

PUBLIC

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

ME-MICI002-2012

**DETERMINATION OF ELIGIBILITY FOR THE CONSULTATION PHASE
MEXICO. MAREÑA RENOVABLES WIND PROJECT**

This documents was prepared by the Project Ombudsperson for the Consultation Phase

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**CONSULTATION PHASE
DETERMINATION OF ELIGIBILITY**

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

FROM: Isabel Lavadenz Paccieri, Project Ombudsperson

VIA: Victoria Márquez-Mees, Executive Secretary

CC: Independent Consultation and Investigation Mechanism

REFERENCE: **ME-MICI002-2012.** Mareña Renovables Wind Project (2644A/OC-ME)

COUNTRY: Mexico

DATE: Friday, 1 February 2013

DETERMINATION OF ELIGIBILITY: The request is **ineligible** for the Consultation Phase

I. Request Processing

1. On 26 December 2012, the Independent Consultation and Investigation Mechanism (ICIM) received Request 052/2012, submitted by 225 members of the indigenous communities of Santa María Xadani, San Mateo del Mar, Colonia Álvaro Obregón, San Francisco del Mar, San Dionisio del Mar, Juchitán de Zaragoza, and Unión Hidalgo, all in the State of Oaxaca, Mexico (“Requesters”) (See Annex: “Original Request”). The Requesters asked for confidentiality as to their identity² and appointed Mr. Leonardo A. Crippa, Attorney, of the Indian Law Resource Center as their representative to the Mechanism.³
2. The Request relates to the Mareña Renovables Wind Project (“the Project”) financed by the Inter-American Development Bank (“IDB” or “the Bank”) in the

¹ The terms Mechanism, Management, Executive Secretary, Project Ombudsperson, Panel, Mechanism Policies, Eligibility, Consultation Phase, Assessment, Executing Agency, and any other relevant term in this memorandum shall have the meaning assigned to them in the Policy Establishing the Independent Consultation and Investigation Mechanism (ICIM) approved on 17 February 2010 and available at: www.iadb.org/mici.

² Cf. Request submitted to the ICIM on 26 December 2012, paragraph 9.

³ Cf. Authorization signed by the Requesters within the framework of the Assembly of Indigenous Peoples of the Isthmus of Tehuantepec in Defense of Land and Territory in the State of Oaxaca on 17 December 2012 (Request submitted to the ICIM on 26 December 2012. Annex I).

- State of Oaxaca, Mexico, and the borrower is Mareña Renovables Capital, S.A.P.I. de C.V. (“Borrower”).⁴
3. On 7 January 2013, the Project Ombudsperson received the Request file.⁵ On 10 January, the Consultation Phase team met with the Requesters’ representative at ICIM headquarters. On 16 January 2013, the Consultation Phase team held a virtual meeting with a group of Requesters in order to explain the ICIM mandate, and the scope and process of the Consultation Phase, gain a better understanding of the issues presented, and confirm their willingness to engage in dialogue. The Ombudsperson asked the Requesters’ representative to provide additional information needed to conclude this analysis of eligibility. On 23 January 2013, the Requesters sent a brief supplementing their initial complaint, whereby they presented additional information regarding project-related disputes before domestic courts and other bodies, provided more details regarding the potential impacts the Project would have on each of the requesting communities, and submitted copies of the opinions issued in 2009 regarding the project by the Comisión Nacional de Biodiversidad [National Commission on Biodiversity] (CONABIO) and the Instituto Nacional de Antropología e Historia [National Institute of Anthropology and History] (INAH).
 4. During the Eligibility stage, the Consultation Phase team also maintained contact through in-person meetings and telephone calls with the Bank’s Project team, which collaborated actively in providing information and arranging a telephone conference with the borrower. That conference was held on 24 January 2013, and its objective was to clarify the mandate of the Mechanism and the particular features of the Consultation Phase, give the Borrower the opportunity to express its viewpoint regarding the Request, and determine its willingness to engage in dialogue.
 5. On 25 January 2013, based on Article 91 of the ICIM Policy,⁶ the Ombudsperson extended the deadline for the Determination of Eligibility to

⁴ Cf. IDB, Projects, Project detail, ME-L1107: Mareña Renovables Wind Project, Financial information. Available at: <http://www.iadb.org/es/proyectos/project-information-page.1303.html?id=ME%2DL1107>. Last accessed: 23 January 2013.

