide evidence of the representative’s authority to represent them.” A “Request” is defined in Part A, Section 27 as “any communication relating to this Policy from a Requester”. Hence, the Panel believes that Ms. Shelton’s status as a “representative” of Requesters has adequately been established. Although irrelevant as to Ms. Shelton’s status as a “representative”, her residence status has been a subject of discussion between ICIM and Management. [REDACTED]

<sup>3</sup> Assessment and Consultation Phase Report, June 2012, document MI-26-1, page 3.

<sup>4</sup> During the Consultation Phase exercise, the Project Ombudsperson received a request from Management for an additional time period to attempt to address the Requesters’ concerns. The Project Ombudsperson granted two pauses of 45 days during the Consultation Phase exercise to the Executing Agency, Management and Requesters for meetings and discussions.

[Program] sustainability as designed, and ...expressed...concerns regarding access to information since [they] had not received all of the information requested from [ACP]”<sup>5</sup>. The Project Ombudsperson declared the Request eligible for the Consultation Phase on February 9, 2012. In April 2012, the ACP opted out from the Consultation Phase, alleging among other issues that: the Requester had a conflict of interest,<sup>6</sup> the burden of proof had been placed on the ACP, relevant information had been disclosed on the ACP’s website and the Request lacked proper documentation.<sup>7</sup>

1.5 Following the Executing Agency’s decision, the Project Ombudsperson concluded the Consultation Phase on June 27, 2012, issuing an Assessment and Consultation Phase Report. On August 15, 2012, the Requesters asked the Executive Secretary to submit the Request to the Panel, because they believed that they might or are likely to suffer damage or direct material harm, owing to the Bank’s alleged failure to comply with its ROPs in connection to the Project.

1.6 Following the procedures established under the ICIM Policy, the Panel Chairperson examined the available information and observed that the allegations appear to involve issues relating to whether the Program’s design dealt adequately with disaster risk management and availability of water resources to ensure long-term sustainability of the operation and whether the Program adequately addressed the impact of its activities on the livelihoods of the Requesters and their communities. These allegations may involve potential non-compliance with several ROPs. Based on the files and correspondence and the Panel’s communications with relevant parties, the Panel Chairperson determined that the Request was eligible for the purposes of a Compliance Review on September 20, 2012.

1.7 Based on information available to date, it appears that the Requesters and Management (as well as the Executing Agency) have expressed conflicting views as to whether the Program’s design complies with the provisions of several ROPs that are intended to prevent harm or ensure the mitigation of risks and potential negative impacts on the environment and local livelihoods, among other issues. The Panel recommends that the Board approve a Compliance Review to establish whether (and if so, how and why) any Bank action or omission in respect to the Program, a Bank-Financed Operation, has resulted in non-compliance with a ROP and direct material adverse effects (potential or actual) to the Requesters.

## **2. The Program and its Context**

2.1 The Panama Canal Expansion Program, combined with the conclusion of a free trade agreement with the United States, is expected to boost Panama’s annual growth rate, helping GDP grow 2.5 times the 2005 level by 2025. However, despite Panama’s status as an upper-middle income nation – as measured by per capita GDP – it remains a country of stark contrasts. Dramatic educational disparities exist and over one-third of Panama’s population of approximately 3.4 million lived in poverty in 2008 and 14.4 percent in extreme poverty. The ACP estimates that the Panama Canal expansion would lift 100,000 Panamanians out of poverty.

2.2 The plan for the expansion of the Panama Canal has been on the agenda of Panamanian authorities for many years. It is one of the largest and most important undertakings in the Western Hemisphere and has been subject of many debates about the most appropriate technical design, the Program’s possible social and environmental impacts and the complexity of financial arrangements for a Program of this magnitude.

---

<sup>5</sup> Assessment and Consultation Phase Report, June 2012, document MI-26-1, page 2.

<sup>6</sup> It has been alleged that Ms. Shelton has a personal interest in promoting her brother’s (Mr. Bart Shelton; engineer) design plan for the Panama Canal expansion.

<sup>7</sup> Assessment and Consultation Phase Report, document MI-26-1, June 2012, page 3.

