

PUBLIC

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

**ICIM-BR-2013-076
DETERMINATION OF ELIGIBILITY FOR THE COMPLIANCE REVIEW PHASE
DRAINAGE, ROADS, WATER SUPPLY AND SEWERAGE
IN THE LOW AREAS OF BELEM
(BR0055)**

This document was prepared by the Compliance Review Panel Chairperson

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

ELIGIBILITY DETERMINATION MEMORANDUM

COMPLIANCE REVIEW PHASE

TO: Requesters, Board of Executive Directors, Senior Management, Project Team and Executing Agency¹

FROM: Mary Rose Brusewitz, Chairperson of the Compliance Review Panel

VIA: Victoria Márquez-Mees, Executive Secretary

PROJECT: Drainage, Roads, Water Supply and Sewerage in the low areas of Belem (BR-0055)

DATE: April 7, 2014

I. EXECUTIVE SUMMARY

- 1.1 On December 18, 2013, Antônio Carlos Pantoja Soares and José Alexandre de Jesus Costa, residents of the city of Belém, in the state of Pará, Brazil, filed a Request with the Independent Consultation and Investigation Mechanism (the “ICIM”) alleging harms from frequent flooding in the area where a Bank-Financed Operation identified as project *BR-0055- Drainage, roads, water supply and sewerage in the low areas of Belem* (the “Project”) was developed. The Requesters expressed their desire for both a Consultation Phase exercise and a Compliance Review.
- 1.2 The Project is a sovereign-guaranteed operation in the water and sanitation sector. The amount financed by the Bank totaled US\$ 145,000,000. The Project was approved by the Board of Executive Directors of the Bank (the “Board”) on November 20, 1991, and was implemented in the city where the Requesters reside. According to publicly available Bank records, the loan agreement was signed on January 27, 1993 and the last disbursement of the loan was on December 31, 2004.
- 1.3 On March 4, 2014, the Eligibility Committee of the Consultation Phase determined that the Request was not eligible for the Consultation Phase. On March 10, 2014, the

¹ Unless otherwise defined herein, terms used in this document have the meanings assigned to them in the Policy Establishing the Independent Consultation and Investigation Mechanism (GN-1830-49) (the “ICIM Policy”), approved on February 17, 2010 and available at: <http://www.iadb.org/mici> (the “ICIM Policy”).

Executive Secretary of the ICIM transferred the Request to the Panel Chairperson for an independent eligibility determination for the Compliance Review Phase.

- 1.4 After careful review of the Request, available case documents and the relationship between the Request and the Project, the Panel Chairperson determines that **the Request is ineligible** for a Compliance Review due to the fact that the eligibility requirement established in Section 56(e) of the ICIM Policy is not fulfilled because the exclusion set forth in Section 37(f) of the ICIM Policy applies. Section 37(f) prohibits application of the Compliance Review Phase for any Request dealing with a Bank-Financed Operation if more than twenty-four months have passed since the last disbursement of the loan.

II. COMPLIANCE REVIEW PHASE

A. Purpose

- 2.1 In accordance with Part D, Section 53 of the ICIM Policy, the purpose of a Compliance Review is to investigate allegations expressed by the Requesters that their rights or interests have been, or could be expected to be directly, materially adversely affected by actions or omissions of the Bank that may constitute the failure by the Bank to follow one or more of its Relevant Operational Policies (“ROPs”) in connection with a Bank-Financed Operation. The objective of a Compliance Review is to establish whether (and if so, how and why) any Bank action or omission, in respect to a Bank-Financed Operation, has resulted in non-compliance with one or more ROPs and direct, material adverse effects (potential or actual) to the Requester.
- 2.2 A Compliance Review is a fact-finding exercise. Part D, Section 65 of the ICIM Policy provides that a Compliance Review is not a judicial process designed to establish guilt or innocence or to adjudicate fault or apportion blame. In addition, a Compliance Review does not involve reaching conclusions about the actions of any party other than the Bank, such as governmental authorities, the Borrower, Executing Agency, project developer or other lenders.

