

PUBLIC

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

**ME-MICI002-2012
DETERMINATION OF ELIGIBILITY FOR THE COMPLIANCE REVIEW PHASE
MEXICO. MAREÑA RENOVABLES WIND PROJECT**

This document was prepared by the Compliance Review Panel members

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MEMORANDUM

COMPLIANCE REVIEW PHASE ELIGIBILITY DETERMINATION

TO: Requesters, Board, President of the Bank, the Country Office Representative, Project Team and Executing Agency¹

FROM: Werner Kiene, Chairperson of the Compliance Review Panel

REFERENCE: Case ME-MICI002-2012 Mareña Renovables Wind Project (Operation Number 2644 A/OC-ME and Project Number ME-L1107)

COUNTRY:

DATE: September 8, 2013

1. Background

1.1 On December 26, 2012, a Request relating to the above-described Bank-Financed Project was filed with the Independent Consultation and Investigation Mechanism (the “ICIM”) of the Inter-American Development Bank (the “IDB” or the “Bank”). The Request was filed by Mr. Leonardo Ariel Crippa (the “Representative” or “Mr. Crippa”), an attorney and member of the non-governmental organization “Indian Law Resource Center”, in his capacity as a representative², on behalf of 225 members of the indigenous communities (the “Requesters”) of (i) Santa Maria Xadani, (ii) San Mateo del Mar, (iii) Colonia Álvaro Obregón, (iv) San Francisco del Mar, (v) San Dionisio del Mar, (vi) Juchitán de Zaragoza and (vii) Unión Hidalgo. These communities are located in the “Istmo de Tehuantepec” in the State of Oaxaca, United Mexican States (“Mexico”). The Requesters asked for confidentiality as to their identity for security reasons and designated Mr. Crippa as their representative before the ICIM, as permitted by the ICIM Policy.

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

² Part B, Section 30 of the ICIM Policy.

1.2 The Request alleges that environmental and social harm may be or has been caused to the land and livelihoods of the Requesters by aspects of the Proyecto Eólico Mareña Renovables (the “Project”), a Bank-Financed Operation. The Request further alleges that the harm is or may be caused at least in part by the Bank’s non-compliance with certain of the Bank’s Relevant Operational Policies (each, an “ROP”). The Bank classified the Project as a private sector operation. The Borrower is a Mexican project company, Mareña Renovables Capital, S.A.P.I. de C.V. (the “Borrower”). The Project was developed by Fomento Económico Mexicano, S.A.B. de C.V. (FEMSA)³, Macquarie Mexican Infrastructure Fund and Macquarie Asset Finance Limited (a subsidiary of Macquarie Capital Group Limited). We understand one or more of these developer entities own all or a portion of the Borrower and control the Borrower in any event.

1.3 On January 7, 2013, the Project Ombudsperson acknowledged receipt of the Request and on January 10, 2013, held a meeting with Mr. Leonardo Crippa at the ICIM’s premises. During January 2013, the Project Ombudsperson requested additional information from the Requesters and Management. On February 1, 2013, the Project Ombudsperson determined that the Request was ineligible for a Consultation Phase exercise. The principal rationale for this determination was that the Requesters were not amenable to a Consultation Phase exercise (Part C, Section 40(g) of the ICIM Policy). In addition, the Project Ombudsperson concluded based on facts available to the ICIM at the time that the exclusion set forth in Part B, Section 37(i) of the ICIM Policy appeared to apply.

1.4 On March 8, 2013, the Requesters filed additional information with the ICIM, indicating that as of that date, approximately 1,100 people supported the Request for a Compliance Review. The Requesters also indicated that 23 of the original Requesters decided not to be included in the Request for a Compliance Review.

1.5 The Executive Secretary forwarded the Request to the Chairperson on March 8, 2013.⁴ During March 2013, Mr. Crippa and the Panel discussed the Request and gathered further information necessary for the Chairperson’s analysis regarding the eligibility of the Request for a Compliance Review. During the same period, the Panel spoke and corresponded with Management regarding issues and concerns raised by the Requesters and sought to facilitate interactions between the Representative of the Requesters and Management.

2. The Project

2.1 The Project involves the construction and operation of a wind farm with total capacity of 396 MW in two adjacent areas on the Isthmus of Tehuantepec, in the State of Oaxaca, Mexico.

³ FEMSA is known as the largest beverage producer company in Latin America.

⁴ Part D, Section 55 of the ICIM Policy, “Eligibility Review by the Chairperson. The Executive Secretary shall forward all Requests to the Panel Chairperson no later than 5 (five) business days after they meet the criteria set forth in Section 54...”

As part of the Project, it is contemplated that 102 wind turbines would be installed on the Barra Santa Teresa (“San Dionisio del Mar Wind Farm”), in the municipality of San Dionisio del Mar, and 30 turbines will be installed in the community of Santa María del Mar (“Isthmus Wind Farm”), which are part of the municipality of Juchitán. In addition, the Project provides for (a) the construction of three substations located in Virgen del Carmen (Santa María del Mar), Tileme, and Santa Teresa (San Dionisio del Mar), the first two of which would be connected by submarine cables; (b) the construction of transmission lines from the Santa Teresa substation to the Ixtepec substation,⁵ extending for 52 kilometers and to be connected to the national grid; (d) the installation of six temporary port stations to facilitate maritime access to both sites; and (e) other engineering works such as construction of new access routes or improvements to existing roads.⁶

3. The Request

3.1 The Request describes alleged environmental and social harms that could result from the Project⁷ due to potential non-compliance by the Bank with certain ROPs.