⁵ A request regarding the project was submitted to the ICIM in October 2012 (Request No. 045/12) but not processed—and consequently not referred to the Ombudsperson—because: (a) the complainants failed to submit formal representation documents; and (b) they had not contacted Management prior to submitting the request to the Mechanism. The Executive Secretariat provided the data on the Project team, so that the requesters could contact Bank Management. As a result, the complainants in that request, including some of the Requesters, met with members of the Project team and the IDB Representative in Mexico on 9 November 2013 (*supra* paragraph 28).

⁶ ICIM Policy, Article 91, “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.”

31 January 2013, in order to give the parties the opportunity to submit additional information regarding the project and relevant issues in the Request.

6. On 31 January 2013, the Ombudsperson contacted both the Requesters' representative and the legal counsel of the lending institutions, seeking additional information on court actions related to the Project. On 1 February, the ICIM received additional information on the "amparo" proceeding for constitutional relief related to the facts presented in the Request (*supra* paragraph 42). For that reason, this determination of eligibility is being issued on 1 February 2013.

II. Request Summary

7. The Request states that "the communities have been calling IDB Management's attention to the situation since early October [2012]," when they contacted certain IDB staff to arrange a meeting regarding their concerns about the project. The meeting with the Project team and the IDB Representative in Mexico took place on 9 November 2013. The Requesters affirm that, during the meeting, they presented Management with "a document signed by two thousand members of the indigenous community, in which they explained the reasons why the project is being rejected," but to date have not received any response to their concerns.⁷
8. The Request describes the alleged environmental and social harm that could result from the Project due to an action and/or omission of the Bank in violation of its Operational Policies. In particular, the Requesters allege that the Project has affected and will continue to affect:
 - a. **The system of self-government and physical integrity of the communities and their leaders**, due to "the Project's increasing pressure on the communities, ignorance of community decision-making and the position of community leaders, and constant intimidation and unceasing persecution of leaders who question the Project."⁸
 - b. **Their land, territories, and resources**, given that the construction and operation of the wind farm and transmission lines would affect the special relationship that the communities maintain with their territories. In addition, they point out that the construction of transmission lines and the expansion and construction of access routes would lead to the division of community lands and a change in their traditional use; the trespass and invasion of indigenous lands, acceleration of acculturation, and other social impacts on children and adults unaccustomed to vehicular traffic and movement of heavy machinery, as well as other impacts.
 - c. **Their way of life, cultural integrity, and traditional knowledge**, given that the wind farm and transmission lines would affect the cultural heritage of these

⁷ Request submitted to the ICIM on 26 December 2012, paragraphs 16-18.

⁸ Request submitted to the ICIM on 26 December 2012, paragraph 15(iv).

communities, particularly sacred sites and pilgrimage routes in the project areas, which, as they point out, play a central role in the communities' cultural and spiritual life.

