



GREEN  
CLIMATE  
FUND

Independent  
Redress  
Mechanism

# Compliance Review Report

## Case C-0006-Nicaragua

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FP146: Bio-CLIMA: Integrated climate action to reduce deforestation and strengthen resilience in BOSAWÁS and Rio San Juan Biospheres

31 August 2022

## Executive Summary

1. The enclosed report contains the factual findings and recommendations of the compliance review process undertaken by the Independent Redress Mechanism (IRM) in relation to a complaint received regarding the Green Climate Fund (GCF) project FP146 *Bio-CLIMA*: Integrated climate action to reduce deforestation and strengthen resilience in BOSAWÁS and Rio San Juan Biospheres in Nicaragua. The accredited entity for this project is the Central American Bank for Economic Integration (CABEI). In accordance with conditions adopted by the Board when approving the project, no disbursements have been made, and project implementation has not commenced, as of the date of this report.

2. In June 2021, the IRM of the GCF received a complaint relating to FP146. The complainant(s) alleged that the project would harm indigenous and Afro-descendant communities as 1) prior to the approval of the project, there was no proper consultation with communities; 2) the project will lead to environmental degradation and attacks by armed non-indigenous settlers; 3) the Accredited Entity's actions do not seem to comply with the GCF's policies, especially on participation and information disclosure; 4) the GCF Board conditions placed on the project, especially relating to the implementation of Free Prior Informed Consent (FPIC) and to the selection of independent third party monitor(s), will not be defined and complied with effectively; and 5) the executing entity will not fulfil its obligations in the implementation of the *Bio-CLIMA* project.

3. The complainant(s) requested confidentiality, and the IRM granted confidentiality in accordance with its Terms of Reference and Procedures and Guidelines, and as a result of its retaliation risk assessment. The complaint was declared eligible in July 2021, and the case proceeded with the Initial Steps phase, where the IRM explored the options of problem solving and compliance review with the complainant(s) and other stakeholders. At the conclusion of this phase (extended to 180 days from the original 60 days), parties were unable to reach an agreement on substantive matters relating to the framework and process design of a dialogue before the deadline. In these circumstances, in January 2022, the IRM referred the complaint to compliance review for further processing. Subsequently, the IRM requested the GCF Secretariat to provide a response to the complaint, and a response was submitted on 3 March 2022. Having received the response, the IRM undertook its compliance appraisal process culminating in a compliance appraisal report, published on 24 March 2022. The IRM subsequently commenced a compliance investigation to further assess the three topics related to compliance with GCF policies and procedures:

- (a) Will indigenous and vulnerable populations face increased violence, including gender-based violence, from non-indigenous settlers through non-compliance with GCF Interim Environmental and Social Standards, GCF Environmental and Social Policy, GCF Indigenous Peoples Policy and Updated Gender Policy?
- (b) Have the rights of indigenous communities to "Free, Prior and Informed Consent" been violated or will such rights be violated in the future by non-compliance of the project with GCF's Interim Environmental and Social Standards, GCF Environmental and Social Policy, and GCF Indigenous Peoples Policy?
- (c) Will Afro-descendant and indigenous communities face increased usurpation of lands titled to them and restrictions to access natural resources due to non-compliance of the project with GCF Interim Environmental and Social Standards, GCF Environmental and Social Policy, and GCF Indigenous Peoples Policy?

4. In conducting the compliance investigation, the IRM examined whether the GCF funded project or programme complied with applicable GCF operational policies and procedures and whether such non-compliance has caused or may cause adverse impacts to the complainant(s). The IRM constituted an investigation team led by the Head of the IRM and contracted the

services of two subject experts who were specialists in the fields of Indigenous People's governance and on Indigenous Peoples and land titling matters.

5. The IRM investigation team gathered information through 9 virtual interviews with the GCF Secretariat staff and accredited entity staff, who had knowledge of and responsibilities for the project, as well as for environmental and social safeguards. The IRM also undertook interviews with external experts on conflict sensitivity and indigenous peoples in Nicaragua. Additionally, some members of the IRM investigation team as well as the problem-solving team conducted a mission to Nicaragua from 20-30 June 2022, and separately held in-person and virtual meetings with the complainant(s) and other indigenous peoples from 14-19 June 2022. The IRM investigation team met with the complainant(s) and several indigenous witnesses introduced by them, over a period of 5 days, comprising 19 meetings with dozens of individuals. While on mission in Nicaragua, the IRM team met with the accredited entity's country office staff, officials affiliated with 6 agencies and ministries of the Nicaraguan Government and Presidents of some Indigenous Peoples Governments as well as with experts knowledgeable about indigenous people in Nicaragua.

6. Based on the findings in this report, the IRM found non-compliance of the project on all three issues as follows:

- (a) The IRM finds that there are ongoing recurrent violent conflicts of a serious nature in the project areas, especially in the north. The IRM also found the human rights situation relating to indigenous people in the project areas problematic in certain respects detailed in the report, and that this situation will likely impact the implementation of the project, particularly when conducting informed consultation and participation, and FPIC of indigenous communities. The IRM finds that due diligence under the GCF's safeguards required proper data gathering and assessment through a conflict sensitivity analysis report and a human rights due diligence report. These reports ought to have been prepared during the design phase of the project but have instead been postponed and will be carried out at a later stage when sub-projects are developed under the project. The IRM finds that this constitutes non-compliance with GCF safeguard policies and procedures and that it may adversely impact the complainant(s) and other indigenous communities in the project areas.
- (b) The IRM finds that the GCF's safeguard provisions on informed consultation and participation (ICP) required in every GCF project have not been complied with in the *Bio-CLIMA* project. ICP involving indigenous people is often the beginning of the process leading to FPIC. In the *Bio-CLIMA* project, key aspects about the project, especially dealing with peaceful co-habitation regime agreements (PCRAs) should have been adequately disclosed and consulted with indigenous communities. The GCF's guidelines under the Indigenous Peoples Policy requires a "framework agreement" to be developed as part of such consultations setting out how, when and where FPIC will be conducted and the disclosure of key elements of the project. There is no evidence of such a framework being discussed as part of project disclosures and consultations with indigenous peoples. While the *Bio-CLIMA* project promises FPIC will be conducted at the sub-project level, the mandatory informed consultation and participation (ICP) process required under GCF safeguards prior to this project being presented to the Board for approval has not been conducted as expected. The IRM finds this to be non-compliance and one that has and will adversely impact the complainant(s) and other indigenous communities in the project areas.
- (c) The IRM finds that proper due diligence in the form of adequate disclosure and consultations has not been done regarding the project to assess the impact of peaceful cohabitation regime agreements (PCRAs) on indigenous communities and former indigenous occupiers who have been displaced by non-indigenous settlers (*colonos*), especially with regard to the right to compensation for loss of access to land and

resources caused by some *colonos* who will receive benefits under *Bio-CLIMA*. This is non-compliance under GCF safeguard policies and may adversely impact the complainant(s) and other indigenous communities in the project areas.

7. In light of these findings, the IRM recommends the following actions to bring the project back into compliance with GCF policies and procedures: (1) prepare a conflict sensitivity analysis at the project framework level as set out in paragraph 186 of this report; (2) prepare a human rights due diligence report as set out in paragraph 187 of this report; (3) carry out a meaningful informed consultation and participation (ICP) process with indigenous communities in the project areas as set out in paragraphs 180 and 188-89 of this report; (4) modify the Board's conditions so that the GCF Secretariat holds approving authority for the selection of the third-party monitor; and (5) request the GCF Secretariat to prepare a remedial action plan. These recommendations are set out in more detail in Section VIII of this report.

8. The IRM has also made recommendations based on lessons learned from this case with regard to the need for policy guidance from the Board on developing projects/programmes in conflict and post conflict areas and fragile states (paragraph 194 of this report) and regarding the Sustainability Unit of the Secretariat.



## Abbreviations

Abbreviation	Definition
AE	Accredited Entity
AWB	Alto Wangki Bocay (Special area in the Department of Jinotega)
BP	Business Plans
CABEI	Central American Bank for Economic Integration
CEJUDHCAN	Centro por la Justicia y Derechos Humanos de la Costa Atlántica de Nicaragua
EE	Executing Entity
ENDE-REDD+	National Strategy for Avoided Deforestation (Nicaragua)
ER Program	Caribbean Coast Emissions Reduction Program
ESIA	Environmental and Social Impact Assessment
ESMF	Environmental and Social Management Framework
ESP	Environmental and Social Policy of the GCF
ESS	Environmental and Social Safeguards
FAA	Funded Activity Agreement
FAO	Food and Agriculture Organization
FCPF	Forest Carbon Partnership Facility
FP	Funding Proposal for the project
FPIC	Free, Prior, and Informed Consent
GAP	Gender Action Plan
GCF	Green Climate Fund
GRM	Grievance Redress Mechanism
GTI	Indigenous Territorial Governments
IACHR	InterAmerican Commission on Human Rights
IACtHR	InterAmerican Court of Human Rights
ICP	Informed Consultation and Participation
IDP	Information Disclosure Policy of the GCF
IFC	International Finance Corporation
ILO	International Labour Organization
INAFOR	National Forestry Institute (Nicaragua)
IP	Indigenous Peoples
IPP	Indigenous Peoples Policy of the GCF
IPPF	Indigenous Peoples Planning Framework
IRM	Independent Redress Mechanism
LUMPs	Land Use Management Plans
MARENA	Ministry of Environment and Natural Resources
MHCP	Ministry of Finance and Public Credit
NACLA	North American Congress on Latin America
OHCHR	Office of the United Nations High Commissioner for Human Rights
PCRA	Peaceful Cohabitation Regime Agreement
PGs	Procedures and Guidelines of the Independent Redress Mechanism
PS	IFC Performance Standards on Environmental and Social Sustainability
RACCN	Autonomous Region of the Caribbean North Coast
RACCS	Autonomous Region of the Caribbean South Coast
REDD+	Reduced Emissions from Deforestation and Forest Degradation
TDP	Territorial Development Plans
TOR	Terms of Reference of the Independent Redress Mechanism
UGP	Updated Gender Policy of the GCF
UN	United Nations
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples
UNESCO	United Nations Educational, Scientific and Cultural Organization



Abbreviation	Definition
USD	US Dollars
WB	World Bank

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## I. Introduction

1. On 30 June 2021, the Independent Redress Mechanism (IRM) received and acknowledged a complaint (see section III below) regarding the Green Climate Fund (GCF) funded project FP146 – “*Bio-CLIMA: Integrated climate action to reduce deforestation and strengthen resilience in BOSAWÁS and Rio San Juan Biospheres*” – in Nicaragua. The Accredited Entity (AE) for the project is the Central American Bank for Economic Integration (CABEI). As of the date of this report, no funds have been disbursed for the project and no project activities have been carried out. This is the compliance review report of the Independent Redress Mechanism to the Board (IRM) of the GCF, following its compliance investigation into the complaint.

## II. Project background

### 2.1 Description of the project

2. On 13 November 2020, the GCF Board approved FP146 “*Bio-CLIMA: Integrated climate action to reduce deforestation and strengthen resilience in BOSAWÁS and Rio San Juan Biospheres*” (B.27/01) with conditions imposed by the Board (“Board Conditions”).<sup>1</sup> The project aims to promote sustainable land-use management and forest management to ultimately restore degraded forest landscapes in the Bosawás and Rio San Juan Biosphere Reserves in the Caribbean Region of Nicaragua. The accredited entity (AE) of this project is the Central American Bank for Economic Integration (CABEI), and the Executing Entity (EE) is the Government of the Republic of Nicaragua, acting through its Ministries of Environment and Natural Resources (MARENA) and Finance and Public Credit (MHCP).

3. The total project cost is USD 116.6 million, which includes GCF funding (grant and loan) and co-financing amounting to USD 64.1 million. The project is co-financed with loans from the AE totalling USD 44.3 million, and with grants from the Global Environment Facility (GEF) of USD 8.3 million. The Funding Proposal (FP) contextualises the project as part of Nicaragua’s programmatic approach to implement its National REDD+ Strategy.<sup>2</sup>

4. According to the FP, the project seeks to reduce emissions by addressing deforestation in the Caribbean Region of Nicaragua, a region that covers 54 per cent of the national territory, contains 80 per cent of Nicaragua’s forests and is home to most of the country’s indigenous populations. The target project locations - Autonomous Region of the Caribbean North Coast (RACCN), Autonomous Region of the Caribbean South Coast (RACCS), Alto Wangki/Bocay Region, and Río San Juan Department - are important areas for the conservation of biodiversity and the livelihoods and cultures of indigenous and Afro-descendant peoples.

5. The project aims to fulfil its objectives through (i) investments for sustainable landscape restoration and management; (ii) the creation of an enabling investment environment; and (iii) strong local capacities for territorial governance and law enforcement. The project is expected to support 95 sub-projects in sustainable community enterprises for business plan preparation and 98 sub-projects for sustainable forest management and harvesting. A total of approximately 165 sub-projects are expected to be implemented to support commercial and community forest restoration efforts.

6. The Funded Activity Agreement (FAA) for the project was executed on 11 August 2021, and subsequently, came into effect on 9 December 2021. The FAA reflected the Board

<sup>1</sup> See page 17-19, Decisions of the Board – twenty-seventh meeting of the Board, <https://www.greenclimate.fund/sites/default/files/document/gcf-b27-22.pdf>

<sup>2</sup> Funding Proposal, <https://www.greenclimate.fund/document/bio-clima-integrated-climate-action-reduce-deforestation-and-strengthen-resilience-bosaw-s>



Conditions. As of the date of this report, no disbursement of GCF funds have been made to CABEL for the project, and project activities have not yet commenced in the project areas. The GCF Secretariat gave the AE until 7 June 2022 to fulfil the Board's conditions. The deadline for first disbursement by the GCF to CABEL has been extended by another 180 calendar days until 4 December 2022, at the request of the AE to allow the AE to fulfil the conditions required for the first disbursement, which includes the requirements under the Board Conditions.

## 2.2 Description of the project area

7. There are 74 protected areas in Nicaragua, with a total area of 2,208,786 hectares, equivalent to 17 per cent of the country's land surface.<sup>3</sup> Only two of the protected areas are national parks that are on state-owned land: Cerro Saslaya (established in 1971) and Volcan Masaya National Park (established in 1979). All the remaining protected areas have been declared on areas held by or titled to private landowners, companies, cooperatives and/or indigenous peoples.

8. The BOSAWAS protected area was established in 1979 – the name is derived from the three areas that comprise the reserve: Rio Bocay, Cerro Saslaya and Rio Waspuk. It is the largest forest reserve in Central America, combining humid tropical and cloud forests, and reaches 1650 meters above sea level at its highest point. It is drained by the Rios Bocay and Waspuk, headwaters of the Rio Coco, the lower reaches of which mark the boundary between Nicaragua and Honduras. In 1997, BOSAWAS was declared a Biosphere Reserve by UNESCO.

9. The BOSAWAS and Rio Platano Biosphere Reserve in Honduras and their buffer and transition zones form a contiguous block of nearly 50,000 km<sup>2</sup> (30,000 km<sup>2</sup> in Honduras and 20,000 km<sup>2</sup> in Nicaragua) of land area. The BOSAWAS Biosphere Reserve has a core area (zona núcleo) of 329,800 hectares, a buffer zone of 523,700 hectares and 1,328,000 hectares of transition zone. The reserve is characterised by its exceptional biodiversity, due to its location at a meeting point of the North and South American continents. It is estimated that 13 per cent of all the world's species can be found in the reserve.<sup>4</sup>

10. The Rio San Juan Biosphere Reserve, on the Rio San Juan – which flows from Lake Cocibolca into the Caribbean and marks the boundary between Nicaragua and Costa Rica – was designated a Biosphere Reserve by UNESCO in 2003. It is the second-largest reserve in Nicaragua and comprises various protected areas and historical monuments and their adjacent territories, most of which were established in 1999. It is in the Autonomous Region of the South Caribbean Coast (RACCS – Región Autónoma de la Costa del Caribe Sur) and the eastern part of the Rio San Juan department. It is part of the Mesoamerican Biological Corridor, with a total area of 1,392,900 hectares, comprising a core area of 357,800 hectares, 520,500 hectares of buffer zone and 514,600 hectares of transition zone.<sup>5</sup>

11. The Rio San Juan Biosphere Reserve includes the Rio San Juan Wildlife Refuge – 43,000 hectares of wetlands comprising estuaries and shallow marine waters, freshwater lagoons and inter-tidal marshlands as well as permanent lakes and rivers, which was declared a Ramsar Wetland site in 2001. It also includes the Indio Maíz Biological Reserve, which takes its name from the two main rivers – the Rios Indio and Maíz – that drain the reserve. It comprises 263,980 hectares of wetlands and lowland forest.<sup>6</sup>

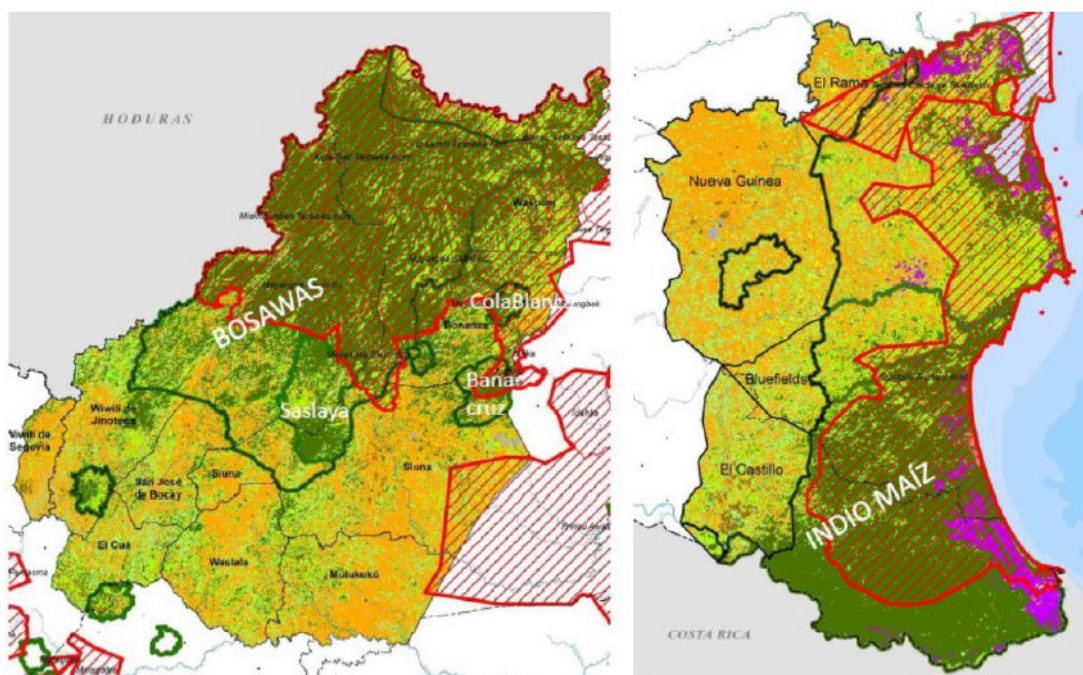
<sup>3</sup> Information from paragraph 7-11 of the report is based on an IRM expert consultant report.

<sup>4</sup> UNESCO, <https://en.unesco.org/biosphere/lac/bosawas>

<sup>5</sup> UNESCO, <https://en.unesco.org/biosphere/lac/rio-san-juan>

<sup>6</sup> Data from Ramsar Wetland, <https://rsis Ramsar.org/rsis/1138>, UNESCO, <https://en.unesco.org/biosphere/lac/rio-san-juan>, and SINAP (National System of Information on Protected Areas).

12. Note that the title of the GCF project (FP146) is “*Bio-CLIMA: integrated climate action to reduce deforestation and strengthen resilience in the BOSAWAS and Rio San Juan Biospheres*” – referring to the broader Rio San Juan Biosphere Reserve. However, the investment component - Component 1 – of the project, is limited to the core areas of the BOSAWAS and Indio Maíz Biological Reserve, as well as 12 Miskitu communities in Waspam and Prinzapolka – and does not envisage investment in the other areas that constitute the Rio San Juan Biosphere Reserve.



**Figure 1:** Map of BOSAWAS (left) and Indio Maíz (right): Protected area core zone (limits in dark green) and indigenous territories (red lines) (Source: ESMF)

### III. Summary of the complaint

13. On 30 June 2021, the IRM received and acknowledged a complaint regarding GCF funded project FP146 – “*Bio-CLIMA: Integrated climate action to reduce deforestation and strengthen resilience in BOSAWÁS and Rio San Juan Biospheres*” – in Nicaragua. The Accredited Entity (AE) for the project is the Central American Bank for Economic Integration (CABEI). The complainant(s) requested confidentiality, and the IRM granted it in accordance with its Terms of Reference (TOR)<sup>7</sup> and Procedures and Guidelines (PGs),<sup>8</sup> and because of its own retaliation risk assessment.<sup>9</sup>

14. The full text of the complaint, redacted as needed to ensure confidentiality, is available in Annex I and is only being made available to the Board of the GCF on a limited circulation basis, given concerns about retaliation. In summary, the complainant(s) alleged that the project has and would harm indigenous and Afro-descendant communities in the BOSAWÁS and Rio San Juan Biospheres and surrounding areas where the project is to be implemented, as:

<sup>7</sup> See paragraph 11, 2017 IRM Terms of Reference, <https://irm.greenclimate.fund/document/irm-tor>

<sup>8</sup> See paragraph 29 and 97, 2019 Procedures and Guidelines of the IRM, <https://irm.greenclimate.fund/document/2019-procedures-and-guidelines-irm>

<sup>9</sup> *Ibid*, paragraphs 80-83 and Supporting Operating Procedure on Retaliation, <https://irm.greenclimate.fund/document/supporting-operating-procedures-irm-retaliation>

- (a) prior to the approval of the project, there was no proper disclosure of project information and consultation with indigenous communities, including no free, prior, and informed consent (FPIC);
- (b) the project will lead to environmental degradation and invasions of territories titled to indigenous communities and violent attacks by armed non-indigenous settlers;
- (c) the indigenous communities affected by this project have been victims of multiple attacks, and the communities fear that this project, as constituted at present, could further increase these violent attacks;
- (d) the AE's actions do not seem to comply with the GCF's policies, especially on participation and information disclosure;
- (e) the GCF Board conditions placed on the project, especially relating to the implementation of FPIC and to the selection of an independent third-party monitor, will not be defined and complied with effectively by the AE and the executing entities (EEs); and
- (f) the EE will not fulfil its obligations in the implementation of the Bio-CLIMA project – FP146.

#### IV. IRM mandate and procedures and procedural history of the case

15. **IRM mandate and procedures:** Under the Procedures and Guidelines (PGs) of the IRM, a compliance review consists of three phases. The first phase is the preparation of a compliance appraisal report in which the IRM assesses if there is *prima facie* evidence of non-compliance of the project or programme with GCF policies and procedures, and whether such non-compliance has or may cause harm to the complainant(s). Where the appraisal report finds that there is such evidence, the IRM launches a compliance investigation based on the terms of reference set out in the compliance appraisal report (second phase of compliance review).

16. At the conclusion of the compliance investigation, the IRM prepares a draft compliance review report (third phase of compliance review). The draft compliance review report sets out the complaint, assesses the evidence gathered during the investigation, and makes findings and recommendations. The draft compliance review report is then sent to the complainant(s), the Secretariat and, where appropriate, to the AE for comment and feedback to be received by the IRM no later than 21 calendar days after the draft report has been shared. After such feedback, the IRM revises the report and presents it to the Board for a decision. The IRM's compliance review report is made public within 10 days of the Board's decision on the report.

17. Under paragraphs 11 and 13(d) of the updated TOR of the IRM, the mandate from the GCF Board for compliance review is for the IRM to investigate and determine "if the project/programme-affected person has or persons or communities have encountered or may encounter adverse impacts through the failure of the project or programme funded by the GCF to comply with the GCF's operational policies and procedures, including environmental and social safeguards" and "prepare a report for the Board's consideration, including, where appropriate, recommendations on possible remedial actions..."

18. In assessing whether a project or programme has complied with the operational environmental and social safeguard policies and procedures of the GCF, as well as the Indigenous Peoples Policy, the question of whether due diligence was performed as required by the policies and procedures, naturally arises for consideration. Since the IRM's mandate is to examine whether the project has complied with the policies and procedures of the GCF, the IRM must examine the collective due diligence performed in this regard by the GCF and the AE during the design and implementation of the project. It must be noted that the complaint in this case was made right after the Board approval of the project and before the FAA was signed.

Since then, no disbursements of funds have been made and project implementation has not taken place. For this reason, the IRM's compliance review triggered by this complaint is confined to assessing compliance with GCF policies and procedures during the design and development phases of the project, up to its presentation for Board approval.

19. The GCF's role is firmly rooted in what constitutes "second level due diligence."<sup>10</sup> The GCF Secretariat conducts "second-level"<sup>11</sup> environmental and social due diligence, while "primary due diligence" is performed by the AE during the design and implementation stages of a project. This division of labour is further explained and clarified in the Environmental and Social Policy as well as the Indigenous People's Policy of the GCF adopted by the Board, with specific references to what is expected of the AE and the GCF. In the IRM's view, the objective of the Secretariat's due diligence is more encompassing than a light check of the work done by the AEs, considering the complexity of projects, agency issues with the AEs, and potential capability challenges of the AEs.

20. The Appraisal Guidance<sup>12</sup> recently published by the Secretariat defines "Secretariat due diligence" as "a process undertaken by the GCF Secretariat to assess the details of a proposed funding opportunity to ensure its adherence to required assurances and fiduciary standards of care and to the GCF mandate. This part of the appraisal process also seeks to identify any relevant risks, including technical, financial, environmental, and social risks, and to ensure consistency with the relevant GCF policies and procedures. The Secretariat relies, for these purposes, on the due diligence and appraisal conducted by the AE, and may, at any stage of its own due diligence and appraisal process, request specific clarification, information and/or additional documents from the AE."<sup>13</sup>

21. According to the GCF's Risk Appetite Statement, the GCF has a "moderate risk tolerance" in relation to environmental and social risk.<sup>14</sup> In the IRM's view, the obligation to assess risks must include adequate due diligence, as well as the provision of adequate and robust information to Board members and active observers so that they may make rational, well-informed decisions about projects. In the view of the IRM, for this model of project preparation and implementation to work well, it is essential that AEs act with the utmost good faith and disclose to the GCF Secretariat all the relevant positive and negative facts pertaining to a proposed project, so that the Secretariat can perform its functions under the GCF's policies and procedures. The GCF Secretariat must be able to rely on the accuracy and veracity of project related information provided by the AE to do its job well. This is particularly important because under the current model, the ways and means available to the Secretariat to verify the accuracy and veracity of project related information supplied by an AE, are limited and constrained.

22. As with other projects, in this project the GCF was required to assess the project against two key criteria: a) "assess... proposals for completeness of documentation" and b) "assess compliance with the GCF interim environmental and social safeguards, Gender policy, financial policies and any other policies promulgated by the Board."<sup>15</sup> Although *Bio-CLIMA* is referred to

<sup>10</sup> See Page xx, GCF Programming Manual, <https://www.greenclimate.fund/document/programming-manual>. Second-level due diligence is a "comprehensive assessment undertaken by the Secretariat, as per decision B.07/03, in respect of funding proposals, which seeks to identify any relevant risks, such as financial, environmental and social, compliance and legal risks, and to ensure consistency with the relevant GCF policies and procedures. As a result of this assessment, GCF may request specific clarification, information and/or additional documents from the AE. For these purposes, the Secretariat relies and bases its assessment on the first-level due diligence conducted by the AE"

<sup>11</sup> GCF project and Program Activity Cycle: GCF Board decision B.07/03, annex VII and Project and Program Monitoring Framework, <https://www.greenclimate.fund/document/monitoring-and-accountability-framework-accredited-entities>. Also see, Decision B.12/31 paragraph (e)), Annex XVII paragraph II. "Due Diligence".

<sup>12</sup> Appraisal Guidance, <https://www.greenclimate.fund/sites/default/files/document/gcf-appraisal-guidance.pdf>

<sup>13</sup> *Ibid.*

<sup>14</sup> Risk appetite statement (Component II): GCF Board decision B.17/11, paragraph (a) (ii), annex VI

<sup>15</sup> Updated Programme and project Cycle, <https://www.greenclimate.fund/document/updated-project-and-programme-cycle>



as a project in the funding proposal, it is the IRM's understanding that it was treated as a programme – in that the proposal establishes broad goals and criteria for sub-project development. Unlike in a project, which has a clear set of activities for which funding is provided, in a programme, a framework approach is adopted and specifies some decisions that need to take place before the sub-projects and exact sites are chosen. In the *Bio-CLIMA* project – the safeguard requirements of FPIC for indigenous communities and conflict sensitivity analysis are specified to be carried out for around 165 sub-projects that are to be developed and implemented after project approval.

23. Because the *Bio-CLIMA* project was treated as a programme/framework (or a project with sub-projects), the due diligence on social and environmental safeguards was sought to be achieved through a framework approach, i.e., at the stage of crafting the funding proposal, a fully articulated system to catalogue, manage and mitigate site-specific environmental and social impact assessments, including components related to a conflict sensitivity analysis was required. Therefore, it was not considered necessary and possible to conduct detailed social and environmental assessments or undertake sub-project specific FPIC or a conflict sensitivity analysis until project locations were determined and the indigenous people affected were identified, and sub-project level Environmental and Social Impact Assessments (ESIAs) and Environmental and Social Management Plans (ESMPs) were produced. GCF Secretariat staff, therefore, emphasised that their responsibilities are to ensure that the AE has the proper systems, frameworks and processes in place to implement sub-projects, including additional site-specific impact assessments, conflict analyses and FPIC and that further due diligence would have to be undertaken when ESIAs and ESMPs were submitted by the AE for the sub-projects, as is the case for all sub-projects under GCF approved programmes.

