



DOCUMENT OF THE INDEPENDENT CONSULTATION  
AND INVESTIGATION MECHANISM

**CO-MICI002-2011**

**RECOMMENDATION FOR A COMPLIANCE REVIEW AND  
TERMS OF REFERENCE**

**EL DORADO INTERNATIONAL AIRPORT PROJECT**

**(CO-L1029)  
(2477A/OC-CO)**

This document was prepared by Victoria Márquez-Mees, Director of MICI

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**INFORMATIVE NOTE**  
**GUIDELINES FOR THE COMPLIANCE REVIEW PHASE**

These guidelines for the Compliance Review Phase have been prepared in accordance with paragraphs 36-41 of the MICI Policy (MI-47-3).

A Compliance Review is a factual investigation process to determine whether the Bank's Management has complied with the Relevant Operational Policies in relation to the respective operation or operations, and whether the alleged harm is connected to it.

The performance of a Compliance Review by the MICI is subject to the authorization of the Board of Executive Directors of the Inter-American Development Bank ("IDB" or "Bank"), which receives a *Recommendation* from the MICI for its consideration, after analysis –within a maximum period of 21 business days— of the main documents of the operation, the additional information provided by Management, the Request, and the Relevant Operational Policies. In the *Recommendation*, the MICI will state its decision to recommend or not that an investigation be conducted taking into consideration the added value for the specific case, and for the Bank in general, in terms of relevance, impact, and efficiency.

For those cases in which an investigation is recommended, the MICI will include the following items in the *Recommendation*:

- The objectives of the investigation.
- The scope of the investigation, including the proposed investigation questions. The scope will be limited in all cases to the assertions made in the Request and will be aimed solely at investigating the acts or omissions of the Bank in the context of the operation or operations pertaining to the case and in relation to compliance with the Relevant Operational Policies.
- The methodology to be used, which will include the proposed investigative method or methods, the activities to be performed, and the products to be delivered.
- The investigation team, comprised by the Compliance Review Phase Coordinator, acting as Panel Chair, and two members of the Roster of Experts. The experts will be selected based on their expertise in the technical matters required by the scope of the investigation and the availability of those experts to participate in the investigation during the required time period. These experts will only be hired once the Board of Executive Directors approves the investigation, and their inputs will be included in the Compliance Review Report.
- The timeline for the investigation activities, which are generally carried out in a term not to exceed a maximum of six calendar months from the time the Panel is established. In the event that additional time is needed, the *Recommendation* document will present the requested time period and its justification.
- The estimated budget required for the investigation.

A preliminary draft version of the *Recommendation* to be submitted to the Board of Executive Directors will be circulated to Management and Requesters, who will have the opportunity to submit written comments to the MICI. The MICI will review the comments and take account of those it deems pertinent. The comments received from both Parties will be included as annexes to the *Recommendation*.

The final version of the *Recommendation* will be submitted to the Board of Directors for their consideration by short procedure. The investigation will be deemed to have been approved if, once the established time period for the approval by short procedure has elapsed, the procedure is not stopped by any member of the Board of Executive Directors. In the event that the procedure is stopped by any of the Directors, the issue will be placed on the agenda for deliberation by the PEC Committee and subsequent consideration by the Board of Executive Directors.

Notice of the decision of the Board of Executive Directors will be provided to the Requesters and Management and published in the Public Registry.

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**ANNEXES**

Annex I	Management Comments on the Preliminary Version of the Recommendation for a Compliance Review
Annex II	Requesters' Comments to the Preliminary Version of the Recommendation for a Compliance Review

**ELECTRONIC LINKS**

1. Original Request  
<http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=37327027>
2. Supplemental Request (original Spanish version)  
<http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=39034045>
3. Management Response to the Original Request  
<http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=38989323>
4. Management Response to the Supplemental Request  
<http://idbdocs.iadb.org/wsdocs/getDocument.aspx?DOCNUM=39970133>
5. Environmental and Social Management Report (original Spanish version)  
<http://www.iadb.org/Document.cfm?id=35435925>

**ACRONYMS AND ABBREVIATIONS**

AEROCIVIL	Special Administrative Unit of Aeronáutica Civil de Colombia
ANLA	National Environmental Permits Authority
EA	Environmental Analysis
ESMP	Environmental and Social Management Plan
ESMR	Environmental and Social Management Report
MMA	Ministry of the Environment
MICI	Independent Consultation and Investigation Mechanism
OPAIN	Sociedad Concesionaria Operadora Aeroportuaria Internacional, S.A.
PEC	Policy and Evaluation Committee of the Board of Executive Directors of the Inter-American Development Bank
Roster	The list of technical experts appointed on an <i>ad hoc</i> basis to the Panel responsible for conducting a Compliance Review

## I. EXECUTIVE SUMMARY

- 1.1 This document is a recommendation to the Board of Executive Directors from the Independent Consultation and Investigation Mechanism for a compliance review of the “El Dorado International Airport” operation (CO-L1029) in relation to the allegations of harm from noise pollution and lack of consultation and information submitted by the neighborhood organization *Comunidades Unidas Macroproyecto Aeropuerto El Dorado* on August 12, 2011, and supplemented on September 3, 2014 when the Request was transferred to the Compliance Review Phase.
- 1.2 The “El Dorado International Airport” project is an “A” non-sovereign guaranteed loan operation, approved by the Board of Executive Directors on December 3, 2010 in the amount of US\$165 million granted to *Sociedad Concesionaria Operadora Aeroportuaria Internacional, S.A. (OPAIN)* for the modernization and expansion of El Dorado Airport of Bogotá. Its objective is to promote the improvement of passenger and cargo transport services, given that the Airport had a number of shortcomings at the time due to highly congested terminals and the fact that it was already functioning at full capacity.
- 1.3 The Request was presented by Mrs. Gloria Molina on behalf of the neighborhood organization *Comunidades Unidas Macroproyecto Aeropuerto El Dorado*, comprised by residents from the Rubén Vallejo Jaramillo housing development located in Localidad Novena de Fontibón, adjacent to the Airport.
- 1.4 The Request was received while the Policy Establishing the Independent Consultation and Investigation Mechanism, approved by the Board of Executive Directors in February 2010 (document GN-1830-49), was in effect. The Request was declared eligible for the Consultation Phase in November 2011, and was processed under that Phase until March 2014, when the MICI concluded the process in view of the infeasibility of reaching an agreement. In August 2014, according to the Requesters’ wishes, the Request was transferred to the Compliance Review Phase, and after the Requesters were given the opportunity to complement the allegations, the President of the Panel declared it eligible in November 2014. From February 2015, the Request has been managed in accordance with the revised MICI Policy (MI-47-3) and the Transition Plan (MI-48-1) approved by the Board of Executive Directors.
- 1.5 This document contains six sections and two annexes in order to provide the Board of Executive Directors with the pertinent decision-making information: section II presents a summary of the “El Dorado International Airport” operation; section III summarizes the allegations made by the Requesters in their original and supplemental requests; section IV contains Management’s response to the allegations; section V summarizes the processing of the Request under MICI procedures to date and section VI presents the recommendation to investigate and the proposed terms of reference for conducting the Compliance Review: justification, scope, methodology, timeline, and budget. Finally, in



keeping with the MICI Policy, the annexes include the comments of Management and the Requesters to the preliminary version of this document. In addition, hyperlinks are provided to the main documents of reference used to prepare this document.

- 1.6 Pursuant to paragraph 41 of the MICI Policy (MI-47-3), and as stated in detail herein, it is recommended that the Board of Executive Directors authorize the MICI to conduct the Compliance Review investigation in relation to the “El Dorado International Airport” operation (CO-L1029), with the objective of determining whether the Bank failed to comply with Operational Policies OP-703 and OP-102 and if so, caused the alleged harm to the Requesters during the time of its involvement with the project of Modernization and Expansion, Operation, Commercial Use, Maintenance, and Administration of the El Dorado International Airport, as alleged in the Request filed by Comunidades Unidas.