2.3 In October 2006, during the early stages of the Program's development, the government of Panama undertook a National Referendum. It has been reported that 77 percent of Panamanians approved the expansion of the Canal. Aside from this initiative, the ACP has established a grievance mechanism and a toll-free hotline to address concerns from citizens during the Program's early stages. According to information provided to the Panel, the grievance mechanism is said to be aligned with the Equator Principles<sup>8</sup> and appears to operate.

2.4 In October 2008, the Board approved a corporate loan to partially finance, together with other international financial institutions,<sup>9</sup> the expansion of the Panama Canal, one of the world's largest transportation sector projects. The Bank has committed to fund approximately USD 400 million, which corresponds to roughly 7.6 percent of the total amount of the USD 5.25 billion estimated to be required to fund the expansion of the Panama Canal. The ACP is the Borrower and Executing Agency.

2.5 The potential benefits of such a large-scale operation, particularly the increase of inter-oceans transit capacity and the exchange of commodities between East and West are significant and represent valuable economic opportunities for Panama and the region. Taking into account the potential positive economic aspects of this operation, it is clear that it must comply with a number of standards with regard to its environmental and social impacts.

2.6 The Bank's resources allocated for the Program are intended to be devoted primarily to assist with the financing of four components, which consist of: (i) the construction of two new larger locks, (ii) the excavation of 11.2 km of new access channels, (iii) deepening of the navigation channels and (iv) the elevation of Lake Gatún. Construction works started in September 2007. The ACP conducted an international competitive bidding process for the design of the locks, gates and valves for the Panama Canal expansion. The consortium "Grupos Unidos por el Canal, S.A." won the bidding process and was awarded the contract in January 2012. Grupos Unidos por el Canal S.A. is expected to complete its activities in late 2014.

2.7 The loan to the ACP was made via the non-sovereign guarantee window of the Bank in accordance with the 2006 authorization from the Board of Governors to lend directly to public sector entities without a sovereign guarantee. With respect to the Bank's Environment and Safeguards Policy (OP-703)<sup>10</sup>, Management classified this Bank-Financed Operation as "Category A", given the Program's potential significant environmental and associated social impacts. A "Category A" operation requires, *inter alia*, an Environmental Impact Assessment (the "EIA") and multiple consultation processes with potentially affected populations during project design and implementation.

2.8 On June 8, 2012, the ACP requested the first disbursement from the Bank. The Bank's records indicate that the Bank's first disbursement took place on June 29, 2012, and that this decision was made on the basis of the Bank's confirmation that the ACP fully complied with all conditions precedent to the first disbursement.

---

<sup>8</sup> The Equator Principles constitute a financial industry benchmark for determining, assessing and managing social and environmental risk in project financing (<http://www.equator-principles.com>).

<sup>9</sup> In addition to the Bank, the multilateral financial institutions are: the Andean Development Corporation, the Japanese Bank for International Cooperation (the "JBIC"), the European Investment Bank (the "EIB") and the International Finance Corporation (the "IFC"), JBIC finances approximately 15.2 percent of the operation (USD800 million).

<sup>10</sup> In October 2007, Management submitted the Environmental and Social Strategy for the Program to the Bank's Environmental and Social Review Committee, which classified the Program as a "Category A" Bank-Financed Operation.

### **3. ICIM Actions Prior to the Compliance Review Phase**

3.1 The Project Ombudsperson declared the Request eligible for the Consultation Phase on February 9, 2012. However, after the Executing Agency declined to participate in the dialogue in April 2012, the Project Ombudsperson determined that it was not possible to proceed with a Consultation Phase exercise, thus declaring that phase as terminated. On August 23, 2012, after receiving confirmation from the Requesters, the Executive Secretary transferred the Request to the Compliance Review Phase. To clarify the issues and concerns raised by the Requesters, the Panel Chairperson identified and gathered information from the staff involved and the records of the Consultation Phase. On September 4, 2012, the Panel Chairperson sent a communication to Management, asking for further information that Management might deem relevant for the purpose of a Compliance Review. On September 5, 2012, Management responded that the Program team had been actively involved in addressing the Requesters' concerns.