3.2 According to the Requesters, potential or actual material direct harm results from: (a) the absence of adequate and complete consultations with the indigenous communities in the early stages of the Project; and (b) the lack of analysis, or inclusion in the Project’s design and implementation processes, of measures to avoid and/or minimize significant adverse impacts, including, without limitation, the absence of a detailed evaluation of the seriousness of potential adverse impacts on the communities, including those communities that would be directly affected by the laying of transmission lines, and the expansion and/or construction of access routes.

3.3 Based on a prima facie review of the allegations in the Request, the material direct harm alleged by the Requesters could relate to potential non-compliance by the Bank with the following ROPs: Environmental and Safeguards Compliance Policy (OP-703) (the “Environmental and Safeguards Policy”), the Access to Information Policy (OP-102) (the “Access to Information Policy”) and Operational Policy on Indigenous Peoples (OP-765) (the “Indigenous Peoples Policy”). *This statement does not signify, and should not be interpreted to*

⁵ According to information available, the Bank is not financing the construction of the Ixtepec substation, which already exists and is in operation.

⁶ IDB, ESMR, Mareña Renovables Wind Project (ME-L1107), Environmental category: A, November 21, 2011, pages 3-4.

⁷ The Request also presents information about alleged acts of harassment and persecution, as well as life threats against some of the indigenous community leaders, for expressing concern and, in some cases, objecting to the Project’s activities in the area. The Requesters state that authorities are increasing pressure on the community leaders to stall objections against the Bank-Financed Operation and are continuing to fail to provide information to the affected parties about the Project in a timely and meaningful manner. They complain that these acts have steadily disrupted the communal organization of indigenous groups, which fear reprisals and threats to their lives for expressing disagreement with the Project.

imply, that the Panel has undertaken a Compliance Review as part of which an appropriate analysis of the merits of the issues presented by the Request would take place. At this time, limited information is available to the Panel.⁸ The Panel makes no inference, nor has the Panel reached any conclusions, as to whether any action or omission by the Bank does not comply with any applicable ROP, or that any non-compliance by the Bank with any ROP has occurred or will occur.⁹ This statement merely reflects that “the Requesters ha[ve] reasonably asserted that [they have] 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 [have] described in at least general terms the direct and material harm caused or likely to be caused by such action or omission...”¹⁰

4. The Bank-Financed Operation

Loan operation

4.1 On November 23, 2011, the Board approved the Mareña Renovables Wind Project (Loan 2644/OC-ME) for an amount of USD 74.9 million equivalent.¹¹ The Loan Contract was signed on February 23, 2012, and as of May 16, 2013, approximately 33.58 percent of the total loan amount had been disbursed by the Bank.¹²

Environmental and social due diligence undertaken by the Bank

4.2 The Environmental and Social Management Report (the “ESMR”) presents information indicating that Management has undertaken a great deal of work relating to the Project, including (a) review of the Environmental, Health, and Safety Management System prepared by the Borrower; (b) monitoring of conditions associated with environmental licenses for the wind farm, in order to ensure that the additional studies and management plans required by the Department of the Environment and Natural Resources (the “SEMARNAT”) were submitted; (c) evaluation of the dissemination of information related to the Project and public consultations held, and proposed new activities to the Borrower to lend continuity to information disclosure and consultations with the population; (d) analysis of impacts of the Project on the indigenous populations; and (e) assessment of potential socioeconomic impacts of the purchase of land, construction activities, and the permanent or temporary loss of access to farmland allocated to build the wind farm, as well as the respective mitigation and compensation measures.¹³

⁸ The standard required to be achieved by Requesters is set forth in Part D, Section 58 (last sentence) of the ICIM Policy.

⁹ For reasons of efficiency, the Panel has adopted “The Request” Section from Part II of the Project Ombudsperson’s Eligibility Determination of February 1, 2013.

¹⁰ Part D, Section 56 f of the ICIM Policy.

¹¹ The Loan was approved in Mexican pesos. Approximately USD 15 million of the original amount was annulled.

¹² See Executive Financial Summary for 2644A/OC-ME ; last seen on June 28, 2013 at 9:30 am, on <http://edwbip.iadb.org/cognos8>

¹³ These activities and the findings were reported in the Environmental and Social Management Report, Mexico, Mareña Renovables Wind Power Project (ME-L1107), Environmental Category: A, November 21, 2011.