- d. **Environment and biodiversity**, as a consequence of adverse impacts on biodiversity that could be caused by the wind towers and turbines on the Barra Santa Teresa sandbar and surrounding lagoons. Herbicides would be used to suppress vegetation on the bar to ensure an area free of vegetation measuring 2,000 square meters around each tower. The space reserved for access routes would also invade the habitat of plants and land animals. Migratory birds would be impacted by collision with the wind turbines. In addition, the impacts on a specific bat species (lesser long-nosed bat), classified as vulnerable, were not considered in the public documents of the Project. Construction of transmission lines above ground could have adverse impacts on the region's flora and fauna due to soil erosion, noise, dust, and interruption of normal animal movement. In this regard, in August 2012, the firm executing the project entered the Barra Santa Teresa "to begin construction of the wind farm, clearing the mangroves and irreparably harming the lagoon area."⁹
 - e. **Food security and traditional subsistence economy**, given that the transmission lines running under the lagoons and the wind turbines would irreparably harm the Barra Santa Teresa, including the mangroves, and would affect the biological cycle of the flora and fauna in the lagoons and the sea adjacent to the Barra. This would impact fishing, which is the communities' primary source of food and income.
9. According to the Requesters, this harm would result from: (a) the absence of consultations with the indigenous communities in the early stages of the Project, which would have provided for the inclusion of measures to avoid and/or minimize significant adverse impacts within the context of the Project design, and following approval of the operation by the Bank; (b) the absence of a detailed evaluation of the seriousness of potential adverse impacts on the communities, including those communities that would be affected by the laying of transmission lines, and the expansion and/or construction of access routes; and (c) the emphasis on the benefits that the Project would bring to the private sector to the detriment of the indigenous communities, which would not appear as beneficiaries of the Project in terms of wind energy. Lastly, the Requesters expressly requested that the Request be declared eligible for the Consultation Phase.
 10. A prima facie review of the Request indicates that the concerns alleged by the Requesters could relate to the IDB's Environment and Safeguards Compliance Policy (Operational Policy OP-703), the Operational Policy on Involuntary Resettlement (OP-710), and the Operational Policy on Indigenous Peoples

⁹ Request submitted to the ICIM on 26 December 2012, paragraph 15(i).

(OP-765). This statement does not imply an analysis on the merits of the issues presented in the Request.

III. Project Background

3.1 Loan operation

11. The Mareña Renovables Wind Project (loan 2644A/OC-ME) was approved by the IDB Board of Executive Directors on 23 November 2011 for an amount of US\$74.9 million equivalent,¹⁰ US\$14.9 million of which was annulled. The loan contract was signed by the parties on 23 February 2012, and, as of the date of this memorandum, the Bank had disbursed US\$20.1 million to the Executing Agency, or 33.6% of the total value of the financing.¹¹
12. The Project has been developed by Fomento Económico Mexicano, S.A.B. de C.V. (FEMSA), Macquarie Mexican Infrastructure Fund, and Macquarie Asset Finance Limited (a subsidiary of Macquarie Capital Group Limited), which owns the Borrower, Mareña Renovables Capital.
13. 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. Under the Project, 102 wind turbines will be installed on the Barra Santa Teresa (“San Dionisio del Mar Wind Field”), in the municipio of San Dionisio del Mar, and 30 turbines will be installed in the community of Santa María del Mar (“Isthmus Wind Field”), which are part of the municipio of Juchitán (see Figure 1). 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 are connected by submarine cables; (b) the construction of transmission lines from the Santa Teresa substation to the Ixtepec substation,¹² 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.¹³

