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

BR-MICI001-2010

**RECOMMENDATION FOR A COMPLIANCE REVIEW AND
TERMS OF REFERENCE
SERRA DO MAR AND ATLANTIC FOREST MOSAICS SYSTEM
SOCIOENVIRONMENTAL RECOVERY PROGRAM
REASSESSMENT AND CLOSURE**

(BR-L1241)

This document was prepared by the Compliance Review Panel.

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TO: Members of the Board of Executive Directors

FROM: ICIM Compliance Review Panel

SUBJECT: **Recommendation to Conduct a Compliance Review and Terms of Reference: Reassessment and Closure**

REFERENCE: Case BR-MICI001-2010 Serra do Mar and Atlantic Forest Mosaics System Socioenvironmental Recovery Program (BR-L1241)

COUNTRY: Brazil

DATE: October 22, 2014

I. EXECUTIVE SUMMARY

- 1.1 The Independent Consultation and Investigation Mechanism (the “ICIM”) Compliance Review Panel submits the following memo to update the Board regarding the status of the Request for a Compliance Review related to the Serra do Mar and Atlantic Forest Mosaics System Socioenvironmental Recovery Program and to recommend closure of the case.¹
- 1.2 According to Bank Project documents, the Program aims to support elements of the preparation and implementation of the Mosaic Law (defined below). As described below in more detail, the Program has three components: (i) protection of the Conservation Units (“CUs”); (ii) social investments in the PESM (defined below); and (iii) supervision of the CUs. The “Protection of CUs” component includes the part of the Program that appears to be most relevant to the Request. It was described in Bank Project documents as follows: “consolidation of the Juréia-Itatins Mosaic includes assistance in submitting the draft law to reclassify the ecological station and create the Mosaic, consolidation of management plans in the conservation units; improvement of existing infrastructure for management, protection, and public use; staff training; design of methodologies to regularize land tenure; implementation of a pilot project for voluntary resettlement; and incentives for the communities to adopt economically sustainable activities.”²

¹ Unless otherwise defined herein, terms used in this document have the meanings assigned to them in the Policy Establishing the Independent Consultation and Investigation Mechanism (GN-1830-49) (the “ICIM Policy”), approved on February 17, 2010.

² Serra do Mar and Atlantic Forest Mosaics System Socioenvironmental Recovery Program (BR-L1241) Loan Proposal, section 1.15, page 6.

- 1.3 The Request was received on May 13, 2009, by the IDB's former Independent Investigation Mechanism ("IIM"). It was processed when the ICIM came into effect in September 2010.
- 1.4 The Request was originally filed by a Brazilian Non-Governmental Organization ("NGO"), Mongue Coastal System Protection, alleging harms that would arise from the implementation of a "mosaic approach" to conservation in the Juréia-Itatins Ecological Reserve ("Juréia-Itatins" or the "Reserve"). At that time, a legislative proposal that would provide for the mosaic approach was pending before the São Paulo State Legislative Assembly. The Bank-Financed Operation related to the Request was still in the preparation phase, but it was foreseen it would support some aspects of the mosaic approach in the Reserve.
- 1.5 After being declared ineligible for the Consultation Phase, the Request was transferred to the Compliance Review Phase on October 27, 2010. The then Panel Chairperson declared the Request eligible for the Compliance Review Phase on December 15, 2010. The Panel then submitted a Recommendation and Terms of Reference to the Board on February 16, 2011 under the short procedure.³ The short procedure was stopped and the Committee of the Whole met on March 9, 2011 to consider the document. In that meeting certain members of the Board expressed concerns regarding whether a Compliance Review was appropriate. The Board postponed consideration of the Recommendation and Terms of Reference.
- 1.6 Over the next two years the former Panel Chairperson oversaw and directed interviews with the Requesters and Bank Management and desk research to obtain information to adequately respond to the Board's concerns. During this time, the Mosaic Law that would alter the boundaries for different areas of conservation in Juréia-Itatins was challenged through lawsuits and experienced setbacks. The uncertainty regarding the Mosaic Law meant that the Bank-financed activities in the territory of concern to the Requesters were not yet fully defined.
- 1.7 The Mosaic Law was ultimately approved by the Legislative Assembly of the State Government of São Paulo on March 6, 2013, but remains subject to challenges in Brazilian courts.