3.2 On September 11, 2012, the Panel Chairperson contacted the representative of the Requesters to clarify the Compliance Review process and to conduct a preliminary assessment of whether the Request was eligible for a Compliance Review. The Requesters reiterated concerns expressed during the Consultation Phase and on September 19, 2012, submitted a written communication to the Panel with allegations about the potential negative environmental and social impacts stemming from alleged non-compliance by the Bank with ROPs that the Program may represent for the Requesters. This written communication describes the potential material harm the Requesters feel they are likely to suffer as well as their broader concerns about the Program's risks. The Panel Chairperson declared the Request eligible for a Compliance Review on September 20, 2012.

### **4. Alleged Harm and Potential Compliance Issues Alleged in the Request**

4.1 In written communications of September 19, 2012, referred to above, the Representative of the Requester submitted allegations regarding the direct material harm suffered or likely to be suffered by Requesters, which the Requesters allege could result from the Bank's non-compliance with certain ROPs.

4.2 The Requesters stated that members of Alianza Pro-Panama, subsistence farmers, fishermen and members of communities located in certain watersheds would be significantly affected by the Program.<sup>11</sup> They also indicate that the local communities fear that decisions on the new water resources incorporated into the expansion of the Panama Canal were solely based on technical and financial concerns, while insufficiently taking into account the negative social and environmental impacts on their livelihoods.

4.3 The allegations of the Requesters emphasize that the current design will cause direct harm to them as it does not address the Panama Canal's vulnerabilities to earthquakes. According to the allegations, the magnitude of potential seismic activity in the Program area is much greater than 7+ on the Richter scale. In addition to causing fear and anxiety for the local population (including the Requesters), the allegations state that the Program's design and/or implementation could generate great vulnerability to damages in the event of a large earthquake. As a result, there is a risk of a natural disaster that could lead to direct material direct harm to them (as well as the entire country).

---

<sup>11</sup> For example, the Requesters allege that subsistence farmers and fishermen would be directly impacted by what the Requesters describe as the Program's "poor use of existing water" which would result in permanent loss of their livelihoods. Written communication sent to ICIM on September 19, 2012. Available in ICIM's physical files and IDB docs.



4.4 The Requesters state that data show that the Miraflores Lake and adjacent locks were originally designed to avoid constructing a lock on any fault line and protect Gatún Lake from excessive salt water intrusion. They allege that the Project, as currently designed and as it is being implemented, will modify such protective functions and increase the risk of greater salt water intrusion into Gatún Lake and imperil the availability of safe water for drinking and agricultural use. The Requesters fear a negative impact on agricultural productivity and loss of income due to soil salinization and potential loss of useful or habitable residential and commercial land.

4.5 The Panel believes the direct material adverse impacts (sometimes referred to as “harms”) alleged in the Request fall into the following broad categories:

- a. The negative impact that the expansion of the Panama Canal as currently being implemented might have on Requesters’ livelihoods
- b. Negative social and environmental impacts from increased exposure to the risk of natural disasters (particularly earthquakes), which the Requesters claim the Program sponsors have not sufficiently assessed and/or taken into consideration

4.6 The Requesters’ allegations appear to be principally related to the Environment and Safeguards Policy (OP-703), Disaster Risk Management Policy (OP-704), Indigenous Peoples Policy (OP-765).

4.7 The Requesters allege that Management did not insist on sufficient analysis of the risk of natural disasters, nor took such analysis into account. They believe there was insufficient consideration of the alternatives to the current Program design. The Requesters state that they believe that there are design alternatives that would greatly mitigate and/or eliminate the risks of salt intrusion, earthquakes and the direct material harms suffered or likely to be suffered by them and others.

4.8 On April 26, 2013, teams from three of the four Independent Accountability Mechanisms (the “IAMS”) of the IFC, the EIB and the IDB that are examining similar Requests, met to review their understanding of the concerns expressed by the Requesters. Although methodologies for possible compliance reviews differ among the involved IAMs, there was agreement that seismic risks and issues related to water management are the most important concerns raised by the Requesters and those raising complaints with the other IAMs.