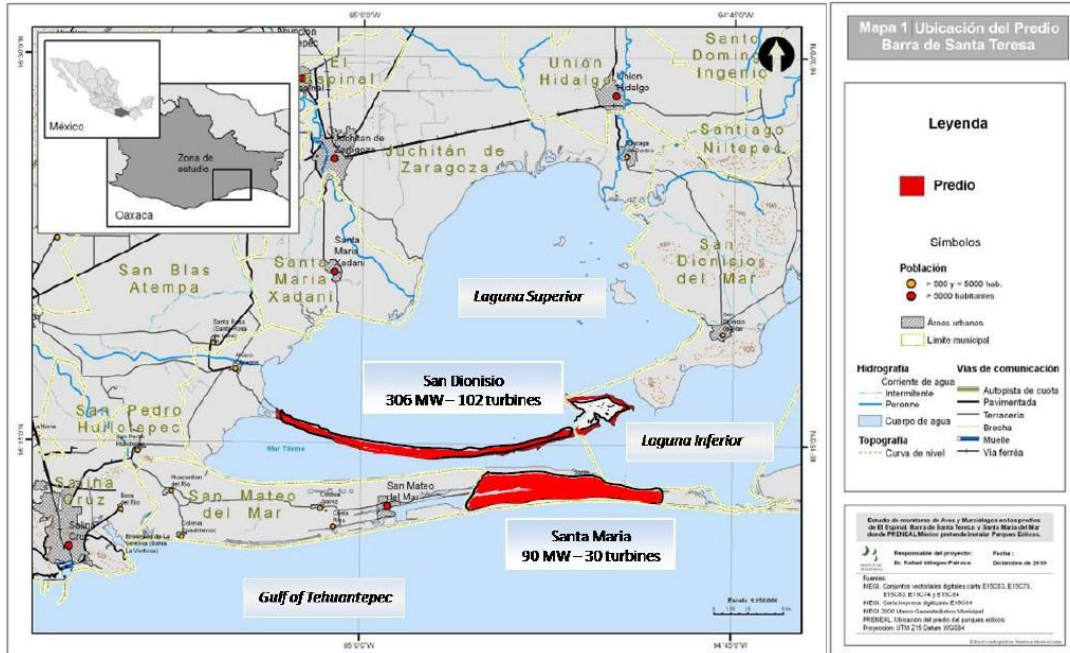
¹⁰ Cf. Financial information, *supra* note 4. The loan was approved in Mexican pesos.

¹¹ Cf. IDB, *Project procurement information, ME-L1107 – Mareña Renovables Wind Project*. Available at <http://www5.iadb.org/idbppi/asp/ppProcurement.aspx?planguage=SPANISH>. Last accessed: 30 January 2013.

¹² According to information from the Project team, the Bank is not financing construction of the Ixtepec substation, which already exists and is in operation.

¹³ IDB, *Environmental and social management report (ESMR), Mareña Renovables Wind Project (ME-L1107), Environmental category: A*, 21 November 2011, pp. 3-4. Available in English at: <http://www.iadb.org/en/projects/project-description-title.1303.html?id=ME-L1107>. Last accessed: 28 January 2013.

Fig. 1 – Location of the Wind Farm in San Dionisio del Mar and Santa María del Mar



Source: IDB (Environmental and social management report, 21 November 2011, p. 3)

3.2 Environmental and social due diligence

14. Within the framework of environmental and social due diligence, the Bank's Project team are said to have adopted measures to confirm whether all relevant impacts and risks of the Project had been, or would be, appropriately and adequately evaluated and mitigated. Among other things, the Project team states that: (a) it reviewed the Environmental, Health, and Safety Management System prepared by the Borrower; (b) monitored 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 (SEMARNAT) were submitted; (c) evaluated 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) analyzed the impacts of the Project on the indigenous populations; and (e) assessed the potential socioeconomic impacts of the purchase of land, construction activities, and the permanent or temporary loss of access to farmland necessary to build the wind farm, as well as the respective mitigation and compensation measures. These activities and the findings were reported in the environmental and social management report (ESMR) issued on 21 November 2011.¹⁴

¹⁴ Cf., ESMR, *supra* note 13.

15. According to the ESMR, the Project has been classified as Category A under Operational Policy OP-703,¹⁵ 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.”¹⁶
16. 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.¹⁷
17. The ESMR indicated that the environmental impact assessments (EIAs) for the two wind farms were concluded in June 2009. It states 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 2011.¹⁸

3.2.1 Potential environmental and social impacts and risks

18. The ESMR stated that during the construction phase of the Project the potential environmental and social impacts and risks would be associated with 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).¹⁹ However, the ESMR maintains that those impacts and risks could be adequately mitigated through management plans, including specific actions for

¹⁵ According to Operational Policy 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).

