

PUBLIC

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

**PN-MICI002-2011
CONSULTATION PHASE DETERMINATION OF ELIGIBILITY.
PANAMA CANAL EXPANSION (2027/OC-PN)**

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

Under the Access to Information Policy, this document is subject to public disclosure.

**CONSULTATION PHASE
DETERMINATION OF ELIGIBILITY**

TO: The Requesters, the Board of Executive Directors, the President, the Country Office, the Project Team, and the Executing Agency.¹
FROM: Isabel Lavadenz Paccieri, Project Ombudsperson
VIA: Victoria Márquez-Mees, Executive Secretary
CC: Independent Consultation and Investigation Mechanism
REFERENCE: Panama Canal Expansion (Operation 2027/OC-PN)
COUNTRY: Panama
DATE: 9 February 2012
DETERMINATION OF ELIGIBILITY: The Request **is eligible** for the Consultation Phase.

I. Request Summary

1.1 On October 10, 2011, the Independent Consultation and Investigation Mechanism (ICIM) received a Request from Mrs. Leila Shelton-Louhi, the director of the organization Gatún Lake Defense Committee, on her own and on behalf of the non-governmental organizations coalition *Alianza Pro Panama* (“the Requesters”).² The Request describes the environmental damages potentially caused by the implementation of the Panama Canal Expansion Program (“the Project”), in Panama. (See Annex 1 for Original Request)

1.2 The Requesters allege, *inter alia*: (i) the lack of transparency, incomplete disclosure of information and misrepresentation of project-related facts among the local and international community; (ii) that the Project is overlooking at the potential intrusion of salt into the transited lakes of the Canal, generating a migratory saltwater pathway across the Isthmus of Panama with consequent damages to the marine-ecology of the Atlantic and Pacific oceans; and (iii) the lack of adequate risk identification and appropriate mitigation measures related to an important seismic fault threatening the Canal’s Pacific end (“the alleged impacts”).

¹ The terms Mechanism, Management, Executive Secretary, Project Ombudsperson, President, Executing Agency, Mechanism Policies, Eligibility, Consultation Phase, and any other relevant term in this memorandum shall have the meaning assigned to them in the Policy Establishing the Independent Consultation and Investigation Mechanism (ICIM) approved on 17 February 2010 and available at: www.iadb.org/mici.

² According to Ms. Shelton-Louhi, the coalition includes groups and organizations such as: Gatún Lake Defense Committee; *Coordinadora para la Defensa de Tierras y Aguas (CODETIAGUAS)*; *Coordinadora Campesina por la Vida*; *Unión Campesina Panameña (UCP)*; *Frente Campesino Contra los Embalses y la Minería de Coclé y Colon (FCCM)*; *Frente Campesino Colonense (FCC)*; *Organización Campesina Coclesana 15 de Mayo (OCC-15 de Mayo)*; *Unión Indígena y Campesina (UIC)*; *Asociación Pro Defensa de las Cuencas Hidrográficas*; *Frente de Resistencia Coclesano (Movimiento – Coclé del Norte area)*. During the Consultation Phase, the Ombudsperson will gather more information about these organizations and evidence of Mrs. Shelton-Louhi’s power of representativeness.

1.3 A preliminary analysis revealed that the impacts alleged in the Request could be referred to the Access to Information Policy (Operational Policy OP-102) of 2006 and 2010³; the Environment and Safeguards Compliance Policy (Operational Policy OP-703); and the Disaster Risk Management Policy (Operational Policy OP-704) of the Inter-American Development Bank (IDB).

1.4 Similar requests have been logged by Mrs. Shelton with the accountability mechanisms of the other financiers of the program⁴, the European Investment Bank's Complaints Mechanism, the Office of the Compliance Advisor/Ombudsman (CAO) of the International Finance Corporation (IFC) and the Office of Examiner for Environmental Guidelines of the Japan Bank for International Cooperation (JBIC).