B. Eligibility

- 2.3 Under the ICIM Policy, a Request proceeds from the Consultation Phase to the Compliance Review Phase if the Requester has expressed a desire for a Compliance Review and if:
 - i. the Consultation Phase has been terminated or concluded for any reason,

- or
- ii. the Request was deemed ineligible under the Consultation Phase.²
- 2.4 As provided in Section 55 of the ICIM Policy, the Panel Chairperson must “review the Request for eligibility, independently of the determination of the Project Ombudsperson.”³
- 2.5 A Request’s eligibility for the Compliance Review Phase is decided based on criteria outlined in the ICIM Policy, which have been included in Annex 1 of this document. In making an eligibility determination, no inference or conclusion is made or expressed as to the merits of the Request or whether any action or omission by the Bank in connection with the relevant Bank-financed Operation has resulted in non-compliance with any of the Bank’s ROPs.

III. THE REQUEST

- 3.1 The Request was filed with the ICIM on December 18, 2013 by Antônio Carlos Pantoja Soares and José Alexandre de Jesus Costa, residents of the city of Belém, in the state of Pará, Brazil. The Requesters allege that harms have arisen from frequent flooding in the area where a Bank-Financed Operation identified as project *BR-0055- Drainage, roads, water supply and sewerage in the low areas of Belem* was developed.
- 3.2 According to the Requesters, the Project was intended to transform the Una Watershed by installing drainage systems in the city of Belém through achievement of the following objectives: to allow flood waters to subside, to prevent erosion and silting, to construct sewage interceptors and channels, and to channel excess water appropriately.⁴ The Requesters say the Project area included a total of twenty neighborhoods with a population of approximately 600,000 people.
- 3.3 The Requesters allege that in neighborhoods that fall within the Project area, even after completion of the Project, approximately 397,000 residents have been affected by continuous flooding and the situation has steadily worsened. The Requesters allege harms due to: i) lack of adequate maintenance of the Project and the loss and/or inadequate use of Bank-financed machinery and equipment related to the Project; ii) failure to complete

² Part D, Section 54 of the ICIM Policy.

³ According to a transition scheme approved by the Board, starting September 1st, 2013, the eligibility determination of the Consultation Phase is made by an Eligibility Committee which is composed by the Executive Secretary of the ICIM and two Case Officers. See: IDB Organization, Human Resources, and Board Matters Committee, Meeting Minutes, June 24, 2013, approved on July 10, 2013.

⁴ “A maior reforma urbana da América Latina, acontecida em Belém, Capital do Estado do Pará,” document included in the original Request to the ICIM, December 18, 2013, page 2.

micro-drainage work left pending at the completion of the Project; and iii) omissions on the part of the Advisory Council (*Comitê Assessor do Projeto Una*, a management mechanism that was created to ensure the sustainability of the Project) to adequately maintain the infrastructure.⁵

- 3.4 The Requesters say their intent in filing the Request is to seek improvements to current conditions in Belém and to help the Bank improve its decision-making process, particularly considering that the IDB is currently financing a project that has the potential to cause similar harms in a nearby watershed.⁶

IV. THE PROJECT

- 4.1 The Project is a sovereign-guaranteed operation related to the water and sanitation sector. The amount financed by the Bank totaled US\$ 145,000,000. The Project was approved by the Board on November 20, 1991, to be implemented in the city of Belém, state of Pará, Brazil.⁷ The loan agreement was signed on January 27, 1993.⁸
- 4.2 The Project had the following objectives: i) resolve flooding problems in the lowlands of the Una Watershed through the installation of an efficient drainage system which would channel water into the Guajará Bay; and ii) provide the residents of the Una Watershed adequate water and sanitation in order to improve living conditions.⁹
- 4.3 The Project included the construction and/or installation of many infrastructure components, such as plant and equipment to promote better drainage (including channels and floodgates and drainage systems for storm water); sanitation systems (including sewage sanitation, distribution systems for potable water and water reservoirs); roads (paving, installation of bridges and walkways); and usage measurement systems for homes. Complementary equipment and activities included acquisition of equipment for waste removal and system maintenance, resettlement of residents, and environmental education.¹⁰

⁵ According to the Requesters the Advisory Council was made up of 18 members: four from the Pará state government, four of the Municipality of Belém, one from LEME Engineering, one from the Brazilian Association of Sanitary and Environmental Engineering (ABES), one from the University of Amazonia (UNAMA) and seven community members resident of the watershed.

⁶ Communication from the Requesters received on February 28, 2014.