³ In accordance with ICIM Policy, if a Request is deemed eligible for purposes of the Compliance Review Phase, the Chairperson will identify two other members of the Panel to serve on the investigative team; the Chairperson and the two other members will then act as the "Panel." See ICIM Policy Section 58.

- 1.8 Prior to the latest passage of the Mosaic Law, the Panel circulated a revised draft Recommendation and Terms of Reference to the Requesters and Management for comment on March 4, 2013. The Panel Chairperson intended to take into consideration the comments of the Board from nearly two years before, but the revised document was not submitted to the Board as would have been the next procedural step.
- 1.9 Given the passage of time and evolving facts and circumstances related to the Mosaic Law, the Bank-Financed Operation, and the Request before the ICIM, the Panel, under the leadership of a new Panel Chair as of October 2013, decided to reassess the case using up-to-date information.
- 1.10 *The reassessment has led the Compliance Review Panel to decide that it will not recommend a Compliance Review of Case BR-MICI001-2010 on the Serra do Mar and Atlantic Forest Mosaics System Socioenvironmental Recovery Program.*
- 1.11 Among the questions raised at the Board meeting during which the Request was discussed was whether Section 37(i) of the ICIM Policy might be implicated due to the existence of several proceedings. Uncertainty regarding whether or not the Mosaic Law would ultimately be effective and govern the Reserve was present while the Request was considered by the ICIM and remains to this day. These factors, and how and whether they could relate to Bank-financed activities in the Reserve, as well as what link the Bank's proposed activities might have to the harms alleged by the Requesters were among the factors that complicated the Panel's analysis of the case.
- 1.12 The Panel wishes to underscore that this case has not been formally reviewed. The recommendation set forth herein in no way reflects any judgment as to the merits of the Request. This recommendation does not reflect any conclusion as to whether there was compliance or non-compliance by the Bank with its Relevant Operational Policies ("ROPs"). Instead, the Panel has made a practical recommendation to the Board, in light of the facts and circumstances of this case, including its reassessment of the Bank-Financed Operation and the Request, as described below, that a Compliance Review is not recommendable.

II. BACKGROUND

A. The Request

- 2.1 On May 13, 2009, the IDB's former independent accountability mechanism, the IIM, received a Request alleging potential harm from the proposed implementation of a "mosaic" approach to conservation in the Juréia-Itatins Ecological Reserve. The alleged harms were related to a Bank-Financed Operation, the Serra do Mar and Atlantic Forest Mosaics System Socioenvironmental Recovery Program, at the time in the preparation phase.
- 2.2 The Request was processed and transferred to the Project Ombudsperson once the ICIM came into effect in September of 2010. On October 8, 2010, the Request was declared ineligible for the Consultation Phase.
- 2.3 The Request was then transferred to the Compliance Review Phase and on December 15, 2010, the former Panel Chairperson determined that the Request was eligible for a Compliance Review. In December 2010, another interested Requester, Mr. Dauro Marcos do Prado, President of the Juréia Resident's Union (*União dos Moradores da Juréia*, "UMJ"), wrote to the Panel Chairperson, describing similar concerns about the Project. After communicating with this party, this Requester agreed to have his concerns joined with those of the NGO by the then-Panel Chairperson.
- 2.4 On February 16, 2011, the Panel sent a Recommendation to conduct a Compliance Review and related Terms of Reference (collectively, the "TOR") to the Board. The Panel met with the Board during its consideration of the TOR on March 9, 2011. During that meeting, the Board asked the Panel a series of questions relating to the Eligibility Determination and the TOR. Among the issues raised were: (i) whether Mr. Melo had the authority to represent affected parties; (ii) whether or not certain legal proceedings allegedly underway in Brazil at the time triggered the exclusion outlined in ICIM Policy Section 37(i); and (iii) whether there was a need for further clarifications of the harms being alleged and their possible relationship to any Bank action or omission. The Board's consideration of the TOR was postponed until the Panel could clarify these issues.
- 2.5 Over the next two years, the Panel undertook interviews with the Requesters and Bank Management, analysis of evolving legal challenges to the Mosaic Law in Brazil, and other desk research to obtain information that would adequately respond to the Board's concerns.