II. Background:

A) Panama Canal Expansion

2.1 The Panama Canal ("the Canal") is approximately 77 kilometers long and consists of seventeen artificial lakes – including Gatun and Miraflores lakes –, artificial channels, and two sets of locks. Ships enter and depart the Canal through sets of locks on either the Atlantic or Pacific side lifting ships to and from the transit lakes and channels. The Canal is operated by the Panama Canal Authority (ACP, for its Spanish acronym), an autonomous legal entity of the Republic of Panama whose management responsibility was granted by the Constitution⁵.

2.2 Facing the increasing demand for services and the Canal current capacity limitations, ACP undertook studies and analyses in order to identify the most appropriate alternative to respond to such challenges and improve the functionality of the Canal. As per available project documents, such analyses concluded that a third set of locks with larger chambers would be the most appropriate option for the expansion program, which would minimize the need of involuntary resettlement. The results of these studies culminated with Law 28 of July 27, 2006, which determined the legal basis for the expansion program. This act provided the key parameters for a formal National Referendum regarding the expansion program and associated requirements and conditions, such as public reporting and control. The referendum was voted in October, 2006, when 77% of the electorate expressed their support to the Project⁶.

³ The Access to Information Policy (Operational Policy OP-102) approved in 2006 refers to data or documents prepared from 1 January 2004 through 31 December 2010. In turn, the Access to Information Policy (Operational Policy OP-102) approved in 2010 applies to data and documents produced starting on the policy's effective date, 1 January 2011.

⁴ The Panama Canal Expansion Program is being financed, among others, by JBIC, EIB, CAF, and IFC.

⁵ Inter-American Development Bank. *Panama Canal Expansion Program (PN-L1032)*. Environmental and Social Management Report (ESMR). September, 2008, paragraph 1.1. Available at:

<http://www.iadb.org/en/projects/project.1303.html?id=PN-L1032>

⁶ *Id.*, paragraph 3.8.

2.3 In July, 2007, ACP presented an Environment Impact Study for the Panama Canal Expansion Program to the National Environment Authority (ANAM, for its Spanish acronym). ANAM approved the EIS through Resolution 632-2007 of November 9, 2007⁷.

2.4 According to the Loan Proposal and other project-related documents, with the addition of a third set of locks, the Canal will be able to handle twice as much cargo and, as 60% of water used to fill the locks will be reutilized through special recovery and retention basins. The new locks will be using 7% less water than the existing ones⁸.

2.5 The Project involves four main components: (i) the construction of a third set of locks, including two lock complexes and water-saving basins at the Atlantic and Pacific ends of the Canal; (ii) the deepening of the Pacific and Atlantic entrances of the Canal; (iii) the deepening and widening of existing Canal navigational channels, including the Gaillard Cut; and (iv) the raising of Gatun Lake to its maximum operational level. As a consequence, the expansion program aims at: (i) achieving long-term sustainability and growth of Panama's greatest economic asset; (ii) maintaining the competitiveness of the Canal and increasing its throughput capacity, and (iii) making the Canal more productive, safe and efficient. Construction began in 2007 and is expected to be concluded in 2014.⁹

B) The Project - Loan Operation

2.6 The loan operation was approved by the IDB's Board of Executive Directors on October 8, 2008, and the Common Terms Agreement was signed with ACP on December 9, 2008, to provide partial financing for the expansion program.¹⁰ The Project's total cost is US\$5.25 billion, of which US\$400 million will be financed by the Bank. The IDB has not begun disbursements. With it, the Project is expected "to result in major improvements in ACP's business performance, contribute to economic development in Panama and around the world through job creation and the facilitation of worldwide trade, and promote private sector development."¹¹

2.7 The Project involves four main components: (i) the construction of a third set of locks, including two lock complexes and water-saving basins at the Atlantic and Pacific ends of the Canal; (ii) the deepening of the Pacific and Atlantic entrances of the Canal; (iii) the deepening and widening of existing Canal navigational channels, including the Gaillard Cut; and (iv) the raising of Gatun Lake to its maximum operational level.