4.3 According to the ESMR, the Project has been classified as Category A under the Environmental and Safeguards Policy,¹⁴ primarily due to the “scale of the wind park, potential for significant direct and indirect impacts on avian and marine fauna, the likelihood of residual impacts on the terrestrial fauna, the presence of social conflicts in the vicinity of the Project area, [and] the potential cumulative impacts on avian fauna given the presence of numerous other wind parks in the region.”¹⁵

4.4 According to the Project documents, the Project’s direct area of influence includes the Ikojts (Huave) indigenous communities of San Dionisio del Mar and Santa María del Mar, which would be directly impacted by the construction and operation of the wind farm. The direct area of influence also includes the right of way for the 52 kilometers of transmission lines. The indirect area of influence includes the municipalities of San Mateo del Mar and San Francisco del Mar, also populated by Ikojts (Huave) indigenous communities, and the municipal agency of Álvaro Obregón and the municipality of Juchitán de Zaragoza, both occupied by Binniza (Zapotecas) indigenous groups.¹⁶

4.5 The ESMR indicates that environmental impact assessments (the “EIAs”) for the two wind farms were concluded in June 2009, and that SEMARNAT authorized the Project. However, it required the company to satisfy a series of conditions, such as additional studies on birds, bats, and the Tehuantepec jackrabbit. During the environmental and social due diligence, the Borrower is said to have submitted these studies, with all the conditions required by SEMARNAT expected to be satisfied in November 2011.¹⁷

Potential environmental and social impacts and risks

4.6 The ESMR states that during the construction phase of the Project, certain environmental and social impacts and risks would result from the installation of wind towers and turbines, transmission lines, substations, and access routes. Such impacts include habitat disturbance, loss of plant cover, soil erosion, generation of dust, increased land and maritime traffic, impacts on sea turtles and Tehuantepec jackrabbits, occupational safety and health risks to the workforce, and impacts on economic activities (fishing, cattle grazing, and salt production).¹⁸ However, the ESMR maintains that those impacts and risks could be adequately mitigated through management plans, including specific actions for sea turtles and the Tehuantepec jackrabbit, given their conservation status.

¹⁴ According to OP-703, Category A operations are those that “...are likely to cause significant negative environmental and associated social impacts, or have profound implications affecting natural resources” (Directive B.3, paragraph 4.17).

¹⁵ ESMR, page 29.

¹⁶ Idem, pages 7-8. In addition, the ESMR contains information about the integrated social management plan applies to three communities in the direct area of influence: San Dionisio del Mar, Santa María del Mar and Álvaro Obregón (ESMR, pages 24-25).

¹⁷ Additional measures would include those recommended by the National Commission on Biodiversity (CONABIO) and the National Institute of Anthropology and History (INAH) in 2009.

¹⁸ ESMR, pages 15-18.

4.7 During the operational phase of the Project, the Request alleges potential impacts and risks that include bird collisions and bat barotrauma from the wind towers; loss of vegetation, accidental release of hazardous materials, risks for community safety and health; impacts from noise created by the wind turbines, disturbance of the social dynamic, and other risks such as social stratification, financial dependence, exacerbation of existing social conflicts, inadequate management of public resources, and problems of communication with the community. To address these impacts and risks, it appears that the Borrower plans to implement an environmental and social management system (the “ESMS”), including mitigation measures in the following areas: (a) social and environmental assessment; (b) management program; (c) organizational capacity; (d) training; (e) community engagement; (f) monitoring; and (g) reporting.¹⁹ The ESMR also noted that the Borrower had engaged a specialized firm to conduct additional social studies (i.e., stakeholder identification, risk analysis of conflicts), and additional studies are being prepared on fishing activities.²⁰ According to information from Management, the integrated social management plan was already completed and is now being implemented and the compensation plan for fishing activities is being finalized and will shortly be the subject of consultations with the affected population.

Public consultations

4.8 The ESMR notes that, during various stages of Project preparation, the population received information regarding the Project’s objectives and scope. However, the Requesters point out that the consultations focused on securing usufruct and right of way agreements, rather than on potential risks of and proposed mitigation measures to alleviate potential social and environmental harms. The ESMR notes that the consultation activities were not fully recorded.²¹ The ESMR states that the usufruct agreements were approved and ratified by the respective communal assemblies of San Dionisio del Mar and Santa María del Mar, in accordance with Mexican law. It also states that the consultation process included informational meetings for the communities in the direct area of influence and in other communities where the Project would require land permits. The EMSR provides that to lend continuity to this work, the integrated social management plan to be adopted by the Borrower would include consultation and communication, community development and participatory monitoring programs for the construction and operation stages. Similarly, the environmental and social action plan would establish measures to provide information to, and consultation with the communities.

5. Safeguards Required by the Bank

5.1 Pursuant to the ESMR, the IDB is required to impose contractual requirements and monitor compliance with the same, in order to ensure that the Project complies with the Bank’s environmental and social safeguards policies. Among other general requirements, the Bank was to ensure that all Project components comply with: (a) Mexican environmental, social, labor, health and safety regulatory requirements, including those relating to permits, authorizations, and licenses necessary for the Project; (b) the environmental and social aspects and components of

¹⁹ ESMR, page 23.

²⁰ ESMR, page 5.

²¹ ESMR, page 28

the Operation's environmental, labor, social, and health and safety aspects documents; and (c) ongoing information disclosure and consultation activities related to environmental, labor, social, and health and safety aspects of the Project. Contractual requirements applicable to the Borrower appear to have been put into place.

