

PUBLIC
SIMULTANEOUS DISCLOSURE

DOCUMENT OF THE INDEPENDENT CONSULTATION AND INVESTIGATION MECHANISM

MICI-AR-2014-081

**DETERMINATION OF ELIGIBILITY FOR THE CONSULTATION PHASE
AUSA ROAD SAFETY AND URBAN MOBILITY PROGRAM**

(AR-L1166)

This document was prepared by the Eligibility Committee for the Consultation Phase in accordance with the Transition Plan approved by the Board of Executive Directors on 10 July 2013.

This document is being released to the public and distributed to the Bank's Board of Executive Directors simultaneously. This document has not been approved by the Board. Should the Board approve the document with amendments, a revised version will be made available to the public, thus superseding and replacing the original version.

MEMORANDUM ON DETERMINATION OF ELIGIBILITY FOR THE CONSULTATION PHASE

To: Requester, Board of Executive Directors, Senior Management, Project Team, and Executing Agency
From: Eligibility Committee for the Consultation Phase
Via: Victoria Márquez-Mees, Executive Secretary
c.c.: Independent Consultation and Investigation Mechanism
Project: AUSA Road Safety and Urban Mobility Program (AR-L1166)
Date: 14 October 2014

I. EXECUTIVE SUMMARY

- 1.1 On 19 August 2014, the Independent Consultation and Investigation Mechanism (“ICIM” or “Mechanism”) received a Request referring to the AUSA Road Safety and Urban Mobility Program (AR-L1166) (“the Program”) submitted by Mr. Pedro Barragán (Requester), who is a resident of the neighborhood adjacent to the highway known as Autopista 25 de Mayo (AU 25 de Mayo), in the city of Buenos Aires, Argentina.
- 1.2 The Request alleges harm to the environment and to the health and property of the Requester and his family, arising from the fact that the noise generated by the operation of the highway in question exceeds the limits established by local regulations and the standards of the World Health Organization (WHO), and that the situation would be aggravated by the construction of a central Metrobus lane along AU 25 de Mayo, which, according to press reports available to the Requester and the bidding documentation at the AUSA website, is being financed by the IDB.
- 1.3 The Program is a non-sovereign guaranteed loan operation in the amount of US\$130 million, to be executed by Autopistas Urbanas, S.A. (AUSA). The operation was approved by the Board of Executive Directors of the Inter-American Development Bank (IDB or Bank) on 4 June 2014. The Program was classified under environmental and social category B in accordance with the Bank’s Environment and Safeguards Compliance Policy (OP-703).
- 1.4 The Operational Policy applicable to this Request is the Environment and Safeguards Compliance Policy (OP-703).
- 1.5 This memorandum and the information contained in it is presented in accordance with the Access to Information Policy (OP-102) relating to non-sovereign guaranteed operations.



- 1.6 In the determination of eligibility, the Eligibility Committee did not reach consensus¹ as to applicability of the exclusion stipulated in paragraph 37 (i), leaving it to the Executive Secretary to make the final decision as to its applicability. On this basis, and also with respect to applicability of other exclusions, it is concluded that this Request MICI-AR-2014-081 **is not eligible** for the Consultation Phase.

II. TRANSITION PLAN FOR THE CONSULTATION PHASE AND ITS IMPLICATIONS FOR THE DETERMINATION OF ELIGIBILITY PROCESS

- 2.1 In January 2013, in light of the findings and recommendations contained in the ICIM evaluation report prepared by the Office of Evaluation and Oversight (OVE), the Board of Executive Directors decided to launch a process to adjust the ICIM policy and operating structure, in order to strengthen the mechanism and ensure its more effective and efficient management.
- 2.2 In particular, changes in human resources led the Board to mandate the introduction of transitional operating arrangements starting on 1 September 2013 and remaining in force until the revised ICIM Policy is introduced. Under these arrangements, the eligibility of Requests for the Consultation Phase is determined by an Eligibility Committee (the Committee) comprised of the Executive Secretary and the two Case Officers from the Consultation Phase team. This determination of eligibility is conducted as mandated under the Transition Plan and pursuant to the provisions of the current ICIM Policy relating to this stage (paragraphs 37 and 40).