C) Potential environmental and social impacts

⁷ *Id.*, paragraph 3.9.

⁸ *Id.*, paragraph 2.16.

⁹ Inter-American Development Bank. *Panama Canal Expansion Program (PN-L1032)*. Loan Proposal, Project Abstract.

¹⁰ The Agreement was signed among ACP, as borrower, and IDB, IFC, EIB, CAF and JBIC, as Credit Facility Lenders. Loan proposal, *supra* note 4, paragraph 2.13 and Table 2; Common Terms Agreement of 9 December 2008.

¹¹ Loan Proposal, *supra* note 5, paragraph 1.7.

2.8 Based on its potential environmental and social impacts, the Project was classified as a “Category A” operation, in accordance with Operational Policy OP-703.¹²

2.9 The Environmental and Social Management Report (ESMR) states that “most of the environmental and social risks are easily manageable given the fact that expansion related activities are conducted within previously intervened areas; the type of works have relatively moderate impacts, and the ACP’s ample experience in Canal operations.”¹³ These risks and impacts would be prevented and/or mitigated by the ACP through its Environmental Management Plan (EMP) in which specific measures are set in eight core programs, related to air quality, soils protection, water resources protection, flora and fauna protection, waste management, materials management and a socioeconomic and cultural control program.¹⁴

D) Safeguards

2.10 With a view to avoiding and/or mitigating such impacts, the ESMR states that, as part of the loan agreement, the Bank will require that ACP and all Project components: (i) comply with requirements of Panamanian law; (ii) comply with IDB Operational Policies on environmental and social issues; (iii) implement the EMP and the Environmental, Health and Safety Management System; and (iv) “implement ongoing information disclosure and consultation activities related to environmental, social, and health and safety aspects of the Expansion Program, and in particular related to the indemnification and resettlement plan.”¹⁵

2.11 Eventually, if any physical or economic displacement is required as a consequence of the expansion program, the Bank will require the ACP to develop and implement a Resettlement Plan in accordance to IDB’s Operational Policy on Involuntary Resettlement (OP-710).¹⁶

2.12 In addition, prior to each disbursement, the Bank will require the ACP to confirm compliance with all environmental and social requirements in the Common Terms Agreement and, as applicable, provide a description of any significant environmental, social, or health and safety accident, impact, event, claim, liability, material complaint, or unforeseen environmental, health or safety impact or risk. On a semi-annual basis during the construction of the Project, the Bank expects to receive a compliance report by an independent specialist on the environmental and social issues of the Project. The expert opinion shall be accompanied by a report on the status and progress of the implementation of the mitigation and monitoring activities.¹⁷

III. Prior contact with Management

¹² *Id*, paragraph 6.1. Section 4.17 of OP-703 states that “[a]ny 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.”

¹³ *Id*, paragraph 5.35.

¹⁴ *Id*, paragraph 6.5.

¹⁵ *Id*, paragraph 8.2.

¹⁶ *Id*, paragraph, 8.3.

¹⁷ *Id*, paragraphs 8.4-8.5.

3.1 In accordance with Article 40(h) of the ICIM Policy, on November 4, 2011, the Ombudsperson decided to suspend the Eligibility Analysis of this Request for a 45-day period to provide management and the Requesters with the opportunity to listen and address the issues raised in the Request. As per the request of Management and the Requesters, this period was extended for another 45 days until January 17, 2012. During this ninety-day period, the Requesters, the Executing Agency and the Bank's team were able to understand the scope of the Request and exchange information about the Project. On December 21, 2011, the parties met in Panama City to discuss the information provided by the ACP, and respond queries from the Requester. At the end of this process, the Ombudsperson consulted with the parties the results of this interaction.