## II. THE PROJECT<sup>1</sup>

### A. Background

- 2.1 The El Dorado Airport (“Airport”) was built in 1959 and is currently Colombia’s main national and international airport. It is the fourth busiest airport in Latin America in terms of passenger flow and number one in cargo transport. It is located 15 km. of the city center, in the west part of Bogotá city, between the districts of Fontibón and Engativá and the Municipalities of Funza and Mosquera. The Airport’s total area is 966.14 hectares.
- 2.2 The Airport is the largest in Colombia for both passenger and cargo volume. At the time the operation was identified, the Airport had two runways and two passenger terminals: a main terminal for national and international flights and a smaller one, for the so called “Air Bridge,” for national connections.
- 2.3 The Special Administrative Unit of Aeronáutica Civil de Colombia is the authority responsible for operating the Airport. It is the governing body and is responsible for performing two functions related to air transport: air navigation and airport services.
- 2.4 Between 2004 and 2005, Aerocivil put together the project “Modernization and Expansion, Operation, Commercial Use, Maintenance, and Administration of the El Dorado International Airport” as a 20-year concession contract. In August 2006, the concession was awarded to Sociedad Concesionaria Operadora Aeroportuaria Internacional, S.A., and required that construction works for the modernization and expansion be carried out from 2007 to 2014. In addition, the concession was for the administration, operation, maintenance, and commercial use of the concession area.
- 2.5 The Airport currently operates under the “Regular Environmental License” issued through Resolution No. 1330 on November 7, 1995 by the then Ministry of the Environment; the License-holder is Aeronáutica Civil. This License was issued for the construction and operation of the second runway and/or expansion of the Airport. The Environmental License was subsequently amended and complemented by Resolutions 598 of 1997, 534 of 1998, and 745 of 1998. As part of the concession process, the partial assignment of this License to OPAIN was authorized through Resolution 1001 of June 2009, which assigned those obligations contained in the Environmental License that are related to the operation and commercial use of the concession area in accordance with Appendix I to the concession contract.

### B. The “El Dorado International Airport” Operation (CO-L1029)

- 2.6 The “El Dorado International Airport” project is an “A” non-sovereign guaranteed loan operation, approved by the Board of Executive Directors on December 3, 2010 in the amount of US\$165 million granted to OPAIN for the modernization and expansion of the

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<sup>1</sup> The information presented on the operation has been extracted from the Environmental and Social Report of September 2010, available on the Bank’s website and in the Links section of this document.

El Dorado International Airport of Bogotá, including the following construction works: (i) a new terminal to provide national and international flight services; (ii) a new cargo infrastructure, including additional parking positions for planes; (iii) a new administrative building for Aerocivil, (iv) a new maintenance area; (v) a new fire station, and (vi) a new control tower.<sup>2</sup>

- 2.7 The Project is part of the “Modernization and Expansion, Operation, Commercial Use, Maintenance and Administration of the El Dorado International Airport” program. Its objective is to improve passenger and cargo transport, given that the Airport had a number of shortcomings at the time due to highly congested terminals and the fact that it was already functioning at full capacity. In addition, positive macroeconomic repercussions were anticipated, such as the creation of business opportunities, increased passenger and cargo transport activity, and revenue from exports and tourism.
- 2.8 The Project was classified under category B pursuant to the Environment and Safeguards Compliance Policy (OP-703); and according to the Project documentation, the applicable policies are OP-102, on Access to Information, and OP-703 and its directives B.01 to B.07, B.10 to B.12, and B.17.

### III. THE REQUEST

- 3.1 On August 12, 2011, Mrs. Gloria Molina filed a Request<sup>3</sup> with the MICI on behalf of the neighborhood organization *Comunidades Unidas Macroproyecto Aeropuerto El Dorado*, comprised by residents from the Rubén Vallejo Jaramillo housing development located in Localidad Novena de Fontibón, adjacent to the Airport. The Request expresses the Requesters’ concern over the findings in the Environmental and Social Management Report<sup>4</sup> issued by the IDB in the framework of the “El Dorado International Airport” operation (CO-L1029).
- 3.2 In its Original Request, the requesting group alleges that “in the process of expanding and modernizing the El Dorado Airport, environmental violations are ongoing with respect to the issues covered in the IDB’s Environmental and Social Impact Report issued on the second semester of 2010.”<sup>5</sup> In particular, the Requesters point to the risks identified in the report with regard to the treatment and dumping of wastewater into the Bogotá River; the handling of toxic waste; the impacts of noise and air pollution; the impact on wetlands, and social management. Moreover, they assert that the public consultation was not sufficiently inclusive, because it included only the Fontibón and

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<sup>2</sup> According to Management, the construction of the new control tower was removed from the purview of the project subsequent to its approval by the Board of Executive Directors.

<sup>3</sup> The Original Request received on August 12, 2011 is available in the MICI’s Public Registry and in the Annexes section of this document.

<sup>4</sup> Environmental and Social Management Report, September 2010.

<sup>5</sup> Original Request, August 12, 2011.

Engativá working groups and excluded other working groups including Comunidades Unidas.

- 3.3 On September 3, 2014, at the Compliance Review Phase, the Requesters complemented<sup>6</sup> the Original Request with a *Supplement regarding the Connections between the Noise-related Harm and the actions and omissions of the Inter-American Development Bank (BID) contrary to its Operational Policies*.<sup>7</sup>
- 3.4 The Supplement submitted by the requesting group focuses on the harm stemming from the noise, as it is “one of the most important and far-reaching issues for the organization Comunidades Unidas [...] and the community members of Fontibón.” In the Supplement, the Requesters assert that the noise—which already existed prior to the IDB project—increased as a result of the project and that the Bank failed to take the necessary measures to ensure that it had an adequate mitigation plan. In particular, they maintain that subsequent to the construction of the new airport terminal the community has experienced an uptick in the number of complaints due to growing noise levels. The Requesters describe in their Request documented effects on the health and well-being of the residents, including insomnia, anxiety, irritability, and hearing loss, which affect the community’s children in particular.
- 3.5 The Requesters assert that as part of the Bank-financed operation, the schedule for Runway 2 (south) was extended<sup>8</sup> in order to complete the modernization of Runway 1 (north), as well as to address the increase in air operations. They allege that this extended operating schedule, has directly affected the community of Fontibón. They are also concerned that the need to handle the growing flight demand means that Runway 2’s extended hours will be permanent, with the resulting longer-term adverse impact on the communities next to the Airport. Furthermore, the Requesters underscore that the Bank identified elevated noise levels as one of the environmental and social risks of the Project.
- 3.6 Finally, the Requesters allege that they were neither consulted about the Project nor informed of the relevant environmental assessments or social mitigation measures on behalf of the community. In particular, they claimed that they were unfamiliar with the ESMP, and were unable to find it on the Bank’s website.
- 3.7 In short, the Requesters allege that the Bank has violated its Relevant Operational Policies by failing to “take the necessary steps to ensure that the Project had an

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<sup>6</sup> Paragraph 57 of the Policy Establishing the Independent Consultation and Investigation Mechanism, approved in February 2010, provided that, “Prior to making a determination of ineligibility, the Panel Chairperson shall provide a Requester reasonable opportunity to complete or correct a Request.”

<sup>7</sup> The Supplemental Request received in September 3, 2014 is available in the MICI’s Public Registry and in the Links section of this document.