4.9 In its Appraisal Report of June 26, 2013, CAO, the IFC Compliance Review Mechanism, examined compliance related to salinity level at Gatún Lake and the Paraiso water intake, water availability for operating the locks, land related impacts of the rise in water levels of Gatún lake, and Project support by affected communities. CAO raised serious questions about these issues, in particular about water availability. Given its Operational Guidelines, CAO will not undertake additional steps for a compliance investigation. However, its Appraisal Report emphasizes the commitment obtained from IFC Management for long-term and regular monitoring of the risks its Appraisal Report has identified. The procedures and Operational Policies against which the other IAMs have to judge compliance are different.

## **5. Management Response to the Allegations and to the Draft Recommendation and Terms of Reference**

5.1 The Project Ombudsperson published an Assessment and Consultation Phase Report on June 27, 2012, with its findings based on communications with Requesters, Management, the Executing Agency and others, a site visit and meetings with stakeholders and other information and documents relating to the

Program. The Assessment and Consultation Phase Report identified three main issues: (i) incomplete access to information, (ii) a risk of salt-water intrusion in the Canal Lake and (iii) seismic risks.

5.2 In response to the Assessment and Consultation Phase Report, Management prepared a report<sup>12</sup> in August 2012 (the “Management Response”), summarizing its views as to the three main issues mentioned above and concluding that “...the issues...were duly addressed during the due diligence phase, [and Management] stand[s] ready to work with ICIM and other parties to further clarify any concerns regarding these matters.” Management also clarified that the Bank made its first disbursement for the Program on June 29, 2012.

5.3 On September 5, 2012, in response to written communication from the Chairperson, Management stated that after receiving the Assessment and Consultation Phase Report, it again reviewed the allegations made by the Requesters. Management referred to its Response to the Assessment and Consultation Phase Report<sup>13</sup> and confirmed its position that it used its best efforts to address the Requesters’ concerns in terms of disclosure of meaningful information and natural risk assessment. Management also stated its view that the Program incorporates sufficient requirements and conditions that ensure that it will be executed and operated in a manner consistent with the ROPs. Management further stated that the issues raised thus far were carefully addressed during the Program preparation process and are being continuously monitored in connection with the loan

5.4 Management also provided comments to the draft of the Panel’s recommendation and ToR. A copy of those comments was distributed simultaneously to the second version of this document. Subsequently, the Panel had additional exchanges with Management. The Panel appreciated Management’s inputs and comments and considered them in the present document as per ICIM Policy, Part D and Section 58.

## **6. Panel’s Recommendation to Conduct a Compliance Review**

6.1 The Panel acknowledges the importance of the Program and what it may represent in terms of economic opportunities for Panama and the broader region. After analyzing the original Request, subsequent communications from the Requesters and written and oral explanations provided by Management, the Panel recognizes that Management did attempt to address many of the issues and concerns raised by the Requesters at the Program design phase and did make efforts to include forward-looking mechanisms to ensure compliance in the future. On the other hand, the Requesters make assertions about important aspects of the Program that they still feel are relevant and may cause them harm that appear to conflict with Management’s position. Without an authorization to undertake a Compliance Review, the Panel cannot dismiss out of hand some of the Requesters’ allegations nor can the Panel evaluate the validity of Management’s statements, such as those regarding the long-term sufficiency of water resources from the currently defined watershed and the independence of the seismic risk assessment and related mitigation measures. A Compliance Review would include an investigation of the Requesters’ assertions and an analysis of Management’s positions as well. No determination as to the relative merits of either “side” of the debate as to these matters can be taken absent a Compliance Review.

---

<sup>12</sup> Management issued a response (document PR-3204-5) to the Assessment and Consultation Phase Report (document MI-26-1) for loan 2027/OC-PN for the “Panama Canal Expansion Program”, on August 2, 2012.

<sup>13</sup> Assessment and Consultation Phase Report for loan 2027/OC-PN for the “Panama Canal Expansion Program”, (document MI-26-1).