5.2 The ESMR also states that Borrower should be required to comply with the activities and timelines in the Environmental and Social Action Plan (the "ESAP"), which was finalized by Management in December 2011.²² Appropriate monitoring must also take place. The contractual requirements appear to be in place vis a vis the Borrower. The ESAP identifies environmental and social aspects of the Project that must be corrected or improved by the Borrower, and establishes what measures must be implemented for this purpose in five thematic areas: (a) environmental and social management system; (b) labor and worker conditions; (c) the plan for land purchase, economic resettlement, and livelihood restoration; (d) cultural sites; and (e) biodiversity conservation. For example, the ESAP requires actions to be taken related to conservation of sea turtles and the Tehuantepec jackrabbit, the monitoring of birds and bats (including the lesser long-nosed bat); as well as social studies, including impact assessments. The Project team emphasizes that it has regularly monitored compliance with the ESAP.

5.3 The Requesters recognize that efforts were made to undertake consultations with affected populations. However, they allege that these efforts were not meaningful or timely. The Requesters believe that the Bank disregarded the Bank's Environment and Safeguards Compliance Policy, Access to Information Policy and Indigenous People Policy by not monitoring these efforts or ensuring that the consultations were meaningful and timely. The Requesters believe that the lack of an adequate consultation process has caused or will cause the Project's activities to negatively impact their livelihoods and thus may have caused or potentially may cause direct, material harm to them.

6. Eligibility Analysis

6.1 The ICIM Policy states that a Request proceeds from the Consultation Phase to consideration under the Compliance Review Phase if the Requester has expressed a desire for a Compliance Review and if:

- a. the Consultation Phase has been terminated or concluded for any reason, or
- b. the Request was deemed ineligible under the Consultation Phase²³.

6.2 Once a Request is forwarded to the Panel, the Chairperson is required pursuant to Part D, Section 55 of the ICIM Policy²⁴ to make an independent determination as to whether the Request is eligible for a Compliance Review. The Chairperson makes an analysis of whether the Request

²² IDB, Mareña Renovables Wind Project (ME-L1107), Environmental and Social Action Plan, December 11, 2013.

²³ Part D, Section 54 of the ICIM Policy.

²⁴ Part D, Section 55 of the ICIM Policy "Eligibility review by the Chairperson... The Panel Chairperson will review the Request for eligibility, independently of the determination of the Project Ombudsperson..."

meets the eligibility criteria (Part D, Section 56 of the ICIM Policy)²⁵ and whether any of the exclusions from eligibility (Part D, Section 37) is applicable to the Request, all based on a prima facie review of the Request and documents and information made available to the Chairperson, and on any communications or meetings held with Management, the Requesters(s) or other parties.²⁶

6.3 Based on the above-described review, the Chairperson has determined that the Request meets the requirements of Part D, Section 56 of the ICIM Policy, paragraphs (a), (b), (c) and (d)²⁷.

6.4 The Chairperson has also determined that the Requesters have alleged in reasonable detail that they could be directly, materially adversely affected and harmed by an action or omission of the IDB in violation of one or more ROPs in the context of the Project. Furthermore, the Chairperson determined that a Compliance Review may assist in determining whether there were Bank actions or omission that may have resulted in non-compliance with ROP and resulted in direct, material adverse impacts (potential or actual) to the Requesters. Based on the foregoing, the Chairperson has determined that the requirements of Part D, Section 56, paragraphs (f) and (g) of the ICIM Policy have been met. *This statement does not signify, and should not be interpreted to imply, the Panel has undertaken a Compliance Review as part of which an appropriate analysis of the merits of the issues presented by the Request has been undertaken, as limited information is available to the Panel at this time.*²⁸ *Nor has the Panel made any inference or reached any conclusions as to whether there has occurred or may occur any action or omission by the Bank that may not comply with any applicable ROP.*²⁹

6.5 During March 2013, the Chairperson contacted the parties to verify whether the requirement of Part D, Section 56(h) of the ICIM Policy³⁰ had been fulfilled. Mr. Crippa and Management confirmed that the Request had been brought to the attention of Management.

²⁵Part D, Section 56 of the ICIM Policy. Eligibility criteria for the Compliance Review Phase.

²⁶ Part B, Section 37 of the ICIM Policy... Exclusions for the application of the Consultation and the Compliance Review Phases.

²⁷ “Part D, Section 56 of the ICIM Policy. Eligibility criteria for the Compliance Review Phase. Requests shall be deemed eligible for the Compliance Review Phase if the Panel Chairperson determines the following, either via the Request or via IDB records: a. the names and contact information for the Requester are available; b. the names and contact information for the Representative, if any, and proof of the authorization are available; c. the Bank-Financed Operation(s) at issue has been identified; 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)”.

²⁸ The standard required to be achieved by Requesters is set forth in Part D, Section 58 (last sentence) of the ICIM Policy.

²⁹ For reasons of efficiency, the Panel has adopted “The Request” Section from Part II of the Project Ombudsperson’s Eligibility Determination of February 1, 2013.

³⁰ “Part D, Section 56(h) 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.”