IV. Eligibility Analysis

4.1 The Eligibility Analysis is conducted pursuant to the eligibility and exclusion criteria set forth in Articles 40 and 37 of the Policy, respectively. Article 38 of the ICIM Policy states that –*The purpose of the Consultation Phase is to provide an opportunity, applying consensual and flexible approaches, to address the concerns of a party that believes it has been or could reasonably be expected to be directly, materially adversely affected by the failure of the IDB to follow its Relevant Operational Policies in a Bank-Financed Operation.*

4.2 Given the exchange of information process led by the Bank's Management (*supra* paragraph 3.1), the Ombudsperson provided the Requesters an opportunity to withdraw, complete and/or adjust their Request based on the additional information received directly from the ACP. The Requesters supplemented and confirmed their concerns, stating *inter alia* that:

a) Access to Information. There were irregularities in the 2006 referendum process owing to the lack and misrepresentation of information, where: “i) public forums were structured and controlled to keep focused on pre-packaged themes; ii) the design [of the expanded Canal] was legally formalized mid-way through the pre-referendum public consultations; iii) information to Panamanians was restricted, limiting citizen input on this and other projects; iv) engineering details of the design selected were never revealed or discussed fully; v) water resource management techniques were not comparatively assessed; vi) environmental impacts of the design selected were downplayed or denied; and vii) loan processes underway to obtain public funding were insufficiently divulged”¹⁸.

b) Salt Intrusion in the Canal Lakes. The expansion will overwhelm the salt expelling process from the Canal system because the salt inflows will markedly increase; the Miraflores salt barrier will be bypassed and the mitigation ability of the modified system will be significantly reduced. The Requesters allege these impacts could compromise the Atlantic and Pacific oceans ecosystems. In particular, they assert that the salt-intrusion report prepared by Delft Hydraulics in March of 2009 considered inadequate or incomplete assumptions, such as: i) transit numbers growing to 12 vessels over 15 years; ii) study projection limited to 15 years; iii)

¹⁸ Electronic communication to the Ombudsperson by the Requesters on February 1st, 2012.

reduced average transited vessel size (between 8,500 and 9,500 TEU); iv) inclusion of an yet-to-be-proven air-bubbling system to control salt concentration in the water of the Canal; v) constant use of water-use reducing tanks; and vi) unchanged salt-concentration benchmarks, concerning data gathered in 2003, 2004 and 2005.

c) Seismic risks. The Requesters indicate ACP's current design for new locks (with rolling gates) would not be adequate in light of the potential earthquake risk. In addition, they explain that *Miraflores* Lake was included in the original Panama Canal specifically as a "sacrificial" lake to bridge seismically active faults that cross the Panama Canal. The selected Project design plans to bypass it. Additionally, the Requesters mention that "emerging geologic research suggests that Central Panama -- including the Panama Canal and Panama City area -- may face much greater seismic risks than previously believed. They believed a major earthquake (magnitude 7.0 or greater) could hit the Panama Canal and Panama City area at any time". According to the Requesters, this research was conducted in 2007 by ACP with the assistance of experts from the Western region of the U.S. Geologic Survey (USGS). Although the Requesters asked the ACP to provide a copy of this study, they did not receive such document during the exchange of information promoted by the Project Team. After four years of the mentioned geological report, the ACP is yet studying how to ensure that the "Gatun Lake would not empty due to a potential failure at today's Pedro-Miguel Locks", and "no solution has been advanced to address its findings and to reduce risks to the canal"¹⁹.

4.3 On the other hand, the Project Team provided information on these issues and affirmed *inter alia* that:

a) **Access to Information.** The Requesters received additional information and had their questions answered by the ACP and the Bank's Management during the exchange of information activities facilitated by the Project Team;

b) **Salt Intrusion in the Canal Lakes.** The ACP has been modeling salt water intrusion in the water of the Canal for the past five years, using several models, leading engineering firms and even developing a specific trio-dimensional model to assess this risk. In this context, in 2009, the firm Delf Hydraulics completed a report that was based in the development of specific mathematical model for assessing the salt water intrusion through the locks of the Panama Canal and the salt water dispersion in Gatun Lake. The modeling analyzed both, the existing situation and the future situation with expanded Canal and new Post-Panamax locks located beside the existing locks. The 2009 report considered tens of scenarios with many different situations and variables. As a result, it was concluded that the salt concentration level for the entire Gatun Lake area will be higher in the long run than at present. Notwithstanding, the salt concentration remains below the fresh water limit in this area and is much lower in the areas far from the locks. The report also indicated that the flushing of the lock chambers by means of a dummy lockage is a promising measure for controlling the salt water intrusion.