## PART II

### Terms of Reference

The ToR defines the main issues that will be investigated during the site-visit as well as the main concerns of the Requesters that will be elaborated in the Compliance Review Report. Although it would be best to define very specific goals of the investigation, the ICIM's Policy does not foresee a site-visit during the Eligibility Phase, which impairs the ability of the Panel to define precisely the objectives and potential results of the investigation. For this reason, at this stage, the Panel is able to provide the general objectives of the investigation, a brief description of the Bank-Financed Operation, proposed schedule and budget for the investigation, anticipated use of consultants, and a statement of deliverables, based on the existing information provided by Requesters and Management, as determined by Part D, Section 58 of the ICIM Policy.<sup>14</sup>

#### 7. General Objectives of the Compliance Review

**O1: To determine if the allegations of “harm” in the Request are or could be caused by any action or omission by the Bank that may have led to non-compliance with one or more of its ROPs:** The Panel will carry out a fact finding field visit to clarify the alleged material direct adverse impacts/ “harms” to the Requesters. The Requesters have reasonably asserted that their rights or interests may have been or could be expected to be directly, materially adversely affected by the failure of the IDB to follow its ROPs in this Bank-Financed Operation. Although the Requesters raise concerns based on allegations of fear of a potential harm, the Panel will assess whether those concerns are reasonably connected to non-observance of ROPs within the scope of the activities related to the Program.

**O2: Compliance with applicable Bank ROPs:** The Panel will examine whether the preparation, approval process and implementation of the Program by the Bank complies with ROPs relevant to the allegations and concerns of the Requesters.

**O3: Causal link of alleged harm and compliance issues:** The Panel will investigate whether the alleged harm stemming from the Program's design and associated activities is related to or caused by actions or omissions by the Bank in violation of its ROPs. More specifically, the Requesters' allegations will be assessed in the light of the Environment and Safeguards Policy (OP-703), Disaster Risk Policy (OP-704), and the Indigenous Peoples Policy (OP-765).

**O4: Options for solving the identified issues:** Depending on the outcome of the Compliance Review, the Panel may be able to identify potential options for dealing with the identified compliance issues, if any, that have led to the Request. The Panel will seek to outline such options, if any, in its report.

#### 8. Focus of the Compliance Review

8.1 As indicated, the Panel's discussions of April 26, 2013, with other IAMs participating in reviewing this Request, confirmed four broad areas of concern expressed by the Requesters:

- a) Seismic risk and its potential impact on the Panama Canal and more broadly

---

<sup>14</sup> “The ToR shall include: the objectives of the investigation, the specific investigative criteria identified, a brief description of the Bank-Financed Operation, proposed schedule and budget for the investigation, anticipated use of consultants, and a statement of deliverables, which shall comprise the Panel report described in Section 64...”

- b) Salinity in the Gatún Lake and its impact on the population's access to water suitable for drinking and other purposes
- c) Impacts on biodiversity due to additional salt water intrusion and enhanced species migration between the Atlantic and the Pacific
- d) Water availability for running the locks in an efficient and sustainable manner and the impact of potential water shortage on communities in the Panama Canal watershed

8.2 Based on currently available information, the Panel will focus much of its work on the issues of seismic risk and water availability and their potential negative impact feared by some of the Requesters<sup>15</sup>:

- (i) Seismic risk:

The Panel proposes to examine the Bank's handling of the seismic risk issues because of the Requester's allegations that "[i] international financial institutions have failed to truly independently verify and certify Project plans, procedures and assertions made by PCA<sup>16</sup>." The Panel was also informed that in the Board Meeting of October 10, 2012, on the Assessment and Consultation Phase Report on this Request (dated June 27, 2012), a number of Executive Directors had suggested that these allegations should be examined in the context of a Compliance Review.

The proposed focus would be on analyzing whether the design and implementation of this Bank-Financed Operation have been consistent with the precepts of the Disaster Risk Management Policy (OP-704).

OP-704 contains detailed requirements for a project's approach to manage situations such as seismic risk. Of particular importance are the requirements for natural hazard risk assessment.<sup>17</sup> The Requesters' allegations suggest that several of the steps listed in the Disaster Risk Management Policy (OP-704) might not have been undertaken as required by the Policy. They also suggest that not all of these activities were reviewed by the Bank through sufficiently independent processes. Management has insisted that the Disaster Risk Management Policy (OP-704) has been adhered to.