24. **Procedural history:** On 21 July 2021, the IRM determined that the complaint was eligible under paragraphs 20-21 and 23-24 of its PGs.<sup>16</sup> At the eligibility stage, the IRM determined that the complainant(s) are from the indigenous and Afro-descendant communities of Nicaragua, and that they are or may be affected by GCF Funded project FP146. Subsequently, the IRM began engaging with the complainant(s) and other stakeholders in the initial steps phase, to further evaluate the issues in the complaint and to provide information on the options available regarding the processing of the complaint.

25. As part of this process, the IRM's Compliance and Dispute Resolution Specialist met with the complainant(s) and undertook a mission to Central America in the fourth quarter of 2021 to meet with several stakeholders and conducted virtual online consultations with the government of Nicaragua, and both virtual and in-person consultations with the AE and GCF staff. At the conclusion of these meetings, parties initially agreed to engage in problem-solving, facilitated by the IRM. However, despite the extended 180 days provided (exceeding the 60 days normally allowed for this purpose by the PGs) the parties were unable to agree on the content and issues for mediation. Consequently, the complaint was referred to compliance review on 17 January 2022.<sup>17</sup>

26. Following the referral of the complaint to compliance review, on 31 January 2022, the IRM requested the GCF Secretariat to provide a response to the complaint within twenty-one days i.e., on or before 21 February 2022, in accordance with the PGs. On 31 January 2022, the IRM also informed the AE and the National Designated Authority (MHCP) that it had requested a response to the complaint from the Secretariat and to liaise with the Secretariat regarding the issue. On 7 February 2022, the Secretariat also wrote to the AE asking it to liaise with the Secretariat in preparation of its response.<sup>18</sup>

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<sup>16</sup> Supra, fn 7.

<sup>17</sup> See the initial steps report of the IRM, <https://irm.greenclimate.fund/sites/default/files/case/initial-steps-report-nicaragua-01-2022.pdf>

<sup>18</sup> The Secretariat submitted a copy of its communication to the AE as part of its response.

27. In addition to the issues raised in the complaint, the IRM identified the following potential non-compliance of the project with GCF's operational policies and procedures by the GCF Secretariat and/or the AE and/or the EE, which, if proven, may potentially adversely affect the complainant(s):

- (a) Non-compliance with either a part or whole of the GCF's Interim Environmental and Social Safeguards [Performance Standards of the International Finance Corporation] (Decision B.07/02, paragraph (c) and Annex III), in particular with performance standards 1, 3, 4, 5, 6 and 7;
- (b) Non-compliance with either a part or whole of the GCF's Environmental and Social Policy (as originally adopted by Decision B.19/10, paragraph (b) and annex X), in particular with paragraphs 8(a), (i), (m), (p), and (q), 12(b), 13, 14(a)(v), 16-18, 26-27, 37-38; 47-48, 60, 62-63, 67, 69, and 78;
- (c) Non-compliance with either a part or whole of the GCF's Indigenous Peoples Policy (Decision B.19/11 of Annex XI), in particular with paragraphs 26-27, 31, 35, 44, 46, 48, 51, 52, 58, and 60 and paragraph 39 of the Operational Guidelines issued by the Secretariat under said policy; and
- (d) Non-compliance with either a part or whole of the GCF's updated Gender Policy (Decision 24/12), in particular with paragraphs 5, 20, 21, 22 and 25.

28. As indicated in the PGs, the Secretariat was requested to provide information: (i) related to the factual statements and allegations in the complaint; (ii) about the steps taken by the GCF Secretariat to ensure compliance with applicable GCF operational policies and procedures, including those identified by the complainant(s) or IRM; and (iii) about remedial actions, if any, that the GCF Secretariat may have taken or intends to take to ensure compliance with such policies or procedures, as appropriate.

29. On 21 February 2022, the GCF Secretariat requested an extension of time to submit its response, citing the following reasons: a) challenges related to COVID-19 working arrangements within the GCF Secretariat; and b) more time required for interdivisional collaboration and effort within the Secretariat to prepare the response. Acting in terms of paragraph 95 of the PGs, the IRM extended the period for the Secretariat to provide a response from 21 February 2022 to 3 March 2022 (10 calendar days). On 3 March 2022, the GCF Secretariat submitted a response to the complaint. A copy of the Secretariat Response is in Annex II and summarised below. The annexes attached to the Secretariat response have been removed for convenience and confidentiality reasons. Non-confidential annexes can be shared upon request. In its response, the Secretariat explained how it conducted its due diligence and what risk mitigation measures are in place to safeguard future risks, and that the Secretariat deems that it has complied with the policies and procedures as of the date of the complaint and response.

30. Upon receipt of the Secretariat's response to the complaint, the IRM commenced a compliance appraisal. The Compliance Appraisal Report was published on 24 March 2022 and found that there was *prima facie* evidence that the complainant(s) had been affected or may be affected by adverse impacts through non-compliance of the project with GCF operational policies and procedures.<sup>19</sup> Accordingly, the IRM decided to conduct a compliance investigation and in the appraisal report set out the following three questions as the focus and terms of reference of the compliance investigation, to be determined by reviewing compliance of the project during the design phase and up to the point of approval of the project by the Board:

- (a) Will indigenous and vulnerable populations face increased violence, including gender-based violence, from non-indigenous settlers through non-compliance with GCF Interim

<sup>19</sup> Compliance Appraisal Report, <https://irm.greenclimate.fund/sites/default/files/case/compliance-appraisal-report-publication-c0006.pdf>

Environmental and Social Standards, GCF Environmental and Social Policy, GCF Indigenous Peoples Policy and Updated Gender Policy?

- (b) Have the rights of indigenous communities to “Free, Prior and Informed Consent” been violated or will such rights be violated in the future by non-compliance of the project with GCF’s Interim Environmental and Social Standards, GCF Environmental and Social Policy, and GCF Indigenous Peoples Policy?
- (c) Will Afro-descendant and indigenous communities face increased usurpation of lands titled to them and restrictions to access natural resources due to non-compliance of the project with GCF Interim Environmental and Social Standards, GCF Environmental and Social Policy, and GCF Indigenous Peoples Policy?

31. Pursuant to the compliance appraisal report, on 24 March 2022, the IRM commenced a compliance investigation. In preparation for the compliance investigation, the IRM constituted an investigation team led by the Head of the IRM, and in addition consisting of the Registrar and Case Officer of the IRM, the Executive Assistant of the IRM, two (2) supporting interns and two (2) subject experts. The two subject experts were specialists in the fields of Indigenous People’s governance and on Indigenous People and land titling. The IRM investigation team, including the IRM staff and the two experts, reviewed the GCF Secretariat’s project documentation, documents submitted by the AE and assessments and emails archived by GCF Secretariat staff. It also gathered information through 9 virtual interviews with the GCF Secretariat staff and AE staff, who had knowledge of and responsibilities for the project, as well as for environmental and social safeguards. The IRM also undertook interviews with external experts on conflict sensitivity analysis and indigenous peoples in Nicaragua. Additionally, some members of the IRM investigation team as well as the problem-solving team conducted a mission to Nicaragua from 20-30 June 2022, and separately held in-person and virtual meetings with the complainant(s) and other indigenous peoples from 14-19 June 2022. The IRM investigation team also met with the complainant(s) and several indigenous witnesses introduced by them, over a period of 5 days, comprising 19 meetings with dozens of individuals. While on mission in Nicaragua, the IRM team met with the AE’s country office staff, officials affiliated with 6 agencies and ministries of the Nicaraguan Government and Presidents of some Indigenous Peoples Governments as well as with experts knowledgeable about indigenous people in Nicaragua. The IRM also requested the GCF Secretariat and the AE’s staff as well as officials of the Nicaraguan Government and the complainant(s) to provide supplementary documentation and written responses to questions which could not be fully addressed during the interviews, or which required further elucidation and details.

32. Having concluded the investigation, the IRM investigation team developed a draft compliance review report which was shared with the complainant(s), the GCF Secretariat and the AE on 3 August 2022 for comments and feedback as required by the PGs. The complainant(s), the GCF Secretariat and the AE provided their comments and feedback on the draft compliance review report on 24 August 2022. Additionally, the IRM advised CABEI to share the draft report with the Government of Nicaragua and to communicate their feedback to the IRM. CABEI has submitted the Government of Nicaragua’s comments to the IRM. The IRM revised the draft compliance review report having taken all the said comments and feedback into due account and has produced this final compliance review report for presentation to the Board. During the investigation, the IRM also continued to facilitate the parties to mediate their dispute, and despite progress being made, the parties have not been able to agree to enter into a mediation agreement as of the date of this report. The IRM has therefore ended its efforts to mediate this dispute.

## V. Summary of the response from the GCF Secretariat

33. As stated earlier in this report, on 31 January 2022, the IRM requested the GCF Secretariat to provide a response to the complaint on the following areas as per the PGs:
- (a) related to the factual statements and allegations contained in the grievance or complaint;
  - (b) about the steps taken by the GCF Secretariat to ensure compliance with applicable GCF operational policies and procedures, including those identified by the complainant or IRM; and
  - (c) about remedial actions, if any, that the GCF Secretariat may have taken or intends to take to ensure compliance with such policies or procedures, as appropriate.
34. On 3 March 2022, the GCF Secretariat submitted a response to the complaint (Annex II - redacted). In summary, in its response, the Secretariat highlighted that project implementation had not started, and no disbursement of funds had been made to the AE at the time of the complaint and at the time of response. The Secretariat stated that the project complied with the relevant GCF policies and procedures at the time of FP review and approval. The Secretariat's second-level due diligence has identified the risks stated in the complaint, and that the risk mitigation measures built in the environmental and social safeguard instruments of the project are adequate and will be implemented and monitored when the actual project implementation starts. The Secretariat maintained that the project complied with the operational policies and procedures of the GCF applicable to the matters raised in the complaint, as assessed by the Secretariat in its second-level due diligence and review of the funding proposal submitted by the AE. The Secretariat stated that the project has complied with applicable GCF policies and procedures concerning stakeholder engagement, consultation, and FPIC, at the development and approval stages of the project. The Secretariat stated that in its assessment, the Environmental and Social Management Framework (ESMF) submitted by the AE as part of the funding proposal adequately addressed the key issues and risks relating to GCF's interim Environmental and Social Safeguards (ESS) at the framework level, including safeguard 1: "Assessment and Management of Environmental and Social Risks and Impacts", 3: "Resource Efficiency and Pollution Prevention", 4: "Community Health, Safety, and Security", 5: "Land Acquisition and Involuntary Resettlement", and 7: "Indigenous Peoples". Regarding transparency, the Secretariat stated that the AE has complied with the Information Disclosure Policy (IDP) and the Environmental and Social Policy (ESP) in respect to disclosure of environmental and social reports of the project.
35. The Secretariat also noted its role in actively monitoring the Board conditions linked to disbursement. The response stated that where gaps or weaknesses exist, the Secretariat will require that the AE address these concerns, so an effective system is put in place before the first disbursement and before GCF-financed activities are implemented on the ground. Regarding remedial actions undertaken by the Secretariat (if any), the response stated that as the Secretariat views the project to be in compliance with GCF's operational policies and procedures thus far, there is no basis for taking any remedial action, and that the Secretariat has put in place increased monitoring of the project to prevent any non-compliance. In its response, the Secretariat detailed the various steps and assessments it undertook as part of its due diligence.

## **VI. Discussion of evidence and findings of the IRM on issues raised in the complaint**

36. In the following paragraphs, the IRM (a) sets out the applicable GCF operational policies and procedures, (b) provides the evidence and information gathered on each of the three issues set out in the terms of reference for the compliance investigation, and (c) discusses the evidence, makes findings and develops remedial recommendations, where appropriate.



37. According to the terms of reference set out in the compliance appraisal report, the IRM will assess if there has been partial or whole non-compliance against the following GCF Operational Policies and Procedures:

- (a) GCF Interim Environmental and Social Safeguards (the International Finance Corporation (IFC) Performance Standards (PS) on environmental and Social Sustainability)
  - (i) PS 1: Assessment and Management of Environmental and Social Risks and Impacts. The objectives of PS1 are to identify and evaluate environmental and social risks and impacts of the project; to adopt a mitigation hierarchy to anticipate and avoid, or where avoidance is not possible, minimise, and, where residual impacts remain, compensate/offset for risks and impacts to workers, Affected Communities, and the environment; to promote improved environmental and social performance of clients through the effective use of management systems; to ensure that grievances from Affected Communities and external communications from other stakeholders are responded to and managed appropriately; to promote and provide means for adequate engagement with Affected Communities throughout the project cycle on issues that could potentially affect them; and to ensure that relevant environmental and social information is disclosed and disseminated.<sup>20</sup> More specifically:
    - (1) Do the environmental and social assessments conducted for the project sufficiently incorporate the identification of risks and impacts; emergency preparedness and response and stakeholder engagement?<sup>21</sup>
    - (2) Did the identification of risks and impacts take into account the findings and conclusions of related and applicable plans, studies, or assessments prepared by relevant government authorities or other parties that are directly related to the project and its area of influence?<sup>22</sup>
    - (3) Does the project contain differentiated measures so that adverse impacts do not fall disproportionately on disadvantaged or vulnerable individuals and groups, namely in relation to gender-based violence vis-à-vis the ongoing conflict situation?
    - (4) Should human rights due diligence have been conducted to complement the identification process for environmental and social risks and impacts of the project?
    - (5) Should a conflict sensitivity analysis have been conducted as part of emergency preparedness and response activities?
    - (6) Was a process of Free, Prior, and Informed Consent conducted in a manner and scale appropriate to the project's risks and impacts?
  - (ii) **PS 4: Community Health, Safety and Security.** The objectives of PS4 are to anticipate and avoid adverse impacts on the health and safety of the Affected Community during the project life from both routine and nonroutine circumstances; and to ensure that the safeguarding of personnel and property is carried out in accordance with relevant human rights principles, including

<sup>20</sup> IFC Performance Standard 1, Assessment and Management of Environmental and Social Risks and Impacts, Objectives, [https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/policies-standards/performance-standards/ps1](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards/ps1)

<sup>21</sup> *Ibid.*, See Page 2, Paragraph 5

<sup>22</sup> *Ibid.*, See Page 4, Paragraph 11

women's rights, and in a manner that avoids or minimises risks to the Affected Communities.<sup>23</sup>

- (iii) **PS 5: Land Acquisition and Involuntary Resettlement.** The objective of PS5 is to anticipate and avoid, or where avoidance is not possible, minimise adverse social and economic impacts from land acquisition or restrictions on land use by (i) providing compensation for loss of assets at replacement cost and (ii) ensuring that resettlement activities are implemented with appropriate disclosure of information, consultation, and the informed participation of those affected.
- (iv) **PS 7: Indigenous Peoples.** The objectives of PS7 are to ensure that the development process fosters full respect for the human rights, dignity, aspirations, culture, and natural resource-based livelihoods of Indigenous Peoples; to anticipate and avoid adverse impacts of projects on communities of Indigenous Peoples, or when avoidance is not possible, to minimise and/or compensate for such impacts; to promote sustainable development benefits and opportunities for Indigenous Peoples in a culturally appropriate manner; to establish and maintain an ongoing relationship based on Informed Consultation and Participation (ICP) with the Indigenous Peoples affected by a project throughout the project's life-cycle; to ensure the Free, Prior, and Informed Consent (FPIC) of the Affected Communities of Indigenous Peoples when the circumstances described in this Performance Standard are present; and to respect and preserve the culture, knowledge, and practices of Indigenous Peoples.<sup>24</sup>
- (b) The GCF's Indigenous People's Policy,<sup>25</sup> which in paragraph 17 states "(t)his Policy applies whenever indigenous peoples are present in, have, or had a collective attachment or right to areas where GCF-financed activities will be implemented. This includes indigenous peoples who, during the lifetime of members of the community or group, have lost collective attachment to distinct habitats or ancestral territories in the project area because of forced severance, conflict, government resettlement programs, dispossession of their land, natural disasters, or incorporation of such territories into an urban area."
- (c) The GCF's Operational Guidelines under the Indigenous People's Policy,<sup>26</sup> in paragraph 58(e) states "Designing a process to achieve the FPIC of indigenous peoples should, inter alia, take account of the following...(t)he possibility of unacceptable practices (including bribery, corruption, harassment, violence, retaliation and coercion) by any of the interested stakeholders both within and outside the affected communities of indigenous peoples."
- (d) The GCF's Environmental and Social Policy,<sup>27</sup> which in paragraph 8(q) under the sub-heading "Human Rights" states "(a)ll activities supported by GCF will be designed and implemented in a manner that will promote, protect, and fulfil universal respect for, and observance of, human rights for all recognised by the United Nations. GCF will require the application of robust environmental and social due diligence so that the supported

<sup>23</sup> IFC Performance Standard 4, Community Health, Safety and Security, Objectives, [https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/policies-standards/performance-standards/ps4](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards/ps4)

<sup>24</sup> IFC Performance Standard 7, Indigenous Peoples, Objectives, [https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/policies-standards/performance-standards/ps7](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards/ps7)

<sup>25</sup> Indigenous Peoples Policy, <https://www.greenclimate.fund/document/indigenous-peoples-policy>

<sup>26</sup> Operational Guidelines: Indigenous Peoples Policy, <https://www.greenclimate.fund/document/operational-guidelines-indigenous-peoples-policy>

<sup>27</sup> Environmental and Social Policy, <https://www.greenclimate.fund/document/environmental-and-social-policy>

activities do not cause, promote, contribute to, perpetuate, or exacerbate adverse human rights impacts.” This safeguard is further strengthened by paragraph 21(c) of the Indigenous People’s Policy of the GCF, which states “All GCF activities will respect the principles set forth in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and other relevant international and regional instruments relating to the rights of indigenous peoples and individuals, including, where applicable but not limited to, the International Labour Organization (ILO) Convention No. 169, the International Covenant on Economic, Social and Cultural Rights, and the International Convention on the Elimination of All Forms of Racial Discrimination;”

- (e) Furthermore, paragraph 48 of the Environmental and Social Policy states “GCF will require and ensure that activities are screened, including component subprojects of programmes and activities requiring financial intermediation, for any potential adverse impacts on the promotion, protection, respect for, and fulfilment of human rights. This may be done through the required social and environmental impacts assessment (complemented by specific human rights due diligence deemed relevant by the accredited entities with respect to specific circumstances or activities). For activities that have potential adverse impacts on human rights, GCF will require the preparation of an action plan that identifies national laws and/or obligations of the country directly applicable to the activities under relevant international treaties and agreements and describes the mitigation measures that will be taken to comply with those obligations and national laws. Such measures are to be described and costed as part of the consideration for GCF funding. GCF will not finance activities where planned mitigation is inadequate.”

## 6.1 Conflict between non-indigenous settlers and indigenous and Afro-descendant communities: violent attacks, dispossession and displacement of vulnerable populations located in the project area

38. In this section, the IRM responds to the question “will indigenous and vulnerable populations face increased violence, including gender-based violence, from non-indigenous settlers through non-compliance with GCF Interim Environmental and Social Safeguards, GCF Environmental and Social Policy, GCF Indigenous Peoples Policy and Updated Gender Policy?”

39. The complainant(s), Secretariat and AE agree that the project will be implemented in the context of ongoing and recurrent violent conflict in some areas that fall within the project’s area of influence. As such, the evidence presented and analysed below seeks to determine whether ‘appropriate and necessary due diligence has been conducted for the project to ensure compliance with GCF operational policies and procedures, particularly regarding the application of robust environmental and social safeguards.’

40. Applicable GCF Operational Policies and Procedures:

- (a) Performance Standard 1: Assessment and management of environmental and social risks and impacts
- (b) Performance Standard 4: Community health, safety and security
- (c) Performance Standard 7: Indigenous peoples
- (d) GCF Environmental and Social Policy (paragraphs 8(p), 8(q), 17, 26, 37, 47-48 and 69)
- (e) Indigenous Peoples Policy (paragraphs 31, 46 and 48)
- (f) Updated Gender Policy (paragraph 5)

### 6.1.1. The nature, frequency and location of violent conflict in the project area

41. The complainant(s) allege that indigenous and Afro-descendant communities in the Coastal Caribbean region have been experiencing a process of “*violent colonisation*” of their territories and which has significantly increased over the past ten years, according to indigenous witnesses.<sup>28</sup> While all stakeholders agree that conflicts have historically arisen and continue to persist in indigenous territories of the Caribbean Coast, especially concerning occupation and use of titled lands, there are substantial differences of opinions among the stakeholders on the nature of these incidents and the potential impact and relevance of this conflict situation on the design and future implementation of the project. It is to be noted that the funds for the project have not yet been disbursed and no activity has taken place yet.

42. The information presented by the complainant(s) particularly points to the severity of the problem in the Mayangna and Miskitu territories. According to the complainant(s), in the period between 2011-2020, “49 indigenous Miskitus were killed, 49 injured, 46 kidnapped, and four persons remain missing.... around a thousand indigenous people have been forcibly displaced.”<sup>29</sup> In Mayangna Sauni As territory, two serious incidents of killings in 2020 and 2021 were brought to the attention of the IRM:

- (a) In January 2020, 4 indigenous people were reportedly killed, and 2 injured after approximately 80 armed settlers allegedly raided Mayangna Sauni As territory. Testimony by community members indicates that 13 houses were burned, and survival goods, such as items essential for wellbeing and livelihood, were looted, which seriously affected the community.<sup>30</sup> This incident took place prior to project approval and prior to the disclosure of the ESMF. Information on this incident was not made available to the GCF prior to approving the funding proposal.
- (b) In August 2021, a massacre of at least 11 indigenous people, including the sexual assault and murder of women and girls, was widely reported. The attack is alleged to have been perpetrated by non-indigenous settlers. According to the Inter-American Commission on Human Rights (IACHR), one victim was repeatedly raped before her death and had a leg mutilated. Another victim, who survived the attack, was repeatedly sexually abused by the attackers, and was forced to witness the murder of her husband. A minor who was present at the time of the attack was forced to watch his stepfather being murdered and tortured. This incident took place after the project was approved by the Board and therefore could not have been considered in project documentation. It is referred to here as indicative of a continuing trend of violent conflict in the project area that had commenced and was present during project design and prior to project approval by the Board.
- (c) Incidents of violent attacks, dating back to 2013, in Miskitu territory have also been documented by the IACHR. The IACHR and the Inter-American Court of Human Rights (IACtHR) have granted precautionary measures and provisional measures regarding the situation of violence faced by inhabitants of the communities of the Miskitu Indigenous People in the Caribbean Coast Region of Nicaragua due to the presence of settlers.<sup>31</sup> Precautionary measures were granted to communities of Wangki Twi-Tasba Raya in 2015, and extended in 2016 to communities in the indigenous territories of Wanki Li Aubra and Miskitu Li Lamni Tasbaika Kum. IACHR further requested IACtHR to grant provisional measures in 2016, 2017, 2018 and 2019, having identified specific situations of extreme risks faced by beneficiaries of precautionary measures. The above measures

<sup>28</sup> Confidential testimonies with indigenous witnesses

<sup>29</sup> Complaint

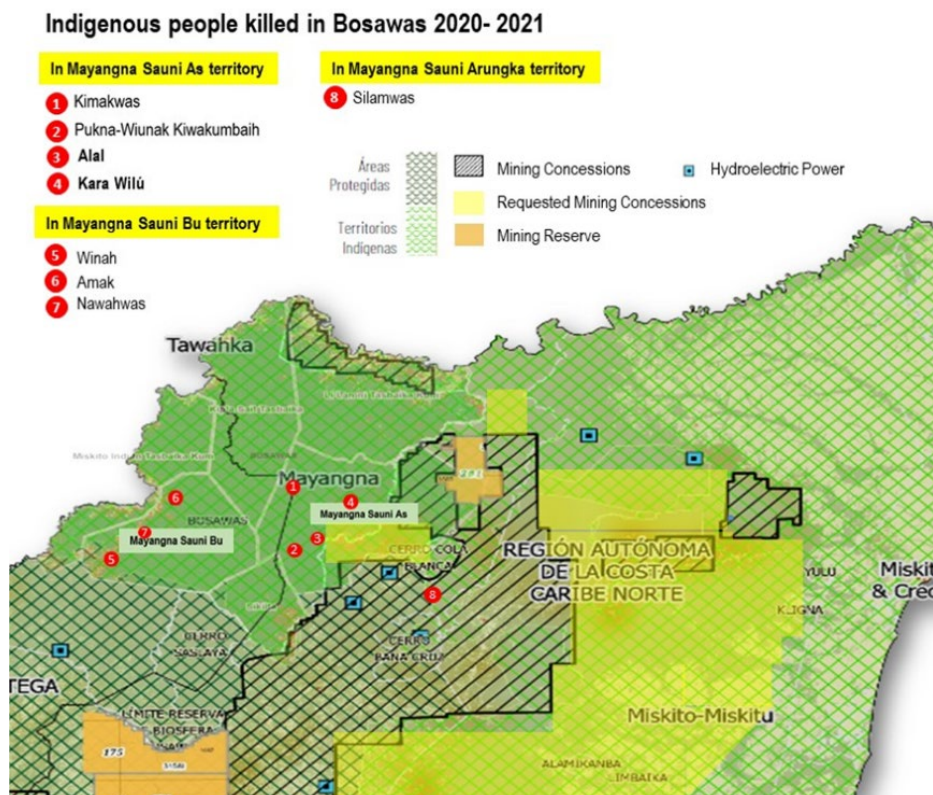
<sup>30</sup> Inter-American Commission on Human Rights, Indigenous people of the Musawas Suniwas and Wilú Communities of the Mayangna Sauni As Territory in the North Caribbean Coast Autonomous Regions regarding Nicaragua, 2022, [https://www.oas.org/en/iachr/decisions/mc/2022/res\\_9-22\\_mc\\_505-15\\_ni\\_en.pdf](https://www.oas.org/en/iachr/decisions/mc/2022/res_9-22_mc_505-15_ni_en.pdf)

<sup>31</sup> *Ibid.*



were documented and disclosed by the IACHR prior to the approval of the project and could have been included in the assessment of the conflict situation.

- (d) Additionally, the complainant(s) prepared and submitted a map of recent violent conflicts to the IRM (see below). The locations show that these allegedly incidents occur in the project area and within the Bosawás Reserve. Focusing on the attacks that occurred prior to November 2020, prior to when the project was approved, complainant(s) documented 12 violent attacks by settlers on Mayangna and Miskitu indigenous communities. As a result, indigenous communities reportedly suffered 11 fatalities, with 10 persons experiencing severe injury and dozens of families being displaced.



**Figure 2:** Map of the communities in Bosawás where violent incidents occurred, prepared by the complainant(s)

43. Evidence of violent attacks continues to be reported to IACHR, which is currently handling 3 active cases from Nicaragua concerning the safety and security of indigenous and Afro-descendant peoples on the Caribbean Coast. Notably, IACHR has expressed “its extreme concern about the serious and intense violence that is shown by the facts alleged by the representatives in the context of violence assessed by the Inter-American Court in provisional measures in force. IACHR observes that the third parties or “settlers” are reportedly heavily armed and seek to seize indigenous lands that have been in a land titling process for years. The factual elements indicate that over time not only have there been threats against indigenous people who are the proposed beneficiaries of this project, but also that they have materialised over time. Only in August and October 2021 does IACHR note that there were violent events against Mayangnas, including violent deaths. IACHR also observes that, “despite the domestic

complaints, the representatives have raised questions about the lack of investigation on the acts of violence.”<sup>32</sup>

44. The 2022 Annual Report of the United Nations High Commissioner for Human Rights on Nicaragua delivered to the 49th Session of the United Nations Human Rights Council stated: “Nicaragua’s Indigenous peoples have continued to suffer violent attacks in the context of land disputes, most of them in complete impunity. In 2021, OHCHR received reports of at least six attacks and violent incidents, resulting in at least 11 indigenous men killed, one woman and one girl raped, and seven persons injured, including two children.”<sup>33</sup> According to the complainant(s), there have been 2 murders of indigenous leaders in 2022. These incidents have taken place after the project was approved. Nevertheless, they show a continuing trend of violent conflict that had commenced before the project was approved.

45. Evidence gathered by the IRM suggests the pattern of violent attacks, at least those leading to the loss of life, are concentrated in the North Caribbean Coast Autonomous Region (RACCN), especially in Mayangna and Miskitu territories. The complainant(s) and several indigenous persons whom the IRM interviewed have provided evidence documenting specific cases of violence targeting indigenous and Afro-descendant populations, providing audio-visual evidence and first-hand testimony of violent incidents. While the evidence suggests that there may be fewer or no attacks in the South Caribbean Coast Autonomous Region (RACCS), indigenous witnesses have cited less direct forms of intimidation and coercion, citing the presence of armed settlers as a threat to safety and security.<sup>34</sup> Witnesses who had participated in forest patrols, in the absence of official and/or state-supported forest rangers or “*guardabosques*” to monitor and document the situation in each territory, stated feeling threatened by settlers bearing “weapons of war,” specifically AK47 rifles, shotguns and pistols.<sup>35</sup>

46. Despite the demarcation of land and granting of land titles to indigenous people, according to evidence gathered by the IRM, there has been no decrease in non-indigenous settlers occupying indigenous lands in the project areas. In an article published in a North American Congress on Latin America (NACLA) report on the Americas, it is mentioned that in the Mayangna Territory of Awas Tingni areas, “settlers often enter by force, clearing forest for bean fields and cattle pastures that displace Mayangna uses, threatening anyone who opposes them.”<sup>36</sup> An indigenous association, Prilaka Community Foundation, has also mentioned this issue on its social media, where it published testimonies of indigenous people being driven out of their territories by illegal settlers or abandoning their lands in fear of attacks.<sup>37</sup> These statements corroborate the testimony of witnesses that have been interviewed by the IRM, mentioning that some indigenous people have left the country out of fear of being the target of settlers’ violence.<sup>38</sup> In a report by the Centro por la Justicia y Derechos Humanos de la Costa Atlántica de Nicaragua (CEJUDHCAN), which also mentions the displacement of Miskitu families due to threats from settlers, a list of all the attacks against indigenous people throughout 2020

<sup>32</sup> Inter-American Commission on Human Rights, Indigenous people of the Musawas Suniwas and Wilú Communities of the Mayangna Sauni As Territory in the North Caribbean Coast Autonomous Regions regarding Nicaragua, 2022, [https://www.oas.org/en/iachr/decisions/mc/2022/res\\_9-22\\_mc\\_505-15\\_ni\\_en.pdf](https://www.oas.org/en/iachr/decisions/mc/2022/res_9-22_mc_505-15_ni_en.pdf)

<sup>33</sup> Human Rights Council, Situation of human rights in Nicaragua, <https://reliefweb.int/report/nicaragua/situation-human-rights-nicaragua-report-united-nations-high-commissioner-human-1>

<sup>34</sup> Confidential testimonies with indigenous witnesses

<sup>35</sup> Confidential testimonies with indigenous witnesses

<sup>36</sup> See page 58, Bryan, J., 2019, For Nicaragua’s Indigenous Communities, Land Rights in Name Only, <https://doi.org/10.1080/10714839.2019.1593692>

<sup>37</sup> Informacion Puntual, 2022, Familias abandonan sus tierras ante presencia ilegal de colonos en territorio indígena Sang Sang, <https://ipnicaragua.com/familias-abandonan-sus-tierras-ante-presencia-ilegal-de-colonos-en-territorio-indigena-sang-sang>.

