

PUBLIC

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

BR-MICI003-2011

**DETERMINATION OF ELIGIBILITY TO INITIATE THE COMPLIANCE PHASE
FOR THE OPERATIONS BR-L1296 AND BR-L1302 "RODOANEL MÁRIO COVAS –
NORTHERN SECTIONS 1 AND 2"**

This documents was prepared by the Panel Chair Person for the Consultation Phase

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

COMPLIANCE PHASE ELIGIBILITY DETERMINATION

FROM: Werner Kiene, Chair of the Compliance Review Panel
TO: Executive Secretary
CC: MICI
REFERENCE: Case BR-MICI003-2011
PROJECT: Rodoanel Mário Covas – Northern Sections 1 (BR-L1296) and 2 (BRL1302)
COUNTRY: Brazil
DATE: December 22, 2011

1. Summary

- 1.1. On May 13, 2011, the Independent Consultation and Investigation Mechanism,¹ received a Request filed by Mauro Antonio Moraes Victor and Marco Antonio Garcia Martins on their behalf and in representation of members of a coalition of non-governmental organizations (hereinafter Colectivo de Entidades Ambientalistas or the Requesters). The Requesters complain about the potential negative impacts that the planned construction of the Northern portion of the Rodoanel Mário Covas Project (hereinafter the Project or the Beltway) could cause.
- 1.2. The Requesters allege that the harm they fear is partially due to the Inter-American Development Bank's (IDB) failure to comply with its obligations to ensure that the planning for this section of the Rodoanel would be in keeping with the provisions of certain IDB Operational Policies.
- 1.3. The Compliance Review Panel assessed with care the complexity of the Project and the Request. The Panel's task was assisted by information provided by the Requesters and by IDB Management. Although a number of concerns have been clarified, there still exist conflicting assertions about some of them requiring an analysis that would go beyond the scope of an eligibility determination. Therefore, the **Chair of the Panel, in line with the Policies of the Mechanism and without any judgment on the merits of the Complaint, determines that the Request is eligible** for the purpose of a Compliance Review by the Panel. The reasons for this determination are summarized in Section 8.3.

¹ The terms: Mechanism, MICI, ICIM, Management, Executive Secretary, Project Ombudsperson, Panel, Mechanism Policy, Eligibility, Consultation Phase, Assessment and any other relevant term in this memorandum shall have the meaning assigned to them in the Independent Consultation and Investigation Mechanism (ICIM) Policy approved on February 17, 2010.

2. The Project

- 2.1. This is an important Project. It has been designed with a great deal of effort and consists of a Beltway for the City of Sao Paulo to be financed by the IDB. It has been divided into four sections: the Western Section, which is 32 km long and has been in operation since 2002; the Southern Section, which is 61 km long and began to operate in 2010; the Eastern Section, which has been concessioned and began in August 2011; and the Northern Section addressed in this Operation, which is nearly 43 km long and for which competitive bidding on construction was scheduled to begin in 2011.²
- 2.2. The Project will be executed by the State Department of Logistics and Transportation (SLT), acting through the Desenvolvimento Rodoviário S.A. (DERSA). It includes two loan operations. The first loan is for the Northern Section 1 (BR-L1296)³ for a total amount of US\$1,049,870,000, with US\$400 million to be financed by the IDB. This part of the Project, which would build 22 km of highway from the Eastern Section to the Fernão Dias highway, includes the following components: (i) engineering and administration; (ii) civil works technical and environmental supervision; and (iii) social and environmental viability.
- 2.3. The second loan for Northern Section 2 (BR-L1302) for a total amount of US\$1,965,363,000, with US\$748,633,000 to be financed by the IDB. This part of the Project, which would build 21 km of highway from the Western Section to the Fernão Dias highway, has two components: (i) civil works; and (ii) institution-strengthening.
- 2.4. The IDB classified the Project as an environmental “Category A”⁴ operation. This means that it is likely to cause significant negative environmental and associated social impacts, or that it could have profound implications affecting natural resources.
- 2.5. The Proposal for the loan approved by the IDB Board of Executive Directors identified the main social risk of the Project as relating to the need to remove nearly 2,700 structures (now used for residences by an estimated 5,000 people and for commercial and institutional purposes). The Proposal also stated that this could be a complex process in light of the vulnerability of the population, the need for simultaneous removals at different worksites, and the possibility of delays in the construction of low-income housing units to be financed by the Project. Moreover, it was anticipated that neighboring populations will be impacted because

² The Strategic Environmental Assessment (SEA) was conducted in 2004. The Environmental Impact Study on the section was completed in 2010, along with several additional analyses and complementary studies, as called for by the national environmental licensing process.