The proposed Compliance Review is intended to provide an impartial assessment of these conflicting assertions. In its examination, the Panel will neither conduct new technical studies nor repeat the technical due diligence undertaken by expert groups. Based on observations from the site visit, interactions with the Requesters and other stakeholders on site and the analysis of publicly available information, the Panel intends to understand whether the design and implementation of this complex Bank-Financed operation complied with the provisions of the Disaster Risk Management Policy (OP-704).

---

<sup>15</sup> For the other issues of concern to the Requesters, the Panel will rely on information and analysis provided by the other IAMs involved.

<sup>16</sup> Assessment and Consultation Phase Report of June 27, 2012, paragraph 10.

<sup>17</sup> OP- 704 states that "Project teams will carry out a natural hazard risk assessment for projects that are found to be highly exposed to natural hazards or to have a high potential to exacerbate risk. Special care should be taken to assess risk for projects that are located in areas that are highly prone to disasters... When significant risks due to natural hazard are identified at any time throughout the project preparation process, appropriate measures should be taken to establish the viability of the project, including the protection of populations and investments affected by Bank financed activities. Alternative prevention and mitigation measures that decrease vulnerability must be analyzed and included in project design and implementation as applicable. These measures should include safety and contingency planning to protect human health and economic assets.... Expert opinion and adherence to international standards should be sought, where reasonably necessary."

(ii) Water availability for running the locks in an efficient and sustainable manner:

The Requesters have expressed concern about seasonal fluctuations in the quantity of water available for the enlarged locks and the impact this could have on water shortages<sup>18</sup>. Of particular concern to some Requesters is the fear that this might lead to an expansion of the current watershed and the negative impact this could have on them and their communities. The Compliance Review will need to examine whether such concerns are relevant and how they were considered under the Environment and Safeguards Policy (OP-703), particularly on Directive A.6: Assessing Environmental Risks and Opportunities.

Management has stated that the Project has undertaken the necessary risk management. This, however is contested by the Requesters. Therefore, the Panel, following the Environment and Safeguards Policy (OP-703), Directive A.6, has to provide an impartial assessment as to the adequacy of the risk management approach undertaken and will assess whether the Project has followed the required risk management approach. The Panel may have to review the anticipated precautionary measures and required capacity building and other enabling conditions for proper environmental management,

The Panel proposes to assess the concerns from the Requesters about the long-term availability of water for the population and the operations of the Canal beyond 2025 and their fear that water needs for future operation will require the expansion of the watershed to the west and the building of additional dams.<sup>19</sup> These potential actions may lead to non-compliance with the Environment and Safeguards Policy (OP-703), which calls for long-term sustainability of the benefits of development activities including goals of environmental sustainability in all the operations and activities of the Bank.<sup>20</sup>

The Panel will assess if the fear among the Requesters regarding the potential shortage of water supply for human consumption and future operations of the Canal, which would eventually push dam constructions to the west and into territories claimed by indigenous populations has been taken into account within the parameters stipulated by the Bank's ROPs, including the Indigenous Peoples Policy (OP-765). The Unión Indígena y Campesina (UIC), one of the Requester organizations, has opposed and is already denouncing the construction of dams in their territories.<sup>21</sup>

---

<sup>18</sup> The World Bank's 2008 Country Environment Assessment Report raises the possibility that the Panama Canal may face water capacity issues post 2025. The report points to potential flaws in ACP's projections of population growth and the possible effects of climate change on water availability. Although ACP projects a 7 percent cushion to allow for an increase in demand, any significant change in these variables could lead to a situation where there is not enough water to allow normal canal traffic and other uses. In anticipation, indigenous communities affiliated to the Unión Indígena y Campesina have already expressed concern and active opposition to the planned damming of rivers in their territories as the Panama Canal Watershed could expand to satisfy future water demands.

<sup>19</sup> This is supported by The World Bank's findings questioning ACP's water projections, on which IDB Management relies, with respect to increasing demand because of population growth and potential effects of climate change on water supply.