<sup>38</sup> Confidential testimonies with indigenous witnesses

and early 2021 are enumerated and mentions murders, kidnappings, forced displacement, assaults, arm violence, burning of indigenous houses, etc.<sup>39</sup>

47. On the other hand, representatives for relevant government ministries and some indigenous leaders presented conflicting accounts of the specific instances of violence that have been reported in the region. At the meeting the IRM had with the leaders of the indigenous territories of the RACCN (North), one of the leaders stated that some deaths were the result of inter-community conflicts (including conflicts between the Mayangna and Miskitu) as well as internal disputes, caused by conflicts over irregular or illegal sales of land to outsiders.<sup>40</sup> When asked about the prevalence of arms or weapons in indigenous territories, the staff of MARENA denied that such a situation exists. Furthermore, in the meeting with representatives of the Indigenous Territorial Governments in the RACCS (South), an indigenous leader suggested that the complainant(s) are exaggerating the problem. Nonetheless, the same representative stated that they believed the *Bio-CLIMA* project FP would reduce instances of such conflict. According to the Governor of the RACCN (North), there are over 6,000 settlers living in the 17 indigenous territories of the region.<sup>41</sup> However, he stated that there are ongoing conflicts in only 13 communities of the 230 or so indigenous communities in the region.<sup>42</sup>

48. The BOSAWAS Biosphere Reserve appears to be the region with the highest levels of violent conflict between indigenous peoples and non-indigenous settlers (*colonos*). However, it has been difficult to find more reliable information on the scale and causes of the conflicts. There have been a number of reports in the international press of massacres of indigenous people – particularly of Mayangna.<sup>43</sup> However, there are no officially published reports that provide a summary of the number and types of incidents (murder, threats, wounding, etc.) or information on the causes of the various violent conflicts.<sup>44</sup> Such information is absent from project documentation, which instead offers a description of the existing avenues for land titling and land dispute-related remedy or conflict resolution.<sup>45</sup> No data relating to the governmental response to these alleged incidents of violence or census data has been made available to the IRM, by the AE or the Nicaraguan authorities, even though the IRM requested them while on mission in Nicaragua and later followed up with a written request. For example, such data could be used to determine the trends in migration flows, and the exact extent and composition of non-indigenous populations in indigenous and Afro-descendant territories. Additionally, data from the criminal justice system could have provided information on the nature and impact of the government response to the alleged violence. This data was especially relevant given that the GCF project seeks to strengthen law enforcement activities in the biosphere reserves.

49. In the absence of adequate official public data, the IRM has had to examine testimony and evidence submitted by the complainant(s) and witnesses introduced by them, and the desk review of information reported by the United Nations and other regional multilateral

<sup>39</sup> Centro por la Justicia y Derechos Humanos de la Costa Atlántica de Nicaragua (CEJUDHCAN) Informe de actualización sobre la situación de los Derechos económicos, Sociales, y Culturales de los Pueblos Indígenas y Afrodescendiente de la Costa Caribe de Nicaragua, <https://cejudhcan.org/>

<sup>40</sup> Confidential testimonies with indigenous witnesses

<sup>41</sup> The 17 indigenous territories include Kipla Sait Tasbaika – part of which is in the Special Area.

<sup>42</sup> Cited by the governor at the meeting held in Puerto Cabezas on 24 June 2022.

<sup>43</sup> Nicaragua's Failed Revolution: The Indigenous Struggle for Saneamiento, 2020, <https://www.oaklandinstitute.org/nicaragua-failed-revolution-indigenous-struggle-saneamiento>

<sup>44</sup> The IRM verbally and in writing requested this information from the AE and from the executing entity but was not provided the same.

<sup>45</sup> See page 94, Environmental and Social Safeguards Management Framework (ESMF): "With regard to addressing existing conflicts and tensions between GTIs and non-indigenous settlers, the Property Institute of the Office of Attorney General of the Nation (Procuraduría General de la República) and its Second Land Administration project (PRODEPII), as well as the Directorate for Alternative Conflict Resolution of the Supreme Court (DIRAC de la Corte Suprema de Justicia) are working in mediating in land tenure conflicts in the CR and are recognized by indigenous organizations. *Bio-CLIMA* shall support this through Activity 1.1.1.4 to facilitate the dialogue and agreement processes with the support of an independent, specialized entity to be specifically entrusted with this process." [https://www.bcie.org/fileadmin/user\\_upload/Annex\\_6\\_English\\_Bio-Clima\\_Environmental\\_and\\_Social\\_Safeguards\\_Management\\_Framework.pdf](https://www.bcie.org/fileadmin/user_upload/Annex_6_English_Bio-Clima_Environmental_and_Social_Safeguards_Management_Framework.pdf)

organisations, news services and academic publications to determine the extent, nature, severity, and location of violent conflict within the project areas. In interviewing complainant(s) and indigenous people introduced by the complainant(s), data was offered based on the percentage of territory invaded. The complainant(s) allege, for example, that 50 per cent – 70 per cent of Mayangna Sauni As territory has been invaded. The IRM did not obtain this information through official sources but through interviews. Apart from assertions repudiating the claims by the complainant(s), the executing entity has not been able to provide the IRM with information and data to substantiate the assertions that the situation of violent conflicts was not as widespread or serious as the complainant(s) alleged and that perpetrators of such violence were being brought to justice or that the relevant land disputes were being resolved through the institutional framework referred to in the project documentation. Even in the comments and feedback from the AE to the draft compliance review report, no data or substantive information has been provided on past or ongoing violent conflicts, other than statements that it is occurring. The AE asserts that it is fully aware and familiar with situations of violent conflict, as it has worked extensively in Nicaragua and asserts this information has been taken into account in preparing and designing the project.

#### 6.1.2. Triggers for the violent conflict and impacts

50. The violent conflicts between indigenous peoples and outsiders may be related to several different causes. These include disputes over rights to land; disputes over access to natural resources, particularly timber; and disputes over access to areas used for mining, particularly illegal artisanal mining. Another unknown but potential source of violence is drug trafficking – and perhaps other organised criminal activities, given that the BOSAWAS Biosphere Reserve is in the remote, and often violent frontier area with Honduras.<sup>46</sup> Additionally, there are a significant number of mining concessions granted in the project areas. This may have led to conflicts with the mine workers, sometimes because mining companies are allegedly expanding their concession territories. The complainant(s) have challenged the legality of these mining concessions granted over lands titled to indigenous communities, without their consent.

51. As described in project documents, the existence of “recurrent tensions”<sup>47</sup> in territories titled to indigenous and Afro-descendant people is widely acknowledged by all stakeholders relevant to the project. The Caribbean Coast of Nicaragua has been the site of ongoing conflict, including the “Contra” civil war in 1987 that politically divided the indigenous and Afro-descendant peoples. This phenomenon can be traced back to the 1980s when the approval of Law 28/87 recognised the autonomy of the indigenous people and Afro-descendant communities and established the Autonomous Regions of the Atlantic coast – now referred to as the autonomous regions of the North and the South Caribbean Coast (RACCN and RACCS).<sup>48</sup> Given that the biological reserves, which are part of the indigenous territories, abound with natural resources, there has been pressure coming from settlers from the Central and Pacific regions and the border between the North Caribbean and the South Caribbean to occupy indigenous territory. Complainant(s) allege and have testified that these invasions have been escalating significantly, especially during the last decade, and are violent in nature. These testimonies affirmed that the situation is particularly tense in Mayangna and Miskitu territories in the North Caribbean Coastal Region and the Alto Wangki Bocay (AWB) special area. This is corroborated by some indigenous representatives who confirmed the presence of 3,000 *colono* families who have recently moved into areas that previously did not have any non-indigenous

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<sup>46</sup> IRM Expert Report

<sup>47</sup> See page 5, paragraph 119, Environmental and Social Safeguards Management Framework (ESMF), [https://www.bcie.org/fileadmin/user\\_upload/Annex\\_6\\_English\\_Bio-Clima\\_Environmental\\_and\\_Social\\_Safeguards\\_Management\\_Framework.pdf](https://www.bcie.org/fileadmin/user_upload/Annex_6_English_Bio-Clima_Environmental_and_Social_Safeguards_Management_Framework.pdf)

<sup>48</sup> Environmental Justice Atlas, 2017, Dispute Over Indigenous Miskito Lands, Nicaragua, <https://ejatlas.org/conflict/miskito-nicaragua>



populations.<sup>49</sup> Even when there are no instances of violent attacks, threats, intimidation or coercion on the part of the *colonos*, their very incursion into the territories represents a conflict with the traditions and customs, practices and way of life of indigenous populations.

52. The complainant(s) allege that “[t]he GCF project is set to be implemented in reserves that currently are being deforested by the massive invasion of settlers, extensive cattle ranching, the introduction of extractive companies for logging, gold mining and monoculture plantations, such as African palm...” They allege that “impunity for these violent acts is the norm” and that the authorities have failed to provide information on the number and status of investigations of the murders and attacks on indigenous peoples in the project area. The complainant(s) claim that indigenous land use patterns are different in nature to the destructive methods of *colonos*. The forest is not seen by indigenous communities in the project area as another resource to exploit; it is seen as a “way of life” or “life” itself. This view is not exclusive to the complainant(s). Independent indigenous experts interviewed by the IRM confirm, for example, that the Mayangna people practice a tropical forest production system and do not engage in activities that contribute to deforestation.<sup>50</sup> On the other hand, project documentation notes that settler populations have engaged in ecologically destructive practices, observing that “... low land prices, undervaluation of the standing forest, lack of access to [technical assistance], finance and responsible markets have driven settlers to convert forests into extensive pastures with the aim to initially take as much land as possible, often encroaching into indigenous territories. Between 1983 and 2015, 2.2 million hectares of forests were cut down and 1.4 million hectares of extensive pastureland was established. The area converted to perennial crops multiplied by ten in that period.”<sup>51</sup>

53. The difference in land use and economic activities carried out by indigenous and Afro-descendant peoples can be viewed as another of the triggers for violent conflict. In the BOSAWAS Reserve, settlers have cleared areas of forest for farming and planting pasture. They also use timber to construct houses and barns.<sup>52</sup> Activities driving deforestation, at least in the protected areas and reserves of the Caribbean Coast, such as Bosawás, Indio Maíz and Rio San Juan, are prohibited by law in the inner “nucleus” of the reserves. Currently, the National Forestry Institute (or INAFOR in Spanish) is responsible for oversight of the extraction, transport and sale of timber, and regularly confiscates timber, equipment and vehicles used to transport unregistered timber.<sup>53</sup> However, enforcement of the rule of law and the capacity of the state and local institutions to monitor the reserves remains weak,<sup>54</sup> and in that sense, resources are vulnerable to illegal exploitation which creates conflict.<sup>55</sup> As such, even though 98.12 per cent of land in the Caribbean Region is titled (53 per cent as communal property of the 23 indigenous and Afro-descendant peoples & 45 per cent as private property),<sup>56</sup> in practice, illegal occupation and trafficking of land in indigenous territories persist.

54. In 2017, MARENA published a detailed study on the causes of deforestation and forest degradation, financed by the FCPF as part of the preparation for Nicaragua’s ENDE-REDD+ strategy.<sup>57</sup> It shows that the main driver of deforestation is the expansion of the agricultural frontier by small and medium-scale farmers and ranchers from the Central and Pacific regions,

<sup>49</sup> Interview with GTIs

<sup>50</sup> Confidential testimonies with experts

<sup>51</sup> See page 31, paragraph 65, Environmental and Social Safeguards Management Framework (ESMF), [https://www.bcie.org/fileadmin/user\\_upload/Annex\\_6\\_English\\_Bio-Clima\\_Environmental\\_and\\_Social\\_Safeguards\\_Management\\_Framework.pdf](https://www.bcie.org/fileadmin/user_upload/Annex_6_English_Bio-Clima_Environmental_and_Social_Safeguards_Management_Framework.pdf)

<sup>52</sup> IRM Expert Report

<sup>53</sup> IRM Expert Report

<sup>54</sup> See page 36, paragraph 80, Environmental and Social Safeguards Management Framework (ESMF)

<sup>55</sup> See page 58, Staver, A.C., Jong, W.D., KAIMOWITZ, D., 2007, Nicaragua’s frontier: the Bosawás biosphere reserve. In: Jong, W.D., Donovan, D., Abe, K.I. (eds) *Extreme Conflict and Tropical Forests*, [https://www.researchgate.net/publication/225210894\\_NICARAGUA%27S\\_FRONTIER\\_THE\\_BOSAWAS\\_BIOSPHERE\\_RESERVE](https://www.researchgate.net/publication/225210894_NICARAGUA%27S_FRONTIER_THE_BOSAWAS_BIOSPHERE_RESERVE)

<sup>56</sup> See page 36, paragraph 78, Environmental and Social Safeguards Management Framework (ESMF)

<sup>57</sup> Study of the causes of deforestation and forest degradation, MARENA, 2017.

who are driven by poverty and climate-change induced drought in the Dry Corridor. The construction of access roads has played a key role in facilitating this process, as has the lack of effective controls to protect the reserves.

55. A survey carried out for the study shows that in the BOSAWAS Biosphere Reserve some 65 per cent of the non-indigenous colonists are living below the poverty line. Around 20 per cent hold some kind of title documents to the land they are working, a further 20 per cent have no deeds of any kind, while 60 per cent have documents that show they have acquired their land through informal transactions, such as notarised sale and purchase agreements. This suggests that the occupation of indigenous lands is a process that starts with illegal occupation and is sometimes then consolidated via the informal and unregulated sale of improvements and “occupation rights”.

56. Small-scale, often illegal artisanal mining is another cause of conflicts, especially in the territories of the Mining Triangle on the southern side of the BOSAWAS Reserve. Although some press reports have claimed that artisanal mining – and larger scale commercial mines – have led to violent conflict between indigenous peoples and miners, this issue was not raised by the leaders of the territorial governments,<sup>58</sup> but has been canvassed by the complainant(s) as a serious one.

57. In the RACCS, another source of conflict is the use of illegal and unsustainable methods of fishing. Apparently, some outsiders have been using Gramoxone (a toxic herbicide) to poison the fish, which float to the surface. This practice destroys the aquatic environment and depletes the stocks of fish on which the local people depend for their subsistence and livelihoods. The Kriol people who live in the Rio San Juan Biosphere Reserve have asked MARENA to help evict the colonists but have been informed that this can only be done by the army.<sup>59</sup>

58. Another key component of the ongoing conflict between indigenous and Afro-descendant communities and settlers is linked to the incomplete implementation of the Communal Lands Law 445 initiated in 2005.<sup>60</sup> The 5-step law which consists of granting “Indigenous People and Afro-descendant communities’ titles to, and decision-making power over, their communal lands”<sup>61</sup> has never been fully implemented as the fifth stage, referred to as *Saneamiento*, remains to this day incomplete in most territories titled to indigenous and Afro-descendant peoples.<sup>62</sup> The absence of *Saneamiento* in many indigenous and Afro-descendant territories titled to them thus leaves a gap in the titling and land management regime allowing non-indigenous settlers to continue to occupy these lands. This issue is more extensively dealt with in Section 6.3 below.

59. The complex situation of indigenous land titles and the failure to effectively implement the fifth stage of Law 445 allows settlers to encroach on indigenous lands and conduct disruptive and illegal activities, while most of the time facing only weak or non-existent challenges and creating violent conflict and unrest for indigenous and Afro-descendant populations. The project would thus be implemented in this context of “strong migration pressure” from the West of the country<sup>63</sup> and is likely to have significant implications on the full enjoyment of social, environmental, and cultural rights of the original indigenous inhabitants of these territories.

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<sup>58</sup> IRM Expert Report

<sup>59</sup> IRM Expert Report

<sup>60</sup> Art. 54, Law. No. 445.

<sup>61</sup> See page 167, Sylvander, N., 2018, *Saneamiento Territorial in Nicaragua, and the Prospects for Resolving Indigenous-Mestizo Land Conflicts*.

<sup>62</sup> *Ibid.*

<sup>63</sup> See page 36, paragraph 78, Environmental and Social Safeguards Management Framework (ESMF), [https://www.bcie.org/fileadmin/user\\_upload/Annex\\_6\\_English\\_Bio-Clima\\_Environmental\\_and\\_Social\\_Safeguards\\_Management\\_Framework.pdf](https://www.bcie.org/fileadmin/user_upload/Annex_6_English_Bio-Clima_Environmental_and_Social_Safeguards_Management_Framework.pdf)

60. Overall, there are several triggers outlined above, including settler invasions and related activities on indigenous lands, which potentially set off or provoke violent conflict in some of the project areas. Having reliable data on them and understanding them well is important for project design and even for project implementation.

#### 6.1.3. **Migration patterns and the potential for co-habitation: actors and dynamics of conflict**

61. In the interviews conducted by the IRM during its mission, it became clear that there is no consensus among indigenous and Afro-descendant populations regarding the concept of cohabitation with settlers. The complainant(s) and some of the indigenous witnesses expressed the view that the cohabitation situation would result in a progressive taking of their lands and were therefore strongly opposed to this proposal. Government representatives, in contrast to the complainant(s)' opinion, emphasised the principle of co-habitation in the application of relevant laws and procedures vis-à-vis the presence of settlers in indigenous territories. In this regard, government officials interviewed stated that they follow the specific procedures and guidelines for co-habitation established by each GTI. This perspective is further echoed by representatives of GTIs themselves, asserting that in some territories, such as Rama Kriol for example, the existence of third parties does not prove a hindrance, provided they are not engaged in illegal activities, acknowledge indigenous titles to lands and pay rent. They cited many cases, where non-indigenous families have resided for decades, becoming integrated with the larger community. Some indigenous witnesses interviewed by the IRM also mentioned that if settlers were following the rules of indigenous people and not encroaching into illegal zones of the territories, cohabitation was acceptable.<sup>64</sup> This perspective is echoed by the AE and the government ministries of Nicaragua interviewed by the IRM.

62. Poverty is seen as the primary driver of movement of people into the indigenous territories of the Caribbean Coast. According to the AE's staff, "people are coming into these areas to improve their living conditions and living standards. Not all of them necessarily arrive to kill or take away lands or gold. There is a lot of poverty in this country, and this area has resources and opportunities." Similarly, from the perspective of the government, the biggest problems facing the Caribbean Coast are those rooted in poverty: poverty of those moving into the territories and poverty of those already residing there. Therefore, the AE and the staff of Government Ministries argued that incentivising activities to reduce deforestation and scaling up investments such as those proposed by the project would go a long way in addressing poverty and the direct and indirect pressures on indigenous territories.

63. This latter perspective is shared, to some degree, by the GCF staff who were interviewed by the IRM. Interviews with GCF staff demonstrate that the GCF was aware, through information provided by the AE as part of the FP package, of the phenomenon of settlers moving into indigenous territories, and the risks this could pose to community health, safety, and security. According to GCF staff interviewed, from the safeguards perspective, the objective is first to "avoid" - and where avoidance is impossible, mitigate adverse impacts to people and the environment by verifying if adequate mitigatory measures have been deployed to fully address these risks. As settlers were already in the area and more were likely to move there,<sup>65</sup> the project would then aim to put some incentives to deter deforestation through these incursions and to better capacitate indigenous governments to respond.

64. Some indigenous representatives, for example, asserted that the process of internal "migration" for the purposes of engaging in economic or territorial activities is one that needs to be addressed not through resettlement or eviction, but through the regularisation of rents and land use/lease permits administered and granted by the indigenous territorial governments themselves. This concept is very similar to that of Peaceful Cohabitation Regime Agreements

<sup>64</sup> Confidential testimonies with indigenous witnesses

<sup>65</sup> Interview with GCF staff member

(PCRAs) embraced in the *Bio-CLIMA* project FP146. For some indigenous leaders, the priority is not the removal of third parties, as much as it is the proper enforcement and application of laws, strengthening of capacities of territorial governments and the creation of new instruments to facilitate their peaceful cohabitation in indigenous territories. To quote one indigenous leader, “We need to acknowledge that the movement of people is something natural.”

65. Activity 1.1.1.4 of the funding proposal (FP) to the GCF proposes to facilitate, among others, the non-indigenous settlers to enter into a “Peaceful Co-habitation Regime Agreement (PCRA)” on the promise of renouncing any claim they might have to ownership of the land and acknowledging the indigenous territorial title to the land. The FP states that “non-indigenous families (so called “*terceros*”) that have settled within indigenous territories will be supported by the project to legalise their land use and occupation through a “Peaceful Co-habitation Regime Agreement” with the GTI.<sup>66</sup> The project documentation also states that PCRAs are arrangements created and recognised by indigenous people themselves, and that the PCRAs would be offered to settlers who have been in peaceful occupation of such lands for five or more years. On the other hand, the complainant(s) and several indigenous witnesses presented by them assert that PCRAs under *Bio-CLIMA* project, are basically a way of benefiting newly arrived settlers who often occupied indigenous lands violently - which contradicts the project objectives.

66. Another key dynamic central to determining whether the presence of non-indigenous third parties fundamentally presents a conflict situation is the primacy of identity, specifically indigenous identity in terms of rights over land use and administration. Indigenous witnesses introduced by the complainant(s) point out that for many *colonos*, their identity as Nicaraguans first and foremost means that they should be able to access, use and occupy lands anywhere in the country, including in indigenous territories. According to the witnesses, the *colonos* may argue that since both indigenous and *colonos* populations experience high levels of poverty, there should be no prohibition on how they are able to access and use land, if it is done legally.

67. Amongst indigenous and Afro-descendent communities, the differences in lifestyles and attitudes to settlers vary. There are a large number of settlers living in the Rama Kriol territory since this was one of the areas where the Government of Nicaragua actively promoted colonisation by small farmers and ranchers from the Central and Pacific Regions of the country in the 1960s and 1970s. In comparison with the RACCN, relations between the established settlers and the Rama-Kriol from the RACCS appear less conflictive. The leaders of the GTIs and their advisors that participated in the meeting with the IRM delegation held in Bluefields on 27 June 2022, emphasised that there has been long-standing cooperation between the *mestizo*/settler families and the Rama-Kriol communities, with considerable intermarriage and active cooperation in the preparation of the Autonomous Development Plan (PADA) for the territory.<sup>67</sup>

68. The settlers and the indigenous and Afro-descendant communities are not uniform groups of people; the intrinsic disparities make the conflicts more complex and have to be analysed in depth to understand their dynamics. Once again, it is difficult to fully comprehend these details without visiting the areas. In practice, this means that any independent external supervision of the project must be based on regular site visits to the critical areas of the Indio Maíz Biological Reserve and other areas in the Rio San Juan Biosphere Reserve.<sup>68</sup> On the one hand, the complexity of the local dynamics involved in the violent conflict in the project areas justifies the sub-project level conflict sensitivity analysis that has been proposed in the FP and will be undertaken during project implementation. On the other hand, many of those dynamics also take place regionally and nationally as well as in adjoining indigenous territories, justifying

<sup>66</sup> See Page 18, [Funding Proposal Bio-CLIMA: Integrated climate action to reduce deforestation and strengthen resilience in BOSAWÁS and Rio San Juan Biospheres | Green Climate Fund](#)

<sup>67</sup> IRM Expert Report

<sup>68</sup> IRM Expert Report

a project level conflict sensitivity analysis, which is essential for selecting sub-project sites, activities, mitigatory measures and conditions.

69. Based on testimony given to the IRM and evidence gathered, it appears that the impacts on indigenous people of the violent conflict that is recurrent in some project areas are serious. Where lands titled to indigenous communities are being invaded and occupied with violence, the situation is tense and indigenous people live in fear. Where there have been massacres, the indigenous communities are grieving, and have not received support to help them cope with the trauma. Many have become refugees in neighbouring countries. In situations where indigenous lands have been occupied by non-indigenous settlers, the evidence suggests that some of the settlers defend it with arms, and this denies indigenous people of their traditional lands where they once hunted and harvested food. Occupied lands are regularly converted to pasture and used for cattle ranching. Deforestation causes environmental impacts that some indigenous people interviewed highlighted for the IRM. In the long term, the illegal, forcible, and fraudulent occupation of indigenous lands represents for some indigenous people, a gradual “colonisation” of their territories, and they deeply fear their decimation and eventual extinction as a people. What has historically happened to many indigenous communities across the Americas remains fresh in their minds and a constant reminder of the dangers of colonisation, no matter in what form it presents itself. These fears are exacerbated when the perpetrators of violence and illegal occupation are slow to be brought to justice through the criminal justice system and are able to commit violence with impunity, and as stated in the ESMF of the project, law enforcement is weak.

#### 6.1.4. Findings

70. In considering all the evidence as a whole collected by, and made available to the IRM, on a balance of probabilities, the IRM concludes that the complainant(s) are justified in their concerns about the nature, severity, location and scope of the violent conflict situation in the Caribbean Coast/project areas. The IRM also finds that their concerns that the project may cause or exacerbate conflict and violence in some areas are also justified. The IRM further finds that the violent conflict situation was insufficiently detailed in the Funding Proposal and other connected project documentation, leaving out key information that would have better enabled the GCF staff, Board, and other stakeholders in assessing and mitigating the risks posed by and to the GCF project and its intended beneficiaries. This is particularly concerning, given that the AE, in comments on the draft compliance review report, has repeatedly asserted that it is well versed in and knowledgeable about the project areas and has worked in them on many previous projects. On a balance of probabilities, the IRM also finds that the violent conflict in the project areas – especially in the Bosawás Biosphere Reserve is recurrent and ongoing and is significantly adversely impacting indigenous communities. The conflict is varied in nature, more often involving violence by non-indigenous settlers using arms against indigenous people, and perhaps to a lesser extent, violence between indigenous communities and individual conflicts generated by the illegal and irregular sale of rights to land and/or natural resources by some unscrupulous people. The nature of these violent conflicts is such, that the evidence suggests that it is creating an atmosphere of intimidation, fear and general uncertainty and instability in some project areas, especially within the Bosawás reserve and its environs. The weak law enforcement coupled with weak rule of law is leading to adverse impacts on the rights of indigenous people in the project areas and the project will likely exacerbate this impact in some project areas.

71. The IRM also finds that the conflicts in indigenous territories covered by the project cannot simply be attributed to the feud between indigenous peoples and settlers alone. As mentioned above, the conflicts over land have a long history and are complex, given that the non-indigenous settlers do not constitute a homogeneous group. They include settlers that have been living in the region for a long period, some of whom may hold legal titles going back to the period before the autonomous regions were established (prior to Law 28/87) or at least to the



period before Law 445/03 was approved. It also includes veterans of the civil wars, heavily armed groups, miners, land grabbers who sell illegal titles to other non-indigenous people, cattle ranchers, and poor people seeking livelihoods. To add to the complexity of the conflict, some of the conflicts are triggered by disputes between indigenous communities.

72. Weak law enforcement and rule of law, both of which are recognised in project documents, do not help the situation, creating an atmosphere of impunity on the side of non-indigenous settlers and some disputants. All these dynamics are at play in a complex landscape of violent conflict and the actors are local, regional and national. The recurrent violent conflict is creating in some indigenous areas, especially in the RACCN, an atmosphere of intimidation and fear among some indigenous communities and some communities are struggling to cope with the trauma of past violence. Implementing a project such as *Bio-CLIMA* in this context, with all the environmental and social safeguards as well as the GCF's Indigenous Peoples Policy and Gender Policy applications, is to say the least, a very challenging one. In this context, the IRM observes that the PCRA instrument, together with its attendant incentives may well be acceptable in some project areas, while in others it is rejected and opposed by indigenous and Afro-descendant people and may well exacerbate the ongoing violent conflict leading to more fear and trauma for some indigenous communities.

#### 6.1.5. Project compliance with GCF's operational policies and procedures

73. The existence of violent conflicts as described above, is not an obstacle *per se* to the GCF moving forward with a Category A funding proposal. What is critical is whether, in project design and development, the GCF and the AE, through their collective due diligence and assessments, adequately identified risks and deployed required mitigatory measures.

74. The Funding Proposal and other project documentation mention conflict, and violent conflict a few times. Even though the ESMF and gender assessments give some details on the type of violence and conflict occurring in the region, there is no in-depth analysis or description of the violent conflict by reference to the nature, scope, locations, actors, triggers, governmental response and dynamics of the violent conflict at the framework level. Further, the interpretation of the conflict situation by GCF staff who were interviewed by the IRM relied heavily on what is reported in the Funding Proposal, Environmental and Social Management Framework, Indigenous People's Framework and stakeholder participation documents. In the view of the IRM, within the business model of the GCF, the GCF's staff have limited space to probe and verify the information presented by an AE. In practice, this means that the GCF staff do not conduct missions to a country, do not visit proposed sites of projects and have no direct interaction with affected communities or as in this case, the government entity charged with executing the project. All communications are conducted with the AE alone, which is charged with ensuring that primary due diligence has been properly conducted vis-à-vis stakeholders closest to the project.