¹⁹ Email sent by the Requesters on February 1st, 2012.

c) **Seismic risks.** The ACP has been studying the seismic risks for many years. The Executing Agency has identified that the epicenter of a seismic activity could be closer to the Canal when compared to the 1882 seismic event in Panama. As a result, ACP included in the Project's bidding documents that locks have to be designed and constructed to the most strict construction codes. Indeed, the dam has been designed to withstand a magnitude of a 6.5 seismic event. In addition, the ACP already changed the location of the locks which were originally to be constructed close to a seismic fault. ACP is also surveying and assessing the design of the existing structures, including those of Pedro Miguel locks, to safeguard them in case of an occurrence of a seismic event of a considerable magnitude. These studies will be concluded in 2012.

4.4 In view of the foregoing, and for purposes of the Eligibility Analysis, the Requesters' arguments meet the requirements of the ICIM Policy, inasmuch as they describe in a reasonable way how they would be directly, materially, and adversely affected by an action or omission of the Bank in violation of relevant Operational Policies. The Request presents none of the exclusions of Section 37 and fulfills the requirements of Section 40 of the Policy.

4.5 A summary of the results of this Eligibility Analysis is given in the following table:

Eligibility Criteria	Determination by Ombudsperson	Comments
Name and contact information of the Requester	Meets the criteria	The contact information of the Requesters is on file.
Names and contact information of the Representative, if any, and proof of the authorization	Meets the criteria	The contact information of the Representative is on file. A letter authorizing the requester to speak on behalf of the <i>Alianza pro Panama</i> group is on file. Further evidence of cross-representativeness will be gathered during the Consultation Phase.
Project or operation duly identified	Meets the criteria	Panama Canal Expansion Program (Operation 2027/OC-PN).
The Requester resides in the country where the operation is or will be implemented (or a qualified Representative has been appointed).	Meets the criteria	The Requesters, and people who could be affected by the Project reside in Panama.
None of the exclusions set forth in Section 37 applies.	None	
The Requester has reasonably asserted that it could be expected to be adversely, directly, and materially affected by an action or omission of the Bank in violation of one or more Relevant Operational Policies.	Meets the criteria	The Requesters have described the environmental and social impacts that could result from actions or omissions of the Project.
The parties agree to take part in a consultation or mediation process.	Meets the criteria	The Requesters and the Project Team have shown their willingness to enter into a dialogue. The ACP is yet to be further consulted during the evaluation stage.
The Requester has taken steps to bring the issue to the attention of Management.	Meets the criteria	The Requesters contacted management which led a process of information exchange between the Requesters and ACP. The Project Team also facilitated a meeting with the parties to discuss the concerns raised in the Request.

IV. Conclusion

The Project Ombudsperson, in the exercise of her duties and under the authority granted her by the ICIM Policy, determines that the Request described herein is **eligible** for the Consultation Phase. This determination does not imply any judgment by ICIM regarding

compliance, and the merits of the issues raised in the Request will be further examined during the Consultation Phase

The Executive Secretary will kindly proceed to notify the Requesters, the Board of Executive Directors, the President, the Country Office, the Project Team, and the Executing Agency of this Determination of Eligibility, and will post this Determination of Eligibility on the Public Registry of the ICIM five business days after its distribution to the Board of Executive Directors.

Isabel Lavadenz Paccieri
Project Ombudsperson