<sup>20</sup> See Políticas de Salvaguardias Ambientales y Sociales del BID, Guías de implementación y Política de Acceso a la Información: Política de Salvaguardias Ambientales y Sociales (OP-703); Objectives of the Policy on page 5.

<sup>21</sup> There is no official recognition of indigenous settlements in the Project area and the Panel has inconclusive evidence of such settlements. Only the site visit will lead to a well-informed conclusion regarding their presence and potential relationship to the applicable ROP.

## 9. Methodology and Investigative Criteria

9.1 **Fact-finding exercise:** A Compliance Review is a fact-finding and evidence-based exercise. The purpose is to review the Bank's compliance with its own ROPs. While information provided and reported about decisions made by, or acts or omissions of, the Executing Agency, Panamanian authorities, or other parties, including other financial institutions, may be relevant to an understanding of a Request, such decisions, acts or omissions are not the subject matter of a Compliance Review.

9.2 **Applicable Bank ROPs:** Based on the Panel's current understanding of the case and without pre-judging the course of the investigation, it appears that the issues raised by the Requesters may relate to the Bank's non-compliance with the following:

- Environment and Safeguards Policy (OP-703)
- Disaster Risk Management Policy (OP-704)
- Indigenous Peoples Policy (OP-765)

9.3 **Applicable version of ROPs:** Any alleged non-compliance with ROPs in connection with the Program would be assessed on the basis of any relevant ROPs in force at the time the Program was approved in 2008, unless the Panel discovers that one of these ROPs and/or available legal documentation provided otherwise.

9.4 **Investigative tools:** To achieve these objectives, the Panel seeks to employ best practices that have evolved and are documented in the literature for this kind of exercise through work at Headquarters, in the Program area and in the Country Office. For this specific case, the most important tools available to the Panel include:

### **i) Capturing the institutional memory of the evolution of the Program and its design through:**

- a) Research of relevant Bank files and obtaining information from Bank's staff members and other sources. Emphasis will be on documentation related to the issues raised by the Requesters, particularly environmental and social assessment reports and records. This includes the establishment and verification of a "decision timeline" for the Bank leading through the various steps of the Program's preparation, appraisal and implementation.
- b) Headquarters interviews will be carried out with Management responsible for the various stages of this Program. The interviews will help to further the Panel's understanding of the evolution of the Program and get first hand staff accounts on the Bank's decision making during the design phase of the Program and in subsequent implementation steps.

### **ii) Establishing an understanding of the legal dimensions of the Program:**

- a) What do the loan-related documents include that might be relevant in assessing the allegations related to compliance with the Bank's ROPs
- b) Have there been waivers or amendments to the legal documents that relate to compliance with the Bank's ROPs

### **iii) Site visit:**

- a) Meetings with Requesters; field-checking of the Requesters' observations and facts underlying the Request

- b) Cross-checking of observations and facts alleged by the Requesters with selected individuals and/or communities who live in the Program area of influence but are not part of the Request, using a selection methodology to be determined by the Panel as the work progresses
- c) Discussions and interviews with representatives and staff members of the Executing Agency and other governmental entities and NGOs operating in or near the Program area<sup>22</sup>
- d) Review of public or other official documents that might help shed light on the issues raised by or related to the Request

**iv) Country Office interviews:** Discussions with the Bank's Panama Program team members and possibly with the Bank's regional staff members who are knowledgeable about the genesis and evolution of the Program and the Requesters' concerns.

## 10. Organization of the Investigation

### Collaboration with other IAMs:

10.1 As described above, the Panel has been in contact with the IAMs of other financial institutions supporting the Program. Although such cooperation affords certain synergies, it has become evident that the process of coordination is time consuming and difficult because the IAMs have different procedural requirements. Notwithstanding the necessity and merits of such cooperation, planning of review activities has turned out to be difficult and logistically cumbersome.

10.2 The Panel will structure its collaboration in accordance with principles that have been developed in other cases for cooperation among IAMs. While a perfect synchronization of activities might not be feasible, there will be a free sharing of technical analyses among the cooperating partners, but any resulting determination of compliance or non-compliance will be carried out independently by each IAM. According to preliminary conversations, each institution will focus on different technical aspects of the Request received by them to avoid duplication of efforts. The Panel hopes to have access to consultants' reports commissioned by the other IAMs and participate in information exchange, which may permit cost savings. Discussions continue to fine-tune coordination and to carry out a joint site visit to Panama to maximize synergy and cost-effectiveness.