75. While the GCF's assessment of the Funding Proposal identifies the "*aggravation of conflicts between IPs and colonos*" as one of the major risks of the project, the due diligence that was conducted was primarily reliant on information reported by the AE in project documents. The Funding Proposal does not contain detailed information about the nature, frequency, location, actors, dynamics, scope, and severity of the violence in the Caribbean Coast, either due to the unavailability of data or through a decision to defer a more robust analysis to a later stage of project implementation at the sub-project level. In IRM interviews, GCF staff explained that information had been provided regarding the conflict situation, that a conflict analysis at the level of the sub-project would shed light on individual instances of violence, historical or ongoing, and significantly, that mitigatory measures had been deployed (via the exclusion criteria for sub-project selection, for example) to address these risks.

76. Perspectives on whether the *Bio-CLIMA* project is designed to mitigate or even address the conflict situation vary. According to the GCF Secretariat, the issue has been sufficiently dealt

with thus far – and the project activities themselves have been designed to address some of these tensions as part of the project design. On the other hand, AE staff asserted that *Bio-CLIMA* “... is not a project to reduce violence. It is not a project to reduce political division in the region and it is not a project to improve the relationship between the communities in the region.” The goal of the project, according to the AE, is the reduction of greenhouse gas emissions and to increase the resilience of the population to climate change. In fact, the ESMF (in para 127) states “The design of the project builds on the comprehensive safeguards determined for the National REDD+ Strategy and the *Bio-CLIMA* project that comply with Warsaw guidance. Furthermore, a commitment to active and effective participation by local stakeholders and indigenous communities through effective multi-level landscape governance will limit the potential for human rights abuses and negative impacts on marginalised communities.” The documentation indicates that the programme design allows for the potential limitation of these “tensions” in the areas. However, there is no explanation as to what is meant by “multi-level landscape governance” nor how “active and effective” participation by local stakeholders and indigenous communities” will be facilitated or ensured in the broader context of the ongoing recurrent violent conflict and human rights situation in some project areas.

77. On the issue of whether the risks arising from the violent conflict situation in some project areas have been appropriately identified and mitigation measures deployed, the IRM finds the social and environmental safeguard due diligence collectively performed by the GCF and AE to be insufficient compared to the severe risks posed to indigenous and Afro-descendant communities, based on evidence collected by the IRM of the situation and on the ground. Even though the documentation prepared and reviewed by the AE and Secretariat acknowledge recurrent violent conflicts in the project area, it does not provide an assessment of the nature, locations, scope, causation, triggers, dynamics and severity of that ongoing violent conflict at the overall framework level, probably because it was planned to be undertaken at the sub-project level. It is therefore reasonable to expect that in the context of the serious and egregious nature of the ongoing violent conflict in the project area, data gathering, and analysis of that conflict ought to have been done as part of framework level safeguards due diligence. This latter information could have been obtained through a robust conflict sensitivity analysis for the project at the framework level, but as detailed above, conflict analysis has been planned to be done at the sub-project level in the future.

78. A conflict sensitivity analysis is a well-known and established tool.<sup>69</sup> Notwithstanding the severity and complexity of the risk of recurrent violent conflict in some project areas identified in the project documents, no evidence of a robust conflict sensitivity analysis at the framework level for this project has been presented to or found by the IRM.<sup>70</sup> IFC’s performance standard 4 (GCF’s interim social and environmental safeguards) states “[t]he level of risks and impacts described in this Performance Standard may be greater in projects located in conflict and post-conflict areas.”<sup>71</sup> The Guidance Note of IFC performance standard 4 on community health and safety states: “For larger operations or those in unstable environments, the review will be a more complex and thorough risk assessment that may need to consider political, economic, legal, military and social developments, and any patterns and causes of violence and potential for future conflicts. It may be necessary for clients to also assess the record and capacity of law enforcement and judicial authorities to respond appropriately and lawfully to violent situations. If there is social unrest or conflict in the project’s area of influence,

<sup>69</sup> The IRM’s literature survey and digital searches yielded substantial information. The IRM also spoke to an expert organization on conflict sensitivity analysis in Switzerland.

<sup>70</sup> See page 12, paragraph 36, Compliance Appraisal Report, <https://irm.greenclimate.fund/sites/default/files/case/compliance-appraisal-report-publication-c0006.pdf>

<sup>71</sup> IFC Performance Standard 4 Community Health, Safety and Security, [https://www.ifc.org/wps/wcm/connect/f69651b9-3080-4870-a9c5-7d5ee8cb1af7/PS\\_4\\_CommHealthSafetySecurity.pdf?MOD=AJPERES&CVID=jqueu2Wm](https://www.ifc.org/wps/wcm/connect/f69651b9-3080-4870-a9c5-7d5ee8cb1af7/PS_4_CommHealthSafetySecurity.pdf?MOD=AJPERES&CVID=jqueu2Wm)

the client should understand not only the risks posed to its operations and personnel but also whether its operations could create or exacerbate conflict.”<sup>72</sup>

79. When GCF staff were asked why such an analysis was not conducted at the framework level, the response was that it would still need to be done when the sub-project areas become known, and the indigenous people involved are also known. The IRM finds this to be an inadequate reason to have omitted to call for a conflict sensitivity analysis for the whole project at the framework level. While the project area is large, its boundaries are known, and the indigenous communities involved are also known. In fact, a conflict sensitivity analysis at the sub-project (micro) level for smaller areas, while useful, will not give the GCF or AE a holistic (macro) view of the conflicts, their vertical and horizontal dynamics, actors, triggers and impacts on the project or project impacts on the conflicts themselves.

80. Given the IRM’s findings that violent conflicts in some of the project areas are complex, recurrent and have involved massacres of indigenous people, the IRM finds non-compliance of the project with that part of the IFC Performance Standard 4 covering projects in conflict, post conflict and unstable environments and the need to adequately assess such risks. A conflict sensitivity analysis ought to have been conducted for the project as a whole during the design phase. Such an analysis would have informed the design of the project excluding areas where there is potential to exacerbate the violent conflict and allowing project benefits to be better targeted. It would also have allowed for the development of appropriate mitigatory measures, including serving as valuable and useful guidance and a baseline to an independent third-party monitor of the project. Such an analysis could have been used to decide where sub-projects might or might not be located.

81. Additionally, the GCF’s safeguards make it clear that where there are ongoing human rights issues, a human rights due diligence report should be prepared.<sup>73</sup> Furthermore, according to the GCF ESP, screening of activities for any potential adverse impacts on human rights “may be done through the required social and environmental impacts assessment (complemented by specific human rights due diligence deemed relevant by the accredited entities with respect to specific circumstances or activities).” The above cited safeguards from the IFC performance standards as well as several provisions in the GCF’s own Environmental and Social Policy expressly make this requirement amply clear. Generally, human rights due diligence can and should be included in the environmental and social management framework or system as well as in assessments done in this regard. However, not all human rights are covered or addressed within the environmental and social safeguards framework. For example, issues such as due process of law, access to justice and remedy, freedom of assembly, freedom of association, and freedom of expression are just some human rights that are recognised by the United Nations, but not specifically or fully included within the ambit of environmental and social safeguard systems. For this reason, when there are serious concerns about human rights issues, in the context of a project, with regard to matters not usually covered in the social and environmental safeguard system, the policies recommend that a separate human rights due diligence be performed, to ensure that such issues are also addressed. The GCF’s policy is clear that no project will be funded where the activities of the project can lead to human rights violations.

82. Under paragraph 48 of the ESP cited above, the primary responsibility to assess the relevance to conduct human rights due diligence is assigned to the AE. While this requirement is discretionary, in a situation such as in this project, where human rights issues are of concern, it behoves an AE to undertake a human rights due diligence assessment in order to ensure that the situation on the ground does not adversely impact project requirements or implementation and/or that the project does not exacerbate or cause a worsening of the situation. The IFC’s

<sup>72</sup> Guidance Note on IFC Performance Standards 4, [https://www.ifc.org/wps/wcm/connect/c7f84508-d39e-43ec-9719-1873e91aa8e1/2007%2BUpdated%2BGuidance%2BNote\\_4.pdf?MOD=AJPERES&CVID=jqeAWoe](https://www.ifc.org/wps/wcm/connect/c7f84508-d39e-43ec-9719-1873e91aa8e1/2007%2BUpdated%2BGuidance%2BNote_4.pdf?MOD=AJPERES&CVID=jqeAWoe)

<sup>73</sup> IFC Performance Standard 1, Assessment and Management of Environmental and Social Risks and Impacts, Objectives, [https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/policies-standards/performance-standards/ps1](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards/ps1)



Performance Standard 1, Guidance Note 1 also states "GN47. If the client decides to undertake business human rights due diligence, as noted in footnote 12 of Performance Standard 1, the client may find it helpful to refer to the human rights aspects of the risks and impacts identification and management processes as well as several scenarios of human rights risks presented in the Guide to Human Rights Impacts Assessment and Management, a joint publication of the International Business Leaders Forum and IFC (see Bibliography)." Footnote 12 states "12 - In limited high-risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with specific human rights due diligence as relevant to the particular business"

83. There is ample evidence through interim and final findings on the Inter-American Human Rights Commission, and the Inter-American Human Rights Court and the IRM's own research and interviews that there are ongoing human rights issues and concerns regarding indigenous peoples in the project area. While these issues and concerns are not caused by the *Bio-CLIMA* project, there is a possibility that they may well be exacerbated by the project when implemented, or that the human rights situation may itself impact the *Bio-CLIMA* project and aspects such as informed consultations and FPIC under it. Documentation examined by the IRM of the related World Bank funded project shows that the seriousness of such human rights issues and concerns were much more openly and transparently highlighted than those highlighted by the AE for the *Bio-CLIMA* project.<sup>74</sup> In this context, it is the IRM's view that the safeguards triggered a need for a human rights due diligence report. Unfortunately, even though the safeguard specifically requires a human rights due diligence in these circumstances, no such due diligence report was prepared for the project. As such, the IRM finds that this project has not complied with the established GCF safeguard.

84. For these reasons, on a balance of probabilities, the IRM finds that there are ongoing human rights issues and concerns relating to indigenous people in particular within some of the project areas. The AE's assertion that the *Bio-CLIMA* project "follows a human rights-based approach" is not entirely accurate in some respects, as this IRM report demonstrates. In these circumstances, a human rights due diligence report ought to have been done for the project as required by the GCF's environmental and social policy. Not doing so resulted in non-compliance with established GCF environmental and social safeguards.

85. Based on the evaluation of evidence above, the IRM finds that the *Bio-CLIMA* project is not in compliance under the following applicable GCF Policies and Procedures:

**Table 1:** Applicable GCF Policy and Procedure and Findings on Compliance

Applicable Policy and Procedure	Specific Text of the Policy/Procedure applicable to this project for non-compliance assessment	Reasons for Non-Compliance
Performance Standard 1:	(a) Identify funding proposal's environmental and social risks and impacts; (b) Adopt mitigation hierarchy: anticipate, avoid; minimize; compensate or offset; (d) Engagement with affected communities or other stakeholders throughout funding proposal cycle.	The IRM finds non-compliance of the project with this standard as the funding proposal did not contain sufficient analysis of the violent conflict situation in the project area as a whole. Human rights due diligence was not conducted or deemed relevant for the project. There is insufficient evidence to indicate affected communities were consulted on the

<sup>74</sup> World Bank, Appraisal Environmental and Social Review Summary, Emission Reductions Program to Combat Climate Change and Poverty in the Caribbean Coast, the BOSAWAS and the Indio Maiz Reserves P167434, <https://documents1.worldbank.org/curated/en/718511610473918129/pdf/Appraisal-Environmental-and-Social-Review-Summary-ESRS-Emission-Reductions-Program-to-Combat-Climate-Change-and-Poverty-in-the-Caribbean-Coast-the-BOSAWAS-and-the-Indio-Maiz-Reserves-P167434.pdf>



Applicable Policy and Procedure	Specific Text of the Policy/Procedure applicable to this project for non-compliance assessment	Reasons for Non-Compliance
	This includes communications and grievance mechanisms. (e) PS 1, footnote 7 explicitly states that, “[i]n limited high risk circumstances, it may be appropriate for the client to complement its environmental and social risks and impacts identification process with <u>specific human rights due diligence</u> .” (Emphasis added)	projects risks, proposed mitigants, or on PCRAs.
Performance Standard 4:	(a) To anticipate and avoid adverse impacts on the health and safety of the affected community; (b) To safeguard personnel and property in accordance with relevant human rights principles.	The IRM finds non-compliance due to the failure of the funding proposal to adequately assess risks to community health, safety and security vis-à-vis the occurrence of violent conflict in the project area and the impact of the human rights situation on project requirements.
Performance Standard 7:	(a) Ensure full respect for indigenous peoples (i) Human rights, dignity, aspirations; (ii) Livelihoods; (b) Avoid/minimize adverse impacts; (d) Free, prior and informed consent in certain circumstances	The IRM finds non-compliance of the project due to the failure of the project to incorporate affected communities early and often in consultations, especially related to gathering data and carrying out assessments of the conflict and human rights situation to inform project design.
GCF’s Environmental and Social Policy paragraphs 8 (p), and (q), 17, 26, 37, 47-48 and 69	Para 8(p): the design and implementation of activities will be guided by the rights and responsibilities set forth in the United Nations Declaration on the Rights of Indigenous Peoples including, of particular importance, the right to free, prior and informed consent.  Para 8(q): GCF will require the application of robust environmental and social due diligence	The IRM finds non-compliance of the project due to insufficient evidence of informed consultation with affected communities on the assessments and proposed mitigants around the conflict situation.  The IRM finds the due diligence performed for the project failed to include human rights due diligence and conflict sensitivity analyses, and thus, did not meet the requirement of applying robust due diligence.
	Para 17: GCF will also require the accredited entities to ensure ... that the individual subprojects and delegated activities are properly screened, assessed, assigned an appropriate risk category, subjected to due diligence and oversight, and that the implementation and outcomes are monitored and reported.	The IRM finds non-compliance of the project due to insufficient due diligence on mitigatory measures and selection criteria of sub-projects that take full account of the violent conflict and human rights situation in the project areas. The GCF ought to have ensured that the AE conducts a robust analysis of the conflict situation, and that affected communities are consulted and informed about the assessments and proposed mitigants. Part of the reason for this failure is that the GCF was not adequately alerted to and provided with critical situational information on violent conflict and human rights.



Applicable Policy and Procedure	Specific Text of the Policy/Procedure applicable to this project for non-compliance assessment	Reasons for Non-Compliance
	<p>Para 26: GCF will require that applicable environmental and social safeguards standards are determined and actions sufficient to meet the requirements of each applicable environmental and social safeguards standard pursuant to the GCF ESS standard and this policy are identified.</p>	<p>The IRM finds non-compliance of the project as safeguards assessments did not adequately capture the risks associated with Performance Standard 1, 4, 5, and 7 on the impacts to land and livelihoods titled to indigenous and Afro-descendant communities. The IRM also finds that adequate informed consultations were not conducted, the impact of violent conflict and the human rights situation were not adequately assessed and mitigatory measures were not adequately developed.</p>
	<p>Para 37: GCF will undertake due diligence based on the most recent, reliable and relevant information of the activities...</p>	<p>The IRM finds non-compliance of the project as the GCF failed to probe risks posed by the conflict situation, including failure to obtain details on the conflict situation, its frequency and impact on project implementation. While some information that is publicly available could have alerted the GCF to the violent conflict and human rights situation in the project areas, other information required for a situational analysis was not supplied to the GCF.</p>
	<p>Para 47: The plans or <u>frameworks</u> will be developed with the full and effective participation of indigenous peoples through a process of meaningful consultation tailored to the indigenous peoples; ensuring the free, prior and informed consent of the affected indigenous peoples, where required by the relevant policies of GCF. The scope and extent of such plans will be proportional to the vulnerability of the indigenous peoples and the extent of impacts.</p>	<p>The IRM finds non-compliance of the project as affected communities were not informed or consulted during the project formulation stage on impacts to Indigenous and Afro-descendant Communities, nor were they afforded an adequate opportunity to provide feedback and input into project framework design and development.</p>
	<p>Para 48: GCF will require and ensure that activities are screened ... for any potential adverse impacts on the promotion, protection, respect for, and fulfilment of human rights. This may be done through the required social and environmental impacts assessment (complemented by specific human rights due diligence deemed relevant by the accredited entities with respect to specific circumstances or activities).</p>	<p>The IRM finds non-compliance of the project as it did not sufficiently screen for adverse impacts on human rights as a result of increased risks and triggers of violence in the region, weak law enforcement and rule of law, and did not consider mitigatory, preventive and protective measures to ensure that project activities are not impacted by the situation of violent conflict and human rights concern.</p>
	<p>Para 69: GCF will require and ensure that the meaningful consultation will be culturally appropriate, undertaken throughout the life cycle of activities, with information provided and disclosed in a timely manner, in an</p>	<p>The IRM finds non-compliance of the project due to failure to meaningfully inform and consult affected indigenous communities in the project areas about the description of the key elements of the project (including PCRA) and key</p>



Applicable Policy and Procedure	Specific Text of the Policy/Procedure applicable to this project for non-compliance assessment	Reasons for Non-Compliance
	understandable format, in appropriate local languages, gender inclusive and responsive, free from coercion, and will incorporate the views of stakeholders in the decision-making process.	elements of the proposed mitigatory measures to address the risks posed by the violent conflict and human rights situation.
Indigenous Peoples Policy	Para 31: The environmental and social assessment should identify affected groups and understand the nature of specific impacts.	The IRM finds non-compliance of the project as information on trends and reach of the violent conflict and human rights situation was not adequately sought or incorporated in the project design assessments.
	Para 46: Further guidance on community development programmes is provided in the GCF “Sustainability guidance note: Designing and ensuring meaningful stakeholder engagement on GCF-financed projects”.	The IRM finds non-compliance of the project due to lack of evidence of meaningful stakeholder engagements and consultations on key elements of the project.
	Para 48: where government processes involve project-level decision and actions, the accredited entity should review these processes in relation to the requirements of the Policy and GCF ESSs and address identified gaps or non-compliance.	The IRM finds non-compliance as the Funding Proposal did not assess whether government processes, especially with regard to land use and land titling, aligned with the Policies of the GCF.
Updated Gender Policy	Para 5: In the context of sustainable development, GCF will consistently mainstream gender issues in its implementation arrangements and <u>frameworks</u> for its projects. The Gender Policy recognizes that gender relations, roles and responsibilities exercise important influences on women’s and men’s access to and control over decisions, assets and resources, information, and knowledge.	Given the above findings of non-compliance of the project, the IRM does not make a finding on this aspect. The IRM expects that the recommended remedies will allow differentiated gender data to be gathered and analysed as part of the conflict sensitivity analysis and human rights due diligence that is recommended. This should enable further mainstreaming of gender issues and assessment of gender impacts arising from the violent conflict and human rights concerns leading to the development of adequate mitigatory measures.

#### 6.1.6. Impact of non-compliance on indigenous people

86. In the absence of a conflict sensitivity analysis with insights into when, where, how and who are in conflict and as to the nature, scope, actors, triggers, dynamics etc. of the ongoing conflict, there is little to no information available to the GCF Secretariat and other stakeholders, to judge whether the location and conditions for each sub-project could lead to conflict and violence and/or exacerbate the existing conflict and violence. The planned sub-project level conflict sensitivity analysis, while useful, will not allow the GCF Secretariat and the AE to assess the complex nature of the ongoing conflict and the dynamics and actors and locations at play early on, before selecting locations for the sub-projects. Such sub-project level conflict analysis, when undertaken as planned, would also be better informed if a project level analysis had been done previously. This potential impact is compounded by the paucity of project specific

information available to the GCF Secretariat on ongoing human rights issues and concerns. Had this information been available, much better judgements could be made by all concerned about the location, conditions, and timing for sub-projects. All concerned would be in a much better position to make informed and timely decisions about the location, conditions, and timing of sub-projects. As things stand, some of these sub-projects at the very least, may either create or exacerbate violence and conflict, particularly in the RACCN.

87. For these reasons, the IRM finds that as a result of the non-compliance identified in section 6.1.5 above, some indigenous communities in the project areas, particularly those in the RACCN (North) may encounter adverse impacts in the form of new conflicts over land and attendant violence and/or the exacerbation of existing conflict over land and attendant violence.

#### 6.1.7. Conflict sensitivity analysis

88. There are several reliable sources of information on conflict sensitivity analysis that the GCF and AE could use. The IFC in its guidance note on performance standard 4 refers to one such source, namely, "Guidance on responsible business in conflict-affected and high-risk areas: a resource for companies and investors".<sup>75</sup> Another useful source is the Stabilization Unit Conflict Sensitivity Tools and Guidance published by the United Kingdom Government. Based on the definition of the UK guidance, conflict sensitivity can be implemented at any stage of a programme or project and consists of four interlinked steps:<sup>76</sup>

- (a) Step 1: Conflict analysis is a systematic and structured approach to identifying the factors driving conflict and violence, the actors involved and their interests, key trends and any entry points or opportunities to build society's capacities for resolving differences or pursuing objectives without resort violence.
- (b) Step 2: Conflict sensitivity review uses the findings of the analysis to review and assess new or ongoing programmes and actions for interactions with the conflict context - in terms of risks of harm and opportunities. The programme design or action can then be adjusted to reduce risks of harmful impacts on the conflict and maximize opportunities to build peace.
- (c) Step 3: Conflict sensitive implementation involves ensuring implementing partners are able to operate in a conflict sensitive manner.
- (d) Step 4: Conflict sensitivity monitoring involves a regular refresh of the analysis, monitoring of key conflict sensitivity risks and ongoing adjustments to the intervention/ activities as necessary.<sup>77</sup>

89. During its investigation process, the IRM contacted the private and neutral Swiss Foundation, Peace Nexus, which specialises in supporting conflict-sensitive business operations and addressing specific conflict risks. During this exchange, Peace Nexus experts clearly expressed the importance of conducting a conflict sensitivity analysis not only at the micro level of a project, but also at the macro level even without the exact sub-project areas being established. A conflict sensitivity analysis at the macro level provides an overview of the context of a given situation and helps to assess how the conflict situation at the micro level, i.e., the sub-project level, is affected by the overall context. As mentioned in the Conflict Sensitivity Tools and Guidance, a conflict sensitivity analysis can be implemented at any point in the implementation of a project. Since the first disbursement for this project has not yet been made, a macro-level conflict analysis would be useful in understanding the broader conflict dynamics and would help identify where a more detailed sub-project analysis should be conducted. It

<sup>75</sup> Guidance on Responsible Business in Conflict-Affected and High-Risk Areas: a resource for companies and investors, [https://d306pr3pise04h.cloudfront.net/docs/issues\\_doc%2FPeace\\_and\\_Business%2FGuidance\\_RB.pdf](https://d306pr3pise04h.cloudfront.net/docs/issues_doc%2FPeace_and_Business%2FGuidance_RB.pdf)

<sup>76</sup> See page 3-4, United Kingdom Government, Conflict Sensitivity Tools and Guidance, <https://www.gov.uk/government/publications/conflict-sensitivity-tools-and-guidance>

<sup>77</sup> *Ibid.*



would also help the AE (in consultation with the EE), and GCF decide where sub-projects can be safely located and whether further mitigation measures are needed to avoid conflict and ensure the project does not exacerbate an already recurrent and existing violent conflict situation.

#### 6.1.8. Human rights due diligence report

90. The application of human rights due diligence should be used in high-risk project situations where there is evidence of human rights concerns and issues and where a project could negatively impact the human rights of local populations, or the human rights situation can affect the project and its implementation. The IRM notes that the scope of the human rights due diligence assessment may be reasonably restricted to the Caribbean Coast of Nicaragua, where the project will be implemented. Further, the assessment would not encompass a broad review of the human rights situation in the country, but rather focus on those impacts and risks directly related to the project. The GCF's Environmental and Social Policy<sup>78</sup> has some guidance on assessing human rights. Other guidance includes the definition of the United Nations Human Rights Council (OHCHR) Guiding Principles on Business and Human Rights Framework, (which has been analysed by the IFC against its performance standards<sup>79</sup> (adopted by the GCF as its interim ESS standards)), where human rights due diligence is defined as follows:

"In order to identify, prevent, mitigate and account for how they address their adverse human rights impacts, business enterprises should carry out human rights due diligence. The process should include assessing actual and potential human rights impacts, integrating and acting upon the findings, tracking responses, and communicating how impacts are addressed. Human rights due diligence:

- (a) Should cover adverse human rights impacts that the business enterprise may cause or contribute to through its own activities, or which may be directly linked to its operations, products or services by its business relationships;
- (b) Will vary in complexity with the size of the business enterprise, the risk of severe human rights impacts, and the nature and context of its operations;
- (c) Should be ongoing, recognizing that the human rights risks may change over time as the business enterprise's operations and operating context evolve."<sup>80</sup>

In 2021, the United Nations Development Programme (UNDP) created a Human Rights Due Diligence Training Facilitation Guide following the OHCHR Guiding Principles on Business and Human Rights, which introduce human rights due diligence with the four steps of the process:<sup>81</sup>

- (d) Identifying and assessing actual and potential human rights impacts
- (e) Integrating and acting upon the findings
- (f) Tracking effectiveness of responses

<sup>78</sup> Paragraphs 8(r) and 50 of the GCF's Revised Environmental and Social Policy, <https://www.greenclimate.fund/sites/default/files/document/revised-environmental-and-social-policy.pdf> The original policy contained the same provisions.

<sup>79</sup> UN Guiding Principles on Business and Human Rights and IFC Sustainability Framework, <https://www.ifc.org/wps/wcm/connect/012f5800-acf6-42d1-807f-67f712a35420/UNGPsandIFC-SF-DRAFT.pdf?MOD=AJPERES&CVID=jonf21S>

<sup>80</sup> See page 17-18, Guiding Principles on Business and Human Rights, Implementing the United Nations "Protect, Respect and Remedy" Framework, <https://www.ohchr.org/en/publications/reference-publications/guiding-principles-business-and-human-rights>

<sup>81</sup> Human Rights Due Diligence Training Facilitation Guide, <https://www.undp.org/publications/human-rights-due-diligence-training-facilitation-guide>

- (g) Communicating how impacts are addressed

#### 6.1.9. Recommendations

91. After the first disbursement but before any activities under the project are undertaken, the IRM recommends that a conflict sensitivity analysis that looks at all components of the conflict in the entire project area should be performed in accordance with the contents and conditions set out in paragraph 186 of this report.

92. The IRM recommends that a human rights due diligence report be prepared after the first disbursement but before any project activities are undertaken, by an independent competent third-party appointed by the AE and approved by the GCF Secretariat in accordance with the contents and conditions set out in paragraph 187 of this report.

## 6.2 Informed consultation and free, prior, and informed consent (FPIC)

93. The Caribbean Coast of Nicaragua has been identified as the area of highest priority for the reduction of greenhouse gas emissions.<sup>82</sup> The region contains 80 per cent (3.2 million hectares) of Nicaragua's total forest area. The region is home to 1.1 million inhabitants, including several indigenous and Afro-descendant communities, namely the Mayangna, Miskito, Rama, Ulwa, Creoles and Garifuna communities. According to project documents, nearly all natural forests in the region are located within 23 indigenous and Afro-descendant territories, covering a total land area of 3,819,340 hectares and including 304 communities.

94. The complainant(s) allege that the consultation processes for *Bio-CLIMA* were "insufficient and inadequate"<sup>83</sup> and that the project has not fulfilled the requirements of Free, Prior and Informed Consent (FPIC) of indigenous peoples. Additionally, they allege that the parties, which were consulted in a limited way, did not have the legitimacy to represent indigenous and Afro-descendant peoples, describing them as unlawfully established "parallel" governments.

95. According to the Interim Environmental and Social Safeguards of the GCF (IFC Performance Standard 7), the AE is expected to undertake an engagement process as required in Performance Standard 1 and a process of Informed Consultation and Participation (ICP) when project activities impact indigenous peoples. ICP entails consultation that occurs freely and voluntarily, without any external manipulation, interference, or coercion, and without intimidation. In addition, indigenous peoples should have access to relevant project information prior to any decision making that will affect them, including information on potential adverse environmental and social impacts affecting them at each stage of project implementation. To achieve this objective, consultations should take place prior to and during project planning.

96. Additionally, according to the GCF's Indigenous Peoples Policy and the Interim Environmental and Social Safeguards of the GCF, the AE is required to seek the Free, Prior, and Informed Consent (FPIC) of affected indigenous communities for activities that impact the lands and titles of indigenous people. Additionally, FPIC is a recognised right of indigenous people under international laws and treaties. There are some important differences in the interpretation of GCF requirements to note, regarding the application of FPIC to a programme, as opposed to a project. These differences spring from the interpretation of the text of Paragraph 51 of the Operational Guidelines under the GCF Indigenous Peoples Policy,<sup>84</sup> pointing to the need for a "framework agreement" with the relevant indigenous people and the timing of that agreement. The framework agreement is expected to spell out how FPIC processes will be

<sup>82</sup> Forest Carbon Partnership, <https://www.forestcarbonpartnership.org/country/nicaragua>

<sup>83</sup> Complaint

<sup>84</sup> Indigenous Peoples Policy, <https://www.greenclimate.fund/document/indigenous-peoples-policy>

conducted for sub-projects, but the timeline for the framework FPIC is not specified in the IPP. This issue is further discussed below.