³ The IDB’s Board of Executive Directors approved the first loan in November 8, 2011. The second loan is scheduled for submission to the Board of Executive Directors in February 2012.

⁴ See the Environment and Safeguards Compliance Policy, Inter-American Development Bank, Directive B.3. (GN-2208-19), January 19, 2006.

of losses of income from affected commercial buildings; and due to the effects associated with the rerouting of traffic through densely populated areas.⁵

3. ICIM actions thus far

- 3.1. On May 13, 2011 the Requesters submitted the Request to the ICIM. The Request consisted of a letter that described the concerns of involved citizen groups and an elaborate environmental impact assessment (called a “Counter-RIMA”) that was proposed as an alternative to the official Environmental Impact Assessment established by the Project Authorities.
- 3.2. On May 23, 2011, the Request was transferred to the Project Ombudsperson. Information available to the Panel shows that the IDB’s Project Team, the Requesters and other civil society organizations met on July 12, 2011, and agreed to continue exchanging information. No other actions or subsequent steps were specified.⁶
- 3.3. According to the Project Ombudsperson, during the ICIM’s Consultation Phase the Requesters expressed their interest to transfer the case to the Compliance Review Process. On August 22, 2011 the Project Ombudsperson issued the Eligibility Memorandum declaring the Request ineligible for purposes of the Consultation Phase, and the Request was transferred to the Compliance Review Panel on August 23, 2011.⁷
- 3.4. In order to clarify the issues and concerns raised by the Requester, the Panel identified and gathered information from stakeholders and others experiencing related issues.⁸
- 3.5. Pursuant to Section 55 of the ICIM Policy, the Panel Chairperson reviewed this Request independently of the determination of the Project Ombudsperson. To ensure due diligence to the Requesters’ concerns and additional information received from them, the Panel had to extend the eligibility determination process through December 16, 2011.

⁵ See Proposal for the loan “Rodoanel Mário Covas Project – Northern Section” Brazil, (BR-L1296), Par. 2.3. Document of the Inter-American Development Bank (IDB), October 25, 2011.

⁶ See Memorandum of Consultation Phase Determination of Eligibility Section 3.3, August 22, 2011, Case BR-MICI003-2011, document of the Independent Consultation and Investigation Mechanism (ICIM).

⁷ While the Consultation Phase aims to provide an opportunity for applying consensual and flexible approaches to address the concerns of a party, the Compliance Review Phase’s purpose is to verify whether any of the issues raised could have been caused by non-compliance with IDB Relevant Operational Policies. See paragraphs 38 and 53 of the Policy Establishing the Independent Consultation and Investigation Mechanism of the Inter-American Development Bank (IDB).

⁸ See the Consultation Phase Determination of Eligibility of September 2, 2011, Case BR-MICI005-2011.

4. Harm Issues of the Request

- 4.1. The Requester's allegations include, but are not limited to: impact on water resources; increased risk of flooding and natural disasters; increased soil and water pollution; incremental impact on natural habitats; impact on climate change; and impact on health.
- 4.2. Regarding the impact on water resources, the Requesters argue that the water resources in the area, where the Beltway will pass over the São Paulo City Green Belt Biosphere Reserve and Cantareira State Park, is beginning to show signs of over-development. In addition, they claim that the construction and operation of the highway will expand the area of human activity in the area of natural springs and aquifers protection will negatively impact São Paulo's main sources of water.
- 4.3. On the increased risk of flooding and natural disasters, the Requesters stated that the construction of the highway would increase the impact of floods and natural disasters due to massive earthworks, changes in run-off, sedimentation of rivers, and changes in mountain contours. The Requester's concern on the increased soil and water pollution refers to the construction and operation of the highway that would increase the risk of fuel and hazardous substance spills in an area of great environmental importance.
- 4.4. Concerning the incremental impact on natural habitats, they allege that the impact on flora and fauna, some species of which are endangered, was insufficiently inventoried in the EIA, which lacks specific mitigation and compensation measures. Moreover, the Requesters consider that the EIA does not include the direct or indirect impacts of construction of the northern segment of the Beltway on the ecosystem and on environmental services provided by the São Paulo City Green Belt Biosphere Reserve and Cantareira State Park; these impacts would be significant, and many would be irreversible.
- 4.5. With respect to the impact on climate, the Requesters argue that the Biosphere Reserve sequesters carbon produced in the city. The EIA does not address the Project's impact on potential climate change in the region. The Requesters also highlighted that the impact on health will be significant since the analysis of the beltway's impact on health caused by pollution levels used local standards that are not as strict as those used by the World Health Organization. In addition, they allege that the EIA does not include an inventory of phototoxic gases or their effects.
- 4.6. The Requesters also addressed the impact of resettling the population. They stated that the number of people to be resettled has increased more than 50%, from 2700 households to some 4100 households, around 20,000 people. Likewise, they claim that the EIA does not include details on the effects that the resettlement required by the Project will have on the surrounding population. They allege a lack of planning for needed mitigation measures. The Requesters informed the Panel about individual