10.3 The Compliance Review Mechanism of the EIB has already undertaken a pre-investigation fact-finding mission to Panama, which took place in September 2011. Its "Initial Assessment Report" (October 2012) highlights the potential of seismic risks, water quality (salinity) and water availability. Since the EIB Mechanism has already undertaken a large amount of work on salinity levels, including its implications for drinking water and the potential creation of a saltwater pathway between the Pacific and Atlantic oceans, it has made water quality its main focus.

10.4 Given the EIB's existing work on water quality, the Panel agreed with the EIB Mechanism that the Panel's focus would be on water availability, which is also of concern to the EIB. Both institutions will benefit from cost-savings as a result of this arrangement. The EIB Mechanism, in consultation with the ACP, will undertake its mission to Panama in September 2013 and expressed its commitment to do this mission jointly with the ICIM. The adviser of the JBIC Office of Examiner for Environmental Guidelines has also confirmed the participation of his team in this mission.

---

<sup>22</sup> It is noteworthy that the Panel will not in any way investigate the Borrower, but it might be necessary to access knowledgeable individuals that can provide information on the alleged harm or on other aspects of the Request.

**10.5 Anticipated Use of Consultants:** The Program and the Request are complex. Although the Panel has reduced its principal focus to the two areas mentioned above it has become evident that there is considerable technical and factual interaction with the other elements of the Request requiring sufficient time to be allocated both for the three Panel Members principally assigned to the case and additional consultant inputs.

10.6 The proposed Compliance Review would require specific expertise to determine if the Project design and operation took into account the requirements of natural hazard risk assessment as stipulated in the Disaster Risk Management Policy (OP-704).

**10.7 Proposed Schedule:**

The proposed compliance review is to be implemented in collaboration with the Mechanism of the EIB. A representative from JBIC will also participate. The following schedule (from July 2013 to February 2014) is therefore a tentative one.

<b>July - August– 2013</b>	Following approval of a Compliance Review by the Board, request non-objection for a site visit from the Executive Director representing Panama. Continue desk research, hire consultant, finalize schedule and prepare logistics of site visit with country office, coordinate work with the IAMs
<b>August – September 2013</b>	Conclude desk review. Communicate with Management and Requesters. Finalize investigation design and check list. Site visit to Panama: Program site visit and discussions/interviews with the Requesters, the Executing Agency, Management in Panama Country Office and other stakeholders. Analysis of field information and report writing
<b>September - October – 2013</b>	Prepare draft Compliance Review Report
<b>November -2013</b>	Submit draft Compliance Review Report to Management and Requesters
<b>December 2013 to January 2014</b>	Finalize Compliance Review Report, request translation into Spanish
<b>February 2014</b>	Submit Compliance Review Report to the Board Respond to questions from Board, if requested

**10.8 Possible Causes for Changes in Planned Schedule:**

- The Board requests more information and/or meetings regarding the Recommendation and the ToR prior to approval of investigation
- Developments regarding the Requesters, the Program, the Bank or other issues related to the Program or Panama that would render a site visit/Compliance Review not feasible/productive and result in delays



- Cooperating with the other IAMs creates delays, including delays in timing of coordinated missions, receipt of consultants’/technical reports or other factors
- Delays caused by potential need to coordinate with Board schedules

#### **10.9 Deliverables:**

The Panel will deliver a Compliance Review Report by February 2014 (tentative) and meet with the Board, if requested.

#### **10.10 Panel Interaction with the Board and other Program Stakeholders:**

The Panel stands ready to interact with the Board, Management, the ACP, Panamanian authorities, the Requesters, members of civil society and other stakeholders at all stages of the Compliance Review.

#### **10.11 Monitoring (potential):**

After the conclusion of the Compliance Review and if the Board so requests, the Panel will be prepared to monitor activities of corrective action agreed upon, if any, as a result of the Compliance Review.