97. The applicable policies and procedures are listed below:
- (a) Performance Standard 1: Assessment and management of environmental and social risks and impacts
  - (b) Performance Standard 4: Community health, safety and security
  - (c) Performance Standard 7: Indigenous peoples
  - (d) GCF Environmental and Social Policy (paragraphs 8(i), 8(p), 8(q), 12 (b), 13, 14(a)(v), 18, 47-48, 60, 62, 67 and 69);
  - (e) Indigenous Peoples Policy (paragraphs 26(a), 26(c), 26(d), 31, 35, 44, 51, 52(a), 52(b), 52(d) and 58
  - (f) Operational Guidelines of the Indigenous Peoples Policy (paragraphs 39,51 and 58)

#### 6.2.1. Lack of evidence of informed consultations and applicability of FPIC

98. The consultations cited in support of *Bio-CLIMA* can be found in the Environmental and Social Management Framework (ESMF) and in 'Annex 7 Summary of consultations and stakeholder engagement plan.' Both documents position *Bio-CLIMA* as synchronous with the Nicaraguan National Strategy for Avoided Deforestation (ENDE REDD+) and the Caribbean Coast Emissions Reduction Program (ER Program) that was approved and subsequently withdrawn by the World Bank's Forest Carbon Partnership Facility. In the ESMF, the ER Program and FP146 are described as complementary components of the ENDE REDD+ and share overlaps in terms of the territories they cover. There is substantial documentation, dating back to 2014, published and accessible on MARENA's website, showing that meetings were held with various stakeholders regarding the ENDE REDD+ framework and the ER Program. Thus, in determining whether the requirements for consultations and FPIC have been met for *Bio-CLIMA*, the scope of investigation was expanded to consider engagements undertaken under both the ENDE-REDD+ Strategy and the FCPF's ER Program.

99. In assessing the nature, scope and quality of consultations held, two types of processes are relevant when it comes to projects that have disproportionate impacts on indigenous peoples (i) Informed Consultation and Participation (ICP) process; and (ii) Free, Prior and Informed Consent (FPIC). Performance Standard 7 (Indigenous Peoples) requires an informed consultation and participation process to occur prior to and during project planning and any related decision-making<sup>85</sup> and where the project may result in adverse impacts on land and natural resources, the AE is required to obtain Free, Prior and Informed Consent (FPIC). An investigation on the question of consultation would therefore need to factor in both processes i.e., ICP and FPIC and their appropriate application at the various stages of a project and its sub-projects.

100. When asked about the specifics of the consultations, the GCF Secretariat explained that in their view, the project had been discussed many times with the relevant indigenous people and documents were made available in advance of the Board decision on the project. Additionally, they pointed to the requirement for FPIC to be obtained at the sub-project level, for each of the 165+ sub-projects envisioned under the project. Notwithstanding planned future engagement activities and FPIC processes, complainant(s) and indigenous witnesses interviewed by the IRM could not recall participating in meetings, thus far, where *Bio-CLIMA*'s specific components were discussed. On the contrary, several interviewees mentioned that

<sup>85</sup> See Guidance Note 15 on Performance Standard 7: [https://www.ifc.org/wps/wcm/connect/9baef8f6-9bd9-4d95-a595-7373059081d4/GN7\\_English\\_2012.pdf?MOD=AJPERES&CVID=nXqnhP5](https://www.ifc.org/wps/wcm/connect/9baef8f6-9bd9-4d95-a595-7373059081d4/GN7_English_2012.pdf?MOD=AJPERES&CVID=nXqnhP5)



conversations on *Bio-CLIMA* had only begun in earnest in their communities in the weeks preceding the visit by the IRM team to Nicaragua.

101. The Environmental and Social Management Framework (ESMF) for *Bio-CLIMA* and its supplementary framework document<sup>86</sup> were reported to have undergone a “consultation process from 19-24 September 2019 in the localities of San Andres- Alto Wangki Bocay (19-20 September), Bilwi- RACCN (19-20 September), and in Bluefields RACCS (23-24 September 2019).” The ESMF estimates that there were approximately 76 participants per event. Of those who participated, 26 per cent were women, 57 per cent were indigenous (Miskito, Mayangna, Ulwa, Rama) and 19 per cent were Afro-descendants (Creoles and Garifunas). Participants reportedly came from the regional autonomous governments and councils, 2 communal governments, 15 GTIs, 5 municipal governments, universities, producer and farmer associations and civil society organisations (namely Centro de Derechos Humanos, Ciudadanos y Autónomos (CEDEHCA), Nación Mayangna, Asociación de Mujeres Indígenas de la Costa Atlántica de Nicaragua (AMICA), Asociación para El Desarrollo de la Costa Atlántica (PANA-PANA)). Meeting notes also identified representatives from several ministries and public institutions (MARENA, INAFOR, MEFCCA, MHCP, MINED, Civil Defense, PRONICARAGUA, National Police).

102. In 2019, when the consultations noted above were said to have been conducted, the Government of Nicaragua was carrying out consultations for the national ENDE-REDD+ strategy and related programs. According to MARENA, between 2011-2020, approximately 325 activities had been organised, including dialogues, consultations, evaluations, technical sessions and trainings<sup>87</sup> pertaining to the national REDD+ strategy. Consultations around the REDD+ strategy and various readiness activities were financed, in large part, by the World Bank and the Forest Carbon Partnership Facility. The *Bio-CLIMA* project was being formulated at the same time as consultations were being held for the World Bank’s Emissions Reduction Program. As mentioned previously, the two projects were meant to act in a complementary manner to realise the objectives of the ENDE REDD+ framework.

103. To better illustrate the overlaps between the two projects, the table below<sup>88</sup> demonstrates the key overlaps between the Strategic Priorities 1 & 2 of the ER Program and the relevant components and sub-components identified in *Bio-CLIMA*.

**Table 2: Applicable GCF Policy and Procedure and Findings on Compliance**

Emissions Reduction Program	<i>Bio-CLIMA</i>
Strategic Line 1: Updating and disseminating territorial and communal development and land use zoning plans	Activities 1.1: Support indigenous and non-indigenous communities with intensive technical assistance (TA) to undertake the land use and management planning of their farms, productive units and/or territories on which they sustain their livelihoods. Outputs are Land Use Management

<sup>86</sup> According to the ESMF, the following documents relevant to *Bio-CLIMA* were presented during the consultations: Environmental and Social Management Framework; Labour Management Procedures; Integrated Pest Management Plan; Process Framework for Involuntary Restrictions to Access to Resources in Protected Areas; Biodiversity Management Plan; Guidelines for Forest Management; Indigenous Peoples Planning Framework; Guidelines to Protect Cultural Heritage; Stakeholder Engagement Plan including the Mechanism to Address Complaints, [https://www.bcie.org/fileadmin/user\\_upload/Annex\\_6\\_English\\_Bio-Clima\\_Environmental\\_and\\_Social\\_Safeguards\\_Management\\_Framework.pdf](https://www.bcie.org/fileadmin/user_upload/Annex_6_English_Bio-Clima_Environmental_and_Social_Safeguards_Management_Framework.pdf)

<sup>87</sup> Caribbean Coast Emissions Reduction Program, Forest Carbon Partnership Facility, <https://www.forestcarbonpartnership.org/country/nicaragua>

<sup>88</sup> See Page 101, paragraph 175, Environmental and Social Management Framework (ESMF) [https://www.bcie.org/fileadmin/user\\_upload/Annex\\_6\\_English\\_Bio-Clima\\_Environmental\\_and\\_Social\\_Safeguards\\_Management\\_Framework.pdf](https://www.bcie.org/fileadmin/user_upload/Annex_6_English_Bio-Clima_Environmental_and_Social_Safeguards_Management_Framework.pdf)



Strategic Line 2: Improving territorial and communal legal statutes, internal norms and regulations, and administrative and contractual procedures for forest and land use by community members or outsiders	Plans, Business Plans and Territorial Development Plans.  Activity 1.1.1.4: Facilitate celebration and formalization of landscape restoration and forest conservation agreements including the use of Peaceful Cohabitation Regime Agreements (PCRAs)
	Activities 1.2: Finance Sustainable Community Enterprises (SCE) in indigenous territories within protected areas. Finance commercial Community Forest Management (CFM) and Community Forest Restoration (CFR) sub-projects with business plans prepared by indigenous communities outside protected areas. Reforest degraded land on slopes (> 50 per cent) into biodiverse, Close to Nature Planted Forests (CTNPFs)
<p><b>Key Differences</b></p> <p>The ER Program identifies the updating of territorial development and land use zoning plans as a key intervention but identifies existing plans, legal statutes, norms and regulations etc. as the target for these interventions.</p> <p><i>Bio-CLIMA</i> contextualises its interventions within clearly defined and novel outputs i.e., Land Use Management Plans (LUMPs), Business Plans (BPs) (TDPs) and Territorial Development Plans. LUMPs and BPs are made accessible to non-indigenous farmers, with certain restrictions attached that are primarily enforced through the use of PCRAs. PCRAs are a unique component to <i>Bio-CLIMA</i>.</p> <p>The ER Program proposes expansion of ongoing activities of the national social reforestation crusade and natural regeneration programmes whereas <i>Bio-CLIMA</i> provides discrete categories of sub-projects to finance and promote both within and outside protected areas of the reserves.</p>	

104. The similarities in some project activities and components between the ER Program and *Bio-CLIMA* meant that several key safeguard process documents were used by both projects, namely the instruments dealing with labour, access restrictions on land and natural resources, biodiversity and forest management, pest management and cultural heritage. In fact, documentation submitted to the GCF Board, as part of the Funding Proposal for *Bio-CLIMA*, included an Environmental and Social Management Framework that was applicable to both the ER Program and the *Bio-CLIMA* project. A question therefore arises as to whether the consultations that were conducted under the Emissions Reduction Program could be considered to meet the requirements of ICP vis-à-vis the activities, risks and mitigation measures proposed under the *Bio-CLIMA* project. A further complication arises from the lack of clarity as to which documents were used in consultations. It is therefore also necessary to examine whether consultations were organised recognising *Bio-CLIMA* as a separate project, with its own unique components.

105. Representatives of the Government of Nicaragua have emphasised the centrality of the ER Program and ENDE-REDD+ framework in understanding the origins of *Bio-CLIMA*. Engagements on ER Program and ENDE-REDD+ would have touched upon the broader objectives and strategies to reduce carbon emissions, and *Bio-CLIMA* was the natural next step in the process via the identification and financing of concrete actions to reduce emissions. A

complementary objective to create a baseline for unlocking future Results-Based-Payments (a core component of the ER Program but not *Bio-CLIMA*) would also be fulfilled. Further clarification whether a baseline will be developed, needs to be clarified by the Secretariat with the AE and the Government of Nicaragua, as according to the AE, there is no change in the activities under the ER programme, but only the source of funding. To factor in these complexities, the IRM examined if indigenous and Afro-descendant communities had been meaningfully consulted on the components and activities that would eventually constitute the *Bio-CLIMA* project. The IRM closely examined the three consultation documents produced by MARENA to search for evidence that the *Bio-CLIMA* project and/or its planned activities and interventions were the topic of discussions, in working groups and presentations.

106. In the three documents cited, the IRM found that the term *Bio-CLIMA* was mentioned in passing on one occasion during the consultation in Bilwi-RACCN (19-20 September). In this consultation, a civil society representative asked about which specific activities and strategies were being implemented to combat deforestation. In response, a representative of SERENA shared that a number of sub-projects would be developed to support the goal of reducing emissions, citing *Bio-CLIMA* as an example. The representative noted that the *Bio-CLIMA* project would allow for complementarity with the activities of EPRD and other projects. No further information on *Bio-CLIMA*, such as the exact nature of sub-projects and the provision of PCRAs, was noted in meeting minutes. Except for this one interaction, there is no evidence to suggest that the ESMF that was being considered contained information on *Bio-CLIMA*, including details of key outputs such as (i) Land Use Management Plans; (ii) Territorial Development Plans and Business Plans for each territory; (iii) Peaceful Co-habitation Regime Agreements (PCRAs); (iv) reforestation through Close to Nature Planted Forests; and (v) financing Sustainable Community Enterprises.

107. In addition to the documentary review, the IRM interviewed key stakeholders – including complainant(s), representatives of GTIs, representatives of the AE, GCF Secretariat staff, the officials of the Government of Nicaragua and FAO (consultants commissioned by the AE to develop the *Bio-CLIMA* project) – and invited them to share their reflections of and participation in consultations pertaining to *Bio-CLIMA*. During the investigation, the IRM also interviewed and met with at least 45 indigenous and Afro-descendant people, inclusive of representatives of 23 GTIs, customary indigenous leaders, technical experts, legal representatives, academics and those engaging in subsistence activities.

108. When asked about whether they had looked closely into the consultation documents submitted by the AE, GCF staff emphasised their role as performing “second level due diligence.” The question of whether consultations were accurately reported on, whether *Bio-CLIMA* had been discussed in detail and/or questions regarding the substance of the discussions could not be answered by GCF staff as such matters pertained to “first level due diligence” and were verified by the AE’s staff, as part of their role in providing relevant information in the FP package. When AE’s staff were subsequently asked about the consultations, the IRM was told to ask the FAO, the entity contracted by the AE to draft the Funding Proposal and its accompanying instruments. When the IRM asked FAO representatives, they said that MARENA should be asked about the consultations as they were the ones responsible for holding consultations on the *Bio-CLIMA* proposal with indigenous and Afro-descendant communities. FAO was reportedly told by MARENA that consultations on *Bio-CLIMA* had taken place in September 2019, and this was subsequently included in the Funding Package that was ultimately delivered to the GCF Board. None of the staff of the GCF, the AE or FAO could offer confirmation that the ESMF and related instruments of *Bio-CLIMA* had actually been used in consultations with indigenous and Afro-descendant communities, as described in the ESMF. When pressed on the matter, the GCF referred to the responsibilities of the AE outlined in the GCF’s Environmental and Social Policy. The AE and FAO, for their part, did not appear to have knowledge of the consultations beyond what was already reported by MARENA.

109. The importance of consulting on *Bio-CLIMA* separately is borne out by the serious risks posed by the project in escalating tensions and potentially increasing the invasions of indigenous territories by settlers. Such risks could have been more fully explored in discussions around PCRAs, for example particularly in the Funding proposal package. However, in interviews with the complainant(s), indigenous witnesses, and representatives of indigenous territorial governments (GTIs) on the proposal of using PCRAs, the IRM found that interviewees were unable to provide even basic details on the *Bio-CLIMA* project and the nature of the sub-projects, the suggested criteria and importantly, the proposal to offer PCRAs to non-indigenous third parties through 165 sub-projects located in indigenous territories. Those interviewed were aware of the concept of co-habitation but the formalisation of co-habitation agreements between indigenous peoples and third parties came as a surprise to many. In one case, a GTI representative was unable to offer details on PCRAs despite having claimed that they had participated in consultations and having asserted that consent for PCRAs had been sought and obtained from communal assemblies in their territories. The lack of knowledge of PCRAs amongst representatives of GTIs is especially concerning, given that GTI representatives are meant to act as the decision-makers responsible for advancing various activities and components of *Bio-CLIMA*, including requesting PCRAs for non-indigenous settlers. These aspects of PCRAs as well as more issues identified in the following sections of the IRM report dealing with land usurpation, were not addressed in the funding proposal package.

110. The complainant(s) have asserted that the size, scope and risks posed by *Bio-CLIMA* meant that Free, Prior, Informed Consent should have been sought prior to presenting the project to the Board of the GCF. They also alleged that no opportunities were given to communities to consult on the design of the project – and specifically whether PCRAs as an instrument should even be deployed in the proposed project areas. The complainant(s) further questioned the basis on which the eligibility criteria for PCRAs had been decided. From information gathered during the interviews, the IRM notes that, PCRAs were an ‘innovation’ of the FAO technical team contracted by the AE to prepare the project proposal. The technical team appears to have done so after a limited number of field visits and meetings (not part of formal consultations) with some indigenous peoples in the Caribbean Coast during the project formulation stage. In the interview with the FAO personnel involved in project formulation, one of its leaders passionately advocated for PCRAs as one of their innovations that would allow settlers to have security of land tenure, affirm indigenous ownership of the land, transform the landscape to sustainable agricultural practices and provide the indigenous government with emissions reductions payments. However, the FAO staff interviewed had not been part of the consultations carried out by MARENA and therefore did not know if PCRAs were disclosed and consulted on with indigenous communities. As innovative as this proposal might have been, GCF safeguards require that it should have been transparently disclosed to affected indigenous communities and the communities consulted on their views about that innovation. When some indigenous witnesses were informed for the first time about PCRAs by the IRM during interviews, they reacted that this was another innovation within a development paradigm that international institutions and settlers have agreed to, but that it did not accord with the way of life of indigenous peoples and their notions of caring for the land.

111. Several indigenous witnesses also stated that their communities would likely reject cohabitation and expressed their concern that indigenous and Afro-descendant communities were not asked to weigh in on this part of the design. Theoretically, if some communities decide against entering into PCRAs with settlers, then no PCRAs would be signed. This is part of the criteria applied to ensure PCRAs are entered into in a voluntary manner, at the initiative of indigenous communities themselves via their GTI representative. However, as pointed out by one indigenous community member, PCRAs may not be a matter that GTI representatives can make a decision on without the consent of not only an individual community but the territories as a whole. If GTIs had the authority to make those decisions, some indigenous witnesses expressed concern that consent for PCRAs might be granted even when it was not in the best interests of the community because they feared influence and pressure would be exerted on



GTIs. The AE has asserted that in cases where consensus is not reached and PCRAs cannot be signed for a sub-project to take place, *Bio-CLIMA* has considered steps to reformulate the sub-project or intervene in other areas of the territory with other sub-projects. However, this latter clarification was offered to the IRM by the AE in response to the draft compliance report and is not explicitly outlined in the funding proposal. Perhaps, this information from the AE signifies a recent change of approach regarding PCRAs being an optional component of a sub-project, rather than a mandatory one as described in the funding proposal. Nonetheless, the collective rights over the use, ownership and management of communal lands could arguably mean that a collective decision-making process might be more appropriate when introducing such interventions. On the one hand, the concept of PCRAs ought to have been fully disclosed and consulted on during ICP processes with indigenous communities in the project areas. On the other hand, whether PCRAs should or should not be part of a sub-project, and the various conditions (such as whether it should be available to settlers who have peacefully occupied indigenous lands for 5 years or more), and selection criteria that should or should not be part of PCRAs, are matters best dealt with during negotiations and co-creation at the sub-project level when FPIC processes take place.

112. The decision by the AE to not conduct a robust and adequate Informed Consultation and Participation (ICP) process on the project components is particularly concerning because in the case of indigenous peoples, ICP often forms the start of the continuum that leads to adequate FPIC at a later stage. The failure to undertake adequate ICP lays a weak foundation for FPIC that may happen later and may well lead to a potential failure of FPIC as well. In this sense, central to ICP, where FPIC follows (as in this project), is the notion of co-designing or co-creating developmental interventions together with indigenous communities. By not carrying out a meaningful informed consultation process during the design and project preparation phase, when critical elements of the project are taking shape and getting incorporated into a proposal for funding, the opportunity to co-design or co-create the project with indigenous people as beneficiaries, is lost. In the absence of ICP, initiating FPIC at a later sub-project stage also means that indigenous people who are beneficiaries would lose the opportunity to influence and co-design and co-create upstream framework level aspects of that project, which by then have concretised and become cast in stone. These will include aspects that are critical for setting project goals, policies and objectives and for making choices of funding mechanisms and project tools – such as PCRAs. When asked about FPIC not being conducted at the project formulation stage, GCF staff responded that it would not be appropriate to seek FPIC on the level of the larger project (in the nature of a programme), as the sites for sub-projects were not yet determined and it was not clear who FPIC should be sought from at the framework level. The Indigenous Peoples' Plan Framework, presented as part of the Funding Proposal, was deemed sufficient in meeting the requirements at the project formulation stage, with further work ahead for the AE and the GCF regarding reaching a framework level agreement on FPIC with indigenous communities and conducting sub-project level FPIC.

113. On the other hand, the Government of Nicaragua rationalised the decision not to initiate FPIC on the project on the basis that it would be better in terms of managing expectations. Indigenous communities had been participating in consultations on the national strategy for emissions reductions for over a decade, and many were expecting specific interventions to start not long after consultations. The withdrawal of the FCPF may also have contributed to feelings of frustration expressed during interviews by representatives of the Government of Nicaragua, as well as some representatives of GTIs.

#### 6.2.2. Challenges associated with hosting free and fair consultations and FPIC

114. Some interviewees presented a narrative that the complaint filed with the IRM was the reason why the project hadn't been implemented yet. At various moments, some interviewees, especially during the meetings with GTIs, expressed hostility towards the complainant(s) whom they described as "anonymous" and demanded to know their identity. The IRM clarified its role



and Board-granted mandate in guaranteeing confidentiality to the complainant(s) and noted that it was the GCF Secretariat (and not the IRM) that had oversight of disbursements and project implementation timelines. This narrative did raise the question of whether indigenous people could freely participate in an FPIC process without fear of retaliation or intimidation.

115. A requirement for conducting an ICP process (or in a later FPIC process) is the freedom from intimidation or coercion. Affected indigenous peoples should not be influenced by outside pressure or monetary inducements and the AE should “allow critics to express their views and enable various groups to speak out freely with equal opportunity, so as to facilitate a full debate involving all viewpoints.”<sup>89</sup> The complainant(s) have alleged that indigenous leaders and activists have been facing threats to their lives and livelihoods for their activism or work in defending their territories.

116. Press reports, including online national and international media, have reported widely on the restrictions faced by civil society, limiting their full exercise of freedom of expression and assembly.<sup>90</sup> The enforcement of two recent pieces of legislation – the 2020 Law on Foreign Agents, and the 2022 Law on Regulation and Control of Non-Profit Organizations (NPO) - resulted in the closure of over 700 civil society organisations, 487 of whom were shut down in July 2022 alone.<sup>91</sup> While these trends have accelerated significantly in the past year after project approval, there have been substantial and wide-ranging reports of the increasing restrictions faced by civil society in the years leading up to project approval, including the closures of civil society organisations focused on human rights and democracy.<sup>92</sup>

117. The civil society organisations facing recent restrictions also include those led by indigenous peoples. In March 2022, legislation was passed enabling the closure of over 30 civil society organisations, including CEJUDHCAN (Centro por la Justicia y los Derechos Humanos de la Costa Atlántica Norte), which has a long history of working to defend the rights of Miskitu indigenous peoples.<sup>93</sup> The Oakland Institute reported the revocation of the status of more than a hundred NGOs and other entities, including “organizations defending the lands, livelihoods, and very lives of indigenous and Afro-descendant peoples in Nicaragua.”<sup>94</sup> An article by Chris Lang published in REDD-Monitor also mentioned that the cancellation of organisations protecting indigenous and Afro-descendant people’s rights is concerning considering the situation of increased attacks against indigenous peoples in recent years.<sup>95</sup> The weakening of civil society and local organisations and the limiting of their operating space could therefore worsen the situation of indigenous peoples, who will have even fewer resources or avenues for recourse.

118. The closure of hundreds of civil society organisations on a large scale, including those working on indigenous rights raises questions about how ICP and/or FPIC can be designed to

<sup>89</sup> See Guidance Note 105 on Performance Standards on Environment and Social Sustainability:

[https://www.ifc.org/wps/wcm/connect/9fc3aaef-14c3-4489-acf1-a1c43d7f86ec/GN\\_English\\_2012\\_Full-Documents\\_updated\\_June-14-2021.pdf?MOD=AJPERES&CVID=nXqnsjp](https://www.ifc.org/wps/wcm/connect/9fc3aaef-14c3-4489-acf1-a1c43d7f86ec/GN_English_2012_Full-Documents_updated_June-14-2021.pdf?MOD=AJPERES&CVID=nXqnsjp)

<sup>90</sup> AP News, Nicaragua closes Mother Teresa charity, 100 other groups, 2022, <https://apnews.com/article/caribbean-nicaragua-daniel-ortega-non-governmental-organizations-mother-teresa-0b472e065663fac592032168d2864c41>

<sup>91</sup> Nicaragua: UN experts denounce arbitrary shutdown of civil society organisations, 2022, <https://www.ohchr.org/en/press-releases/2022/07/nicaragua-un-experts-denounce-arbitrary-shutdown-civil-society-organisations>

<sup>92</sup> See Freedom House Country Report 2020, <https://freedomhouse.org/reports>

<sup>93</sup> Asamblea Nacional, <https://ondalocalni.com/media/uploads/2022/03/16/cancelaciones-personerias-juridicas.pdf>

<sup>94</sup> The Oakland Institute, Nicaraguan Government’s Closure of Organizations Defending Indigenous and Afro-descendant Peoples Is an Attempt to Silence Their Struggle for Lands and Lives, March 23, 2022. URL: [Nicaraguan Government’s Closure of Organizations Defending Indigenous and Afro-descendant Peoples is an Attempt to Silence their Fight for Their Lands and Lives | The Oakland Institute](https://oaklandinstitute.org/nicaraguan-government-closure-organizations-defending-indigenous-and-afro-descendant-peoples-is-an-attempt-to-silence-their-struggle-for-lands-and-lives/)

<sup>95</sup> REDD Monitor, 2022, The Nicaraguan government is attacking human rights and Indigenous organisations. Where does this leave the Green Climate Fund’s REDD programme?, <https://redd-monitor.org/2022/03/29/the-nicaraguan-government-is-attacking-human-rights-and-indigenous-organisations-where-does-this-leave-the-green-climate-funds-redd-programme/>

allow for the full participation of stakeholders, in a manner that is free from coercion, intimidation or retaliation.

119. During IRM interviews with the complainant(s) and witnesses introduced by them, the current atmosphere of fear could be felt by the members of the IRM delegation. On several occasions during interviews, indigenous witnesses would speak in a soft voice, and would look over their shoulders to make sure no one could hear their testimonies. Some witnesses also broke down in tears and shared their fear and anxiety of retaliation for sharing information with the IRM. The complainant(s) explained that this climate of intimidation was a relatively recent development. At least until the mid-2010s, some witnesses interviewed by the IRM reported partnering with various government agencies in carrying out their work. However, those same witnesses reported that presently, they could not even visit the areas where they previously worked, citing fear for their personal safety and security. The IRM cannot definitively identify the sources or causes of fear amongst indigenous people apart from retaliation, but there are a multitude of contexts and causes in project areas that seem to contribute to such fear, including violent conflict and weak law enforcement.

120. The complainant(s) and indigenous witness testimony is further borne out by the experience of experts from other multi-lateral and international institutions operating in the country and region. Some experts and/or their institutions had sought to work actively with civil society, especially indigenous people's groups, to carry out projects in the Caribbean Coast. However, they reported a steep decline in the number of individuals and/or organisations operating in the region who could assist them. Many individuals were forced into exile and civil society organisations voluntarily shut down, after encountering increasing restrictions. One witness also cited the difficulty of organising FPIC processes that went beyond the level of GTIs. Witnesses' and experts' concerns weren't just limited to the difficulty in programme design and implementation. Some expressed concerns to the IRM that if their identities were revealed, they, their families or colleagues in Nicaragua could face retaliation.

121. Much of these trends have intensified over the last two years. The GCF Secretariat states that these factors were not set out in the funding proposal package and as such, were not considered in the secondary due diligence performed in applying environmental and social safeguards and the indigenous people's policy. In the absence of tools such as a human rights due diligence or a conflict sensitivity analysis – even limited to the Caribbean Coast – concerns regarding freedom of assembly or freedom of expression could only be considered by the GCF Secretariat in the context of site-specific impacts i.e., at the sub-project level, if at all. In order for indigenous people to participate in a robust ICP process at the project framework level or FPIC process at the sub-project level, there would need to be a basic level of freedom of expression, assembly and association. Otherwise, ICP or FPIC would not be “free”, nor would any purported “consent” be genuine, credible, and authentic, nor would genuine “consultation” be possible. The project documentation submitted by the AE and the Secretariat's own assessments failed to take into account the risks posed by the increasing limitations placed on civil society. These limitations would have been made manifest and transparent through a human rights due diligence report which would have suggested possible mitigatory measures, an independent third-party monitor being just one of them.

122. More robust assessments on the part of the GCF could have been useful in understanding the underlying challenges for indigenous communities to freely participate in consultations and FPIC. For example, in interviews with the IRM, some GTI representatives stopped short of going into detail about certain contentious issues, for example, on the invasions or forest fires. The fear of freely expressing themselves on some matters seemed palpable to the IRM during the interviews conducted with members of the GTIs and indigenous witnesses. On several occasions, representatives of GTIs from both autonomous regions affirmed that the problem of invasion was not so dire, although in the RACCN (North) some GTI members have expressed their willingness to find solutions to prevent further invasion of their territory. When asked, if they had observed a trend of increasing land invasions in their territories, some GTI

representatives in the RACCS (South) asserted that they had noticed no significant increase in settler populations in the last decade. Some GTI representatives asserted that they had no major problem with land invasions. This latter statement differs significantly from the comments made during the regional consultation held in September 2019, where several participants, including representatives from the same GTIs, voiced their concerns about the presence of settlers, increasing invasions and how this would be dealt with in the context of distribution of payments from the ER Program. Such concerns were not raised in the meeting with the IRM, even when queried directly on such matters.

123. Moreover, the quality of consultations needs to be assessed against the principle of legitimate representation i.e., whether the GTI representatives and GTIs themselves are recognised as decision-making bodies, as envisioned in the design and implementation of *Bio-CLIMA*. The design of *Bio-CLIMA* capacitates and entrusts to GTIs the responsibility of implementing key actions such as Environmental and Social Impact Assessments and safeguards related Action Plans. Further, the ESMF notes that no sub-project can be approved without approval by the "Territorial Assembly and/or GTI."