¹⁶ ESMR, *supra* note 13, p. 29.

¹⁷ *Cf.* ESMR, *supra* note 13, pp. 7-8. In addition, that report mentioned that 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, pp. 24-25).

¹⁸ Additional measures would include those recommended by the National Commission on Biodiversity (CONABIO) and the National Institute of Anthropology and History (INAH) in 2009.

¹⁹ *Cf.* ESMR, *supra* note 13, pp. 15-18.

sea turtles and Tehuantepec jackrabbit, given their conservation status. In the operation phase, potential impacts and risks would involve 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.

19. To address these impacts and risks, the Borrower plans to implement an environmental and social management system (ESMS), including 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.²⁰ 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.²¹ According to information from the Bank's Project team, 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.

3.2.2 Public consultations

20. The ESMR notes that, during various stages of Project preparation, the population received information regarding the Project's objectives and scope. However, consultations were said to focus on securing usufruct and right of way agreements, and the consultation activities were not fully recorded. The ESMR emphasizes 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 stated 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. To lend continuity to this work, the integrated social management plan (*supra* paragraph 19) would include consultation and communication, community development, and participatory monitoring programs for the construction and operation stages. Similarly, the environmental and social action plan (*infra* paragraph 22) would establish measures on providing information to, and consultation with, the communities.

3.2.3 Safeguards required by the Bank

21. The ESMR states the requirements that the IDB should include in the loan contract, in order to ensure that the Project complies with the Bank's environmental and social safeguards policies. Thus, among other general

²⁰ ESMR, p. 23.

²¹ ESMR, p. 5.

- requirements, the Bank was to require the Borrower and all Project components to 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 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.
22. The Bank also requires the Borrower, under the loan contract, to comply with the activities and timeline in the environmental and social action plan (ESAP), which was finalized by the Project team in December 2011 (*supra* paragraph 20).²² 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 Plan provides actions 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 assessment. The Project team emphasized that it has regularly monitored compliance with that plan.
23. Lastly, the ESMR indicates that the loan contract also establishes that the Borrower will deliver regular compliance and monitoring reports on the social and environmental aspects of the Project. The contract was also to provide for Bank monitoring of the Project's environmental, social, labor, and health and safety aspects.²³ It would appear that the loan contract did, in fact, include the measures recommended in the ESMR.²⁴

IV. Eligibility Analysis

24. ICIM Policy establishes, inter alia, that the purpose of the Consultation Phase is to clarify the concerns of Requesters who believe they have been and/or could reasonably be expected to be directly, materially adversely affected by a Bank-financed operation, and to provide an opportunity, applying consensual and flexible approaches, to address those concerns.

²² IDB, Mareña Renovables Wind Project (ME-L1107), *Environmental and social action plan*, 11 December 2013. Available in English at: <http://www.iadb.org/en/projects/project-description-title,1303.html?id=ME-L1107>.

²³ Cf. ESMR, *supra* note 13, pp. 31-32

²⁴ Cf. *Credit agreement*, dated as of 23 February 2012, among Mareña Renovables Capital, S.A.P.I. de C.V., the Inter-American Development Bank *et al.* Schedule 6.12.