Management informed the Panel about a public meeting held with the Requesters during the Consultation Phase³¹. It was unclear to the Panel Chairperson whether the meeting should be considered to have comprised a meaningful and substantive opportunity for or effort by Management to address the concerns raised by the Requesters. Thus the Chairperson asked for clarification. In one conversation, Management was asked whether it was or had been involved in addressing concerns raised by the Requesters. A Management representative replied that Management could not have been involved in resolving the Requesters' issues or concerns due to a desire on the part of at least some Requesters for confidentiality. The Chairperson felt obliged to inform Management that Management could communicate with the Requesters through the Representative, Mr. Crippa, who is located in Washington, D.C. Based on this interchange with Management, the Chairperson extended³² the deadline for the eligibility determination³³ to give the parties additional opportunities to discuss issues and concerns highlighted in the Request related to the Bank's role in the Project. The Panel wanted to be certain that the eligibility criterion set forth in Part D, Section 56(h) of the ICIM Policy was fulfilled, and that Management was comfortable that it had been afforded adequate opportunity to interface with Requesters to address their concerns, and thus potentially avoid unnecessary use of the Bank's resources. At the time, the Representative reiterated his desire to meet with Management. However, Management then indicated that it was unlikely that further dialogue would contribute to addressing the concerns raised by the Requesters. Based on the foregoing, the Chairperson has determined that the requirement of Part D, Section 56(h) has been met.

6.6 The Chairperson also examined the Request in light of the exclusions from eligibility set forth in Part D, Section 56(e)³⁴ of the ICIM Policy. Accordingly, and based on the information provided in the context of the Request and documents of the Bank-Financed Operation, the Chairperson determined that Part B, Section 37(a) to (h) are not applicable³⁵ to the Request.

³¹ Determination of Eligibility for the Consultation Phase Mexico Mareña Renovables Wind Project, page 10, paragraph 28.

³² Part D, Section 91 of the ICIM Policy, "Time periods. Any time period referred to in this Policy may be extended by the Project Ombudsperson or Panel Chairperson, as appropriate, for as long as is strictly necessary to ensure the full and proper processing of Requests. The Requester and other relevant parties shall be notified of any extension, and it shall be noted on the Registry."

³³ Part D, Section 56(h) of the ICIM Policy, "...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..."

³⁴ "Section 56...e. none of the exclusions set forth in Section 37 applies; and h. the Requester has taken steps to bring the issue to the attention of Management."

³⁵ "Section 37... Exclusions. Neither the Consultation Phase nor the Compliance Review Phase will be applied to: 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; b. Requests related exclusively to the laws, policies or regulations of the host country(ies), borrower/recipient or the executing agency; 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; d. procurement decisions or processes (in which case the Executive Secretary shall

7. Analysis of Applicability of ICIM Policy Part D, Section 56(e) and Part B, Section 37(i)

7.1 Part D, Section 56(e) of the ICIM Policy provides that a Request shall be deemed available for the Compliance Review Phase if “none of the exclusions set forth in Section 37 applies”. A more detailed analysis regarding the applicability of the exclusion from eligibility set forth in Part B, Section 37(i) of the ICIM Policy, is set forth below (“Section 37(i)”). Section 37(i) provides that a Request is not eligible for a Compliance Review if the Request *raises issues under arbitral or judicial review by national, supranational or similar bodies*.³⁶

7.2 Based on available information and after asking the Representative and Management a number of times about this matter, there appear to be four “proceedings” that may relate to the Project as of the date of this determination: (i) the Petition for Revocation of Power of Attorney filed with the Constitutional Legislature of the State of Oaxaca; (ii) the Request for Interim Equitable Relief lodged with the Inter-American Commission on Human Rights (the “IACHR”); (iii) an Invalidity Action against Acts of the Assembly filed with the One-Judge Agrarian Tribunal of the 22nd District and (iv) an Indirect “*Acción de Amparo*” for Constitutional Relief filed before the Seventh District Court of the State of Oaxaca.

7.3 The **Petition for Revocation of Power of Attorney** (“Proceeding N° 1”) was presented to the Constitutional Legislature of the State of Oaxaca objecting the conduct of the Mayor and the Treasurer of the City of San Dionisio del Mar. Some of the conduct as to which the parties objected related to the Project. Proceeding N° 1 is not judicial or arbitral in nature and thus no “judicial or arbitral review” of any issue is pending. Thus, Proceeding N° 1 is not relevant to the Section 37(i) exclusion.

7.4 A **Request for Interim Equitable Relief** (“Proceeding N° 2”) was lodged with the IACHR. The allegations before the IACHR and the issues indicated in the Request are similar. Thus, the Panel Chair has investigated further as to whether Section 37(i) may be implicated. Section 37(i) refers to “arbitral or judicial review by national, supranational or similar bodies”.

The nature of the *fora* set forth in Part B, Section 37(i) is quite broad, and the IACHR might be a “supranational or similar body”, as it is an autonomous organ of the Organization of American States (the “OAS”). However, it is broadly understood that the proceedings carried out by the

redirect the Request to the appropriate office within the Bank); 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; f. Requests dealing with a Bank-Financed Operation that are filed after twenty-four (24) months of the last disbursement; 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); h. any Request that on its face (i) is without substance, or (ii) has been submitted to gain a competitive business advantage.”