124. The division of responsibilities between GTIs and Territorial/Communal Assemblies is crucial to understanding the concern over whether GTIs can and/or should be the decision-makers on some aspects of the project. Assemblies are gatherings of all members of a community/territory based on the specific criteria defined by each community/territory. According to Law 445, Communal Assemblies constitute "the highest authority of the indigenous and ethnic communities" and that territorial assemblies are "the highest authority" in the territory.<sup>96</sup> According to Article 10 of Law 445, traditional communal authorities may grant authorisations for the use of communal lands and natural resources in favour of third parties if the Communal Assembly expressly orders them. Therefore, a plain reading of the law would suggest that decision-making on the use of communal lands and natural resources should be made at the level of assemblies or by GTI's if that power is appropriately delegated to them by the assembly. Complainant(s) and indigenous witnesses have reiterated the need for consultations on project documents, proposals and plans to happen at the level of assemblies, and not merely during meetings with GTI representatives, as was the basis for organising the regional consultations within the ER Program. The IRM has not consulted with Nicaraguan legal experts to clarify this issue but raise it in this report merely to indicate that due diligence on this project to safeguard the rights of indigenous people might require clarifications as to whether GTI's or Territorial Assemblies are the right entity to be involved in ICP consultations.

125. Complainant(s) and other indigenous witnesses have alleged that the election of representatives to GTIs has become an openly politicised process in the past decade. Testimony given to the IRM suggests a lack of confidence among some indigenous people that GTIs can be trusted as the legal representatives of the indigenous communities. Testimony from witnesses also suggested that there was significant interference with the governance and constitution of GTIs. Witnesses testified that the consultations organised under the ER Program were by invitation only and that some people, including the legal representatives of communal authorities had been turned away and/or prevented from participating in those consultations.

126. Complainant(s) have alleged that 'parallel governments' operate in the region, usurping traditional authorities. A report submitted to the UN Committee on Economic, Social and Cultural Rights by the Organización Mujeres Afrodescendientes de Nicaragua (OMAN) and the Gobierno Communal Creole de Bluefields (GCCB) mentions the creation of parallel governments in Nicaragua: "The creation of parallel communal governments has caused great divisions in the indigenous and ethnic communities especially when the national government has not shown interest to clean up communal lands and promotes in the parallel communal governments the approval of any amount of land for concessions or projects that the national government,... The *Bio-CLIMA* project that was recently approved by the Green Climate Fund (2020) without taking

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<sup>96</sup> Law 225, Article 4-5

into account that the support of communal governments to this project was granted by the parallel communal governments imposed by the national and regional government.”<sup>97</sup> In its concluding report, observations on Nicaragua published in November 2021, the UN Committee on Economic, Social and Cultural Rights raised concerns about “parallel governments” in the region. The lack of an adequate mechanism to consult and receive consent from indigenous people and the fact that development projects were being approved without proper consent from the communities was mentioned in that report.<sup>98</sup> The term ‘parallel governments’ could be interpreted in a number of ways such as the usurpation of decision-making powers by GTI; or co-option of GTIs by a single political group; or the de-prioritisation of communal and territorial assemblies; or, all of the above. However, the evidence gathered by the IRM is inconclusive. On a balance of probabilities, the IRM is not able to conclude, one way or the other at this time, on the existence and operation of parallel governments set up to undermine traditional authorities.

### 6.2.3. Findings

127. On ICP, the IRM finds that indigenous and Afro-descendant communities were not engaged in an informed consultation process at the stage of project formulation. For an effective consultation to take place, consultations on *Bio-CLIMA* should have included an in-depth exchange of views and information in the form of an iterative consultation – dedicated to the components of *Bio-CLIMA* as a stand-alone proposal – separate from the ER Program which did not share the same substantive components. At the very least, the key elements of *Bio-CLIMA* should have been made explicit during the consultations on the ER Program and thoroughly discussed, to conclude that there was adequate information and consultation on the project. Unfortunately, the evidence does not suggest that this was the case. The lack of specificity in consultations results in a situation where the disclosure of information does not meet the standard of “relevant, transparent, objective, meaningful and easily accessible.”<sup>99</sup> As stipulated under Performance Standard 7, the AE did not provide the IRM with any information to suggest that it held consultations after February 2020, when project documents were disclosed online on the MARENA website. In the absence of such information, and given the above assessment, the IRM can only conclude, on a balance of probabilities, that indigenous and Afro-descendant communities were not informed of the measures taken to avoid or minimise risks to, and adverse impacts from *Bio-CLIMA*, nor were they consulted on the project.

128. On the matter of Free, Prior and Informed Consent (FPIC), the IRM finds that FPIC at a framework level was not required for this project. According to the project documents, FPIC will be conducted at the sub-project level once the exact location and the indigenous communities involved are identified. Nevertheless, the innovation of using PCRAs should have been included as part of the ICP and stakeholder consultations that ought to have been undertaken at the stage of project formulation. In the case of this project, and in similar situations, ICP at the project or programme level is the fore-runner of FPIC at the sub-project level. They are closely connected. Without an adequate ICP process, the subsequent sub-project level FPIC will also fail to satisfy the safeguards. This is because key elements of the project/programme must be disclosed and consulted on as part of ICP during project formulation. Those consultations will reveal much with regard to which indigenous communities accept key elements of the project/programme and which ones do not and what viable alternate suggestions might be forthcoming from the

<sup>97</sup> See page 8, paragraph 26, OMAN, GCCB, 2021, Situación de los derechos económicos, sociales y culturales de los Pueblos Afrodescendientes de Nicaragua. Informe al Comité de Derechos Económicos, Sociales y Culturales, [https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/NIC/INT\\_CEDAW\\_CSS\\_NIC\\_46919\\_S.docx](https://tbinternet.ohchr.org/Treaties/CEDAW/Shared%20Documents/NIC/INT_CEDAW_CSS_NIC_46919_S.docx).

<sup>98</sup> See paragraph 11, United Nations Economic and Social Council, 2021, Concluding observations on the fifth periodic report of Nicaragua, [https://www.ohchr.org/sites/default/files/HRBodies/HRC/RegularSessions/Session46/Documents/A\\_HRC\\_46\\_2\\_1\\_AdvanceEditedVersion.pdf](https://www.ohchr.org/sites/default/files/HRBodies/HRC/RegularSessions/Session46/Documents/A_HRC_46_2_1_AdvanceEditedVersion.pdf)

<sup>99</sup> IFC Performance Standard 7, Indigenous Peoples, [https://www.ifc.org/wps/wcm/connect/topics\\_ext\\_content/ifc\\_external\\_corporate\\_site/sustainability-at-ifc/policies-standards/performance-standards/ps7](https://www.ifc.org/wps/wcm/connect/topics_ext_content/ifc_external_corporate_site/sustainability-at-ifc/policies-standards/performance-standards/ps7)



indigenous communities. This information is critical in developing and co-creating the sub-projects that will be done at a later stage of the project. In other words, the ICP process at project/programme level sets the stage for the FPIC to follow at the sub-project stage. They are inextricably linked. As such, it is the IRM's conclusion that for this project to be brought back into compliance with GCF safeguards, ICP needs to be conducted for the project before any other steps are taken towards implementation.

129. The above findings of the IRM regarding challenges for hosting free and fair informed consultations and FPIC processes in the project area will impact any ICP or FPIC process conducted now or in the near future. The restricted civil society space, the fear and concern for retaliation and the recurrent violent conflict in the project areas will make a free and fair ICP process or FPIC process challenging to accomplish without significant assistance and positive supportive involvement by governmental authorities, law enforcement, the independent third-party monitor to be appointed under the Board's conditions, and the AE. For these reasons, also, the IRM recommends that the conflict sensitivity analysis and human rights due diligence reports referred to above in this report, be prepared first. These reports will then inform whether and how ICP and FPIC might be conducted and what challenges will need to be overcome. Mitigatory measures and supportive actions can then be designed to ensure that the ICP process takes place as expected and required under the GCF's safeguards. The third-party monitor appointed under the Board conditions will need to observe and monitor the ICP process to ensure compliance with GCF safeguards and report back to the GCF whether the ICP process satisfies the safeguards, before further implementation steps are taken in the project. As the Board's conditions already provide for the third-party monitor to provide oversight and monitoring of the FPIC processes that will take place at the sub-project level, the IRM makes no recommendations with regard to FPIC at the sub-project level.

#### 6.2.4. Compliance of the project with GCF policies on ICP and FPIC

130. GCF's safeguard provisions on informed consultation and participation (ICP) that applies to projects involving indigenous people and land rights have not been complied with in the *Bio-CLIMA* project. The fundamental purpose of this procedural safeguard is to ensure that in the case of indigenous people, projects will be designed and implemented with due regard for the views and aspirations of indigenous peoples. With regard to FPIC, the IRM finds that it is not required for this project (programme) at the design and formulation stage but is required for sub-projects. Since project documents and the Board's conditions already stipulate that FPIC will be conducted for sub-projects under the supervision of the third-party monitor appointed pursuant to the Board's conditions, the IRM makes no compliance findings at this stage regarding FPIC. However, the IRM finds that for FPIC to be in accordance with the GCF's Indigenous People's Policy and its Guidelines, there will need to be a "framework agreement" setting out the key elements of the project and how, when and where FPIC will be conducted that must first be negotiated and agreed with the indigenous communities involved.

131. FPIC also requires that indigenous communities be fully informed of the project details and their consequences, that the information must be provided in advance of any project decisions, that the indigenous communities involved should have the freedom to consider the project, freely discuss it in an environment free of threats, coercion or fear and then provide their consent (meaning agreement) to the framework agreement and sub-project. Often, FPIC requires repeated meetings and discussions with communities. In FPIC, the process is as important as the outcome. Each community has its own culture of how they consider and decide on issues. These cultural norms must be respected and honoured. There cannot be a one size fits all approach to FPIC. FPIC processes often lead to negotiations as to the content of a project or sub-project. And once an agreement is reached, consent is provided by the community through their traditional decision-making methods. In essence, FPIC is all about co-designing and co-creating projects or sub-projects. In the absence of ICP on the project as a whole in the design



and formulation stage, the likelihood of achieving true and legitimate FPIC can be called into question.

132. When the IRM examined the processes followed in the *Bio-CLIMA* project, what the IRM observes is a detailed set of project activities proposed by the AE – and a past consultation on ENDE-REDD and the ER project being transposed as ICP. From the assessment of the IRM, indigenous communities, their assemblies or their representatives were not afforded the opportunity to be fully informed on the elements and activities of *Bio-CLIMA* and to discuss it during project planning stages. For example, there is no evidence of information disclosure or discussions around whether PCRAs for non-indigenous settlers who have been on indigenous lands for five (5) or more years are the right instrument and if so whether 5 years is the right timeframe. Lack of consultation with indigenous populations meant that indigenous representatives were not afforded the opportunity to give input on key PCRA-related decisions, including the timeframe, the minimum criteria landholders must meet to be party to the PCRA, and whether the PCRAs should address *Saneamiento* issues, among others. These and other such issues which indigenous witnesses raised with the IRM were never discussed as part of informed consultations. Nor was an opportunity to do so provided to indigenous communities for the *Bio-CLIMA* project.

133. Based on the evaluation of evidence above, on a balance of probabilities, the IRM finds that the *Bio-CLIMA* project is not in compliance with the requirements for ICP for the project, under the following applicable GCF Policies and Procedures:

**Table 3: Applicable GCF Policy and Procedure and Findings on Compliance**

Applicable Policy and Procedure	Specific Text of the Policy/Procedure applicable to this project for non-compliance assessment	Reasons for Non-Compliance
Performance standard 1	((d) Engagement with affected communities or other stakeholders throughout funding proposal cycle. This includes communications and grievance mechanisms.	The IRM finds non-compliance as there is insufficient evidence to indicate that affected communities were engaged in an ICP process related to the project's components and activities, both at the stage of project design and finalisation of the funding proposal.
Performance standard 4	(a) To anticipate and avoid adverse impacts on the health and safety of the affected community; (b) To safeguard personnel and property in accordance with relevant human rights principles.	Not relevant to this issue
Performance standard 7	(d) Free, prior and informed consent in certain circumstances.	FPIC is not required for this project (programme) during the planning stages and before approval. FPIC will be conducted at the sub-project level and will be monitored for safeguard compliance by the third-party monitor appointed under the Board's conditions. As such, the IRM makes no finding regarding FPIC at the sub-project level.
GCF's Environmental and Social Policy	Para 8(i): The ESMS requires that there is broad multi-stakeholder support and participation throughout the lifecycle of GCF-financed activities, including the development of measures to mitigate, manage and monitor	The IRM finds non-compliance due to lack of evidence that informed consultations and participation (ICP) was conducted dedicated specifically to address <i>Bio-CLIMA</i> , especially its unique activities such as PCRAs, impacts and proposed mitigants.



Applicable Policy and Procedure	Specific Text of the Policy/Procedure applicable to this project for non-compliance assessment	Reasons for Non-Compliance
	<p>environmental and social risks and impacts.</p> <p>Para 8(p): The design and implementation of activities will be guided by the rights and responsibilities set forth in the United Nations Declaration on the Rights of Indigenous Peoples including, of particular importance, the right to free, prior and informed consent, which will be required by GCF in applicable circumstances;</p> <p>Para 8 (q): GCF will require the application of robust environmental and social due diligence so that the supported activities do not cause, promote, contribute to, perpetuate, or exacerbate adverse human rights impacts;</p>	<p>FPIC is not required for this project (programme) during the planning stages and before approval. However, ICP is required for this project. FPIC will be conducted at the sub-project level and will be monitored for safeguard compliance by the third-party monitor appointed under the Board's conditions. As such, the IRM makes no finding regarding FPIC at the sub-project level.</p> <p>Not relevant to this issue.</p>
	<p>Para 12 (b): Confirming that ...free, prior and informed consent of indigenous peoples is obtained, by the accredited entities or through its executing entities during the design and implementation of the activities...</p>	<p>FPIC is not required for this project (programme) during the planning stages and before approval. However, ICP is required for this project. FPIC will be conducted at the sub-project level and will be monitored for safeguard compliance by the third-party monitor appointed under the Board's conditions. As such, the IRM makes no finding regarding FPIC at the sub-project level.</p>
	<p>Para 13: Where the accredited entities fail to comply with the safeguards requirements, GCF will work with the accredited entities to develop and implement timebound corrective actions that will bring the activities back into compliance.</p>	<p>Based on this report, the GCF Board will decide whether safeguards have been complied with, and if so, will decide on corrective action to be taken by the GCF.</p>
	<p>Para 14 (a)(v): Ensures disclosure of information on the GCF-financed activities and component subprojects...</p>	<p>The IRM finds non-compliance due to lack of evidence that adequate disclosure of <i>Bio-CLIMA</i>'s activities occurred at the community level, with both indigenous representatives and community members.</p>
	<p>Para 18: GCF will require that accredited entities undertake all necessary measures to ensure that the communities affected or potentially affected by the activities ...are properly consulted in a manner that facilitates the inclusion of local knowledge in the design of the activities, provides them with opportunities to express their views on risks, impacts and mitigation measures related to the activities, and allows the accredited entities to</p>	<p>The IRM finds non-compliance due to a failure of ensuring adequate informed consultations that resulted in an ongoing engagement on the project and its proposals between the affected peoples and the AE. As a result, indigenous communities affected did not have an opportunity to include their local knowledge in the design of the activities, or an opportunity to express their views on risks, impacts and mitigation measures</p>



Applicable Policy and Procedure	Specific Text of the Policy/Procedure applicable to this project for non-compliance assessment	Reasons for Non-Compliance
	consider and respond to their concerns.	related to the activities of the <i>Bio-CLIMA</i> project.
	Para 47: The plans or frameworks will be developed with the full and effective participation of indigenous peoples through a process of meaningful consultation tailored to the indigenous peoples; ensuring the free, prior and informed consent of the affected indigenous peoples, where required by the relevant policies of GCF.	The IRM finds non-compliance due to the failure to conduct meaningful consultations meeting the requirements for ICP, during the project design phase. ICP should have included the Indigenous Peoples Planning Framework that was part of the project documentation submitted to the GCF.
	Para 48: GCF will require and ensure that activities are screened, including component subprojects of programmes and activities requiring financial intermediation, for any potential adverse impacts on the promotion, protection, respect for, and fulfilment of human rights.	Not relevant for this issue
	Para 60: In monitoring the environmental and social performance of activities, GCF shall require the accredited entities to undertake all necessary measures to ensure participatory monitoring through the involvement of communities, local stakeholders, indigenous peoples and civil society organizations in all the stages of the life cycle of activities.	Not relevant at this stage and for this issue.
	Para 62: The information will be made available in accordance with the provisions of the Information Disclosure Policy, allowing the stakeholders time to review, seek further information and provide inputs on a proposed activity, including ways to improve design and implementation of its environmental and social safeguards.	The IRM finds non-compliance as adequate disclosure, at the community level, was not achieved as there was insufficient ICP for this project, depriving stakeholders of the ability to review and seek further information on the proposed activities of the <i>Bio-CLIMA</i> project.
	Para 67: GCF will require accredited entities, including intermediaries, to ensure the effective engagement of communities and individuals, including transboundary, vulnerable and marginalised groups and individuals that affected or potentially affected by the activities proposed for GCF financing.	The IRM finds non-compliance due to the insufficient informed consultations (ICP) on the project at the level of indigenous communities.
	Para 69: GCF will require and ensure that the meaningful consultation will be culturally appropriate, undertaken throughout the life cycle of activities, with information provided and disclosed in a timely manner, in an	The IRM finds non-compliance due to a failure to hold meaningful informed consultations (ICP) with affected indigenous communities, at the stage of project design and planning.



Applicable Policy and Procedure	Specific Text of the Policy/Procedure applicable to this project for non-compliance assessment	Reasons for Non-Compliance
	understandable format, in appropriate local languages, gender inclusive and responsive, free from coercion, and will incorporate the views of stakeholders in the decision-making process.	
Indigenous Peoples Policy	<p>Para 26:</p> <p>(a) Requiring the accredited entities to implement management system consistent with this Policy, thereby providing for free, prior and informed consent and a systematic, consistent and transparent management of risks and impacts from GCF-financed activities.</p> <p>(c) Conducting due diligence on activities proposed for funding consideration, and recommending to the Board for financing only those proposed activities with free, prior and informed consent and satisfactory approaches to managing risks and impacts, consistent with this Policy;</p> <p>(d) Requiring that risk and impact assessments for activities are adequate and provide sufficient information to assess whether free, prior and informed consent has been properly provided...</p>	FPIC is not required for this project (programme) during the planning stages and before approval. However, ICP is required for this project. FPIC will be conducted at the sub-project level and will be monitored for safeguard compliance by the third-party monitor appointed under the Board's conditions. As such, the IRM makes no finding regarding FPIC at the sub-project level.
	Para 31: ...land take may affect all members' access to and use of land and resources while specifically impacting the land claims of only one clan, as well as any current use of the resources.	Not relevant for this issue
	Para 35: The accredited entities will be responsible for ensuring that the communities affected or potentially affected by the activities are properly consulted in a manner that provides them with opportunities to express their views on all aspects of the activity and allows the accredited entities to consider and respond to their concerns.	The IRM finds non-compliance as insufficient informed consultations (ICP) was conducted for this project involving indigenous communities.
	Para 44: The concerns or preferences of indigenous peoples will be addressed through meaningful consultation, including a process to seek and obtain their free, prior and informed consent and documentation will summarize the consultation results and describe how indigenous peoples' issues have been addressed in	The IRM finds non-compliance as insufficient informed consultations were conducted for this project involving indigenous communities.



Applicable Policy and Procedure	Specific Text of the Policy/Procedure applicable to this project for non-compliance assessment	Reasons for Non-Compliance
	the design of the GCF-financed activities.	
	Para 51: To promote the effective design of GCF-financed activities, to build local project support or ownership or buy-in, and to reduce the risk of delays or controversies, the accredited entities will undertake an engagement process with indigenous peoples.	The IRM finds non-compliance as insufficient informed consultations were conducted for this project involving indigenous communities.
	Para 52: For indigenous peoples, the process of meaningful consultation will also: (a) Involve indigenous peoples' representative bodies and organizations (e.g. councils of elders, village councils, or chieftains) and, where appropriate, other community members, including indigenous women and youth. (b) The consultation process will, therefore, allow sufficient time for internal deliberations and decision-making processes to reach conclusions. The consultation process will be free of external manipulation, interference, coercion and intimidation; (d) Take into account the interests of community members that are particularly affected and marginalized...	The IRM finds non-compliance as insufficient informed consultations were conducted for this project involving indigenous communities.  The IRM also finds non-compliance due to the failure to host a process inclusive of representative bodies such as territorial or communal assemblies.  The IRM also finds non-compliance due to the absence of evidence of internal deliberations for decision-making on <i>Bio-CLIMA</i> .  The IRM expresses concern as to whether in the current situation of violent conflict and human rights concerns, ICP and FPIUC can be conducted for this project without significant governmental, law enforcement support and independent third-party monitoring under the Board's conditions.
	Para 58: Where the activities proposed to be financed by GCF may require the establishment of legally recognized rights to lands and territories, the accredited entities, working with the states and the affected indigenous peoples, will prepare a plan to ensure the legal recognition of such property rights in accordance with applicable law and obligations of the state...	Not relevant for this issue
Indigenous Peoples Operational Guidelines	Para 39: Meaningful consultation approaches should build upon existing customary institutions and decision-making processes utilized by indigenous peoples, and are designed together with the concerned communities.	The IRM finds non-compliance due to the failure to involve indigenous communal and territorial assemblies to design a suitable consultation process that would satisfy the requirements of ICP under the GCF's safeguards.
	Para 51: The appropriate sequencing of achieving FPIC is generally to first agree on key principles through an overall framework, and then consult on specific aspects once designs are	FPIC is not required for this project (programme) during the planning stages and before approval. However, ICP is required for this project. FPIC will be conducted at the sub-project level and will





Applicable Policy and Procedure	Specific Text of the Policy/Procedure applicable to this project for non-compliance assessment	Reasons for Non-Compliance
	<p>further advanced and locations are determined. Documents that are required to be submitted in the process of achieving FPIC should, in almost all cases, include a framework agreement on engagement and consultation and agreements demonstrating FPIC. The absence of such a framework agreement would need to be carefully justified.</p>	<p>be monitored for safeguard compliance by the third-party monitor appointed under the Board's conditions. As such, the IRM makes no finding regarding FPIC at the sub-project level, other than to state that a "framework agreement" as set out in this report will be required to be agreed to with the indigenous communities involved in the sub-projects before FPIC processes are conducted.</p>
	<p>Para 58:            (a) While the project environmental and social risks and impacts assessment process typically defines the project area of influence and identifies the population of directly affected communities of indigenous peoples, in certain circumstances the formal and informal leaders and decision-making bodies of the affected communities of indigenous peoples may be located outside this area;            (b) ...where leadership is known to be highly politicized and/or only marginally representative of the affected population or if there are multiple groups representing different interests, FPIC should rely on identification, recognition and engagement of greater numbers or representativeness of stakeholder sub-groups;            (c) The occurrence of conflict... should be assessed in terms of the nature of the conflict, the different interest groups and the affected communities' approaches to conflict management and resolution mechanisms;            (d) The role, responsibilities and participation of external stakeholders with vested interests in the outcome; and            (e) The possibility of unacceptable practices (including bribery, corruption, harassment, violence, retaliation and coercion) by any of the interested stakeholders both within and outside the affected communities of indigenous peoples.</p>	<p>Not relevant for this issue. See table under previous issue with regard to violent conflict and human rights.</p>

#### 6.2.5. Impact of non-compliance on indigenous people

134. From the above findings, it should be obvious that the failure to conduct ICP is a violation of the internationally recognised rights of the indigenous peoples affected by this project. This, in and of itself, is an adverse impact on them. At a practical level, indigenous communities who will be affected by this project, and whose lands will be impacted by PCRAs, have not had a free and fair opportunity to receive meaningful information on the *Bio-CLIMA* project, and have not been consulted in a meaningful way on project design. They have not yet given their consent to a framework agreement consisting of the key elements of the project, including PCRAs and how, when and where sub-project level FPIC will be conducted. The conduct of FPIC at the sub-project level will not cure this deficiency as indigenous people will not be able to influence or provide feedback on the macro level objectives, tools, methods, and outcomes of the project. If the project is implemented without ICP, sub-project level FPIC will also be insufficient under the GCF safeguards and indigenous people will be adversely impacted through rights violations and will lose the opportunity to participate in the design and planning of key elements of *Bio-CLIMA*, which is a project meant for their benefit.

135. Retrofitting an ICP process for an approved project is not ideal, but sometimes necessary to bring a project back into compliance with established policies and procedures of the GCF. This is particularly so when the project involves indigenous populations. Fortunately, no disbursements have been made and no activities have commenced in the *Bio-CLIMA* project yet, and corrective action is therefore still possible. In the current circumstances that the *Bio-CLIMA* project is placed, where significant preparatory work has been concluded, it is still essential that ICP procedures be completed before project implementation. If this is not done, FPIC process, however well conducted at the sub-project level, will not conform to GCF policies and procedures. As a matter of sequencing, the recommended conflict sensitivity analysis and human rights due diligence report ought to be completed first.

136. Once sub-project locations are selected and known based on the project level conflict sensitivity analysis and human rights due diligence report referred to in section 6.1.8 and 6.1.9 above, indigenous communities and their assemblies and GTI can be consulted at a framework level with details of the *Bio-CLIMA* project and as much detail about the sub-projects, as well as details about how, where and when FPIC will be conducted at the sub-project level. Consultations can enable dialogue and negotiation to allow the indigenous communities to weigh in on the terms and conditions under which PCRAs will be considered for *colonos* in each of their areas. These elements can then be incorporated into a “framework agreement”. Based on such dialogue, indigenous communities and their assemblies must be considered equal parties to this framework agreement. Once the framework agreement is in place, FPIC processes can be conducted for each sub-project where the indigenous community involved and their assemblies and territorial governments fully participate in a culturally appropriate manner to co-design and co-create the sub-project in their area and provide FPIC to the same.

137. The IRM takes the view that the ICP can be done after the first disbursement but before any implementation activities are undertaken. This will ensure that the executing entity has funding to conduct the needed ICP activities, in a way that is satisfactory to the GCF and the independent third-party monitor mentioned in the Board conditions. If the independent third-party monitor reports issues regarding the ICP process in any indigenous community, either those processes will need to be repeated properly or those areas excluded from the project.

#### 6.2.6. Recommendation

138. Once sub-project locations are selected and known based on the project level conflict sensitivity analysis and human rights due diligence report referred to above, the IRM recommends that affected indigenous communities and their assemblies and GTIs be consulted through ICP at a framework level with key details of the *Bio-CLIMA* project and as much detail about the sub-projects as may be available at that time in accordance with the conditions and contents of paragraphs 180 and 188-89 of this report.

139. Should the conflict sensitivity analysis, human rights due diligence report and ICP result in significant or major changes to the *Bio-CLIMA* project, GCF's processes and procedures applicable to project restructuring must be followed to obtain necessary approvals.

### 6.3 Increased risks related to usurpation of lands of indigenous communities and restrictions to access natural resources

140. The *Bio-CLIMA* project makes a deliberate choice of a single land occupancy tool – namely PCRAs to the exclusion of other potential tools that might be in use among indigenous communities for managing the occupancy of their lands. The project also expressly excludes potential eviction of recent settlers. It does not even contemplate voluntary relocation of recent settlers with the provision of incentives such as compensation for improvements, as part of the toolkit available for managing the occupancy of indigenous lands by settlers. A broader choice of such tools could have allowed indigenous communities to assess which ones suited them best and to make informed choices regarding the project and how technical assistance and other benefits may be provided. Instead, the project takes a one-size-fits-all approach by pre-selecting PCRAs, thus denying a wider choice of tools to indigenous communities. In effect, the current design of the project gives indigenous communities a hard choice to make when sub-projects are considered. They will need to decide to either select PCRAs as the land occupancy management tool in return for emission reduction benefits, the benefit of sustainable practices and living with the settlers on the one hand, or reject the project and forego the benefits of sustainability on the other.<sup>100</sup> Even though this seems like a choice, it is less so, because rejecting a sub-project by refusing FPIC simply means continuing to face violent settlers and invasions, with no assistance from local authorities and the continued deforestation and devastation of their lands. Arguably, the “free” and “fair” nature of such a choice would be difficult to determine.

141. By choosing the PCRAs as the tool of choice and leaving little room for consenting to or rejecting sub-projects, the *Bio-CLIMA* project gives indigenous communities little choice but to accept PCRAs as the way forward, if they wish to address land occupancy issues. PCRAs are agreements that create an encumbrance on indigenous lands – by permitting non-indigenous persons to occupy and cultivate, build upon and otherwise use the lands. This fact alone attracts the GCF's interim performance standards 1, 5 and 7, requiring informed consultation and participation (ICP) (already dealt with above), Free Prior Informed Consent (to be carried out at sub-project level) and the due diligence required by performance standard 5. Since re-settlement was in the exclusions list for sub-projects, staff of the institutions interviewed by the IRM stated that performance standard 5 was not applicable to that aspect of the project. Nevertheless, AE and GCF staff did consider performance standard 5 regarding the restriction of access to natural resources.<sup>101</sup> However, there is an aspect of performance standard 5 that the AE and the GCF Secretariat seem to have overlooked.

142. It is undisputed that performance standard 5 applies not only to land acquisition but also to “restrictions on land.” As such, if PCRAs were to be the tool of choice, there ought to have been careful consideration given to the background in each case of how a settler's occupancy was first established. If it was established through violent occupation or fraud or stealth, there

<sup>100</sup> It must be noted that the AE, in their comments on the draft compliance review report, have stated that if PCRA's are unacceptable to an indigenous community, they would be prepared to consider developing sub-projects without PCRAs. The IRM could not find this possibility mentioned in any of the project documentation submitted for project approval to the GCF. If accurate, this signals a change on the part of the AE to adopt a more flexible approach to PCRAs and sub-projects.

<sup>101</sup> The risk of restriction to access natural resources is identified by the AE (see FP para 162) as well as by the Secretariat and provided for the process (Process Framework) by which this will be dealt with (see FP para 164). The Process Framework is also part of the ESMF.