<sup>8</sup> As a measure to mitigate the noise pollution, the Environmental License restricts the nighttime use of Runway 2 (south) for purposes of reducing the noise level in the adjacent communities.

adequate noise mitigation plan.” They argue in particular that the Environment and Safeguards Compliance Policy (OP-703) was not observed by the Bank, insofar as it:<sup>9</sup>

- *Failed to recognize Aerocivil as a third party and manage the risks associated with Aerocivil as required by Operational Policy 703;*
- *Failed to develop an Environmental and Social Management Plan in consultation with the affected parties prior to the project’s approval;*
- *Failed to observe the environmental laws and regulations of Colombia, and*
- *Failed to comply with the due diligence plan described in its own document on the strategy for evaluating the environmental and social impacts.*

#### **IV. MANAGEMENT RESPONSE**

- 4.1 With regard to the issues raised in the Request, Management presented its responses<sup>10</sup> to the Request and to the Supplemental Request at the eligibility stage of the Compliance Review Phase. Those responses are summarized below.
- 4.2 In reference to the construction works for the expansion of the runway adjacent to the community of Engativá (Runway 2), Management asserts that neither the Bank-financed project nor other planned improvements to the Airport and its services include the expansion of the runways.
- 4.3 In reference to the noise-related harm, the project team acknowledges that it identified noise as one of the issues to be reviewed within the due diligence process, as is usually done for infrastructure projects and in the particular case of airports.
- 4.4 In relation to specific allegations, Management asserts that Aerocivil has been tacitly acknowledged as a third party and that its role and responsibilities are described in the ESMR. In addition, Management reports that it has been in contact with Aerocivil with regard to noise management, through technical meetings and by offering comments to its efforts to update its noise modeling analysis.
- 4.5 It added that, in the ESMR, the Bank emphasized the issue of noise related to the Airport’s operation, and the MMA’s decision to limit the nighttime operation of the Airport as a common industry practice for noise mitigation. It also indicated that in the ESMR the Bank documented the use of the Environmental License as a risk mitigator, and that the strategy of the project team has always been to ensure that the Airport continues to

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<sup>9</sup> Information extracted from the Supplemental Request. Available in the Public Registry and in the Links section of this document.

<sup>10</sup> At the request of the Panel Chairperson, Management sent two notes containing remarks to the MICI; one dated August 14, 2014, in reference to the Original Request, and the other dated October 3, 2014, in response to the allegations made in the Supplemental Request. These responses are in the Links section of this document.

operate in compliance with the Environmental License that restricts nighttime operation in order to reduce the noise impact on the surrounding communities. “Any deviation from or breach of the License must be reported to the Bank and properly handled in order to ensure compliance.”<sup>11</sup>

- 4.6 The Bank further indicated that it was conducting periodic supervision activities, and that it had additionally hired an independent consultant (Golder Associates). It stated that the consultant was reviewing the Project to ensure compliance with all of the contract agreements, and maintained that, as of the date on which it issued its reply, no breaches related to the requirements of the Environmental License had been reported.
- 4.7 As for the handling of the social aspects, Management underscored that the borrower monitors and implements its Community Participation and Information Program, adding that OPAIN has actively participated in the communities to minimize the Airport’s reputational risks, keeping the channels of communication with the communities open.
- 4.8 With respect to the allegations about the lack of information on the environmental analyses of the project, Management responded that OP-102 does not require the Bank to publish the Environmental and Social Management Plan.
- 4.9 In sum, Management asserts that: (a) the Bank identified the risks and included them in the ESMR; (b) it worked directly with Aerocivil to identify the associated risks and gave it recommendations for the implementation of mitigation measures; (c) it clearly stated the borrower’s responsibilities according to the concession contract, and (d) it conducted the periodic supervision of the project and hired an independent consultant to ensure compliance with the legal requirements of an environmental and social nature. In addition, it clarified that the loan contract does not require the Bank to demand Aerocivil’s compliance with its responsibilities to mitigate the noise, since it is a national authority that reports to the Colombian Ministry of the Environment.

## **V. THE MICI PROCESS TO DATE**

- 5.1 The Original Request in case CO-MICI002-2011 “El Dorado International Airport” (CO-L1029) and the supplement thereto were received while the Policy Establishing the Independent Consultation and Investigation Mechanism, approved by the Board of Executive Directors in February 2010 (document GN-1830-49), was in effect.
- 5.2 The original Request was declared eligible by the Project Ombudsperson on November 3, 2011. Thereafter, the case was processed under the Consultation Phase<sup>12</sup> and concluded by decision of the MICI in March 2014. Some of the issues raised in the

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<sup>11</sup> Management’s remarks to the MICI Panel for the determination of the eligibility of El Dorado International Airport (CO-L1029) for a compliance review-new request. October 2014, para. c.

<sup>12</sup> For further information, see the following case documents from the Consultation Phase, available in the [Public Registry](#): Eligibility Memorandum, Assessment Report, and Consultation Phase Report.

original Request were clarified and resolved in this process, while the issues of noise and community participation remained unresolved.

- 5.3 In August 2014, the case was transferred to the Compliance Review Phase, and upon receiving the Supplemental Request, the then Panel Chairperson declared it eligible for that Phase on November 21, 2014.
- 5.4 On December 17, 2014, the Board of Executive Directors approved the Policy of the Independent Consultation and Investigation Mechanism (document MI-47-3) providing for its immediate entry into force. On February 4, 2015, the Transition Plan (MI-48-1) was approved, which determined that as of that date the case in question would be processed in accordance with the provisions of that Plan for the transition period, at the end of which it would be processed under the Policy currently in effect.
- 5.5 On August 16, 2015, the MICI Director took office and the preparation of this document was initiated. The draft version was distributed to the Requesters and Management on September 30, 2015 for comments. Both parties had 21 business days to submit their remarks.<sup>13</sup> Their comments have been carefully analyzed, and the MICI appreciates the observations and points made by each one. This version is an objective and impartial compilation of those comments that the MICI has deemed pertinent, and the Mechanism will send the Parties a letter stating the reasons for which some others have not been considered. The original comments of both Parties are available in the Annexes section.
- 5.6 The next step is to request consideration by the Board of Executive Directors of the recommendation by MICI, which is presented in the following section.

## **VI. RECOMMENDATION FOR A COMPLIANCE REVIEW**

- 6.1 This Recommendation for a Compliance Review and its Terms of Reference is submitted to the consideration of the Board of Executive Directors in accordance with paragraphs 39, 40, and 41 of the MICI Policy (MI-47-3).
- 6.2 Pursuant to paragraph 41 of the MICI Policy (MI-47-3), it is recommended that the Board of Executive Directors authorize the MICI to conduct the Compliance Review investigation in relation to the “El Dorado International Airport” operation (CO-L1029), with the objective of determining whether the Bank failed to comply with Operational Policies OP-703 and OP-102 and, consequently, caused harm to the Requesters during the time of its involvement with the project of *Modernization and Expansion, Operation, Commercial Use, Maintenance, and Administration of the El Dorado International Airport*, as alleged in the Request filed by Comunidades Unidas.

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<sup>13</sup> Given that the MICI has still not completed its governance structure as of the date of circulation of this draft, the MICI Director, in accordance with the Transition Plan, decided to extend the deadline for the preparation of this recommendation, as well as the comment period, by 5 business days (with respect to paragraph 40 of the MICI Policy currently in force).

- 6.3 The MICI is of the opinion that the Requesters have referred to a preexisting harm that seriously affects them, and that any increase in noise levels will cause them greater harm. In addition, the MICI observes that there are conflicting statements and different points of view between the Requesters and Management regarding the allegations of harm and compliance with the policies cited in the Request. Given the relevance of the harm alleged and the discrepancy of positions, the MICI finds it pertinent to conduct an investigation to clarify the facts as they relate to the actions and omissions of the Bank, using only the stipulations contained in the operational policies as a reference.
- 6.4 It is important to note that Management recently informed the MICI that the borrower has repaid 100% of the loan granted by the Bank and that, with that action, the contractual relationship with the Bank has ended. The MICI observes that this fact could lead third parties to the inference that because there is no longer any Bank involvement with the project it would be inefficient to conduct an investigation, both in terms of potential access to the client for purposes of obtaining information and due to the diminished impact that the investigation results will have on the case.
- 6.5 Nevertheless, the MICI considers relevant bringing to the attention of the Board of Executive Directors the following: (1) although the ability to access the client for purposes of gathering information, if necessary, to better understand the Bank's actions in the Project is desirable in a Compliance Review, the MICI considers that in this case the investigation can go forward even in the event that such contact cannot be made; (2) the investigation would focus on verifying Management's compliance with the Relevant Operational Policies for the operation in question, and it would be expected that Management would have the relevant documentary evidence; and (3) any finding made with respect to the matter does not only have the purpose of offering the Board of Executive Directors information that will let it know whether Management complied with what the Board approved for operation CO-L1029; it will also assist the Board in its decision-making with respect to similar future operations. Given that the Bank's portfolio contains several projects that involve investment in the airport sector, the MICI is of the opinion that the impact of the investigation and the information it will provide to the Board will go beyond this particular case, generating knowledge for the Bank for its continuous improvement processes regarding identification, attention, supervision and risk mitigation in this type of operations.
- 6.6 In short, the MICI considers that carrying out an investigation not only is relevant but also could have a positive impact on the Bank's work and the sustainability of the projects it finances. The reasons for which the MICI has decided to present this proposed recommendation, scope, methodology, timeline, and budget are stated below.