citizens who have come forward since the original Request has been filed alleging to be negatively affected by the approved design of the Beltway.

- 4.7. The Requesters also allege a lack of civil society participation in the project preparation process and complain about lacking access to information. They claim the consultation process for the preparation of the Project was biased and that the affected population was not heard and they report that they and many of those related to their Request are scared because their way of living will be disrupted.
- 4.8. In referring to IDB's Environment and Safeguards Compliance Policy, Directive B. 9, on Environmental Assessment Requirements, and its requirement for a systemic analysis and comparison of all feasible alternatives to the project and its components in terms of their potential environmental and social impacts, the Requesters claim that the analysis for the "no action" alternative was based on incorrect data. They also allege that their members and others have been misled by false information that the Ringroad will bring less pollution and ease traffic congestion.

5. Compliance Issues Implied in the Request

- 5.1. The Request implied or directly alleged that the IDB failed to ensure that some of its Operational Policies have not been adhered to in the design of the Project. In particular, the Requesters' allegations relate to certain provisions of the Environment and Safeguards Compliance Policy (OP-703), Disaster Risk Management (OP-704); the Involuntary Resettlement Policy (OP-710) and the Access to Information Policy (OP-102).
- 5.2. According to the Requesters, the investigation solicited should cover a detailed review of the IDB's failure to consider that the alternatives included in the EIA are not sound or have not been duly studied, particularly the "no project" alternative.

6. The Management Response to the Allegations

- 6.1. Upon the request of the Panel, the Project Team provided exhaustive explanations of the IDB's views of the issues raised by the Requesters, the rationale behind certain decisions related to the identification, design and approval of the Project. The Management Response also informs about design features and mitigation measures to address potentially negative impacts.⁹
- 6.2. The Management Response documents that during the design of the Operation there was considerable awareness about concerns expressed by the Requesters. Furthermore, the Response also shows how both the IDB and the Executing Agency have tried to deal constructively with these issues.

⁹ The Management Response will be posted in the ICIM registry.

7. The Panel's Examination of the Request and the IDB Management Response

- 7.1. The Panel analyzed both the Requesters' letter and the elaborate alternative impact assessment (Counter-RIMA) furnished by them. While a number of issues raised by the Requesters dealt with collective rights and potential harm, there were also a number of issues that the Panel considered as potentially direct material harm to individual Requesters.
- 7.2. Without entering into the merits of the alleged harm, the Panel considered, for instance, allegations of water contamination, pollution, or evictions as such potential areas of direct negative material impact that could affect the Requesters or those individuals whom they represent.
- 7.3. In order to illustrate their allegations related to direct material harm feared as a result of Project-induced involuntary resettlement, the Requesters presented also information on potential impacts that the Project could cause to the residents of the Jardim Itatinga Condominium. The Panel notes that these issues constitute also the allegation of a different Request brought to ICIM which is currently being processed by the Project Ombudsperson under the Consultation Phase (BR-MICI005-2011). Therefore, considering the provisions of Articles 35 and 54 of the ICIM Policy, the Panel will not explicitly examine the alleged impacts on the Itatinga community. Proceeding with the Consultation Phase for the Itatinga Request will provide an opportunity to address the concerns of the Itatinga parties with the aim of finding a resolution to the issues raised in their request. The Panel's focus, on the other hand, is to establish whether the Bank has adhered to its own Operational Policies in relation to the allegations brought forward by the Request which is the subject of the present eligibility determination.
- 7.4. After analyzing the issues that have been raised in the Request and comparing them with the explanations provided in the Management Response, the Panel observed that the Project authorities and the IDB have begun to constructively react to the number of allegations made by the Requesters. On the other hand, conflicting assertions about important aspects of the Project continue to exist in a number of instances. Clarifying such conflicting assertions goes beyond the scope of the eligibility determination.
- 7.5. With respect to the Bank's concerns about adherence to relevant IDB Operational Policies, there exists preliminary evidence that shows that issues of "involuntary resettlement,"¹⁰ "analysis of alternatives", and "access to information" would be significantly clarified by a thorough review both in the interest of the Requesters' concerns and to prevent reputational risks for IDB.