III. THE REQUEST

- 3.1 On 17 July 2014 Mr. Pedro Barragán, as a party affected by the Autopista 25 de Mayo in the city of Buenos Aires, presented a Request to the ICIM on his own behalf, expressing his opposition to the IDB granting a long-term loan² to Autopistas Urbanas, S.A. (AUSA) in the amount of US\$130 million (AUSA Road Safety and Urban Mobility Program (AR-L1166)).
- 3.2 At the time of the Request intake, the Requester advised that he had made no contact with the Bank's Management before submitting his complaint to the ICIM and, after receiving additional information about the eligibility process, the Requester declared that he was ready to enter into contact with Management before filing his complaint with the ICIM. He was then put in contact with the project team. As a result of that contact, the project team and the Requester, accompanied by his lawyer, met on 14 August 2014 in the Bank's Country Office in Argentina.

¹ Two of the Committee's members considered that the lawsuits in question should not be regarded as binding with respect to paragraph 37 (i) of the policy, which provides as follows: "Exclusions. Neither the Consultation Phase nor the Compliance Review Phase will be applied to ... Requests that raise issues under arbitral or judicial review by national, supranational, or similar bodies." (Paragraph 37 (i) of document GN-1830-49).

² E-mail message sent by Mr. Pedro Barragán to the ICIM on 17 July 2014.

- 3.3 On 19 August, Mr. Barragán again communicated with the ICIM, asking that his complaint be registered on the grounds that his concerns had not been satisfactorily addressed by the Bank's Management.
- 3.4 The Requester alleges that for several years he and his family have suffered from the noise pollution produced by operation of the Autopista 25 de Mayo, which, according to the Requester, exceeds the tolerable limits established by the WHO and violates the permissible limits established in local legislation. In addition, he alleges that he has suffered financial losses, as his dwelling has lost value because of its proximity to the Autopista 25 de Mayo. Mr. Barragán informs the ICIM that, in light of these impacts, he filed a claim in 2001, which at this date is still in process (see paragraphs 3.8 to 3.10). Mr. Barragán argues that, in light of the alleged failure of the AUSA and the Government of the City of Buenos Aires (GCBA) to comply with Argentine environmental legislation and with the environmental safeguards of the Bank, the IDB loan should not proceed.
- 3.5 Mr. Barragán alleges that, in addition to the harm he has already suffered, he fears further damages in terms of noise and air (suspended particle) pollution, health effects and property damage as a result of the construction of mass transit/bus lanes along the entire length of AU 25 de Mayo, which, according to information posted at the AUSA website and newspaper reports, is to be financed by the IDB.
- 3.6 In addition, the Requester alleges that both AUSA and the GCBA are conducting transactions or financial operations for construction, with IDB funding, of a dedicated lane for buses and other public transit, ambulances, etc., which would have an even greater impact by increasing noise together with pollution from suspended particles, which constitute, in the opinion of the Requester, a very serious risk to his health. For the Requester, the foregoing situation has also produced damage to his property, as the value of buildings in the area has dropped considerably.
- 3.7 The Requester asked that the IDB project mentioned should not proceed: (a) in view of the lack of an express commitment by AUSA and the Government of the City of Buenos Aires to take noise mitigation measures consistent with legislation, judicial decisions, and the Constitution, and (b) as neither AUSA nor the GCBA are complying with the safeguards established by the IDB for the granting of loans.