#### **A. Justification**

**In relation to compliance with the Environment and Safeguards Compliance Policy (OP-703), directives B.02, B.03, B.04, B.05, B.06, B.07, and B.12**



- 6.7 The starting point for the analysis of whether to recommend a Compliance Review was the examination of the legal and operational context of the El Dorado International Airport in order to determine the scope of responsibilities for managing noise pollution risks and implementing mitigating measures. In this regard, the MICI confirms that both the Environmental License and the concession contract assign Aerocivil sole responsibility for the impacts arising from the operation of aircrafts, including noise, and the implementation of the appropriate mitigating measures. This was confirmed not only in the review of the legal and regulatory documentation of the concession, but also through the hiring of a noise management expert by the MICI during the Consultation Phase.<sup>14</sup>
- 6.8 The project documents state that the operation of the Airport creates the adverse environmental impacts typically associated with airport activities, including high noise levels in the take-off and landing operations. These documents emphasize that at certain times the noise levels have exceeded the standard.<sup>15</sup> They state that, as a mitigating measure, the Colombian Environmental Authority has included a nighttime use restriction in the Environmental License for one of the runways in order to reduce the noise levels in the adjacent communities. They further underscore the risk that Aerocivil may decide to operate Runway 2 during nighttime hours.
- 6.9 As a result of the above, at the time of the October 2010 Environmental and Social Assessment and as indicated in the ESMR, it was thought that, even though Aerocivil is responsible for the operation of the runways, the Airport operates under a single license; thus any deviations or non-compliance would have to be reported to the Bank and properly managed in compliance with the permits and authorizations in force. Also, the ESMR indicates that the project should comply throughout the life of the loan contract with Colombian environmental, social, health and safety legal requirements, as well as permits, authorizations and licenses as they apply to the project including use restrictions of Runway 2.
- 6.10 The Requesters allege that the use restriction has not been observed and that this has caused greater harm. Therefore, the MICI finds that the investigation would help shed light on this issue in terms of whether the Bank complied with the different directives of the Environment and Safeguards Compliance Policy (OP-703) that apply to the project.
- 6.11 Also, the Requesters allege that there have been additional adverse effects on the communities adjacent to the Airport due to increased operations at the Airport during the execution of the project and/or as a result of the project. The MICI is of the opinion that an investigation will help clarify whether the Bank considered that the operation would contribute to the increase in operations at the Airport and the noise impact that this would have, and whether any decision or action was taken in compliance with the different directives of the Environment and Safeguards Compliance Policy (OP-703) that apply to the project.

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<sup>14</sup> Leonie, Dobbie. Report on Noise Management at the El Dorado Airport, May 2014.

<sup>15</sup> Environmental and Social Management Report, September 2010, para. 4.5.

- 6.12 Additionally, the Requesters allege that they were not properly consulted during the due diligence process or during the execution of the project. For its part, Management states that, in compliance with the public consultation requirements for a category B project, the Bank took the public hearing announced by the General Accounting Office of the Republic on February 20, 2009 as proof of compliance with this requirement. That hearing gave way to a commitment on the part of Aerocivil and the borrower, OPAIN, to propose forms of community participation and monitoring. The Bank endorsed this proposal and made it a condition for OPAIN to regularly make environmental and social information about the project available to the public and to maintain a public consultation system. In its Response, Management further asserted that the Bank has been the catalyst for the renewal of the working groups with the communities. The MICI believes that an investigation would help determine whether the Bank was in compliance with respect to this issue, and in particular with the supervision directive of OP-703.

**In relation to compliance with the Access to Information Policy (OP-102) and Directive B.1 of the Environment and Safeguards Compliance Policy (OP-703)**

- 6.13 The Requesters allege that they were not given information about the environmental analysis conducted, the identification of risks, and the mitigation measures proposed. In short, they allege that they have not had access to the Environmental and Social Management Plan (ESMP), and that they were also unable to access it on the Bank's website. Management has replied that OP-102 does not require the publication of the ESMP. Nevertheless, OP-703 states that for category B projects an Environmental Analysis must be conducted and published on the Bank's website, and that this document must contain a draft management plan if necessary. Management states that it has an EA, but the MICI was unable to locate it on the Bank's website. Therefore, the MICI believes that an investigation would help determine whether the Bank has complied with the Access to Information Policy in relation to this project.

**B. Scope**

- 6.14 This recommendation proposes to the Board of Executive Directors that an investigation be conducted of the El Dorado International Airport loan operation (CO-L1029), focused on verifying the Bank's observance of the Operational Policies on Environment and Safeguards Compliance (OP-703) and Access to Information (OP-102).
- 6.15 The investigation would be centered on the identified risk of pre-existing and incremental noise pollution, and the consultation and information processes.
- 6.16 The investigation would focus on the period of the Bank's involvement: from March 26, 2007, when the mandate letter was issued, to the operation's closing date following the prepayment of the loan made by OPAIN on May 15, 2015.
- 6.17 The product of this investigation is a Compliance Review Report on the El Dorado International Airport Operation (CO-L1029), which will detail the investigation process, its findings, and the conclusions based on the evidence of compliance or non-compliance

with the Relevant Operational Policies as well as the connection, if any, between a potential non-compliance and the harm alleged by the Requesters.

6.18 In view of the information that Management has already provided to the MICI, the investigation will focus on answering the following questions:<sup>16</sup>

- Was the current and potential noise impact of the operation—both direct and indirect—analyzed in accordance with the criteria set forth in OP-703? In particular, was there any consideration of the potential impact of incremental noise, whether direct or indirect, to be created by the Operation?
- If it was considered, how was it dealt with and what implication, if any, did this consideration have on the environmental classification, and why?
- Could this decision have caused harm to the Requesters?

6.19 With respect to the mitigating measures:

- What process did the Bank follow to determine the effectiveness of the existing mitigating measures, as required for a category B operation? Specifically, what analysis did the project team conduct at the preparation stage to determine the effectiveness of the use of the Environmental License as a measure to mitigate the noise impact in the communities adjacent to the El Dorado Airport?
- Could the selection of this mitigating measure have cause harm to the Requesters?

6.20 In relation to the Bank's supervision of compliance with the contractual conditions:

- What supervision scheme did the Bank have to determine compliance?
- During the period of involvement, was the Bank notified of changes in air operations and the use of runways, in particular Runway 2?
- Did the Bank carry out additional verification actions? If so, what were they, and did their findings confirm the other supervision actions?
- At any time were other mitigating actions considered for use in the event of potential non-compliance?

6.21 With respect to the public consultation requirements and the contractual condition of keeping the affected communities informed:

- What were the information and consultation processes undertaken with the community with regard to the project and its effects? What process did the Bank follow to determine the adequacy of those processes?

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<sup>16</sup> Investigation questions are aimed at guiding the process of investigation and to procure relevant facts which may have a bearing on the case. Therewith, the Panel could determine how and why an action or omission of the Bank could have resulted in the non-compliance of the operational policies in question if the case may be.