¹⁰ After the original Request was submitted to the ICIM and declared ineligible for the purposes of a Consultation Phase, The Requesters provided additional information to the Panel about individual citizens affected by the approved design of the Beltway.

7.6. The Panel identified this operation as a highly complex project. It also recognizes the environmental, social, health and safety concerns of the Requesters. Particularly, those described in paragraph 2.5 and section 4 of this Memorandum. Therefore, the Panel followed with utmost attention the procedures prescribed by the ICIM Policy and its spirit.

8. Eligibility Determination

8.1. The Panel has the duty to determine whether the Request satisfies the eligibility criteria for a formal investigation. During this eligibility review process the Panel followed Section 30, 31, 37, and 56 of the ICIM Policy.

8.2. The eligibility determination utilizes information contained in IDB relevant operational policies, procedures and related documents available to the ICIM, gathered additional information on the Project,¹¹ established a dialogue with the relevant IDB Management units, and received additional information from the Requesters.

8.3. The results of the Eligibility Review are summarized in the following table:

¹¹ The information examined by the Compliance Review Panel include the Request and its annexes, IDB's relevant operational and legal documents, the loan proposal approved by the IDB Board of Executive Directors regarding the first loan is for the Northern Section 1 (BR-L1296), the EIA and related Report such as the Environmental and Social Management Report (ESMR) and its the Environmental en Social Management Plan (ESMP) of July2011.

Eligibility Analysis		
ELIGIBILITY CRITERIA FOR A COMPLIANCE REVIEW PHASE (as specified in relevant sections of the ICIM Policy)	THE PANEL'S DETERMINATION	COMMENTS
56.a) The names and contact information for the Requesters are available;	YES	ICIM files contain information on names and contact of the Requester(s).
56.b) The names and contact information for the Representative, if any, and proof of the authorization are available;	YES	The Requesters reside in the State of São Paulo, Brazil. In addition, the Requesters provided to the ICIM letters of representation signed by the Instituto Brasileiro de Proteção Ambiental [Brazilian Institute of Environmental Protection].
56.c) The Bank-Financed Operation(s) at issue has been identified;	YES	Rodoanel Mário Covas Project – Northern Section 1 (BR-L1296) already approved by the IDB's Board of Executive Director -2618/OC BR- and 2 (BR-L1302) scheduled to be approved by the Board of Executive Director in 2012.
56.d) The Requesters resides in the country where the relevant Bank-Financed Operation is or will be implemented (or a qualified Representative has been appointed);	YES	The Requesters reside in the State of São Paulo, Brazil.
56.e) None of the exclusions set forth in Section 37 applies;	YES	<p><u>Exclusion 37 (a) does not apply:</u> The Bank is responsible for the actions that are subject to the Request though co-financiers share in this responsibility.</p> <p><u>Exclusion 37 (b) does not apply:</u> The Request focuses on the Bank's omission in securing adherence to its Operational Policies. It does not relate exclusively to the laws, policies or regulations of the Government and the executing agencies.</p> <p><u>Exclusion 37 (c) does not apply:</u> The Request deals with issues arising from an Operation that is supported by the Bank together with co-financiers. The Requesters' concerns are plausible and may be subject to Bank Operational Policies on Environment Compliance Safeguards, access to Information, and Involuntary Resettlement.</p> <p><u>Exclusion 37 (d) does not apply:</u> The Request does</p>