³⁶ “Section 37 (i)... Neither the Consultation Phase nor the Compliance Review Phase will be applied to: (i) Requests that raise issues under arbitral or judicial review by national, supranational or similar bodies.”

IAHCR do not comprise “arbitral or judicial review”. Reports produced by the IACHR do not comprise or resemble the results of “an arbitral or judicial review”. Arbitral and judicial reviews have in common the binding nature of an award or decision reached by the relevant body. The IACHR does not render any award or decision that bears a resemblance to an arbitral or judicial award or decision resulting from review by the relevant body. The IACHR renders reports in which it recommends to the OAS member countries measures which it believes the member country(ies) should take to better protect and promote human rights. Reports by the IACHR are not binding on any country.

Thus the Chairperson has determined that the process pending before the IAHCR does not comprise an arbitral or judicial review of an issue pursuant to Section 37(i).³⁷

7.5 The **Invalidity/Nullification Action against Acts of the Assembly** (“Proceeding N° 3”), in March 2012, was filed by seven members of the community of San Dionisio del Mar with the One-Judge Agrarian Tribunal of the 22nd District (the “Court”) against: (i) the Community of San Dionisio del Mar (through the Communal Properties Commission); (ii) the Delegate of the National Agrarian Registry in the State of Oaxaca; (iii) Preneal México S.A. de C.V. (the “Preneal”); and (iv) Preneal’s subsidiaries, Energía Alternativa Istemña and Energía Eólica Mareña (the “EE Mareña”) and Vientos del Istmo S.A. de C.V.

7.6 The petitioners in Proceeding N° 3 sought to have declared null and void the resolutions of the General Assembly of the Community of San Dionisio del Mar of November 7, 2004, and February 13, 2009, which resulted in agreements for the usufruct contract on communal lands for the implementation of the Project. According to the petitioners, Preneal and its subsidiaries failed to provide meaningful Project information to the communities and took advantage of their ignorance. The Court admitted the action on April 2012, convened a hearing on June 2012 and rejected the requested interim equitable relief, which sought to prevent the respondents from engaging in any activity related to the usufruct contract until the judicial dispute was resolved.

7.7 On April 29, 2013, the Representative of the Requesters submitted a written communication to the Panel about the current status of Proceeding N° 3.³⁸ According to this written communication, Proceeding N° 3 had been inactive since November 28, 2012. The Panel has been informed that the period of time (120 days)³⁹ during which relevant parties were required to have initiated activity in the case expired on March 28, 2013.⁴⁰ On April 15, 2013, the Court issued a resolution to the effect that the case has ended. For all intents and purposes,

³⁷ We note that if the IACHR referred a case to the Inter-American Court of Human Rights, perhaps the conclusion could be different if a case were in fact pending before the latter body.

³⁸ The e-mail sent by Mr. Crippa is available on the ICIM’s physical files (ME-MICI002-2012, México, folder II), as well as IDB docs.

³⁹ Article 191 of the Mexican Agrarian Law.

⁴⁰ The e-mail sent by Mr. Crippa on April 29, 2013. A physical copy is available on the ICIM’s physical files (ME-MICI002-2012, México, folder II) as well as IDB docs.

Proceeding N° 3 is no longer pending. Thus the Chairperson has determined that Section 37(i) is inapplicable as regards Proceeding N° 3.

7.9 The **Indirect “Amparo” Petition for Constitutional Relief**⁴¹ (“Proceeding N°4”) was filed in December 2012 by 176 members of the community of San Dionisio del Mar, in their own names and as representatives of the Communal Properties Commission (the “Commission”). Proceeding N°4 is an “Amparo”, or Petition for Constitutional Relief. Proceeding N°4 was filed with the Seventh District Court of the State of Oaxaca, against various state authorities that granted permits, authorizations, concessions and/or licenses (“permits”) relating to the Project.⁴² The petitioners in Proceeding N°4 contend that the acts of those authorities undermine communal agrarian rights to the ownership, possession, use and enjoyment of the communal lands located in the Barra Santa Teresa, which are necessary for the subsistence and in connection with preserving the cultural heritage of the communities. Consequently, the petition seeks revocation of the permits.

7.10 The petitioners in Proceeding N°4 have maintained that the Project and other similar operations on the Isthmus of Tehuantepec have been characterized by the absence of free, prior, and informed consultation and consent of the communities. In this regard, they indicated that: (a) at the 2004 General Assembly, the population stated that it needed more information on the project in order to decide whether to accept it or not; (b) they only learned about the existence of the usufruct contract signed with Preneal in August 2011; and (c) since that time they have been expressing to the authorities their rejection of the Project. The petitioners asserted, therefore, that the respondent authorities had granted permits to E.E. Mareña without free, prior and informed consultation with the community.