B. Legal Uncertainty

- 2.6 The Panel encountered a dynamic legal environment in São Paulo state as events relating to the status of the Mosaic Law and the areas inhabited by the Requesters unfolded. The

Program was designed to work in two distinct geographical areas, the Parque Estadual Serra do Mar (“PESM”) and Juréia-Itatins, each with its own set of activities. The final determination of the Bank’s planned activities in Juréia-Itatins, the area of concern to the Requesters, would be affected by whether or not the Mosaic Law was passed in the Legislative Assembly of the State of São Paulo. Under debate at the time of the approval of the Loan, the Mosaic Law was designed to supersede a 1986 law that classified the Reserve as an area of strict environmental protection where dwelling was prohibited. This was because, despite the *de jure* strict conservation status, the Reserve has long been under immense pressure due to *de facto* use by traditional inhabitants and others for many years, including permanent dwellings of an estimated 300 families. If effective, the Mosaic Law would in principle set out new boundaries of differentiated conservation areas in the Reserve. It would maintain strict conservation for some areas, regulate others creating wildlife refuges or state parks that would permit some public use, and create Sustainable Development Reserves (“SDRs”) in which traditional dwellers would be allowed to remain using sustainable practices.

- 2.7 The Mosaic Law was first proposed by members of the São Paulo State Legislative Assembly in 2004 and was passed in 2006. However, because it was introduced by representatives of the legislative power instead of by representatives of the executive power, as required by the applicable Brazilian legislation, it was declared unconstitutional in June 2009 by the Tribunal de Justiça, the highest court in the state. In the absence of the Mosaic Law, the 1986 law was again deemed to govern the Reserve.
- 2.8 A new iteration of the Mosaic Law was later introduced by the Governor and approved by the Legislative Assembly on March 6, 2013. However, the Mosaic Law continues to experience legal challenges. Importantly, a Direct Action of Unconstitutionality (*Ação Direta de Inconstitucionalidade* “ADIN” No. 0199748-62.2013.8.26.0000) was filed on November 12, 2013 by the Attorney General of the State of São Paulo. In it the state’s Attorney General argues that the Mosaic Law is unconstitutional as (i) it violates a principle of “prohibition against environmental regression,” (ii) that a required environmental impact study had not been produced, and (iii) that it is not possible to transform a strict conservation area into an area of sustainable use. The ADIN contained a request for an injunction to suspend the Mosaic Law, which was granted on December 10, 2013, rendering the Mosaic Law ineffective. The ADIN was rejected and the injunction lifted on June 4, 2014 in the São Paulo Court of Justice. On July 30, 2014 an appeal was filed for the matter to be heard in the Supreme Court of Brazil.
- 2.9 Throughout the time period during which the Mosaic Law was debated and challenged, other legal actions threatened the status of those living in the Reserve, including members of the communities represented by one of the Requesters. For example, the Public Civil

Action 1334/08 sought the eviction Mr. Melo's NGO from public land within the Reserve. Another, Public Civil Action 449 of 2010, sought the resettlement of people living in the Juréia-Itatins, including some of the other Requesters. This resettlement was stayed by the competent authorities and thus the implementation of the eviction was deferred in light of the pending vote on the Mosaic Law.