		<p>not address procurement issues.</p> <p><u>Exclusion 37 (e)</u> does not apply: There has not been a previous Review on the same matter.</p> <p><u>Exclusion 37 (f)</u> does not apply: The Request deals with a recently approved Operation.</p> <p><u>Exclusion 37 (g)</u> does not apply: The Request deals with operational issues germane to the Mandate of ICIM and is not subject to review by other bodies of the Bank.</p> <p><u>Exclusion 37 (h)</u> does not apply: The Request deals with feared or actual harm to the livelihood of the Requesters and has not been submitted to gain a competitive business advantage.</p> <p><u>Exclusion 37 (i)</u> does not apply: The Panel has no evidence that the Request submitted to ICIM raises issues under arbitral or judicial review by national, supranational or similar bodies.</p> <p>After the Panel had identified information that a “Precautionary Measure” may have been or will be filed before the Inter-American Commission on Human Rights, it examined the potential impact on Exclusion 37 (i). Based on legal advice obtained from various sources, the Panel concluded that such a “Precautionary Measure” does not constitute a formal legal matter that would fall within this exclusion.</p>
56. f) the Requester has reasonably asserted that it has been or could be expected to be directly, materially adversely affected by an action or omission of the IDB in violation of a Relevant Operational Policy in an Bank-financed Operation and has described in at least general terms the direct and material harm caused or likely to be caused by such action or omission in the Bank-financed operation	YES	<p>While a number of issues raised by the Requesters dealt with collective rights and potential harm, there were also a number of issues that the Panel considered as potentially direct material harm to individual Requesters. Without entering into the merits of the alleged harm, the Panel considered, for instance, allegations of access to safe drinking water, air pollution, or evictions as such potential areas of direct negative material impact that could affect the Requesters or those individuals whom they represent.</p>
56.g) With respect to an issue raised in the Request, a Compliance Review may assist in determining whether (and if so, how and why) any Bank action or omission, in respect of a Bank-Financed Operation, has resulted	YES	<p>Given the Bank’s significant role in identification, design and approval of this Project, it is possible that the IDB by actions or omissions failed to ensure policy compliance that might have contributed to the harm alleged by the Requesters. In particularly in relation to provisions of the Environment and Safeguards Compliance Policy (OP-703), the</p>

in non compliance with a Relevant Operational Policy and direct, material adverse effects (potential or actual) to the Requesters; and		Involuntary Resettlement Policy (OP-710) and the Access to Information Policy (OP-102). Considering the Bank's commitment to adherence to IDB Operational Policies, there exists preliminary evidence suggesting that particularly issues of "involuntary resettlement", "analysis of alternatives", and "access to information" may assist in determining whether (and if so, how and why) Bank actions or omission may have resulted in non-compliance with Relevant Operational Policies
56. h) The Requesters have taken steps to bring the issue to the attention of Management. The Panel Chairperson shall consult with Management as to its response and if Management is involved in addressing the concerns raised, the Panel Chairperson shall allow forty-five (45) calendar days from the date of receipt by the Executive Secretary of the Request for purposes of the Compliance Review before it is deemed eligible. The Panel Chairperson may waive this requirement in his or her discretion if the 45-day period has been invoked by Management during the Consultation Phase.	YES	The Panel has evidence that the Requesters took steps to bring their concerns to the attention of Management in a letter sent by the Requester on February 23, 2011. The Panel has been informed by Management about its efforts to deal with issues raised in the Request.

9. Summary and Conclusions

- 9.1. The Chair of the Panel, in line with the Policies of the Mechanism and without any judgment about the merits of the Request, determines therefore that **the Request is deemed eligible for the Purposes of a Compliance Review by the Panel.**
- 9.2. The issues raised by the Requesters are being dealt with by IDB and the Executing Agency. However, it appears that several conflicting views about the design of this Project continue to persist. Providing an impartial assessment about them would go beyond the scope of an eligibility determination. Therefore, the **Chair of the Panel, in line with the Policies of the Mechanism and without any judgment on the merits of the Complaint, determines that the Request is eligible** for the purpose of a Compliance Review by the Panel .

- 9.3. In consideration of the Bank's commitment to adherence to IDB Operational Policies, there exists preliminary evidence suggesting that particularly issues of "involuntary resettlement", "analysis of alternatives", and "access to information" would need to be clarified by a thorough compliance review. Such a review would be in the interest of the Requesters' concerns as well as in the interest of IDB in minimizing reputational risks of potential non-compliance.
- 9.4. The Panel wishes to express its appreciation to the Requesters for providing explanations about their concerns and to the IDB Project Team for its Management Response and for assisting in the Panel's information gathering.

10. Processing of the Eligibility Determination

As per the Mechanism's Policy, Paragraph 55, please notify the Requesters, the Board, the President, Management and the Project Executing Agency or Borrower on the contents of this memorandum and post the notice of registration on the Registry within 5 business days of distribution to the Board.

Chair of the Compliance Review Panel