⁷ <http://www.iadb.org/es/proyectos/project-information-page,1303.html?id=BR0055>

⁸ *Ibid.*

⁹ Magallanes Fernanda y Di Villarosa, Francesco, editores. *Urbanização de favelas: lições aprendidas no Brasil*, Inter-American Development Bank, 2012, annex 2, page 125
<http://www.iadb.org/wmsfiles/products/publications/documents/36949857.pdf>

¹⁰ *Ibid.* pages 126-129.

- 4.4 The Project's execution period was from 1993-2004¹¹ and the last disbursement was made on December 31, 2004.¹²

A. Access to Information Restrictions

- 4.5 At the time of the Project's approval by the Board in 1991, neither the Access to Information Policy (OP-102) nor the prior policy addressing similar issues, the Disclosure of Information Policy, were in effect. As a result, and according to the Confidentiality Principle that was in effect at that time, the majority of Bank documentation related to the Project was classified as confidential. While the Compliance Review Phase has had access to this documentation in making this eligibility determination, it is obliged not to disclose any classified documents; therefore this document refers only to publicly-accessible information related to the Project.

V. ICIM ACTION TO DATE

- 5.1 On December 18, 2013, Antônio Carlos Pantoja Soares and José Alexandre de Jesus Costa submitted a Request related to the Project in which they expressed the concerns summarized in paragraph 3.3 of this document.
- 5.2 On January 29, 2014, after the Request went through an initial review during process of registering it, it was transferred to the Eligibility Committee of the Consultation Phase to determine its eligibility for that phase.¹³

A. Consultation Phase

- 5.3 From January 29 to March 4, 2014, the Eligibility Committee of the Consultation Phase communicated with the Requesters and Management to better understand the Project and the concerns raised by the Requesters.
- 5.4 On March 4, 2014, the Eligibility Committee determined that the Request was not eligible for the Consultation Phase. The Eligibility Committee cited the following reasons for its ineligibility determination: (i) the Request was submitted in respect of a Bank-Financed Operation more than twenty-four months after the last disbursement of the loan related to the Project; (ii) the Request raises issues under judicial review in the legal system in Brazil; and (iii) the Requesters had not taken steps to bring their issues to the attention of Management.

¹¹ *Ibid.* page 125.

¹² Executive Financial Summary, 649/OC-BR-CPS, last accessed on March 26, 2014.

¹³ *Supra* footnote 3.

- 5.5 Based on that determination and considering that the Requesters had also expressed their desire to have a Compliance Review, the Executive Secretary initiated the administrative procedures to forward the case to the Compliance Review Phase.

B. Compliance Review Phase

- 5.6 On March 10, 2014, the Executive Secretary transferred the Request to the Panel Chairperson for the purposes of the independent determination of eligibility as required by Section 55 of the ICIM Policy.
- 5.7 On March 13, 2014, the Panel Chairperson and staff contacted both the Requesters and Management to inform them about the receipt of the Request and to explain what the next steps would be according to the provisions established in the ICIM Policy.
- 5.8 On March 17, 2014, the Requesters contacted Management to share with them the concerns expressed in the Request.
- 5.9 On March 19, 2014, Management replied to the Requesters, informing them that the Bank had forwarded their communications to the appropriate local authorities that currently have responsibility for the infrastructure that was installed as part of the Project and asked for clarifications in response to the concerns of the Requesters.
- 5.10 On March 24, 2014, the Chairperson and Compliance Review Phase staff had separate conference calls with Management and the Requesters to obtain a better understanding of the Project, the involvement of Management in the case and to hear from the Requesters about the concerns they had raised.
- 5.11 On March 30, 2014, at the request of the Panel Chairperson, the Executive Secretary issued an extension of the deadline for the eligibility determination.¹⁴

VI. ELEGIBILITY SUMMARY FOR THE COMPLIANCE REVIEW PHASE

- 6.1 As per Section 55 of the ICIM Policy, the eligibility analysis and determination for the Compliance Phase is made by the Panel Chairperson independently of the determination carried out for the Consultation Phase.

¹⁴ ICIM Policy, Section 91 provides that any time period may be extended, as appropriate, for as long as is strictly necessary to ensure the full and proper processing of Requests.