Lawsuits under way³

- 3.8 In January 2001, Mr. Barragán filed a lawsuit against AUSA and the GCBA, alleging damage to his health and to the environment and claiming that no environmental impact study was conducted prior to construction of the highway nor were any noise mitigation measures taken on behalf of neighboring residents. As a result of that lawsuit, two judgments were issued accepting the action of *amparo* brought by Mr. Barragán, and requiring AUSA and the GCBA to present a Technical Environmental Impact Study and an Environmental Remediation Plan under the terms established by law.

³ Case 3059/0 "Barragán José Pedro and others vs. AUSA y GCBA (art. 14 CCABA)".

- 3.9 According to documentation submitted by the Requester, as of June 2013 those judgments had not been satisfied, and on that date the corresponding court ordered AUSA to comply with its ruling, and to present an Environmental Impact Study and an Environmental Remediation Plan within 60 days identifying: (i) noise levels in the public space; (ii) noise levels within dwellings and buildings in general, including schools and hospitals, located in areas adjacent to AU 25 de Mayo; and (iii) technical solutions to reduce noise levels in both spaces. In addition, the Remediation Plan must examine the feasibility of structural and nonstructural mitigation measures proposed by a technical team from the University of Buenos Aires (in particular, those referring to acoustic barriers) and, if alternative measures are proposed, they must be technically justified on the grounds of greater efficiency and relevance for meeting the obligations imposed in the original judgment.
- 3.10 According to documentation from the lawsuit in question, in June 2014, after various actions by both parties, the court ordered AUSA and the GCBA to show within eight months that they had complied with the order of June 2013, failing which each respondent would be subject to a fine for each day of delay. The court also ordered the Environmental Protection Agency to submit quarterly reports to the court on implementation of the measures stemming from the study and the plan ordered. The case remains pending, as it appears that AUSA has appealed the judgment, and the time limit established by the judge for compliance with the judgment is still running at this time.

IV. THE PROJECT

- 4.1 The “AUSA Road Safety and Urban Mobility Program” (AR-L1166) (the Program) is a non-sovereign guaranteed corporate financing operation in the transportation sector, in the amount of US\$130 million, approved by the IDB Board of Executive Directors on 4 June 2014. The Program is classified as a category B operation under the Environment and Safeguards Compliance Policy (OP-703)⁴.
- 4.2 The borrower is Autopistas Urbanas, S.A. (AUSA). The Government of the Autonomous City of Buenos Aires (GCBA) owns 95% of this company’s shares and the Buenos Aires Metro Company (Subterráneos de la Ciudad de Buenos Aires) owns 5%. AUSA is responsible, under a public works concession that runs to 2029, for operation, maintenance and expansion of the highway network of Buenos Aires.
- 4.3 The Program consists of executing multiyear investments beginning in the year 2012 and terminating in the year 2016, to improve road safety in the City of Buenos Aires. The investments related to the IDB’s Road Safety Initiative and, more specifically, the IDB Private Sector Program for Road Safety, consist of 35 items that include construction of a series of grade-separated sections and other works at critical intersections, and the

⁴ Environmental and Social Management Report (ESMR), November 2013, page 1.

construction and improvement of safety barriers and road signs, upgrades, and distributor roads.⁵

- 4.4 Because the project involves a non-sovereign guaranteed operation, it is subject to the limitation on the disclosure of “information and documents relating to non-sovereign guaranteed operations or provided to the Bank in connection with such operations, other than (i) information listed in Annex II of this policy and (ii) information with respect to which the respective borrower has expressly consented to disclosure.”⁶