- 2.10 These various lawsuits and setbacks to the Mosaic Law made it difficult to respond adequately to the questions the Board had posed to the Panel. This was in part because Bank Project documents indicate that how and where activities related to the Mosaic approach to be financed by the Bank in the Reserve might take place would depend, at least in part, on whether the Mosaic Law would be effective. Thus it remained challenging to clarify to the Board how Bank-financed activities might ultimately be carried out in the Reserve in order to establish what their link might be to the harms alleged by the Requesters. It was also difficult to obtain information about potential actions and to make a certain determination as to whether there were matters that might implicate the applicability of Section 37(i) of the ICIM Policy.

C. Case Left Outstanding

- 2.11 In the lead-up to the passage of the Mosaic Law, the Panel produced a revised TOR. The then Panel Chairperson intended to take into consideration the comments of the Board and the results of consultations with Management and the Requesters, clarifying outstanding issues and reaffirming the original Eligibility Determination of the Request. The TOR was circulated in draft form to both the Requesters and Management on March 6, 2013 for a twenty-day comment period, as per Section 58 of the ICIM Policy.
- 2.12 Comments were returned on April 4, 2013. The next procedural step would have been to finalize the document for presentation to the Board in order to seek its authorization for the investigation. This final step remained outstanding.

III. CASE REVIEW AND ANALYSIS

A. Case Review

- 3.1 Given the passage of time and changing circumstances to the local situation surrounding the Mosaic Law, the Bank-Financed Operation, and the Request before the ICIM, the Panel, under the leadership of a new Panel Chair as of October 2013, decided to re-analyze the case using up-to-date information.
- 3.2 On October 4, 2013, the Panel communicated with Mr. Melo and Mr. Dauro do Prado, explaining the changes in the Panel makeup and that the Panel proposed to move the case

forward. The Requesters were asked, in light of significant passage of time, to provide an updated explanation of their complaints in relation to the IDB Project.

- 3.3 On October 5, 2013, Mr. Plínio Melo manifested his frustration with the ICIM process and said he would no longer participate in the Request. On October 8, 2013, Mr. Dauro do Prado responded that he wished to proceed with the Request and provided updated information.
- 3.4 The Panel proceeded to analyze the situation and Request.

B. Request and Alleged Harm⁴

- 3.5 The crux of the allegations of harm by the Requesters, many of which are Caiçara traditional peoples whose ancestors have lived in the Reserve for centuries, revolves around the fear of potential involuntary resettlement. The Requesters' fears appear to stem from uncertainties about their fates, depending on the passage and implementation of the Mosaic Law. The Requesters complained in communications to the ICIM that they believe the Bank provided support for the Mosaic Law before knowing its reach and potential impact.
- 3.6 When the Request was filed, the Mosaic Law was still pending before the São Paulo State Legislative Assembly. The Requesters were concerned that not all traditional communities would be included under the rubric of the SDRs. They say they fear that some residents would be subject to involuntary resettlement outside their traditional lands. They also alleged that there had not been meaningful nor sufficient consultation and that they did not have adequate information about the Project. They say they continue to be unsure of what the Bank's financing would support. The Requesters allege that they only had one meeting with the Bank and the Fundação Florestal ("FF"), during which they understood that the decisions surrounding the Bank's investment had already been made. The Requesters say they asked the Bank to meet with them again to clarify the scope of Bank financing for the Project; they say no follow-up meeting ever took place.
- 3.7 The Requesters allege that throughout the years of the Bank's involvement in the Project they have felt excluded. They state that they remain unsure of the exact boundaries that would be established for the SDRs. The Requesters have pointed to a Bank Project document that was shared with them after the meeting they had with the Bank and the FF, which estimates that some 200 families from Juréia-Itatins would be resettled. They

⁴ This section is reported as a summary of concerns brought forth by the Requesters in communications to the ICIM; it should be read as such and is not intended to reflect any judgment by the Panel of the merits or lack thereof of any of the allegations.

claim they still do not understand the details of this resettlement or the Bank's role in it, and fear that they and other Caiçaras might be obligated to move. They complain that even though they asked for further information such as a resettlement plan to clarify the scope of resettlement, nothing further has been shared with them.