- 6.2 Taking into consideration that the Consultation Phase deemed the Request ineligible for the purposes of a Consultation Phase exercise, the prerequisite established in Section 54(b) of the ICIM Policy is fulfilled so the eligibility of the Request for a Compliance Review is to be analyzed in light of the exclusions and eligibility requirements set forth in Sections 37 and 56 of the ICIM Policy.
- 6.3 In that regard, the Panel Chairperson determines that the Request complies with subsections (a), (c), (d), (f), (g) and (h) of Section 56 of the ICIM Policy; and that subsection (b) does not apply to the Request.
- 6.4 However, after careful review of the relationship between the Request and the Project, the Panel Chairperson determines that the eligibility requirement established in Section 56(e) of the ICIM Policy is not fulfilled because the exclusion set forth in Section 37(f) applies. That is, the Request was filed more than twenty-four months after the last disbursement of the Bank financing related to the Project.
- 6.5 According to official Bank documents the Project's last disbursement was made on December 31, 2004,¹⁵ and according to the ICIM Registry, the Request was presented on December 18, 2013.¹⁶ The period of time after the last disbursement and the presentation of the Request was nearly 108 months. Consequently, the exclusion provided in Section 37(f) prevents a determination that the Request is eligible for a Compliance Review.
- 6.6 In addition, after a *prima facie* analysis, the Request also may raise issues that are under judicial review in the Brazilian legal system, which after further review could also prevent a determination of eligibility, in the light of the exclusion established in Section 37(i). While the Panel Chairperson understands that there appear to be pending judicial processes, this exclusion will not be analyzed in more detail because of the clear application of the 37(f) exclusion.¹⁷
- 6.7 Therefore, the Panel Chairperson determines that the **Request is ineligible for the purposes of a Compliance Review**. A full analysis of each eligibility criteria and exclusion can be seen in the table in Annex 1 of this document.

¹⁵ *Supra*, footnote 11.

¹⁶ ICIM, Complaint Detail, Brazil - Drainage, roads, water supply and sewerage in the low areas of Belem (MICI-BR-2013-076), <http://www.iadb.org/en/mici/complaint-detail,1804.html?ID=MICI-BR-2013-076>. last accessed on March 26, 2014.

¹⁷ For further information, the Eligibility Committee of the Consultation Phase made a detailed analysis of the legal proceedings in the eligibility determination for that phase. See: Consultation Phase Eligibility Determination Memorandum for case MICI-BR-2013-076, March 4, 2014, sections 6.10-6.15.

ANNEX 1: COMPLIANCE REVIEW PHASE ELIGIBILITY ANALYSIS TABLE

Eligibility Criteria	Determination by the Chairperson
56 a. The names and contact information for the Requester are available	Meets criteria: The Requesters are Mr. Antônio Carlos Pantoja Soares and Mr. José Alexandre de Jesus Costa. Both have provided their contact information to ICIM staff.
56 b. Names and contact information of the Representative, if any, and proof of the authorization are available	Not applicable: The Requesters filed their Request to the ICIM in their own names and do not purport to represent others in any official capacity.
56 c. The Bank-Financed Operation(s) at issue has been identified	Meets criteria: The Project has been identified as BR-0055: Drainage, roads, water supply and sewerage in the low areas of Belem.
56 d. The Requester resides in the country where the relevant Bank-Financed Operation is or will be implemented (or a qualified Representative has been appointed)	Meets criteria: The Requesters reside in Brazil according to information provided to ICIM staff.
56 e. None of the exclusions set forth in Section 37 applies	Does not meet criteria: See below.
37 (a) actions that are the responsibility of parties other than the Bank, such as a borrower/recipient, technical cooperation beneficiary, or executing agency, and that do not involve any action or omission on the part of the Bank	Exclusion does not apply: Though the Request does make some reference to a lack of follow-through on the part of the Executing Agency to maintain the Project, the Request has also made allegations that appear to relate to the Bank's responsibility to comply with several of its own Relevant Operational Policies. ¹⁸

¹⁸ According to ICIM Policy, Part A, Section 26 Relevant Operational Policies shall be defined as those Operational Policies in effect at the time of Board approval of the operation. Those ROPs in force at the time of the Board's approval of the Project on November 20, 1991 were the following: the Environment Policy (OP-703), the Environmental Sanitation Policy (OP-745), the Maintenance and Conservation of Physical Works and Equipment Policy (OP-707) See: Consultation Phase Eligibility Determination Memorandum for case MICI-BR-2013-076, March 4, 2014, Annex 1, page 11.