V. CONSULTATION PHASE ELIGIBILITY ASSESSMENT

- 5.1 During the eligibility process conducted between 26 August and 13 October 2014,⁷ the Committee communicated by telephone and in writing with the Requester and with the project team; it analyzed the documentation submitted by both parties as well as other public information compiled independently in order to learn about the Program and to clarify and contextualize the concerns expressed in the Request submitted by Mr. Barragán.
- 5.2 The analysis of eligibility for the Consultation Phase is based on the exclusion and eligibility criteria established respectively in paragraphs 37 and 40 of the ICIM policy. This involves a *prima facie* analysis of the facts alleged in the Request as to their eligibility to be addressed by the ICIM, in accordance with the Mechanism’s mandate from the Board of Executive Directors. In no case does the analysis or the final determination represent a judgment as to the validity of the issues raised.
- 5.3 In view of the above, and as may be verified in Annex I to this memorandum, the Request complies with the requirements established in paragraph 40 (a), (c), (d), (f), and (h) of the ICIM policy. Paragraph 40 (b) does not apply to this Request, as the Requester acted on his own behalf without a representative. However, the Committee considers that this Request does not comply with the requirements of paragraph 40 (e). For purposes of clarification for the interested parties, the reasons why the Committee considers that the Request does not comply with that section are detailed below.
- 5.4 First, the Eligibility Committee notes that the Requester refers in his complaint to two principal questions:
1. The allegation with respect to the failure of AUSA and the GCBA to comply with the judgments against them that order them to adopt mitigation measures for the noise generated by AU 25 de Mayo, which has affected the health and property of the Requester and his family since the date of construction of the highway in the vicinity of the building where his home is located;

⁵ Idem.

⁶ Access to Information Policy (OP-102), section 4, paragraph 4.1 (j),

⁷ The Eligibility Committee Requested an extension of 19 working days from the original date of determination in order to receive and analyze additional documentation on the Program requested from Bank Management.

2. The potential damage that the Requester fears with the construction of a bus lane along the length of AU 25 de Mayo and which, according to information he received, is to be financed by the IDB under the “AUSA Road Safety and Urban Mobility Program.”
- 5.5 Given the different nature of the claims put forward by Mr. Barragán in his Request, the eligibility analysis has been conducted separately for each of the types of damage alleged by the Requester.
- 5.6 With respect to the noise pollution generated by the operation of AU 25 de Mayo, the Requester has informed the ICIM of the existence of lawsuits brought by him before the courts of the city of Buenos Aires (described briefly in paragraphs 3.6 and 3.7, for further reference) that two court judgments have been issued in his favor, which at this time are under appeal by the respondents (AUSA and the GCBA). In addition, according to documentation received by the ICIM, at the time of this determination the cases were still pending and the respondents are under orders to comply with the judgments within eight months after the last ruling by the court in June 2014. AUSA has appealed that ruling, and it is possible that it may launch other appeals before the process is finalized.
- 5.7 It was in fact not clear to the Committee whether the Bank, during the due diligence process, was aware of these proceedings and of the damage being caused, recognizing that, even though the Environment and Social Management Report makes mention of vehicle noise as one of the most significant risks and impacts associated with the operation and maintenance of the highways and the concessioned roads,⁸ no details are available on them or on the mitigation actions planned by AUSA.⁹
- 5.8 With respect to the eligibility analysis, paragraph 40 (e) provides that, for a Request to be eligible, none of the exclusions set forth in section 37 applies: this includes paragraph 37 (i), according to which neither the Consultation Phase nor the Compliance Review Phase will be applied to “Requests that raise issues under arbitral or judicial review by national, supranational or similar bodies.” Consequently, as long as the legal proceedings

⁹ Policy Directive B-4, Other Risk Factors. In addition to the risks posed by environmental impacts, the Bank will identify and manage other risk factors that may affect the environmental sustainability of its operations. These risk factors may include elements such as the management capacity of executing agencies/borrowers and of third parties, sector-related risks, risks associated with highly sensitive environmental and social concerns, and vulnerability to disasters. Depending on the nature and the severity of the risks, the Bank will engage with the executing agency/borrower and relevant third parties to develop appropriate measures for managing such risks.

relating to the alleged damage from noise pollution remain pending, that component of the Request **does not meet** the criterion of paragraph 40 (e).¹⁰