- 3.8 In addition, the Requesters say they are aware of significant involuntary resettlement supported by the Bank taking place in the PESM. The Requesters understand that traditional inhabitants like themselves had been resettled to urban areas and were not adapting well to their new environments. The Requesters state that these people do not have the professional skills required to enable them to earn enough to pay for their housing. The Requesters fear that they would face a similar situation once resettlement activities began in Juréia-Itatins.

C. Analysis

- 3.9 The Panel has grappled with the Request since it was first transferred to the Compliance Review Phase. The Request deals with a component of the Project, which itself was based on an assumption of political agreement that had not yet been reached at the time of the Request. This led to Requesters' allegations that the Bank was supporting the Mosaic Law before knowing the impacts it might have. Complexities, such as the uncertain status of the Mosaic Law and matters that might implicate the applicability of Section 37i of the ICIM Policy such as pending or allegedly pending litigations, complicated the Panel's work. In addition, the ICIM Policy has been interpreted such that the Panel does not have the ability to undertake a site visit prior to being authorized to carry out a Compliance Review. In practice, this limits the ability of the Panel to gather facts and analyze the circumstances surrounding a Request as well as engage in face-to-face interactions with the Requesters and other stakeholders, which can help clarify questions and uncertainties.
- 3.10 The essence of the Request is fear of involuntary resettlement on the part of the Requesters. The Requesters appear to believe this activity is being carried out under the auspices of the Program and allege that the Bank did not adequately disclose the purpose or extent of the Program. They allege that they were not meaningfully consulted and that this was not in accord with their rights as traditional peoples under Brazilian and international law.
- 3.11 According to Bank Project documents, the Program aims to support elements of the Mosaic Law's preparation and implementation. The Program has three components: (i) protection of CUs; (ii) social investments in the PESM; and (iii) supervision of the CUs. Under the "Protection of CUs" component is the part of the Program that appears to be relevant to the Request. It was described in Bank Project documents as follows:

“consolidation of the Juréia-Itatins Mosaic includes assistance in submitting the draft law to reclassify the ecological station and create the Mosaic, consolidation of management plans in the conservation units; improvement of existing infrastructure for management, protection, and public use; staff training; design of methodologies to regularize land tenure; implementation of a pilot project for voluntary resettlement; and incentives for the communities to adopt economically sustainable activities.”⁵

- 3.12 The Panel had for a time been occupied by analyzing the facts based on questions raised at the Board meeting during which the Request was discussed. One issue was whether Section 37(i) of the ICIM Policy might be implicated due to the potential existence of several proceedings. In addition, substantial uncertainty regarding whether or not the Mosaic Law would ultimately govern the Reserve was present at all times and remains even now. These and other relevant factors, and how and whether they could relate to Bank-financed activities in the Reserve, as well as what link the Bank’s proposed activities might have to the harms alleged by the Requesters, were among the factors that complicated the Panel’s analysis. The Panel has now reconsidered the scope of the Bank-Financed Operation and the Request, and the Panel does not find that a Compliance Review would be advisable.
- 3.13 The Panel wishes to underscore that no review has been made of the Request. No conclusion has been reached and no findings have been made with regard to any of the merits of the Request, including as to alleged harms, the Bank’s actions or omissions and whether a Compliance Review would find any non-compliance with Relevant Operational Policies in connection with the Request.

D. Panel Recommendation

- 3.14 In summary, *the Panel has decided not to recommend a Compliance Review with respect to the Request filed related to the Serra do Mar and Atlantic Forest Mosaics System Socioenvironmental Recovery Program.*

⁵ Serra do Mar and Atlantic Forest Mosaics System Socioenvironmental Recovery Program (BR-L1241) Loan Proposal, section 1.15, page 6.