7.11 On December 6, 2012, based on Article 233 of the Mexican Amparo Act, the Seventh District Court Judge in the State of Oaxaca ordered, *sua sponte*, “the suspension of the acts being challenged, to prevent the respondent authorities from partially or fully, temporarily or definitively, depriving the complainant population group of the agrarian properties.”⁴³ On December 17, 2012, the Office of the Clerk of the Seventh District Court, among other actions: (a) confirmed that the interim equitable relief remained in effect; (b) identified E.E. Mareña as

⁴¹ For reasons of efficiency, the Panel has adopted excerpts from paragraphs 42 to 49 of the Project Ombudsperson’s Eligibility Determination of February 1, 2013.

⁴² The respondent authorities in the proceeding are: (a) the Energy Regulatory Commission; (b) the Department of Communication and Transportation (SCT); (c) the General Directorate of Ports of the SCT; (d) The SCT Delegation in the State of Oaxaca; (e) the Department of the Environment and Natural Resources (SEMARNAT); (f) the General Directorate of the Federal Sea, Land and Coastal Environments Zone of SEMARNAT; (g) the Regional Directorate for Forest and Soil Management of SEMARNAT; (h) the Federal Delegation of SEMARNAT in the State of Oaxaca; (i) the General Directorate of Environmental Impact and Risk of the Office of the Undersecretary of Management for Environmental Protection of SEMARNAT; (j) the National Water Commission (CNA); (k) the General Technical Subdirector of CNA; and (l) the Municipal Council of San Dionisio del Mar.

⁴³ Seventh District Court of the State of Oaxaca, decision of December 6, 2012, Section II. Division: III-B.PRAL 739/2012, page 12.

the affected third party, ordering that it be notified for the dispute; (c) ordered cessation of the representation by the petitioners of the Commission, inasmuch as the Commission had entered an appearance in the case; and (d) denied the Commission's request to set aside the motion to suspend and order the dismissal of the case.⁴⁴

7.12 On December 31, 2012, the original petitioners filed an appeal challenging the decision to revoke their representation of the Commission. In turn, the Commission filed a brief with the Court on January 2, 2013, seeking dismissal of Proceeding N°4 based on the decision of the General Assembly of Community Members of San Dionisio del Mar of December 29, 2012.⁴⁵ On January 3, 2013, the Seventh District Court Judge reportedly asked the individual petitioners to clarify whether they intended to file a "petition in error," rather than a "challenge," and indicated he would not review the motion to dismiss filed by the Commission before the individual petitioners responded. On January 10, 2013, after the individual petitioners confirmed their intention to file a petition in error, the Court referred the case to the relevant Circuit Court. Consequently, on January 16, 2013, the Presiding Judge of the Three-Judge Circuit Court on Labor and Administrative Matters for the State of Oaxaca (the "TCCMTA") reportedly dismissed the petition in error as untimely. The individual petitioners also reportedly filed an appeal with the court sitting en banc against the decision that dismissed its petition in error. As of now, the following are pending decision: (a) the appeal of the individual petitioners filed with the TCCMTA sitting en banc, and (b) the motion to dismiss Proceeding N°4 filed with the Seventh District Court by the Commission.⁴⁶

7.13 The Requesters allege that the claim in Proceeding N°4 has been satisfied and exhausted, since the Judge in Proceeding N°4 already ordered the suspension of the acts that were the subject of Proceeding N°4. It appears from papers sent to the Chairperson by the Representative that Proceeding N°4 has been suspended and is not pending or active. Thus, the Chairperson has determined that nothing is currently under arbitral or judicial review relating to Proceeding N°4 and Section 37(i) does not apply because of Proceeding N°4.

7.14 It appears from a review of the allegations and discussions with the Representative of the Requesters that the parties who brought Proceeding N°4 sought a judicial decision from the Mexican courts involving specific land rights. The Request lodged with the ICIM seeks a Compliance Review to assess whether the Bank has complied with its ROPs in a Bank-Financed Operation. A Compliance Review does not entail a determination of the validity or applicability

⁴⁴ Seventh District Court of the State of Oaxaca, decision of December 17, 2012, PRAL. 739/2012 III-B

⁴⁵ Petition from the Communal Properties Commission of January 2, 2013, in Appeals Case 739/2012 before the Seventh District Court of the State of Oaxaca.

⁴⁶ According to information from the Project team, the E.E. Mareña Company has already entered an appearance in the case as affected third party, and filed appeals against the motion to suspend issued on December 6, 2012, which are also pending decision by the TCCMTA.

of any land rights of any parties. Thus a review by any relevant court(s) of issues raised by Proceeding N°4 would not involve any issues raised by the Request, as the Request seeks a Compliance Review with respect to the Bank's compliance with its own ROPs in connection with the Project. The two actions are independent of each other and the risk of impact of one on the other appears very remote.⁴⁷ The Chairperson has determined that Proceeding N°4 does not comprise arbitral or judicial review of an issue raised by the Request by a national, supranational or similar body within the meaning of Section 37(i). Thus Section 37(i) does not apply due to Proceeding N°4, even if it were not suspended.