- 5.9 With respect to point 2 concerning potential harm that the Requester might suffer from the construction of a bus lane along AU 25 de Mayo, an analysis of the documents available to the Committee and at the date of this determination shows that the Program does not call for that bus lane to be constructed along the trajectory of AU 25 de Mayo. Rather, the Program envisions construction of a tunnel for the 9 de Julio Metrobus, intended to provide an efficient link between the Plaza Constitución and the Avenida 9 de Julio¹¹, but this would not be relevant to the Requester's allegation of incremental damage, given the distance between the works zone and the dwelling belonging to Mr. Barragán.
- 5.10 The Committee understands that the possibility that this activity may at some point in time be included in the Program, or in another IDB-financed program, cannot be discarded and that this possibility is a cause for concern for the Requester in terms of incremental damage to that already suffered. This concern, which the Committee considers valid, is based on press reports that cite the IDB as financing this work along the path of AU 25 de Mayo, as well as information published by AUSA at its website (www.ausa.com.ar/compras/licitaciones_publica.aspx) in the bidding terms and conditions for **contract 2014-01-0009-00**, which defines the tasks and materials for execution of the "Final Design and Construction of Works to Expand the Viaduct for the AU 25 de Mayo Metrobus." According to those documents, the works to be tendered refer to expansion of the AU 25 de Mayo viaduct to allow reconfiguration of the highway lanes as a result of the inclusion of an exclusive central bus lane. In these documents, AUSA announces that "negotiations are well advanced with the Inter-American Development Bank (IDB) to

¹⁰ The Committee did not reach consensus on this issue: two members of the Committee considered that exclusion 37 (i) did not apply to the case at hand for the following reasons: while the Requester, Pedro Barragán, has indeed initiated judicial review, the respondent party is not only the executing agency (AUSA) for the Bank-financed project, but also the Government of the City of Buenos Aires (GCBA), which are jointly liable in their various spheres of action, and the object of the suit is to protect the collective rights of neighbors affected by the entire AU 25 de Mayo, and not only the rights of the Requester, although it was he who brought action for *amparo* on behalf of the common interest. It is noteworthy that the judges in various courts concluded that the respondents had violated the collective rights and interests of an important segment of residents in the city, and consequently ordered mitigation measures of broad scope in favor of a group of individuals. The case therefore goes beyond the scope of the present Request. In the opinion of these two members of the Committee, given the characteristics of the application for *amparo*, which seeks to protect collective rights, the results of the judicial review will have an impact that goes well beyond the scope of a Consultation Phase, which is focused on addressing specific issues raised by the Requester relating directly to IDB activity in the context of the program under analysis, in the face of the obligations stemming from the judicial review to identify and mitigate the impacts, both in public spaces as well as within dwellings and other buildings, including schools and hospitals, throughout the zone affected by the highway. Consequently, in their view, the exclusion of paragraph 37 (i) would not apply in this case.

¹¹ Road Safety Program for Buenos Aires with IDB financing. Environmental Analysis, 19 November 2013, page. 8.

enter into a works program with financing by that Bank, which could include the works covered by this call for tenders”.¹²

- 5.11 Nevertheless, at the present time the construction of that bus lane, subject of the complaint, cannot be linked to the Program financed by the IDB. The Committee therefore considers that, according to paragraph 37 (c), which provides that neither the Consultation Phase nor the Compliance Review Phase will be applied to “actions or activities that do not relate to a Bank-financed operation”, as well as paragraph 37 (a), which establishes as an exclusion “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,” component 2 of the Request **does not meet** the criterion of paragraph 40 (e).
- 5.12 Lastly, with respect to compliance with paragraph 40 (g), the Requester declared his willingness to participate in a Consultation Phase if this were an essential step in the ICIM process. Accordingly, and as established in the ICIM policy, the parties involved are advised that the Consultation Phase is not a necessary step but rather a voluntary process of the parties.