Eligibility Criteria	Determination by the Chairperson
37 (b) Requests related exclusively to the laws, policies or regulations of the host country(ies), borrower/recipient or the executing agency	Exclusion does not apply: The Request does not relate exclusively to these elements.
37 (c) actions or activities that do not relate to a Bank-Financed Operation or that are not subject to the Bank's Relevant Operational Policies	Exclusion does not apply: The Requesters describe harms that they allege have arisen from a Bank-financed operation to which ROPs apply.
37 (d) procurement decisions or processes (in which case the Executive Secretary shall redirect the Request to the appropriate office within the Bank)	Exclusion does not apply: The Request does not make reference to procurement elements.
37 (e) a particular matter or matters that have already been reviewed pursuant to the Mechanism, or its predecessor, unless justified by new evidence or circumstances not available at the time of the initial Request	Exclusion does not apply: The Request does not raise issues that have been the subject of a previous Request to the ICIM nor its predecessor.
37 (f) Requests dealing with a Bank-Financed Operation that are filed after twenty-four (24) months of the last disbursement	Exclusion applies: The last disbursement for the relevant Bank-Financed Operation was made on December 31, 2004, nearly 108 months before the filing of the Request.
37 (g) ethics or fraud questions, specific actions of Bank employees, non-operational matters such as internal finance or administration, allegations of corrupt practices, or other matters subject to review by other bodies established by the Bank (in which case the Executive Secretary shall redirect the Request to the appropriate office within the Bank)	Exclusion does not apply: The Request does not make reference to these elements.
37 (h) any Request that on its face (i) is without substance, or (ii) has been submitted to gain a competitive business advantage	Exclusion does not apply: The Chairperson's <i>prima facie</i> review has revealed that the Requesters have made allegations of that appear to assert plausible substantive harm and that these do not appear to be alleged for purposes of gaining a competitive business advantage.

Eligibility Criteria	Determination by the Chairperson
<p>37 (i) Requests that raise issues under arbitral or judicial review by national, supranational or similar bodies</p>	<p>Exclusion may apply: The Request may raise issues that are under judicial review by in the Brazilian legal system, however, the Chairperson has not carried out a detailed analysis of these issues given that the Request is ineligible based on the exclusion set forth in 37(f).¹⁹</p>
<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 a 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</p>	<p>Meets criteria: Based on a <i>prima facie</i> review of the original request, which contained numerous photographs, along with Bank Project documents and other support documents provided to the Panel from the Requesters, the Panel Chairperson has determined that the Requesters have reasonably asserted that they have been harmed by frequent floods since 2005, and that these appear to be the result of a lack of maintenance of the Project and/or misuse of equipment provided for the proper execution of the Project. This lack of attention to the Project could be related to non-compliance with one or more of the ROPs related to the Project which create requirements that might have guarded against harms such as those that have been alleged, for example, requiring that the Bank ensure conditions exist for adequate maintenance of physical infrastructure and equipment.²⁰</p>

¹⁹ The Eligibility Committee of the Consultation Phase made a more detailed analysis of possible application of the 37(i) exclusion in their determination of eligibility. See: Consultation Phase Eligibility Determination Memorandum for case MICI-BR-2013-076, March 4, 2014, sections 6.10-6.15.

²⁰ See: Consultation Phase Eligibility Determination Memorandum for case MICI-BR-2013-076, March 4, 2014, Annex 1, page 13.

Eligibility Criteria	Determination by the Chairperson
<p>56 With respect to an issue raised in the g. 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 in non-compliance with a Relevant Operational Policy and direct, material adverse effects (potential or actual) to the Requester</p>	<p>Meets criteria: A Compliance Review investigation of the issues raised in this Request could establish whether (and if so, how and why) any Bank action or omission, in respect of a Bank-Financed Operation, has resulted in non-compliance with one or more ROPs and direct, material adverse effects (potential or actual) to the Requesters.</p>
<p>56 The Requester has taken steps to bring h. the issue to the attention of Management</p>	<p>Meets criteria: On March 17, 2014, the Requesters contacted Bank Management via email, sending documentation of their Request before the ICIM. On March 19, Management replied to the Requesters informing them that the Bank had forwarded on their communications to the appropriate local authorities to whom the Project now corresponds and asked for clarifications in response to the concerns.</p>