- Were there plans for communicating with the affected communities about the effects of the project and about measures to mitigate the harm, especially from the noise generated by the Airport?
  - If so, how did the Bank verify compliance with those plans?
  - In the event that they were not observed, how did the Bank address this non-compliance?
- 6.22 In relation to the publication requirements established in the Access to Information Policy:
- Did the Bank have an Environmental Analysis? Was this document disclosed on the Bank's website or by other means?
  - If not, why was it not disclosed?
  - In the event that it was not disclosed, could this omission cause harm to the Requesters?

### **C. Proposed Methodology**

- 6.23 The proposed investigation would use document review and targeted interviews as the primary investigative method. Based on the results, the information would be checked against the directives of the Relevant Operational Policies to determine compliance or the absence thereof. Finally, in the event that non-compliance is found, a causal-linkage analysis would be performed to determine whether there was any connection between the non-compliance and the harm alleged.
- 6.24 Based on the above, the MICI would perform the following activities:
- i. Preparation of Terms of Reference of the Experts.**
  - ii. One-on-one interviews with the following actors:**
    - Bank personnel at Headquarters and in the Colombia Country Office involved in the operation.
    - Consultants responsible for the project from the consulting company Golder Associates.
    - Requesters.
    - Other actors identified as relevant during the investigation.
  - iii. Document review**
    - Review of the Bank's documentation referring to the operation that is relevant to the scope of the investigation. This includes both public and confidential documents.

- Reports issued by the client, the external consultant Golder Associates and other third parties in accordance with each one's contractual requirements with the Bank.
  - Colombian environmental regulations relevant to the operation.
  - Those documents related to the use of the Environmental License during the Bank's period of involvement with the Project.
  - Review of logs, reports, and other public sources of information in order to document, among other things, the Airport's volume of operations and the use of its runways, especially the nighttime use of Runway 2.
  - Other relevant studies and reports.
- iv. **Mission to Bogotá, Colombia, by the Investigation Panel for purposes of context and contact with the Requesters.**
  - v. **Review of the reports of the experts from the Roster.**
  - vi. **Comparison analysis and determination of the principal findings**
  - vii. **Preparation of the Preliminary Report.**

#### **D. Timeline and Team**

- 6.25 In keeping with the MICI Policy, the proposed investigation would be conducted within a period not to exceed 6 calendar months from the establishment of the Compliance Review Panel.
- 6.26 Considering that this *Recommendation* is presented in the fourth quarter of 2015, and in keeping with the policies and procedures for the hiring of experts, the investigation would begin by the end of January 2016 and would be concluded by the end of July of the same year, in the event it is approved by the Board of Executive Directors under this short procedure. The proposed timeline of activities is presented below.



## Annex I

### Management Comments on the Preliminary Version of the Recommendation for a Compliance Review

October 30, 2015

#### **IDB Management comments on the TOR for a compliance review of El Dorado International Airport (CO-L1029)**

Please find below Management's comments to the Terms of Reference as outlined by the ICIM for a compliance review on the El Dorado airport project in Bogotá, Colombia.

The comments refer exclusively to the scope of the compliance review, and not to the substance of the claims. The response team has provided comments on the substance of the claims in our management responses from August and October.

**In regards to the TOR for a compliance review of the above mentioned project, Management would like to express the following:**

*Para 6.4: "It is important to note that Management recently informed the ICIM that the borrower has repaid 100% of the loan granted by the Bank and that, with that action, the contractual relationship with the Bank has ended. This fact could lead to the inference that because there is no longer any Bank involvement with the project it would be inefficient to conduct an investigation, both in terms of potential access to the executing agency for purposes of obtaining information and due to the diminished impact that the investigation results will have on the case."*

Please clarify that Management has not expressed the view that an investigation would be inefficient. What we expressed is that, since the contractual relationship with the client has formally ended, we cannot guarantee access to the client in terms of site visits and information. In addition, based on the fact that the Bank no longer has a contractual relationship with the client, IDB's rights to enforce obligations against the client under the Finance Documents, including all monitoring of the client by the Bank and its consultants, have ceased. Any possible recommendations by the ICIM could thus have a limited scope.

*Para 6.5: "Given that the Bank's portfolio contains several projects that involve investment in the airport sector, the ICIM is of the opinion that the impact of the investigation will go beyond this particular case, allowing the Bank to determine whether the way in which the guidelines established in the Operational Policies are currently applied is the most appropriate way to address the risks identified in this type of operation."*

This objective goes beyond the objectives of the ICIM as defined in the ICIM Policy, and specifically of the Compliance Review Phase, which is: "to offer an investigative process related to the issues raised in the Request to establish whether the Bank has failed to

comply with any of its relevant Operational Policies and whether that has caused Harm to the Requesters". The objective should be removed from the TOR.

Para 6.8: *"The project documents state that the operation of the airport creates the adverse environmental impacts typically associated with airport activities, including high noise levels in the take-off and landing operations. These documents emphasize that at certain times the noise levels have exceeded the standard."*

Please specify which project documents highlighting the exceedance of noise level standards are referred to, and under which circumstances this has allegedly occurred.

Para 6.16: The prepayment of the loan to IDB was effective on May 15, 2015.

Para 6.18: *"How was the current and potential impact of the operation— both direct and indirect—analyzed in terms of noise?"*

The investigation should not determine "how" the analysis was conducted, but rather whether an analysis was conducted, and whether this analysis was sufficiently robust considering requirements of OP-703? OP-703 Directive B.5 states that: "an environmental analysis should be performed including an evaluation of the potential environmental, social, health and safety impacts and risks associated with the operation". Noise being a potential impact for this operation, OP-703 requires that an evaluation of noise impact be conducted, and that it is sufficiently robust to assess the significance of this potential impact. The policy does not prescribe how such an evaluation is conducted.

Para 6.19: *"With respect to the mitigating measures: How did the Bank determine the effectiveness of the existing mitigating measures, as required for a category "B" operation?"* As per the previous comment, the investigation should not determine "how" the Bank determined effectiveness of existing mitigation measures, but rather whether the Bank evaluated the effectiveness of existing mitigation measures.

Para 6.21: *"With respect to the public consultation requirements and the contractual condition of keeping the affected communities informed: - What were the information and consultation processes undertaken with the community with regard to the project and its effects? How did the Bank determine the adequacy of those processes? -Were there plans for communicating with the affected communities about the effects of the project and about measures to mitigate the harm, especially from the noise generated by the Airport? - If so, how did the Bank verify compliance with those plans? - In the event that they were not observed, how did the Bank address this noncompliance?"*

As per the previous comments, the investigation should not determine "how", but rather: i) whether the criteria and information used by the Bank to determine the adequacy of the consultation process followed the requirements of OP-703; ii) whether the Bank verified compliance with the mitigation plans; and iii) whether the Bank attended to any events of non-compliance.



Para e.: The draft version of the TOR circulated to Management did not include the budget for the compliance review. We suggest, going forward, that all required sections are completed before distribution for comments to Management.

**Annex II**  
**Requesters' Comments to the Preliminary Version of the Recommendation for a  
Compliance Review**

November 2, 2015

Victoria Márquez Mees  
Director  
Independent Consultation and Investigation Mechanism (MICI)  
1300 New York Ave., NW  
Washington, DC 20577  
United States

**Re: Request concerning the El Dorado International Airport (CO-MICI002-2011) –  
Comments to the Recommendation for a Compliance Review and Terms of  
Reference**

Dear Ms. Márquez Mees,

Thank you for the opportunity to provide you with our remarks on the draft Recommendation for a Compliance Review and Terms of Reference in relation to the El Dorado International Airport (the Recommendation).<sup>1</sup>

We are pleased that the MICI recommends undertaking this important investigation. We agree with the MICI's justifications, and in particular with the recommendation that an investigation is needed to examine and resolve the major differences between the assertions and opinions of the Management of the Inter-American Development Bank (IDB) and the affected community.