VI. CONCLUSION

- 6.1 The Eligibility Committee concludes that, in light of the foregoing, and without offering any judgment as to the merits of the Request, **Request ICIM-AR-2014-081 is not eligible for the Consultation Phase**, because it does not meet the requirement of paragraph 40 (e) of the policy, since at the time of the determination component 1 of the Request is subject to the exclusion stipulated in paragraph 37 (i)¹³, and component 2 of the Request is subject to the exclusions stipulated in paragraphs 37 (a) and (c).
- 6.2 The Committee also advises that the Requester may resubmit his Request if there should be a change in the circumstances that at this time render the Request ineligible.

¹² Contract 2014-01-0009-00 “*Proyecto Ejecutivo y Construcción de Obra de Ampliación de Viaducto para el Metrobús de la AU 25 de Mayo*”, Section 8, page 12.

¹³ On this point, see footnote 10.

ANNEX 1. ELIGIBILITY ANALYSIS TABLE

	Eligibility criteria	Analysis
a.	Names and contact information of the Requester.	The ICIM has the contact data of the Requester.
b.	Names and contact information of the Representative.	Not applicable to the Request.
c.	Project or operation has been properly identified.	AUSA Road Safety and Urban Mobility Program (AR-L1166).
d.	The Requester resides in the country in which the operation is being implemented.	The Requester lives in Buenos Aires, Argentina, according to the documentation available to the ICIM.
e.	None of the exclusions for the Consultation Phase set forth in Section 37 applies.	Not fulfilled.
	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.	Does not apply to Component 1 of the Request. Applies to Component 2 of the Request.
	37 (b): Requests related exclusively to the laws, policies, or regulations of the host country(ies), borrower/recipient or the executing agency.	Not applicable – the Request does not relate exclusively to these aspects.
	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.	Not applicable for Component 1 – the Bank is obliged to identify other risk and impact factors that could be generated in an operation, and to design measures for addressing them. Applicable for Component 2 – at the time of the determination, the Program financed by the IDB did not include a Metrobus lane along AU 25 de Mayo.
	37 (d): Procurement decisions or processes (in which case the Executive Secretary shall redirect the Request to the appropriate office within the Bank).	Not applicable – the Request does not refer to procurement processes.

	Eligibility criteria	Analysis
	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.	Not applicable – the Request does not refer to any matter that has already been reviewed by the ICIM or its predecessor.
	37 (f): Requests dealing with a Bank-Financed Operation that are filed after 24 months of the last disbursement.	Not applicable – there have as yet been no disbursements under the Program.
	37 (g): Ethics or fraud questions, specific actions of Bank employees, nonoperational 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).	Not applicable – the Request does not refer to any matter subject to review by other bodies of the Bank.
	37 (h): Any Request that on its face (i) is without substance, or (ii) has been submitted to gain a competitive business advantage.	Not applicable – The Committee considers that the Request is duly grounded and that there is no reason to consider its purpose to be to obtain a competitive business advantage.
	37 (i): Requests that raise issues under arbitral or judicial review by national, supranational or similar bodies.	Applicable to Component 1 of the Request. Not applicable to Component 2 of the Request.
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.	Fulfilled – the Requester has reasonably asserted that he has been directly, materially adversely affected by a possible omission of the IDB in violation of its Operational Policies.
g.	The parties are amenable to participating in a consultation or mediation process.	Fulfilled – the Requester has declared himself amenable, if this were a necessary step. The executing agency was not consulted.



	Eligibility criteria	Analysis
h.	The Requester has taken steps to bring the issue to the attention of Management.	<p>Fulfilled – the Requester made contact with the Bank’s Management in July 2014, but the Committee is not aware of a response to that communication.</p> <p>Subsequently, in light of Management’s interest in resolving the Requester’s concerns to the extent possible, the ICIM facilitated contact between the Requester and the project team, who held a meeting on 14 August 2014.</p> <p>On 19 August 2014 the Requester asked the ICIM to activate the procedure for processing his Request, on the grounds that his concerns had not been satisfactorily addressed.</p>