7.15 Another way to approach the determination of whether Section 37(i) is not applicable due to Proceeding N°4, if it were not suspended, is to apply the internationally recognized concepts that are referred to as *lis pendens*. In international jurisprudence, to determine whether a petition for relief in one forum is substantially the same as another submitted in a different forum, frequently one that has already been determined, an analysis is made of three points, namely, whether: (a) the parties to the two petitions/cases are the same; (b) the object of the action is the same; and (c) the legal grounds for relief are identical. This analysis will be applied to Proceeding N°4, notwithstanding the conclusion noted above regarding inapplicability of Section 37(i) to Proceeding N°4.

7.16 Parties: We note that members of only one of the seven communities involved in the Request commenced Proceeding N°4, namely the Comunidad de San Dionisio del Mar. However, none of the actual Requesters are parties to Proceeding N°4. Thus, the Requesters and the parties to Proceeding N°4 are not the same.

7.17 Object of the Request and Proceeding N°4: Proceeding N°4 sought to have the court revoke the permits. The Request seeks a Compliance Review to determine whether the Bank's actions or omissions complied (or not) with ROPs. Thus the object of the Request is not the same as the object of Proceeding N°4.

7.18 Legal Grounds: The remedy sought in Proceeding N°4 was a revocation of permits, which only a Mexican Court with jurisdiction could grant (and already did). The Request seeks a Compliance Review, the result of which, if the Panel were to determine that there was non-compliance with ROPs by the Bank in connection with the Project, would be a Compliance Report issued to the Board of the Bank, which might contain recommendations to the Board.

⁴⁷ The ICIM Policy Implementation Guidelines provides guidance for the Chairperson's analysis. Paragraph 4.25 of the Guidelines states that : "In determining whether the exclusion ... set forth in ICIM Policy Section B paragraph 37(i) ... applies to all or a portion of a Request, the following principles will be taken into account: among others:

(c) Whether any issue under review as part of any relevant pending and active judicial or arbitral review (a "Pending Dispute") and one or more issues raised by the Request are significantly related or identical;

d. Whether the parties to a Pending Dispute are identical to the parties of the Request/case and are performing similar roles;...

f. Whether the Pending Dispute is active or inactive or is formally or informally suspended or dormant;"

The Board might simply take note of the Compliance Report⁴⁸ or the Board might take a decision to the effect that some action by the Bank/Management might be warranted and instruct Management to carry out such actions⁴⁹, and the Board might require an action plan from Management⁵⁰. Thus the legal grounds of the Request and Proceeding N°4 are not the same

7.16 The results of the Chairperson’s eligibility review are summarized in the table that follows below:

Summary of the Eligibility Analysis		
Eligibility Criteria Pursuant to Part D, Section 56 and Exclusions from Eligibility Pursuant to Part B, Section 37 of the ICIM Policy	Determination by the Chairperson	Comments
56 (a) Name and contact information of the Requester	Meets the criteria	The names and contact information of the Requesters are recorded in the ICIM’s files.
56 (b) Names and contact information of the Representative, if any, and proof of the authorization	Meets the criteria	The name, contact information and authorization of the Representative of the Requesters are recorded in the ICIM’s files.
56 (c) Project at issue identified as a Bank-Financed Operation	Meets the criteria	Mareña Renovables Wind Project (Operation Number 2644A/OC-ME and Project Number ME-L1107).
56 (d) The Requester resides in the country where the operation is or will be implemented (or a qualified Representative has been appointed)	Meets the criteria	The Requesters reside in Mexico.
56 (e) None of the exclusions set forth in Part B, Section 37 applies	No Exclusion applies	See discussion above regarding proceedings that may relate to the Project.
56 (f) The Requester has reasonably asserted that it could be expected to be directly, materially adversely affected by an action or omission of the IDB in violation of a ROP	Meets the criteria	The Requesters have sufficiently described the environmental and social impacts and the direct materially adverse effects on Requesters that, in their view, could have resulted from potential actions or omissions of the IDB with respect to the application of the Bank's ROPs.

⁴⁸ Part D, Section 69 of the ICIM Policy.

⁴⁹ Part D, Section 71 of the ICIM Policy.

⁵⁰ Part D, Section 71 of the ICIM Policy.

56 (g) A Compliance Review could assist in determining whether the Bank’s action or omission, with respect to a Bank-Financed Operation has resulted in non-compliance with a ROP and affect the Requesters	Meets the criteria	The Requesters have described their concerns and stated that they remain fearful of the potential negative impacts of the Project on their land and livelihoods. Their concerns and fears of potential or actual direct, material harm persist. Management has described the actions it has undertaken to avoid or mitigate the alleged harm. A Compliance Review may assist in clarifying the allegations and the conflicting assertions.
56 (h) The Requester has taken steps to bring the issue to the attention of Management	Meets the criteria	The Requesters have taken steps to bring the issue to the attention of Management.

8. Processing of the Eligibility Determination

8.1 The Chairperson, in the exercise of his duties and under the authority granted him by the ICIM Policy, determines that the Request described herein is **ELIGIBLE** for a Compliance Review.

8.2 As per Part D, Section 55 of the ICIM Policy the Requesters, the Board, the President, Management as well as the Borrower will be informed about this Eligibility Report. A notice will be posted in the ICIM Registry within five business days of distribution to the Board.

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