Nevertheless, as we explain in detail below, we have identified some areas in which the Recommendation is incomplete. The summary of the request does not contain significant details about the extent of the environmental and social impacts on the community. In addition, the Recommendation fails to explain the link between these impacts and the alleged violations of IDB policies. We request that the necessary changes be made to include this missing information. Also, the scope of the investigation must incorporate some additional questions that are necessary to determine the IDB's compliance with its obligations, especially given that the mitigation of environmental impacts depends (in whole or in part) on the involvement of a public agency, the Administrative Unit of *Aeronáutica Civil de Colombia* (Aerocivil).

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<sup>1</sup> This document was prepared with support from Accountability Counsel.

We have structured this response as follows: first, we explain our most important comments to sections III (the request), IV (Management's response), and VI (recommendation of a Compliance Review) in this order; later, we will provide our explanation of other concerns about the content of the Recommendation and, finally, we will address our major concern with the decision to withhold information in some parts of the Recommendation.

### **I. The Request Summary in Section III is Incomplete**

The request summary in section III must fairly include the main details of the request. Without these details, the Board of Executive Directors cannot make an appropriate decision on the recommendation of the MICI. At this time, we are of the opinion that section III is insufficient in two respects:

- a) It does not adequately describe some of the essential facts and allegations, including the extended operating hours of Runway 2, the absence of adequate mitigation measures, the lack of consultation, and the harm to the members of the community; and
- b) It fails to identify and explain all of the alleged violations of the IDB policies.

#### **A. *The Recommendation needs to include more details about the environmental and social impacts and the harm to the communities***

The alleged harm to the community is the basis of the request. The existence of the allegations is a criterion of eligibility<sup>2</sup> and the investigation of this harm is one of the main objectives of the MICI and the Compliance Review Phase.<sup>3</sup> Accordingly, the recommendation must describe it with a sufficient level of detail for the Board of Executive Directors to be able to make an informed decision.

In order to present the request fairly, the Recommendation must include the following additional details in ¶¶3.1-3.7:

- a) During the MICI's Consultation Phase, *Sociedad Concesionaria Aeroportuaria Internacional S.A.* (OPAIN) and the Administrative Unit of *Aeronáutica Civil* (Aerocivil) informed the community representatives that they were requesting an extension of the operating hours of Runway 2 from 10:00 p.m. to midnight to allow for the construction and modernization of Runway 1, which was part of the IDB-financed operation.<sup>4</sup>
- b) When the supplemental request was submitted, Aerocivil had already asked the National Environmental Permits Authority (ANLA) for an amendment to the

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<sup>2</sup> MICI Policy, ¶22(c).

<sup>3</sup> MICI Policy, ¶36.

<sup>4</sup> See supplemental request, p. 7.

License that would make the expanded hours permanent. The reason given for the requested amendment was the expansion and modernization of the airport.<sup>5</sup>

- c) Numerous studies document the fact that the members of the community of Fontibón have experienced chronic insomnia, headaches, irritability, anxiety, hearing loss, and difficulty concentrating as a consequence of the high noise levels. Among the community's children, hearing damage is causing problems in scholastic development and progress. A report by the Ministry of Health of Bogotá concluded that the airport's mitigation mechanisms have not been effective in protecting the health and welfare of the residents of Fontibón.<sup>6</sup>
- d) While the supplemental request focuses on the noise issue, the community is also concerned about the lack of social mitigation.<sup>7</sup> The people of Fontibón suffer on a daily basis because of their close proximity to the airport expansion project. The community believes that OPAIN should have taken specific steps to mitigate this harm, such as giving the community opportunities to promote local businesses including hotels, services, and cultural events, and providing timely information about the types of employment positions it seeks to fill, in order to give local youths or professionals the opportunity to prepare for them. The supplemental request explicitly asked for the Compliance Review Phase to include those issues, which were not resolved in the Consultation Phase.<sup>8</sup> The Recommendation should reflect that request.
- e) In ¶3.5 in particular, the Recommendation needs to recall that the IDB identified elevated noise levels as one of the project's environmental and social risks (although it is our opinion that the IDB failed to take sufficient account of the risks associated with this noise increase in its due diligence and supervision of the project).<sup>9</sup>
- f) In ¶3.6, as an additional detail, it was the community that had to request the first meeting with OPAIN in 2009 regarding the project's impacts. Up to that point—three years after OPAIN began operating the concession—it had not requested any meeting with the affected communities.

It is important for these details to be included in the Recommendation in order for the Board of Executive Directors to have a complete picture of the seriousness of the situation, from the community's perspective, when it decides whether to approve the investigation.

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<sup>5</sup> Supplemental request, p. 8.

<sup>6</sup> Supplemental request, pp. 4-5.

<sup>7</sup> Supplement, p. 14.

<sup>8</sup> Consultation Phase Report (July 21, 2014), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=38976388>.

<sup>9</sup> See El Dorado International Airport Environmental and Social Strategy, BID, ¶¶1.4-1.5 (Feb. 28, 2008), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1346148> (“ESS”); Environmental and Social Management Report, Modernization and Expansion, Operation, Commercial Use, Maintenance, and Management of the El Dorado International Airport, IDB, ¶¶4.5, 4.13-4.14, 5.26 (Sept. 2010), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35435925> (“Environmental and Social Management Report”).

***B. The Recommendation must identify and explain all of the alleged violations of IDB policies***

In addition, it is important for the Recommendation to identify and explain all of the alleged violations of IDB policies, given that the connection between the alleged harm and the alleged violations of IDB policies is another fundamental aspect of the MICI process and of the decision of the Board of Executive Directors.

Although the summary of the request briefly recounts our complaints, this description is incomplete and does not explain the relevant obligations of the IDB under the Environment and Safeguards Compliance Policy (OP-703). Further explanation is needed to understand the allegations and their basis in OP-703.

Accordingly, we request the inclusion of the following additional explanations:

- a) It must explain that it is our view that OP-703 requires the IDB to work with the borrowers to ensure the effective management of environmental and social risks.<sup>10</sup> The IDB must prevent negative impacts; when such impacts are inevitable, IDB-financed operations require mitigation measures; and for those impacts that cannot be mitigated completely, it is necessary to implement compensation or offset measures. As we explain in the request, in this case, the IDB did not comply with this hierarchy of mitigation.
- b) ¶3.7 needs to include the fact that the requesters allege that the requirements of OP-703 and the effective mitigation of the excessive noise risk require modern noise abatement measures informed by consultation with the affected communities and in keeping with international best practices.
- c) It is necessary to recall, as one of the specific points in ¶3.7: “Failed to ensure that the project effectively attempted to prevent, mitigate, or compensate the noise risks and related social impacts.”

**II. Comments on Management’s Response in Section IV**

We understand that this section is merely a summary of the IDB Management’s response. Nevertheless, we find that some aspects of this response are difficult to comprehend if other facts are taken into account. We underscore two examples, only to add weight to the MICI’s justification of its recommendation for an investigation.

First, in ¶4.2 and ¶4.5, IDB Management denies that either the project or other improvements to the airport include the extension of runway operating hours. This response is difficult to reconcile with the following facts:

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<sup>10</sup> Although certain aspects of the policy use the term “environmental” by itself, ¶2.3 explains that the term “is defined in its broad sense, which includes physical/chemical factors (geophysical), biological factors (biotic), and associated social factors (anthropic). This policy encompasses social, cultural and economic aspects to the extent that these aspects are derived from geophysical and/or biotic changes associated with a particular operation.”