[https://www.greenclimate.fund/sites/default/files/document/fp146-cabei-nicaragua\\_0.pdf](https://www.greenclimate.fund/sites/default/files/document/fp146-cabei-nicaragua_0.pdf)

is a requirement under the safeguards to compensate the former indigenous occupier and the title holders (indigenous communities) for the loss of the use of that land from the date of the occupation to the date the PCRA is signed. In the GCF Secretariat's comments on the draft compliance report, it is argued that this matter would have been dealt with in the conduct of the FPIC at the sub-project level, and in the preparation of the Indigenous People's Plan where the ESMF states "(m)asures to avoid, minimise or mitigate any negative impacts the sub-project may have and measures and steps for adequate compensation will be considered." However, in the view of the IRM this is not a matter that should be left to be dealt with at the sub-project level and ought to have formed part of due diligence under performance standard 5 at the project (programme) level. If any indigenous persons were evicted or driven out or left their lands out of fear caused by the settler receiving the PCRA, the indigenous persons would be entitled to compensation for that eviction and loss of land, improvements and livelihoods before the PCRA is executed. None of these safeguards are in place in the *Bio-CLIMA* project with regard to PCRA's. The project that was submitted to the GCF Board for approval essentially appears to reward the settler who first came to occupy the indigenous lands through violence, fraud, or stealth – with security of tenure through a PCRA, forgetting entirely the loss of access to resources and loss of land caused to the indigenous community and/or to the former indigenous occupiers, and leaving their losses where they fell.

143. In effect, the PCRA scheme in the project documentation, and the way it is to be deployed will encourage settlers to illegally move into indigenous lands through violence, stealth or fraud, in the hope that at some future date they may also receive a PCRA and thus convert what is essentially unlawful activity into a secure tenure over that land, and freeing them from any losses caused to the previous indigenous occupiers or to the title holding indigenous communities for the past loss of access to and use of, those lands. In essence, it pardons their original illegal operation and in fact, rewards it. While the illegal settler gains these benefits, the losses to the original indigenous occupiers and to the indigenous community who holds the title to the land may not be made good (unless it is agreed to at the sub-project level) and may have to be borne by the indigenous persons and community alike. This potential impact of *Bio-CLIMA* is so fundamentally contrary to the express policy of the GCF's Indigenous Peoples Policy and performance standards 1, 5 and 7 of the interim standards, that it ought to have been considered in due diligence assessments by the GCF and AE. Below is a list of applicable standards and policies.

#### Applicable GCF Policies and Procedures

- (a) Performance Standard 1: Assessment and management of environmental and social risks and impacts
- (b) Performance Standard 5: Land acquisition and involuntary resettlement
- (c) Performance Standard 7: Indigenous peoples
- (d) GCF Environmental and Social Policy (paragraphs 17, 26, and 37)
- (e) Indigenous Peoples Policy (paragraphs 31, 46, 48, 60)

#### 6.3.1. PCRA's as the land occupancy instrument of choice in Bio-CLIMA

144. In the context of addressing the issue of illegal occupation of indigenous lands by non-indigenous settlers, Activity 1.1.1.4 of the funding proposal (FP) to the GCF, proposes to facilitate, among others, the non-indigenous settlers (*colonos*) to enter into a "Peaceful Co-habitation Regime Agreement (PCRA)" on the promise of renouncing any claim they might have to ownership of the land and acknowledging the indigenous territorial title to the land. The FP states that "non-indigenous families (so called "*terceros*") that have settled within indigenous territories will be supported by the project to regularise their land use and occupation through a "Peaceful Co-habitation Regime Agreement" with the GTI. The project documentation also

states that PCRAs are arrangements created and recognised by indigenous people themselves, and that the PCRAs would be offered to settlers who have been in peaceful occupation of such lands for five or more years.

145. However, the complainant(s) allege that PCRAs are not acceptable to them and to many indigenous communities and that these instruments would only further entrench and regularise the illegal occupancy of non-indigenous settlers, stultifying and rendering useless the 5<sup>th</sup> and last stage of land title clearance (*Saneamiento*) under the relevant national laws of Nicaragua – especially Law No. 445. The complainant(s) allege that the recurrent violent conflict and the parallel governments operating in their areas will force the GTIs of indigenous and Afro-descendant communities to agree to the PCRAs with settlers who have invaded their territories, legitimising their otherwise illegal and often forcible or stealthy or fraudulent occupation of the territories titled to indigenous communities.

146. The sequence of events that the complainant(s) and several indigenous people interviewed by the IRM described could be summarised as:

- (a) *terceros* first invade and occupy lands titled to indigenous communities potentially through violence or fraud or stealth;
- (b) they occupy the land, often deforest it, and begin cattle raising or other economic activities;
- (c) the Bio-CLIMA project offers them PCRAs provided they renounce any claims to title and acknowledge the indigenous territorial title of the land;
- (d) the GTI approves the PCRA, and it is signed by the settlers and the GTI;
- (e) the settlers who originally invaded the indigenous land gets security of tenure, technical assistance and subsidies under the Bio-CLIMA project, and the indigenous community loses the use of that land and its historical and cultural land use, and the land is converted to economic uses incompatible with the indigenous way of life;
- (f) other potential settlers observing these proceedings are then encouraged to follow suit, thus creating an incentive for further invasions in the future; and
- (g) the settlers who benefit from Bio-CLIMA, improve the land with project funds, then fraudulently and illegally sell their lands to new settlers creating an informal market in such plots of land, and move on to illegally occupy other indigenous territorial lands.

147. It is the IRM's observation that the above scenarios of this nature described by the complainant(s) and other indigenous people may lead to the creation of perverse incentives through the PCRAs as described in project documents.

148. The ESMF of the project recognises the risk that non-indigenous farmers could claim land tenure rights based on PCRAs, the facilitation process of which can escalate latent land conflicts. It also admits that the settlers "came to these territories through invasion, [legal]<sup>102</sup> or illegal purchase of land or land transfer to colonists [and this] situation has caused recurrent tensions in the territories." The proposed mitigation measures are to enforce the legal framework that does not allow the sale or cessation of land rights of indigenous territories and for the government to strengthen law enforcement and defend IP rights. A key mitigation measure pointed out by GCF, and the AE staff is the presence of an exclusion list for sub-projects – that explicitly prohibits activities that would in any way result in the reduction of lands titled to indigenous and Afro-descendant communities. In effect, the AE contends, that the PCRAs already exist as an instrument to regularise and potentially enforce the rights of indigenous communities over lands that are occupied by third parties.

<sup>102</sup> While the word "legal" purchase is used in the ESMF, sale and purchase of lands titled to indigenous people under Law 445 appears to be illegal and contrary to the express provisions of this Nicaraguan Law.



149. In reviewing evidence collected during the investigation, it became apparent to the IRM that there is a lack of consensus among parties on what exactly are the obligations of the government authorities in implementing and enforcing Law 445, particularly regarding the stage of *Saneamiento*. Furthermore, there is a question of whether the proposed mitigation measures meet the level of the anticipated risks and addresses them. The distributed decision-making over land use i.e., the role of various national, regional and indigenous government entities, traditional territorial authorities and communal assemblies, is complex in the project areas and while some aspects of land administration are clear, other areas of administrative and legal authority over land are ambiguous, open to interpretation and unclear. In this factual context, the IRM found strongly divided opinions among the relevant indigenous stakeholders as to the usefulness, benefits and negative aspects of PCRAs as an instrument to provide security of tenure to non-indigenous settlers, while at the same time also providing acknowledgement of the indigenous title to the land and the emissions reduction results based payments. A deeper assessment and understanding of the state of titling and occupation of the lands in the project area where sub-projects will be developed and implemented would be required before the project can ensure that PCRAs do not create negative impacts predicted by the complainant(s), exacerbate violent conflict and undermine the indigenous titles to the affected lands. The AE has also not assessed whether PCRAs themselves would be legal under Nicaraguan law. What happens if a settler violates the conditions of a PCRA? Will the PCRA be enforceable? Who would enforce the PCRA? What remedies would be available to indigenous territorial governments if PCRAs are violated by a settler? Can a settler who violates a PCRA be evicted from the land? If so, how? These and other related legal questions ought to have been considered by the AE and information provided to the GCF. This does not appear to have been done and is not apparent in project documentation.

150. Under selected risk factors 6, the *Bio-CLIMA* Funding proposal stated:

**Table 4:** Excerpt from Funding Proposal FP146

Description
Uncertainties with regard to future REDD+ results-based payments are a potential financial risk for the full implementation of the National REDD+ Strategy (ENDE REDD+). While this may not directly affect <i>Bio-CLIMA</i> which will have secured this co-financing until year 2025 through the Emission Reduction Programme Agreement (ERPA) to be signed with the World Bank FCPF, it poses a potential risk factor for the sustainability of <i>Bio-CLIMA</i> 's actions and its impacts.
Mitigation Measure(s)
The GCF, BCIE [CABEI] and GEF investments aim to provide the means and the know-how to communities and producers for sustainable landscape restoration, production and the enforcement of land-use zoning (LUMP and TDP) that will trigger changes in land use trajectories in order to secure emission reductions and the payments from the FCPF. The financial risk associated with this is low. However, if the ERPA with the World Bank FCPF failed to materialize for any reason, Nicaragua would offer these emission reductions to another multilateral or private entity, including the REDD+ window of the GCF, in order to secure the sustainability of <i>Bio-CLIMA</i> 's activities and the implementation of national ENDE REDD+ Strategy under the UNFCCC REDD+ process. If these REDD+ RBPs fail to materialize the financial sustainability of the ENDE REDD+ will be at risk. Nonetheless, the project will minimize these risks supporting the preparation of a diversified REDD+ RBP portfolio for Nicaragua from year 2025 onwards. <sup>103</sup>

<sup>103</sup> See page 84, Selected Risk Factor 6, Funding Proposal,  
[https://www.greenclimate.fund/sites/default/files/document/fp146-cabei-nicaragua\\_0.pdf](https://www.greenclimate.fund/sites/default/files/document/fp146-cabei-nicaragua_0.pdf)

151. The IRM interviewed current Presidents of GTIs in Puerto Cabezas and Bluefields in Nicaragua. During these meetings, many of the indigenous leaders spoke of the results-based payments and their usefulness to the GTIs. There is a high expectation among them that funds from the *Bio-CLIMA* project would reach GTIs for community level work.

152. This factor is important because, during the consultations on ENDE-REDD and the ER programmes, it was the results-based payments, benefit sharing and trust fund allocations and purposes, which were the central issues that were mostly discussed. As stated earlier in this report, the PCRAs that are central to the *Bio-CLIMA* project were not discussed. The IRM's examination of the records of the many consultation meetings held for the ENDE-REDD programme, including the meetings cited in the project documentation for *Bio-CLIMA*, do not reveal discussions of the concept of PCRAs and the provision of technical assistance and support for settlers.<sup>104</sup> For these reasons from the point of view of the complainant(s) and some indigenous witnesses, *Bio-CLIMA* now represents a project that simply supports the continuation of the historical colonisation of indigenous lands by non-indigenous settlers.

153. The funding proposal explaining the situation with indigenous and non-indigenous people in the project area states:

"While in some indigenous territories there is the presence of non-indigenous families that have settled and live there, this does not affect the legal right that original peoples have over their territory. According to Law 445 on Communal Property Regime of the Native Peoples and Ethnic Communities of the Autonomous Regions of the Caribbean Coast and the Bocay, Coco, and Maíz Rivers and the civil code of Nicaragua, communal property is defined as collective and is made up of land, water, forests and other natural resources that have traditionally belonged to the community.<sup>105</sup>.... Communal land cannot be taxed, sold or divided and the property right does not end in time. Nevertheless, due to strong migration pressure from the western part of the country, encroachment into indigenous territories by colonists and land conflicts occur, exacerbating cultural and gender inequalities, since the presence of local public institutions and the rule of law is still weak."<sup>106</sup>

154. Based on the evidence of violence and the lack of ICP earlier in this report, the above description raises concerns about what it does not say. First, it makes the point that the fact that non-indigenous people are present on these lands does not affect the indigenous territorial titles to that land. However, what it does not say is that these non-indigenous settlers have excluded the land they occupy from access to it and from its use by the title holding indigenous people. In many cases, this exclusion is either violent and forcible or fraudulent, or done stealthily. What the description also does not say is that sometimes, the occupation of these lands by non-indigenous settlers has taken place at the expense of indigenous occupants being forcibly driven out or excluded by threats and violence or evicted from the land they rightfully occupied. Second, the description highlights that these encroachments by colonists lead to land conflicts. What it does not say, is that those conflicts are often violent and involve the use of arms by the colonists. The description also states that local public institutions and the rule of law is still weak. What it does not say, is that as a result of the weak local public institutions (such as the local police, and GTIs), combined with weak rule of law, many perpetrators of violence on indigenous people, those illegally encroaching on these lands and those dealing in indigenous lands fraudulently, don't appear to face justice through the judicial and criminal justice system.

### 6.3.2. Indigenous land titling in Nicaragua

<sup>104</sup> Please see discussion of this in the previous section above

<sup>105</sup> G González, M., 2017, Community land property ownership in the Nicaraguan autonomous regime. In "Securing rights in tropical lowlands."

<sup>106</sup> See page 8, paragraph 16, Funding Proposal,  
[https://www.greenclimate.fund/sites/default/files/document/fp146-cabei-nicaragua\\_0.pdf](https://www.greenclimate.fund/sites/default/files/document/fp146-cabei-nicaragua_0.pdf)

155. The complainant(s) draw attention to Law No. 445 or the Law of Communal Property. The complainant(s) allege that the lack of definition of the limits of the rights of third parties or settlers within the titled indigenous and Afro-descendant territories, has resulted in communities being “prevented from the full and effective access, use and enjoyment of [their] lands and natural assets.”

156. The Nicaraguan Constitution and laws, recognise the rights of the indigenous and Afro-descendant peoples. In addition, the project documents (including the Annex on legal due diligence) acknowledge the applicability of Law 445 to this project. However, according to the complainant(s), the implementation and enforcement of this part of the legislation has not been concluded for over 15 years, allegedly despite repeated requests for assistance to do so from responsible authorities. In order to deal with this part of the complaint, the IRM expert on land titling provided the historic background to indigenous land titling in Nicaragua, which the IRM recounts in the following paragraphs.

157. The Nicaraguan Constitution of (1987) recognises and protects the land ownership rights of indigenous peoples.<sup>107</sup> For example, indigenous peoples’ constitutional rights are recognised in Article 5 of the Constitution, acknowledging indigenous rights to “preserve communal forms of land property and their exploitation, use, and enjoyment.” Article 5 of the Constitution also establishes an autonomous regime for indigenous communities along Nicaragua’s Caribbean Coast. According to Article 89 of the Constitution, the State recognises the Atlantic Coast communities’ communal forms of land ownership and the right to use and benefit from water and forests.<sup>108</sup> Article 107 of the Political Constitution of Nicaragua also promotes land ownership rights for indigenous communities in Nicaragua.<sup>109</sup> The Statute of Autonomy of the Regions of the Atlantic Coast of Nicaragua (Law of October 28, 1987) was passed the same year as the Constitution (1987) and established the Autonomous Regions in the North (RAAN) and South (RAAS). Law No. 28 resulted from peace negotiations between dissident groups that supported counterrevolutionary forces in the 1980s war (Larson 2008).<sup>110</sup> Law No. 28 also laid the foundation for the first Regional Autonomous Councils in both Regions through the 1990 election.<sup>111</sup>

158. On 4 June 1998, the Inter-American Commission on Human Rights (IACHR) filed a case before the Inter-American Court for Human Rights (IACtHR) against the State of Nicaragua. Among the issues brought forward by the lawsuit, the complaint noted that the Nicaraguan government had not demarcated the communal lands of the Awas Tingni Community, nor had the State adopted effective measures to protect the Community’s property rights to ancestral lands and natural resources.<sup>112</sup> The complaint also alleged that the government granted a concession on community lands without the community’s permission and did not ensure an effective remedy in response to the community’s protest of the concession.<sup>113</sup> The Commission recommended that the Nicaraguan government (1) establish a National Commission for the Demarcation of the Lands of the Indigenous Communities of the Atlantic Coast and (2) pass a law on indigenous community property to make necessary provisions for accrediting the indigenous communities and their authorities, for demarcating properties and providing title documents, and settling disputes.

<sup>107</sup> Article 5, 89-91, 107, 181 Constitution of Nicaragua, 1987.

[https://www.constituteproject.org/constitution/Nicaragua\\_2005?lang=en](https://www.constituteproject.org/constitution/Nicaragua_2005?lang=en)

<sup>108</sup> Article 89, Constitution of Nicaragua

<sup>109</sup> Article 107, Constitution of Nicaragua

<sup>110</sup> Larson, A.-M., 2008, Land Tenure Rights and Access to Forests in Nicaragua’s North Atlantic Autonomous Region: Making the Rules of the Game,

[https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1562/Larson\\_118101.pdf](https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1562/Larson_118101.pdf)

<sup>111</sup> See page 6, *Ibid.*

<sup>112</sup> *Ibid.*

<sup>113</sup> *Ibid.*

159. In 2003, the government passed Law 445 in response to the Inter-American Court for Human Rights ruling, *Awas Tingni v. Nicaragua*.<sup>114</sup> Law No. 445 (2003) defines the procedures for formally titling communal lands. The Law creates the National Demarcation and Titling Commission (CONADETI) and the three Intersectoral Demarcation and Titling Commissions (CIDT) for the RAAN, RAAS, and the Coco and Bocay, define their functions and allocate resources for the demarcation and titling of communal lands. Law 445 gives teeth to the constitutional provisions granting indigenous peoples the right to own and use communal lands based on their traditional and customary patterns of land and resource use and occupancy.<sup>115</sup> The World Bank even supported the Nicaraguan government to develop legislation protecting indigenous property rights.<sup>116</sup> Law 445 guarantees the recognition of indigenous and ethnic community rights of property, use, administration, and management of traditional lands and natural resources.<sup>117</sup>

160. Law 445 recognises the rights of indigenous communities to maintain forms of ownership, communal land use and social organisation.<sup>118</sup> Communal Land is defined in Article 3 of Law No. 445 as the geographical area possessed by an indigenous or ethnic community, either under the real title of ownership or without it.<sup>119</sup> Under Article 3 of Law 445, “community land” includes the lands inhabited by the community as well as land that constitutes the traditional scope of its social, economic, cultural activities, sacred places, wooded areas for reproduction and multiplication of flora and fauna, construction of boats, as well as subsistence activities, including hunting, fishing, and agriculture. Under the law, communal land cannot be taxed, taken by prescription, seized, or transferred.<sup>120</sup>

161. Law No. 445 establishes various roles and responsibilities for indigenous and government authorities. According to Article 4 of Law No. 445, communal assemblies constitute the highest-level authorities of indigenous and ethnic communities; they are community authorities that serve as legal representatives and traditional administrative and government bodies representing communities.<sup>121</sup> Law 445 also establishes territorial authorities as administrative bodies of territorial units they legally represent.<sup>122</sup> According to Article 10 of Law 445, traditional communal authorities may grant authorisations for using communal lands and natural resources in favour of third parties if the Communal Assembly expressly orders them. Communal Assembly authorisation is not required for subsistence activities of third parties.<sup>123</sup>

162. The law further provides that indigenous and ethnic community property rights prevail over titles in favour of third parties who have never owned such land parcels and who, as of 1987, intend to occupy them.<sup>124</sup> Notably, according to Article 38, third parties living on indigenous lands without titles must abandon the indigenous lands without compensation. However, if a third party wants to stay on indigenous lands, it must pay a rental fee to the community.<sup>125</sup>

<sup>114</sup> Law 445: Law of Communal Property Regime of the Indigenous Peoples and Ethnic Communities of the Autonomous Regions of the Atlantic Coast of Nicaragua and of the Rivers Bocay, Coco, Indio and Maiz, <http://calpi.nativeweb.org/Law%20445%20English.pdf>

<sup>115</sup> *Ibid.*, Article 24.

<sup>116</sup> Larson, A.-M., 2008, Land Tenure Rights and Access to Forests in Nicaragua’s North Atlantic Autonomous Region: Making the Rules of the Game. [https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1562/Larson\\_118101.pdf](https://dlc.dlib.indiana.edu/dlc/bitstream/handle/10535/1562/Larson_118101.pdf)

<sup>117</sup> Article 2, Law No. 445

<sup>118</sup> Article 3, Law No. 445

<sup>119</sup> Article 3, Law No. 445

<sup>120</sup> Article 3, Law No. 445

<sup>121</sup> Article 4-5, Law No. 445

<sup>122</sup> Article 5, Law No. 445

<sup>123</sup> Article 10, Law No. 445

<sup>124</sup> Article 35, Law No. 445

<sup>125</sup> Art. 38, Law No. 445.

163. In Law 445, the procedures for legalising indigenous land were established. Five stages are associated with the demarcation and titling process: (1) the application submission stage, (2) the conflict resolution stage, (3) the measurement and marking stage, (4) the titling stage, and (5) the sanitation stage. In 2005, the state initiated the title-granting process for the 23 indigenous and Afro-descendant territories in the Autonomous Regions, culminating with the delivery of the ownership titles in 2013.<sup>126</sup> However, the literature indicates that only four of the five land titling stages have been carried out to date in indigenous territories.<sup>127</sup> Progress has not been made on the fifth stage: *Saneamiento*. A gap in legal and administrative instruments is the lack of a definition of what *Saneamiento* should be.<sup>128</sup> Meanwhile, third parties are often given rights both formally and informally to indigenous territories, which has exacerbated conflict and violence in the region.<sup>129</sup> Some officials authorise or release unilateral public deeds called declarations of ownership rights, declarations of the possessor, or assignments of rights possessory attesting a non-indigenous person is in possession of land that belongs to indigenous or ethnic communities.<sup>130</sup>

164. In 2013, CONADETI reported that 289 communities (3,643,997.91 hectares of land) had been titled to indigenous communities. A report published by CONADETI also shows the progress of the land titling and demarcation process between 2005 and 2013,<sup>131</sup> but notes that *Saneamiento* is pending in many titled areas. According to Sylvander (2018), 23 indigenous territories have been titled, covering approximately 52 per cent of the Caribbean coast, but all of these territories await *Saneamiento*.<sup>132</sup>

### 6.3.3. Non-implementation of *Saneamiento* (clearance) stage of indigenous land titling and relevance to Bio-CLIMA project

165. While indigenous legal rights to land supersede *colonos* rights, the failure to implement *Saneamiento* means that *colonos* continue to occupy and use indigenous territories.<sup>133</sup> Without the full enforcement of the titles of indigenous communities, paying any rents would exclude indigenous peoples of that community from the use of the land. Part of the problem is that Law 445 is ambiguous on how *Saneamiento* should be implemented. Article 59 of Law No. 445 merely states, “each community may commence with the technical and material support from the Rural Lands Titling Office, the title clearance stage (*Saneamiento*), in relation to third parties occupying their lands.”

166. The lack of a clear definition appears to have created a judicial and administrative gap that produces conflicting interpretations and often contradictory expectations.<sup>134</sup> According to CONADETI’s Manual of Operations on Demarcation and Titling, *Saneamiento* refers to the title

<sup>126</sup> Art. 54, Law. No. 445.

<sup>127</sup> Finley-Brook, M., 2016, Territorial ‘Fix’? Tenure Insecurity in Titled Indigenous Territories, <https://onlinelibrary.wiley.com/doi/10.1111/blr.12489>

<sup>128</sup> Bonilla Toruño, W. A., 2013, Diagnóstico sobre el saneamiento de los territorio indígenas y étnicos de la RAAN, Nicaragua, [https://www.academia.edu/es/7872275/Diagn%C3%B3stico\\_sobre\\_el\\_Saneamiento\\_de\\_los\\_Territorios\\_Ind%C3%ADgenas\\_y\\_%C3%A9tnicos\\_de\\_la\\_RAAN\\_Nicaragua](https://www.academia.edu/es/7872275/Diagn%C3%B3stico_sobre_el_Saneamiento_de_los_Territorios_Ind%C3%ADgenas_y_%C3%A9tnicos_de_la_RAAN_Nicaragua)

<sup>129</sup> Oakland Institute, 2020, Nicaragua’s Failed Revolution: The Indigenous Struggle for *Saneamiento*. <https://www.oaklandinstitute.org/nicaraguas-failed-revolution>

<sup>130</sup> Bonilla Toruño, W. A., 2013, Diagnóstico sobre el saneamiento de los territorio indígenas y étnicos de la RAAN, Nicaragua.

<sup>131</sup> CONADETI (Comisión Nacional de Demarcación y Titulación), 2013, Informe ejecutivo de la CONADETI y los CIDTs al 30 de junio de 2013, <https://doczz.net/doc/7741355/informe-ejecutivo-de-la-conadeti-y-las-cidt-s-al-30-de>

<sup>132</sup> Sylvander, N., 2018, Territorial Sanitation in Nicaragua, and the Prospects for Resolving Indigenous-Mestizo Land Conflicts, [doi:10.1353/lag.2018.0007](https://doi.org/10.1353/lag.2018.0007)

<sup>133</sup> *Ibid.*

<sup>134</sup> Bonilla Toruño, W., 2010, Factibilidad de la etapa de saneamiento de los territorios indígenas de Bosawás y de la RAAN, [https://www.academia.edu/es/7872363/Factibilidad\\_de\\_la\\_etapa\\_de\\_saneamiento\\_de\\_los\\_territorios\\_ind%C3%A9genas\\_de\\_Bosaw%C3%A1s\\_y\\_la\\_RAAN](https://www.academia.edu/es/7872363/Factibilidad_de_la_etapa_de_saneamiento_de_los_territorios_ind%C3%A9genas_de_Bosaw%C3%A1s_y_la_RAAN)



clearance stage intended to improve the effective recognition that the state makes to the rights of indigenous and ethnic communities to their lands, through the application of the law, for third parties that might have claims on communal lands.<sup>135</sup> Several indigenous communities have interpreted *Saneamiento* to mean the removal of *colonos* and, in some cases, have forcefully evicted *colonos* themselves.<sup>136</sup>

167. Despite the progress on the first four steps of the land titling process, including the titling stage (the third stage), it is reported that some government authorities continue to grant land titles to non-indigenous people (*colonos*), triggering conflict and violence.<sup>137</sup> A report by the civil society organisation, the Oakland Institute, argues that land titles provide little protection for indigenous peoples and ethnic communities, given continuous land invasions and violent conflict. The Nicaraguan government argues that the Oakland Institute's reports are biased and unbalanced and do not reflect realities on the ground. However, the IRM found many researchers, including those who have conducted research and surveys on the ground, tend to agree that:

- (a) the final *Saneamiento* stage of land titling of indigenous communities has not been started or pursued in nearly all lands in project areas;
- (b) there are divided views on whether or not *Saneamiento* includes the eviction of outsiders who are illegally occupying titled lands; and
- (c) the *Saneamiento* stage certainly includes a settling of land disputes in such a way that indigenous titles to the land are upheld and non-indigenous occupiers are allowed to continue occupying and using the land in ways that are acceptable to the indigenous community having title, and in return agree to make a rental or other payment for that occupation and usage to the community. It can also include payments for past occupation by the non-indigenous person involved.

168. One of the reasons the fifth stage of Law 445 has not been implemented yet comes from the lack of a definition of what *Saneamiento* should be.<sup>138</sup> Some indigenous communities and peoples in the North within the Bosawás Reserve areas of the project tend to hold the view that *Saneamiento* includes the eviction of illegal, and in particular recent *colonos* who have occupied indigenous lands through violence and fraud. For them, such occupation is a continuation of aggressive colonisation of indigenous lands through force and arms and is seen as leading to the eventual demise of the indigenous people and their culture and the dispossession of the communities of their lands. This sentiment, however, does not appear to be as prevalent in the southern areas where the project is to be implemented, with indigenous communities tending to be more willing to negotiate and accommodate *colonos* occupying lands titled to indigenous communities, as long as they acknowledge the indigenous title, pay a rental for the occupation of the land and undertake activities within regular usage norms (or zoning in some cases) established by the communities. It is the IRM's observation, based on the evidence, that the concept of PCRA-like instruments actually originates with these Southern communities and has been adopted for the project as a whole.

<sup>135</sup> Comisión Nacional para la Demarcación y Titulación (CONADETI), 2007, Manual de procedimientos de demarcación y titulación. Managua: CONADETI; González, M., 2012, Securing rights in tropical lowlands. Community land property ownership in the Nicaraguan autonomous regime, <https://doi.org/10.1177/117718011200800406>

<sup>136</sup> Artola, G., 2014, Indígenas presionan por saneamiento, <https://www.elnuevodiario.com.ni/nacionales/326105-indigenas-presionan-saneamiento/>

<sup>137</sup> Larson, A. M., & Lewis-Mendoza, J., 2012, Decentralisation and devolution in Nicaragua's North Atlantic autonomous region: Natural resources and indigenous peoples' rights, <http://doi.org/10.18352/ijc.315>

<sup>138</sup> Bonilla Toruño, W. A., 2013, Diagnóstico sobre el saneamiento de los territorios indígenas y étnicos de la RAAN, Nicaragua, [https://www.academia.edu/es/7872275/Diagn%C3%B3stico\\_sobre\\_el\\_Saneamiento\\_de\\_los\\_Territorios\\_Ind%C3%ADgenas\\_y\\_%C3%A9tnicos\\_de\\_la\\_RAAN\\_Nicaragua](https://www.academia.edu/es/7872275/Diagn%C3%B3stico_sobre_el_Saneamiento_de_los_Territorios_Ind%C3%ADgenas_y_%C3%A9tnicos_de_la_RAAN_Nicaragua)

169. Meanwhile, third parties are often given rights both formally and informally to indigenous territories, which has exacerbated conflict and violence in the region.<sup>139</sup> One researcher concluded that some officials often authorise or release unilateral public deeds called declarations of ownership rights, declarations of the possessor, or assignments of rights possessory attesting a non-indigenous person is in possession of land that belongs to indigenous or ethnic communities.<sup>140</sup> While indigenous legal rights to land supersede *colonos* rights, the failure to implement *Saneamiento* means that *colonos* continue to infringe on indigenous territories.<sup>141</sup> The researcher further writes that juridical and administrative measures, including the Sanitation Manual of Operations, are similarly vague on *Saneamiento*'s meaning.

170. This lack of definition of the concept of *Saneamiento* exists as well within the various indigenous communities as well. While some communities interpret it as the eviction of *colonos*, others, in particular in the South Caribbean Coast, have been applying a form of *Saneamiento* under a system of land tenure for years. Nevertheless, during the interviews conducted by the IRM, the complainant(s) and witnesses argued that the process of *Saneamiento* consists in a collection of distinct types of actions which could include a leasing system to non-indigenous or non Afro-descendant people but should also comprise eviction for third parties who invade indigenous lands by force and refuse to live under indigenous people's rules. In that sense, the prospect of evicting *colonos* that do not abide by indigenous jurisdictions should be part of the process of *Saneamiento* but has not been granted to indigenous communities by government authorities until now. Even throughout the interviews with Indigenous Territorial Government's leaders, in particular in the Autonomous region of the North Caribbean Coast, the fear of an exacerbated invasion of *colonos* and the lack of capacity to deal with this invasion was tangible.<sup>142</sup> Indigenous leaders mentioned that since 2015 the threat of invasion of indigenous land has been an issue and that ways to prevent it are under consideration within indigenous agencies.<sup>143</sup>

171. The invasion of indigenous lands by settlers and the lack of support and capacity to implement *Saneamiento* efficiently have thus created insecurity for indigenous and Afro-descendant people and have also resulted in an upsurge of violence. The Oakland Institute published a report in 2020 based on field research conducted in 2018 and 2019; this report documents dozens of first-hand testimonies from members of the communities – who have been subject to multiple murders, kidnappings, violence, and intimidation, linked to land invasions for mining, cattle ranching, and the exploitation of forests.<sup>144</sup>

172. Moreover, the influx of mining companies has triggered violence, displacement, health risks, and environmental hazards, among other negative impacts on communities.<sup>145</sup> According to the report, a 2017 law created ENIMINAS, the Nicaraguan Mining Company. After that, the government's involvement in mining concessions through joint ventures led to a 20 per cent increase in the total amount of land nationwide held under mining concessions (the total amount of land under mining concessions increased from 1.2 million to 2.6 million hectares).

<sup>139</sup> The Oakland Institute, 2020, Nicaragua's Failed Revolution: The Indigenous Struggle for Saneamiento, <https://www.oaklandinstitute.org/nicaraguas-failed-revolution>

<sup>140</sup> Bonilla Toruño, W. A., 2013, Diagnóstico sobre el saneamiento de los territorio indígenas y étnicos de la RAAN, Nicaragua, [https://www.academia.edu/es/7872275/Diagn%C3%B3stico\\_sobre\\_el\\_Saneamiento\\_de\\_los\\_Territorios\\_Ind%C3%ADgenas\\_y\\_%C3%A9tnicos\\_de\\_la\\_RAAN\\_Nicaragua](https://www.academia.edu/es/7872275/Diagn%C3%B3stico_sobre_el_Saneamiento_de_los_Territorios_Ind%C3%ADgenas_y_%C3%A9tnicos_de_la_RAAN_Nicaragua)

<sup>141</sup> Sylvander, N., 2018, Territorial Sanitation in Nicaragua, and the Prospects for Resolving Indigenous-Mestizo Land Conflicts, [doi:10.1353/lag.2018.0007](https://doi.org/10.1353/lag.2018.0007)

<sup>142</sup> Interview with GTIs

<sup>143</sup> interview with GTIs

<sup>144</sup> The Oakland Institute, 2020, Nicaragua's Failed Revolution: The Indigenous Struggle for Saneamiento, <https://www.oaklandinstitute.org/nicaraguas-failed-revolution>

<sup>145</sup> *Ibid.* p. 6.

Moreover, about 853,800 hectares of this land is in the buffer zone of the Bosawás reserve. The map below shows several existing mining projects in Nicaragua.<sup>146</sup>



**Figure 3:** Map of mining activities in Nicaragua

173. According to an organisation representing indigenous peoples, these mining concessions are usurping indigenous territories given that they are often established without the consent of indigenous and Afro-descendant communities.<sup>147</sup> The issue of mining concession established in indigenous territories without the consent of indigenous and Afro-descendant people, as well as the illegal commerce of land practiced by third parties, in particular in Mayangnas and Miskito's territories,<sup>148</sup> was also raised by experts and the complainant(s) during the interviews conducted by the IRM.

### 6.3.4. Findings

174. Based on a balance of probabilities, the IRM finds that PCRAs as a land occupation instrument may be more acceptable to indigenous communities in some areas of the project (such as in the South) but may be anathema to other communities in the project area (such as in the North). In adopting PCRAs as a standard instrument for regularising the illegal occupation of indigenous lands by *colonos*, without focused and specific attention to this aspect of the project through appropriate disclosure and ICP with affected indigenous communities, much concern and doubt has been engendered in the minds of some indigenous communities and peoples as to the objectives and goals of FP146.

175. While some indigenous groups appear to believe that *Bio-CLIMA* is the substitute project of ENDE REDD and ER and will bring benefits to their communities, others believe that it is part of a continuing effort to support the expansion of the occupation of indigenous lands by *colonos* and the provision of technical assistance and other project benefits to *colonos* so as to make their activities on the land more sustainable and climate friendly, but also entrenching their once illegal occupation and regularising it on a long term basis. To some indigenous communities, this strategy of the project represents an exclusion of indigenous people, first by force, fraud or stealth at the hands of *colonos*, and then through the *Bio-CLIMA* project in favour of *colonos*. It represents for them the loss of the use of natural resources on those lands as well

<sup>146</sup> The Oakland Institute, 2020, cites Oro Verde Limited's "Gold Production" map taken from Oro Verde Limited's website, <https://www.oaklandinstitute.org/nicaraguas-failed-revolution>

<sup>147</sup> Havana Times, 2022, <https://havanatimes.org/features/ortega-delivers-indigenous-territories-to-mining-companies/>

<sup>148</sup> Confidential testimonies from experts

as the cultural and historical way in which they have protected and preserved those lands for the benefit of generations. Therein lies the seeds of conflict and the real chance that the *Bio-CLIMA* project will generate future conflicts and exacerbate the existing conflicts in some of the areas of the project.

### 6.3.5. Compliance of the project

176. The IRM finds that proper due diligence has not been collectively done with regard to the project to assess the impact of PCRAs on indigenous communities and former indigenous occupiers, especially with regard to the right to compensation for loss of access to land and resources caused by *colonos* receiving benefits under *Bio-CLIMA*, including PCRAs. While the GCF Secretariat and AE contend that this may be addressed at the sub-project level during FPIC, the IRM concludes that it is a matter that ought to have received attention as part of environmental and social due diligence at the project (programme) level. The IRM finds that this lack of due diligence is in non-compliance with performance standards 1, 5 and 7.

177. The IRM also finds that if appropriate ICP was conducted at the framework level for the project, with co-design and co-creation as the basis of project development, this non-compliance might have been avoided, if the subject was brought up and addressed during informed consultations. In such a situation, indigenous communities could have raised and discussed the compensation for loss of access to land and resources that beneficiary *colonos* have caused, and perhaps negotiated several remedial measures, including a compensatory element in the payment to be charged, or through seeking a lump sum payment upfront in addition to payments or benefits under the PCRA. Additionally, it may have been possible for the *Bio-CLIMA* project to consider compensating the indigenous community for the loss of access to land and resources. These and other options have been lost at the project level because of the non-compliance with performance standard 5, resulting in a somewhat rigid definition of PCRAs, when a more flexible definition might have addressed these issues.

Based on the evidence evaluated above, the IRM finds non-compliance with the following GCF Policies and Procedures:

**Table 5: Applicable GCF Policy and Procedure and Findings on Compliance**

Applicable Policy and Procedure	Specific Text of the Policy/Procedure applicable to this project for non-compliance assessment	Reasons for Non-Compliance
Performance standard 1	(a) Identify funding proposal's environmental and social risks and impacts; (b) Adopt mitigation hierarchy: anticipate, avoid; minimize; compensate or offset; (c) Improve performance through an environmental and social management system; (d) Engagement with affected communities or other stakeholders throughout funding proposal cycle. This includes communications and grievance mechanisms.	The IRM finds non-compliance due to the failure to identify the risks to indigenous populations arising from granting PCRAs to settlers who have evicted or driven out indigenous occupants from their indigenous lands. The IRM also finds non-compliance as PCRAs were not consulted on as part of ICP, as stated earlier in this report.
Performance standard 5	(a) Avoid/minimize adverse social and economic impacts from land acquisition or restrictions on land use: (i) Avoid/minimize displacement;	The IRM finds non-compliance due to the failure to assess and minimise the increased risks and restrictions on the right of indigenous communities, and indigenous people displaced by settlers to



Applicable Policy and Procedure	Specific Text of the Policy/Procedure applicable to this project for non-compliance assessment	Reasons for Non-Compliance
	<ul style="list-style-type: none"> <li>(ii) Provide alternative project designs;</li> <li>(iii) Avoid forced eviction.</li> <li>(b) Improve or restore livelihoods and standards of living;</li> <li>(c) Improve living conditions among displaced persons by providing:               <ul style="list-style-type: none"> <li>(i) Adequate housing;</li> <li>(ii) Security of tenure.</li> </ul> </li> </ul>	whom PCRAs are granted, to access natural resources and land.
Performance standard 7	<ul style="list-style-type: none"> <li>(a) Ensure full respect for indigenous peoples               <ul style="list-style-type: none"> <li>(i) Human rights, dignity, aspirations;</li> <li>(ii) Livelihoods;</li> <li>(iii) Culture, knowledge, practices;</li> </ul> </li> <li>(b) Avoid/minimize adverse impacts;</li> <li>(c) Sustainable and culturally appropriate development benefits and opportunities;</li> <li>(d) Free, prior and informed consent in certain circumstances.</li> </ul>	The IRM finds non-compliance due to the failure to ensure that indigenous peoples' rights are protected and safeguarded with the introduction of PCRAs, through informed consultations and deployment of additional mitigants regarding PCRAs.
GCF Environmental and Social Policy	Para 17: GCF will require the intermediaries to manage the environmental and social risks associated with the supported activities. In this regard, the intermediaries will review all subprojects and delegated activities, identify where the entities and GCF could be exposed to potential risks, and take necessary actions, including the development and implementation of an environmental and social management system to oversee and manage these risks.	Not applicable to this issue.
	Para 26: In screening activities, GCF will require that applicable environmental and social safeguards standards are determined and actions sufficient to meet the requirements of each applicable environmental and social safeguards standard pursuant to the GCF ESS standard and this policy are identified.	The IRM finds non-compliance due to failure to determine the applicability of ESS standards to PCRAs granted to settlers who have displaced indigenous people from their lands, and failure to identify requirements for PCRAs sufficient to meet performance standard 5 through mitigatory and compensatory provisions for indigenous people displaced by settlers receiving PCRAs.
	Para 37: Where assessments have already been done and permits obtained, the due diligence for the activities will consist of analysis of gaps to understand whether there is a need for any additional studies or measures to meet the requirements of the ESS standards and this policy and a requirement that the gaps be filled.	The IRM finds non-compliance due to the failure to consider whether additional studies were required to assess compensatory and other mitigatory measures for indigenous people displaced by settlers who are to receive PCRAs under the project.





Applicable Policy and Procedure	Specific Text of the Policy/Procedure applicable to this project for non-compliance assessment	Reasons for Non-Compliance
Indigenous Peoples Policy	Para 31: The environmental and social assessment should identify affected groups and understand the nature of specific impacts.	The IRM finds non-compliance due to the failure to assess the impact of PCRAs on indigenous people displaced by settlers who received PCRAs.
	Para 46: Further guidance on community development programmes is provided in the GCF "Sustainability guidance note: Designing and ensuring meaningful stakeholder engagement on GCF-financed projects". <sup>149</sup>	The IRM finds non-compliance due to insufficient engagement with the affected indigenous communities on matters related to PCRAs and restrictions on land use and the impact of PCRAs on indigenous people displaced by settlers receiving PCRAs.
	Para 48: ...where government processes involve project-level decision and actions, the accredited entity should review these processes in relation to the requirements of the Policy and GCF ESSs and address identified gaps or non-compliance.	The IRM finds non-compliance due to the lack of information provided with regard to the legality and enforceability of PCRAs under Nicaraguan Law.
	Para 60: GCF will avoid funding activities that may involve physical displacement (i.e., relocation, including relocation needed as a result of loss of shelter), whether full or partial and permanent or temporary, or economic and occupational displacement (i.e., loss of assets or access to assets that leads to loss of income sources or means of livelihood) as a result of the activities.	The IRM finds non-compliance in the failure to conduct sufficient due diligence on the impacts of PCRAs on displaced indigenous peoples by settlers who receive PCRAs and the resulting continued loss of access to that land and use of that land by the displaced indigenous people.

#### 6.3.6. Impact on indigenous communities

178. The most significant impact of non-compliance with performance standard 5, is that indigenous and Afro-descendant people and communities who have lost their lands to *colonos*, will have to bear the full cost of those past losses and future losses as well when PCRAs are granted to *colonos* who displaced them through force, stealth, or fraud. On the other hand, *colonos* are able to obtain security of tenure of illegally occupied lands through the *Bio-CLIMA* PCRAs, notwithstanding the exclusion criteria.

179. The failure to ensure ICP at the formulation stage prevented indigenous peoples and Afro-descendant communities from providing their input on how project interventions could be designed in a manner that would meaningfully address the problem of displaced indigenous and Afro-descendant people and the denial of access to land and natural resources by settlers who receive PCRAs. Failure to consult at an early-stage risks further entrenchment of the status-quo, where settlers are incentivised to maintain their presence long-term in territories through PCRAs, while indigenous people and Afro-descendants displaced by the very same settlers are

<sup>149</sup>See Sustainability guidance note: Designing and ensuring meaningful stakeholder engagement on GCF-financed projects <https://www.greenclimate.fund/documents/meaningful-stakeholder-engagement>

left to bear the cost of the loss of their lands and livelihoods, while also foreclosing on the option to conduct *Saneamiento* in the future, if so desired by indigenous communities.

### 6.3.7. Recommendations

180. The IRM recommends that the Board requests the AE to reconsider the implications of PCRAs being granted to *colonos*, who have illegally occupied lands that were once occupied by indigenous people (whether individuals or families or communities) and develop fair safeguards that would bring equity to the PCRA operation by considering how indigenous people, who have been evicted or moved away from land out of fear, could have their grievances addressed satisfactorily, including through the possibility of their regaining possession of such lands or being compensated in some way for their losses. Additionally, the AE should assess the legality and legal enforceability of PCRAs and provide the GCF with information on how violations of PCRAs by settlers will be enforced. The AE should also provide explanations of how new settlers coming into lands covered by a PCRA, either through fraudulent means or through violence, will be dealt with. The scheme that is developed should then become part of the rules governing the issuance of PCRAs and should form part of the issues disclosed and consulted on during the ICP processes recommended earlier in this report. The GCF Secretariat would then reassess the revisions to the ESMF document.

181. While the non-completion of *Saneamiento* under Law 445 creates a project condition that contributes to the issues dealt with in this report, its remediation is not a matter that falls under the *Bio-CLIMA* project, or the IRM's mandate or for that matter under any of the social and environmental safeguards. As such, the IRM makes no recommendation with regard to this aspect of the complaint.

## VII. Relevance of Board Conditions

182. As part of this compliance review, the IRM took into account the Board's conditions that were set at the time this project was approved. Prior to the Board agreeing on the conditions that were included as part of the approval, several Board members expressed concerns about this project when it was considered by the Board. For example, the report<sup>150</sup> of the Board's deliberation on this project states: "Given the significant concerns raised by some CSOs and feedback from various stakeholders on the ground, the Board member stated that they could not support the proposal in its current shape. They requested that additional conditions be included in the draft decision...They included the establishment of tranches of finance whereby disbursements would only be made when conditions were met, namely, project implementation as verified by monitoring,... and, last, independent oversight of the process of agreement and signing of landscape restoration and forest conservation agreements [PCRAs]." Another Board member "...also had concerns about the funding proposal, particularly regarding the consultation of indigenous peoples in decision-making and tracking fund allocation. The Board member considered it fundamental to put in place an international independent oversight system to address these questions and welcomed the offer of the AE to incorporate these points in its proposal." Yet another Board member cited this project as an instance where the Secretariat should exercise an active role in managing the pipeline and filtering funding proposals "given the serious concerns raised about fiduciary, social and environmental safeguards." Additionally, "CSOs were concerned that the project would benefit large livestock farmers, as those were the ones named in the proposal, rather than smallholder, local farmers, which would further exacerbate deforestation while failing to address one of its most important drivers..."

<sup>150</sup> Report of the twenty-seventh meeting of the Board, 9 – 13 November 2020, <https://www.greenclimate.fund/sites/default/files/document/gcf-b27-23.pdf>

183. In accordance with paragraph 15 of the voting procedures, all Board members were provided with a copy of the relevant part of the draft decision relating to the consideration of FP146. Additional conditions had been proposed for FP146, which had been circulated to the Board before the meeting. The Co-Chairs noted that the conditions had been discussed and accepted as implementable by the AE, and also had the support of the NDA. The Secretariat was requested to project the draft decision on the Zoom screen.

184. In pursuance of these concerns, the Board adopted conditions which, among others, requires the appointment of an independent third-party monitor to oversee FPIC and PCRA processes, including the full participation of indigenous and Afro-descendant communities. These salutary provisions are consistent with the IRM's own findings in the case and will help provide protections for indigenous people and Afro-descendant communities regarding concerns arising during the implementation phases of the project. However, respectfully, these Board's conditions will not remediate adverse impacts on indigenous people and Afro-descendant communities caused by the failure to conduct ICP for the project during the planning phase and prior to Board approval. Nor will they mitigate the impact on the indigenous people arising from the recurrent violent conflict and human rights concerns in the project areas which will adversely impact both ICP and FPIC procedures and likely lead to an exacerbation of violent conflict. The remedies recommended by the IRM will help provide adequate information and analysis on the violent conflict as well as on the human rights situation, allowing the viability of ICP and FPIC processes to be assessed, and appropriate mitigatory and protective measures to be developed for those processes. Additionally, the conflict sensitivity analysis and human rights due diligence reports will provide the independent third-party monitor, appointed under the Board's conditions, much needed baseline information to facilitate the performance of the functions assigned under the Board's conditions. The IRM's recommendations are consistent with and further supportive of the Board conditions, while also remediating the project non-compliances identified in this report and will help remediate the harm already caused to indigenous and Afro-descendant peoples and harm that may be caused to them in the future. Finally, the IRM is concerned that the appointment of the independent third-party monitor has been left entirely in the hands of the AE, and suggests that the Secretariat be allowed to approve the appointment in order to ensure trust and confidence of all stakeholders.

## **VIII. Recommendations on remedial actions**

185. Given the IRM's findings in relation to the complaint regarding FP146, the IRM presents the recommendations in sub-section 8.1-8.5 below, for consideration of the GCF Board, to bring this project back into compliance with GCF policies and procedures and to remedy harm and prevent future harm to the complainant(s) and other indigenous and Afro-descendant peoples in the project areas.

### **8.1 Conflict sensitivity analysis**

186. A conflict sensitivity analysis that looks at all components of the conflict in the entire project area should be performed after the first disbursement but before any activities under the project are undertaken. This conflict sensitivity analysis should be carried out by an independent and competent independent third party appointed by the AE and approved by the GCF Secretariat that could provide an objective and unbiased analysis of the existing and latent conflict situation of the project area. The analysis should be done in collaboration with stakeholders, primarily the government and the indigenous peoples and Afro-descendant communities. To this end, the third-party organisation must be provided full access to indigenous people and Afro-descendant communities in the project areas. The analysis should address the actors, dynamics, triggers, locations, nature and extent of the conflict and also

discuss law enforcement efforts and measures taken to address the conflict and resolve disputes. The analysis should recommend safeguard and mitigatory measures to be incorporated in the project to ensure that the indigenous communities are safe and healthy during the implementation of the *Bio-CLIMA* project and that ICP at project level and FPIC at sub-project level can be conducted as expected under the GCF safeguards. The analysis should be provided to the GCF Secretariat for its approval and shared with the public on the websites of the AE and GCF and also provided to all the indigenous assemblies and GTIs in the project area. The AE should utilise the analysis to inform the choice of location of sub-projects and based on the report should also generate mitigatory and safeguard measures to be included in the sub-projects and in the conduct of ICP for the project.

## 8.2 Human rights due diligence report

187. A human rights due diligence report should be prepared after the first disbursement but before any project activities are undertaken by an independent competent third party appointed by the AE and approved by the GCF Secretariat. The third-party organisation should have full access to indigenous and other people in the project areas. The report should address human rights issues in the project area, such as the space available for civil society (including those supporting indigenous communities and people) to operate, the freedom of speech and expression, the freedom of assembly for indigenous peoples, the freedom of association, due process of law, access to justice and remedy for violent attacks and other issues relevant to the project's success. The report should be prepared in consultation with the Government of Nicaragua as well as indigenous communities and GTIs, as well as civil society organisations. The report should identify potential human rights concerns and propose mitigatory and safeguard measures to be taken in the project to ensure that beneficiaries, be they indigenous peoples or *colonos*, have their human rights respected in regard to the project and its implementation. The AE should take these recommendations into account in developing sub-projects and the conduct of ICP for the project and should include the suggested mitigatory and safeguard measures in the sub-projects and in the conduct of ICP. The report should be made public via the AE's website and the GCF's website and made available to indigenous communities as well as other civil society organisations, including those of *colonos*.

## 8.3 ICP and FPIC

188. Once sub-project locations are selected and known based on the project level conflict sensitivity analysis and human rights due diligence report referred to in sections 8.1 and 8.2 above, indigenous communities and their assemblies and GTI should be consulted through ICP at a framework level with key details of the *Bio-CLIMA* project and as much detail about the sub-projects as may be available at that time. ICP for the project should be undertaken after the first disbursement, but before any other project activities are undertaken. A more robust stakeholder consultation plan should be prepared, especially in relation to the PCRAs, which the IRM investigation team found were not adequately informed to all stakeholders of the project. As part of assessing PCRAs, the actions set out in paragraph 179 of this report should be accomplished. There should be a more detailed list of conditions on who is eligible to benefit from the PCRAs, and decisions on eligibility criteria should be made after ICP with indigenous and Afro-descendant community stakeholders, and not only GTIs. ICP should enable dialogue and negotiation to enable the indigenous communities to weigh in on the terms and conditions under which PCRAs will be considered for *colonos* in each of their areas. The AE should consider what conditions need to be added to PCRAs to address the losses caused to indigenous and Afro-descendant people and communities displaced by settlers who receive PCRAs. These additional conditions should be disclosed and consulted on during the project ICP. After the conclusion of such an ICP process, an FPIC process can then take place for sub-projects where indigenous

communities should be equal parties to reaching a “framework agreement” for the purpose of how, when and where FPIC will be conducted. Key elements of the sub-project should be outlined in the framework agreement. The framework agreement can then be followed by the FPIC process for the sub-project itself.

189. The IRM takes the view that consultations for the framework agreement can be done after the first disbursement but before the FPIC process for the selection of sub-projects. This will ensure that the EE has funding to conduct these activities, in a way that is satisfactory to the third-party monitor required by the Board, and to be appointed by the AE. If the third-party monitor reports concerns with regard to the ICP or FPIC process in any indigenous community, either those processes will need to be repeated properly or those areas will need to be excluded from the project.

## 8.4 Selection of the third party to monitor project implementation

190. The IRM recommends that the Board modify the Board’s conditions in its Decision B.27/01 approving the *Bio-CLIMA* project so that the GCF Secretariat, which is perceived as the most impartial agency involved in implementing the project, holds approving authority for the selection of the third-party monitor. While the AE can select and propose the third-party monitor, the IRM suggests that the appointment should be approved by the GCF Secretariat after ensuring that the selection process was free and fair and that the selected monitor can remain impartial and unbiased in the performance of the functions expected by the Board.

## 8.5 Secretariat Remedial Action Plan

191. As set out in paragraph 66 of the IRM’s PGs, the IRM recommends that the Board call on the GCF Secretariat to prepare a remedial action plan, in consultation with the AE to give full effect to this Board decision and recommendations of the IRM as set out in the said document and implement the same once it is approved by the IRM. The IRM will monitor the implementation of the approved remedial action plan and the Board decision on this complaint, and report progress to the Board in accordance with the Procedures and Guidelines of the IRM.

# IX. Lessons learned and related recommendations

192. Some of the documentation for the World Bank’s ER program clearly had much more information on the violent conflict and human rights situation where the Bio-CLIMA project is to be implemented. This information, together with other information gathered by the IRM for this case shows that critical information on the violent conflict and aspects of the human rights situation was not fully disclosed to the GCF Secretariat and Board in project documentation prepared for FP146. In some cases, documentation prepared for the ENDE-REDD and ER programmes was copied and adapted to the Bio-CLIMA project with a view to satisfying GCF safeguard and policy requirements. In result, the GCF Secretariat, Board and accredited observers may not have had the necessary information to make informed decisions about the project.

193. The GCF envisages a limited role for the Secretariat to provide oversight, during the design and planning stages of a project regarding compliance with GCF environmental and social safeguards and policies. Its role is limited to second level due diligence which allows it to raise questions and seek more information. However, the Secretariat does not have the mandate to test the accuracy and veracity of information supplied by Accredited Entities, during the design stages of projects. This significantly limits the ability of the GCF to adequately ensure that its policies and safeguards are in fact being respected during the design and planning stages of projects. This level of reliance on the Accredited Entities to comply with GCF policies, with very



limited avenues to verify facts on the ground, even when the Secretariat may have reason to doubt information being supplied or when there are external sources of information telling a different story, leaves the GCF extremely vulnerable to policy and safeguard non-compliance that can result in huge reputational risks to the Fund.

194. In this context, the IRM wishes to alert the Board to several significant systemic and policy issues that this case raises and awaits the Board's attention. These are as follows:

- (a) The need for Accredited Entities to be transparent and accurately and fully disclose all relevant facts (positive and negative) in dealing with the GCF Secretariat regarding environmental and social safeguards, the gender policy and the indigenous peoples' policy, and the consequences and corrective steps that should follow, for not doing so;
- (b) The need for publicised and standardised guidance to Accredited Entities on the conduct of conflict sensitivity analysis and human rights due diligence, that is sometimes, as in this case, required under the GCF safeguards and policies;
- (c) The lack of policies and guidance from the Board on the nature of risks to be undertaken in conflict and post conflict project/programme situations, as well as in fragile states; and
- (d) Providing the Secretariat with the necessary interventional tools during the planning and design stages of projects (such as Privileges and Immunities, necessary missions, Accredited Entity audits, etc) to ensure projects and programmes remain compliant with GCF safeguard and policies and Accredited Entities are honouring their obligations under their AMA's and FAAs and in alignment with GCFs Risk Management Framework

195. On these matters, the Board may wish to consider requesting the Secretariat to prepare a Board paper that could facilitate the adoption by the Board of appropriate policies and guidance on the matters set out in paragraph 194 (a) to (d) above.

196. The Sustainability Unit of the Secretariat, which includes staff that work on environmental and social safeguards (ESS), IP issues, SEAH and Gender is housed within the Office of Risk Management and Compliance (ORMC). The Head of ORMC reports to the Executive Director. ORMC also houses the risk and compliance team. The work of staff from the risk and compliance team focuses on financial and fiduciary risks to the GCF and its projects. The sustainability staff focus on environmental and social risks, which are of a very different character and nature to financial and fiduciary risks. The Green Climate Fund was so named because the term "Green" implies, among other things, being environmentally friendly and supportive. The IRM believes that GCF projects must be environmentally and socially friendly while supporting the cause of slowing down and preventing climate change. The IRM, therefore, recommends for consideration by the Executive Director that the sustainability staff of the GCF enjoy a special place within the structure of the Secretariat. Sustainability staff could form a separate office that is independent of other units within the Secretariat and could have its own head reporting directly to the Executive Director. The Sustainability Unit raises red flags with regard to projects that have environmental and social concerns via the GCF Secretariat's review process and system. Such independence within the Secretariat will help ensure that environmental and social concerns play an equal role to other project concerns and that the imperative of approving projects will not unduly outweigh proper environmental and social assessment of projects.

197. The Sustainability Unit staff of the Secretariat currently consists of 7 staff members and some part-time expert consultants, including through contracted firms. In this project alone, the Board has required that the 165+ sub-projects be presented to the Secretariat for environmental and social assessment. There are also other projects in which the Board has imposed conditions. The GCF Secretariat, per the RESP, reviews all GCF-financed activities, which includes sub-projects, not only those with conditions. While these conditions are salutary, it is critical that the Executive Director consider approving adequate staffing for the

Sustainability Unit to ensure that it can do its job well. Currently, the Sustainability Unit has only one (1) staff member assigned to review indigenous peoples' issues. Given the number of projects and sub-projects involving indigenous people and the special set of safeguards applicable to them, it is the IRM's considered view that the staff capacity of the Sustainability Unit is insufficient to meet the demands. The IRM, therefore, recommends that the Board consider providing extra funding to the Secretariat to recruit adequate Sustainability Unit staff to ensure that environmental and social concerns are properly addressed in projects and sub-projects. If the capacity is not increased, the IRM feels that more complaints relating to environmental, social, indigenous peoples' and gender issues are more than likely to keep flowing into the IRM.

## **X. Conclusion**

198. The IRM thanks the complainant(s), witnesses, staff of the Secretariat, the AE and the Government of Nicaragua for the assistance and cooperation they have all readily extended to the IRM to conduct its investigation and prepare this report.