- a) The IDB's acknowledgement in the ESS that the noise increase is one of the principal risks of the project, due to (i) short-term construction activities; and (ii) a long-term increase in airport activities and services. The ESS expressly stated that: "During operations, the expanded airport will result in increased noise and emissions from additional take-off and landing operations";<sup>11</sup>
- b) OPAIN and Aerocivil's request to the community representatives for the expansion of the runways and the request to extended operating hours for Runway 2, made during the MICI Consultation Phase;<sup>12</sup> and
- c) Aerocivil's application to ANLA for an amendment to the Environmental License that would make the extended operating hours permanent. The reason given for the request to amend the License is the expansion and modernization of the airport.<sup>13</sup>

Second, in ¶4.6, Management says that no violations related to the requirements of the Environmental License had been reported. This response is also difficult to reconcile with the following facts:

- a) Runway 2 has frequently been used after the nighttime license restriction (10:00 p.m.), both as a result of the agreement made as part of the MICI Consultation Phase and on various occasions that did not comply with the terms of that agreement;
- b) The IDB's own Environmental and Social Management Report, published in September 2010, acknowledged that the noise levels exceed national limits. The Report stated that: "Monitoring [of this network] in general had registered levels close to 75 dB in the daytime in residential areas adjacent to the Airport, and median values of 65 dB day/nighttime, which exceed the established limits in the national environmental law."<sup>14</sup>
- c) In November 2014, Aerocivil published an environmental impact study admitting that in the stations located on residential land, 84% of the daytime measurements and 100% of the nighttime measurements were above permissible noise levels.<sup>15</sup> This indicates a failure to improve the noise levels and most likely an ongoing failure to comply during the entire period in which the IDB was involved in the project.

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<sup>11</sup> See ESS, ¶1.5.

<sup>12</sup> See supplemental request, p. 7.

<sup>13</sup> Supplemental request, p. 8.

<sup>14</sup> Environmental and Social Management Report, ¶ 4.5.

<sup>15</sup> Aerocivil, *Estudio de impacto ambiental para la modificación de la licencia ambiental del Aeropuerto Internacional Eldorado de la ciudad de Bogotá* (Nov. 2014), p. 190.

<http://www.aerocivil.gov.co/Aerocivil/GAmbiental/Documents/Estudio%20de%20Impacto%20Ambiental%20para%20la%20modificación%20de%20Licencia%20Ambiental-%20Aeropuerto%20Internacional%20E1%20Dorado.pdf>

We understand that it is not the objective of the Recommendation to refer to all of the discrepancies between the parties. Nevertheless, these examples are particularly significant and underscore the importance of an investigation in this case. As we explain below, the justification for the MICI recommendation should include these discrepancies.

### **III. The Justification, Scope, and Methodology in Section VI Are Missing Important Considerations**

We are pleased that the MICI proposes to conduct an investigation of the Compliance Review in relation to this project. We agree with the reasoning of the MICI, but we think that the justification would be bolstered by the inclusion of some additional points. The scope of the investigation should also include some additional documents and questions to address all of the alleged violations of the policies and the alleged harm, which are the fundamental concerns of the community.

#### ***A. The justification would be strengthened by including additional factors***

We are pleased that the MICI recognizes that the investigation is necessary in order to examine and resolve major differences between the assertions and opinions of the IDB and the affected community. Nevertheless, and in keeping with the above, it would be better to clarify certain important considerations in this part of the Recommendation:

- a) First, the justification should acknowledge the seriousness of the alleged harm to the communities and the importance of an investigation. Even if the IDB were to debate the extent or causation of the harm, its seriousness warrants an investigation.
- b) In ¶6.7, it needs to be clear that OPAIN retains partial responsibility for mitigating and monitoring the noise generated by the airport. This paragraph should clearly state that: (i) the airport operates under a single Environmental License; and (ii) under the concession agreement, OPAIN retains responsibility for the mitigation and monitoring of noise directly linked to the activities covered by the concession, including the modernization and expansion, operation, and administration of the concession area.<sup>16</sup> This provision is very important because, as it is currently worded, ¶6.7 suggests—contrary to what the MICI stated previously—that Aerocivil has sole responsibility for the noise impacts.
- c) The first sentence of ¶6.7 should refer to responsibility for the management of social impacts, as well as the noise pollution. This paragraph should also

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<sup>16</sup> Our understanding of the concession agreement is based on the MICI's descriptions, including in the Determination of Eligibility for the Compliance Review Phase (Nov. 21, 2014), ¶4.13 (“Under the terms of the Concession Agreement, Aerocivil maintained at its charge and excluded OPAIN from responsibilities relating to mitigation measures and monitoring of noise, the monitoring of air quality and social management, but such exclusion only covered such responsibilities to the extent these were not directly linked to the activities covered by the concession, such as: modernization and expansion, operations, commercial use, maintenance and administration of the Concession Area.”).

acknowledge that OPAIN has responsibilities related to the social impacts, even if it is not directly responsible for mitigating the noise.

- d) ¶6.10 should explain that the requesters stress that Runway 2 has frequently been in operation in violation of the flight schedule restriction in the Environmental License and that Aerocivil has applied to ANLA for a License amendment that will make the extended hours permanent, using the expansion and modernization of the airport as a justification for the License modification. Therefore, the requesters argue that the Environmental License is ineffective as the sole mitigation measure. This explanation is important because it highlights the major discrepancy between the parties that the investigation would help clarify.
- e) In ¶6.11, the Recommendation states that an investigation would help clarify whether the IDB considered that the project would contribute to increase operations at the airport and the effect this would have on noise levels. We agree that this is an important question, but the investigation also has to ask whether the increase has in fact occurred, regardless of whether the IDB thinks so. It is possible that the IDB's evaluation was erroneous and the issue of whether there was an increase could be relevant in determining whether the IDB met its due diligence obligations.

These comments are necessary to ensure that the Board of Executive Directors takes account of all the important considerations when deciding whether to approve the investigation.

***B. The scope must expressly include all of the issues necessary to determine the IDB's compliance with its obligations***

We think it is important for the MICI to propose a detailed investigation of this project's due diligence, supervision, and consultation processes. Nevertheless, there are currently certain aspects where the scope of the investigation is either unclear or too limited.

First, we have a significant concern about the relevant period of the investigation as defined in the Recommendation. In ¶6.16, the Recommendation states that the investigation would focus on the IDB's period of involvement: from March 2007 to the operation's closing date (December 2014). It is not completely clear, but we are concerned that the MICI proposes to limit the investigation to matters arising during this period, to the exclusion of other important matters that should be taken into account for the investigation.

It seems appropriate to us if the MICI wants to limit the investigation of the acts and omissions of the IDB to the period of its involvement. However, it is extremely important to the community that the MICI be willing to consider other information outside that time period that is relevant to determining whether the IDB observed its operational policies or whether any non-compliance caused harm to the community. Harm may occur after the period of IDB's involvement but still be caused by its acts or omissions (and the failure to comply with its operational policies) during the period of involvement. Similarly, the situation prior to the IDB's



involvement may be relevant in determining the IDB's obligations (of due diligence or supervision) during the period of its involvement.

Therefore, ¶6.16 must be amended to clarify that the MICI will take account of information from before or after the IDB's period of involvement, when such information is relevant in determining the IDB's compliance with its operational policies and whether any violation thereof has caused harm to the community.

In addition, we would like for the scope to include the following important issues:

- a) In ¶¶6.14-6.22, the questions regarding the harm caused should not say "the requesters." We, the requesters, are a community organization. We represent the members of the community of Fontibón. We prefer that these questions refer to the affected community rather than to the requesters in particular.
- b) In ¶6.14, the description of the investigation's objective must expressly include a reference to whether the failure to comply has caused harm to the affected community.
- c) In ¶6.15, the description of the focus of the investigation has to include other impacts related to noise pollution. The request mentioned a variety of social impacts that are relevant to the investigation.
- d) In ¶6.18:
  - i. The first sentence should not be limited to "the information that Management has already provided to the MICI." We have provided, and can provide, the pertinent information on noise levels and harm to the community, and the scope of the investigation must also take account of this information in developing the relevant questions.
  - ii. The first question must also refer to any prior projections of growth in flight operations and the resulting affected area, and whether those projections are consistent with actual conditions. The scope of the forecast and the affected area is relevant in determining the appropriate environmental classification and the subsequent obligations.
- e) The following questions must be included in ¶6.19:
  - i. Was there a failure to comply with the Environmental License and/or national regulations prior to the IDB's involvement? If the IDB was aware, or should have been aware, of this failure to comply, did it take account of this history of noncompliance with the Environmental License when it developed the mitigation plan?

- ii. Was Aerocivil recognized or should Aerocivil have been recognized by the IDB as a third party? Were the risks related to Aerocivil managed appropriately? The IDB’s analysis of the risks associated with Aerocivil as a third party is a fundamental aspect of the request.
  - iii. Were the mitigation measures selected appropriately and effectively (in reality)?
  - iv. Was the selection of the mitigation measures reviewed, or should it have been reviewed, as a result of any change in circumstances? In particular, what action did the IDB take when OPAIN and Aerocivil proposed modifying the Environmental License to eliminate the principal mitigation measure described by the IDB —the nighttime restriction on the use of Runway 2— and were those actions sufficient? According to OP-703, ¶4.13, “Safeguards apply throughout the project cycle.” It is important that the investigation acknowledges potential changes in circumstances during the project cycle.
- f) The following questions should be included in ¶6.20:
- i. Was there a failure to comply with the Environmental License and/or national regulations prior to the IDB’s involvement? If the IDB was aware, or should have been aware, of this failure to comply, did it take account of this history of noncompliance with the Environmental License when it developed its supervision plan?
  - ii. During the period of involvement, was the IDB notified of excessive noise levels?
  - iii. If there was any lack of supervision, has it caused harm to the affected community?
- g) The following questions should be included in ¶6.21:
- i. Were the information and consultation processes in fact effective in ensuring that the communities were appropriately informed?
  - ii. If there was a failure to consult, has it caused harm to the community?

These additional questions are necessary for determining the IDB’s compliance with its obligations and to address the main concerns of the affected community.

**C. *The proposed methodology must include the additional documents***

In general, we find the proposed methodology to be adequate. However, we think that some changes should be made to ensure that the investigation team has access to all of the relevant information. As an initial point, we recommend including the mission to Bogotá as part

of the “primary investigative method” described in the first sentence of the section. It is our opinion that this mission would be essential to the investigation team’s ability to fully understand the allegations and circumstances of the affected community.

The list of investigated activities contained in ¶6.24 should also be modified to address the main concerns of the affected community. We ask that the list in ¶6.24 expressly include the following activities:

- a) Review of the reports and other sources of information referred to in the requests, including the reports on noise and its effects on the health of community members, as well as any updated information;
- b) Review of reports and other sources of information on international best practices on airport noise abatement, including any comparison between the noise abatement measures taken at the El Dorado Airport and international best practices;
- c) Review of any other document identified as relevant during the investigation, in order to allow the MICI to examine any pertinent information that is unknown at this time. This clarification is important because one of our complaints is the lack of appropriate consultation. Therefore, it is likely that the community is not aware of all of the relevant information; and
- d) In addition to the interviews identified, the MICI must hold open meetings with the affected community during the mission to Bogotá. It is important for the members of the community to be able to explain their experiences and their concerns in their own words. We would be pleased to help organize such meetings.

#### **IV. Other Comments on the Recommendation**

In addition to our main concerns, we have some brief comments about other aspects of the Recommendation’s content.

First, with regard to the timeline and the team at the end of section VI:

- a) In view of the delays already experienced in this case, we would prefer to have more details about the investigation schedule. For example, in the Terms of Reference of the Mareña Renovables Wind Project (ME-MICI002-2012), there is a detailed schedule for the mission, the review of the documents, the preparation of a draft report, etc. We suggest that a similar schedule would also be appropriate in this case.
- b) We would like to be consulted prior to the confirmation of the proposed experts. We understand that their selection is a principal responsibility of the MICI, but we ask the MICI to consider giving us the opportunity to express any concerns about, for instance, the qualifications or potential conflicts of interest of the experts. It

would be preferable, for all of the parties, to address any concerns before the experts are confirmed.

Second, we have concerns about the guidelines for the Compliance Review Phase described at pp. 5-6 of the Recommendation. The MICI states that it will base its decision on whether to recommend an investigation on the added value for the specific case, and for the IDB in general, in terms of relevance, impact, and efficiency. It is our opinion that this statement does not exactly describe the considerations that the MICI and the Board of Executive Directors should take into account. The MICI was established by the IDB to investigate the complaints of requesters alleging harm caused by the IDB's failure to observe its operational policies,<sup>17</sup> in order to enhance the transparency, accountability, and effectiveness of the IDB.<sup>18</sup> Accordingly, any guideline developed by the MICI must acknowledge:

- a) That the fundamental objective of the MICI is to investigate complaints of harm alleged by the adversely affected parties. The considerations regarding the future impacts of an investigation are relevant but should only add to, rather than diminish, the importance of the need to investigate the alleged harm in a specific case; and
- b) The importance of the IDB's values of transparency and accountability, as well as effectiveness. Currently, the guidelines do not recognize transparency and accountability as values favoring an investigation.

#### **V. Withholding Information in this Document is Potentially Unwarranted**

Finally, we express our serious concern over the decision to withhold information in the draft Recommendation. In part, we are concerned because the explanation of this decision is incomplete. In the first email, the MICI gives two reasons for withholding the information: first, because the project is a private sector loan operation; and second, because the MICI has to respect the confidentiality of the documents of third parties and only they, as owners of the information, can authorize its disclosure. In this email and in a later one, reference is made to the need for IDB Management's authorization prior to disclosure. It therefore appears that even though Management gave its authorization, it was not full authorization because information was withheld in ¶¶6.4 and 6.13.

The withholding of information is a significant impediment to our ability to understand the Recommendation and to comment effectively. In addition to the fact that we cannot read the withheld information, in each instance, the sentence immediately following the withheld information is linked expressly to the previous sentence with words such as "nevertheless" in ¶6.5 and "therefore" in ¶6.13. Consequently, the withholding of information also limits our ability to understand the logic of the subsequent sentences. Without full disclosure, we do not

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<sup>17</sup> MICI Policy, ¶5(a).

<sup>18</sup> MICI Policy, ¶2.

have a real opportunity to comment on a draft of the recommendation, in keeping with the MICI Policy, ¶40.

Under the IDB's Access to Information Policy, there is a presumption of disclosure unless there is an applicable exception. The MICI does not specify exactly which exception has been invoked here. We have identified three possible exceptions, and in each case the requirements and reasoning are different. For instance, if the MICI bases the decision on ¶4.1(b), the exception does not apply to documents meant for publication according to the MICI. The Recommendation is clearly a document meant for publication. In addition, under the new MICI Policy, the response of Management—which was withheld in the first version of the draft—would have been published with the eligibility determination, and therefore is not confidential. Also, the exceptions for information provided confidentially (in ¶4.1(e)) and for information relating to non-sovereign guaranteed operations (in ¶4.1(j)) require the authorization of the respective private entity or the borrower; however, the MICI refers to authorization from the IDB, not from OPAIN or another private entity.

Our legal advisors requested a telephone conference with the MICI Director in order to better understand this decision, but the Director prefers to hold this meeting after we provide our comments. Because of this, we are limited in our ability to comment effectively on whether the decision to withhold information is justified.

## **VI. Conclusion**

In sum, we find it appropriate that the MICI proposes to conduct this important investigation. We agree with much of the MICI's reasoning, and in particular with the acknowledgement that an investigation is necessary to examine and resolve the major differences between the assertions and opinions of IDB and the affected community.

Nevertheless, we have identified some areas in which the Recommendation is incomplete. We ask that the necessary changes be made to include this missing information. These changes are needed in order to ensure that the Board of Executive Directors can make an informed and appropriate decision and to ensure that any investigation will be complete.

Cordially,



**GLORIA C. MOLINA V.**  
Spokesperson  
Comunidades Unidas