25. Consequently, the eligibility analysis is based on the exclusions and eligibility criteria established, respectively, in Articles 37 and 40 of the ICIM Policy. This involves a prima facie review of the facts alleged in the Request and not a value judgment on the merits of the issues presented.
26. Accordingly, the Ombudsperson observes that the Request meets the requirements of **Article 40, paragraphs (a), (b), (c), and (d).**²⁵ In addition, in accordance with Article 40(f),²⁶ the Requesters: (a) have reasonably asserted that they have been or will continue to be affected directly, materially adversely by an alleged action or omission of the IDB in the context of the Project, in violation of its environmental and social safeguards policies, and (b) have described the harm caused or likely to be caused by the Project.
27. The Requesters expressed their intent that the Request be declared eligible for the Consultation Phase process (*supra* paragraph 9). At a meeting with the Consultation Phase team, the Borrower said it would be open to engaging in dialogue with the communities. However, it emphasized certain factors that, under the current circumstances, would prevent the company from agreeing to participate in a dialogue process like the Consultation Phase: (a) social conflicts in the area, the large majority of which preceded and/or were due to causes not attributable to the Project; (b) the lack of evidence that the persons who coordinated the submission of the Request actually represent the communities; (c) the unavailability of the company officers engaged in activities already planned for the Project, such as consulting the population on the compensation plan for fishing activities; and (d) delays in Project execution, which prevent the Borrower from waiting until the start of the Dialogue process to begin activities to install the wind farm. Based on the foregoing, **the Ombudsperson deems that the requirement of Article 40(g)²⁷ has not been met.**
28. Based on the information provided by the parties, the Ombudsperson observes that certain Requesters attended the meeting held at the IDB offices in Mexico

²⁵ ICIM Policy, Article 40. "Eligibility criteria for the Consultation Phase. Requests shall be deemed eligible for the Consultation Phase if the Project Ombudsperson 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)."

²⁶ ICIM Policy, Article 40(f). "[T]he 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."

²⁷ ICIM Policy. Article 40(g). "[T]he parties are amenable to a Consultation Phase exercise, and, with respect to an issue raised in the Request, a Consultation Phase exercise may assist in addressing a concern or resolving a dispute or is likely to have a positive result."

City on 9 November 2012. In addition, the Requesters provided a list of the members of the communities mentioned in the Request (*supra* paragraph 1), who appeared at the Bank offices but did not attend the meeting and waited outside the Bank. The list also included certain Requesters. The IDB Project team has confirmed that meeting, mentioning that many of the concerns expressed in the Request were presented there. Therefore, the Ombudsperson deems that the Requesters have taken steps to bring their issues to the attention of Management and for this reason have met the requirement of **Article 40(h)**.²⁸

29. To examine the requirement of **Article 40(e)**,²⁹ the Ombudsperson must analyze whether any of the exclusions provided in **Article 37 of the Policy** applies. Accordingly, the Ombudsperson finds no reason to declare the Request ineligible based on **Article 37, paragraphs (a) to (h)**.³⁰
30. However, a more detailed analysis is necessary regarding the application of **Article 37(i)**, or the “judicial clause” of the ICIM Policy,³¹ since there are **four disputes**—judicial, administrative, and quasi-judicial in nature—that could relate to the Request, namely: (a) a Petition for Revocation of Power of Attorney filed with the Constitutional Legislature of the State of Oaxaca; (b) a Request for Interim Equitable Relief submitted to the Inter-American Commission on Human Rights (IACHR); (c) an Invalidity Action against Acts of the Assembly filed with the One-Judge Agrarian Tribunal of the 22nd District, and (d) an Indirect “Amparo” Petition for Constitutional Relief before the Seventh District Court of the State of Oaxaca.

²⁸ ICIM Policy. Article 40(h). “[T]he Requester has taken steps to bring the issue to the attention of Management.”

²⁹ ICIM Policy. Article 40(e). “[N]one of the exclusions set forth in Section 37 applies.”

³⁰ ICIM Policy. Article 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 direct the Request to the appropriate office within the Bank); (e) a particular matter or matters that have already been received 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, 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); (h) any Request that on its face (i) is without substance, or (ii) has been submitted to gain a competitive business advantage.”

³¹ ICIM Policy. Article 37. “Exclusions. 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.”

31. Independent accountability mechanisms (IAM) are not known to include a factor for the exclusion of requests similar to the “judicial clause” of the ICIM Policy. The inference is that the intent of that clause is to prevent the Mechanism from interfering in matters being heard by judicial and arbitral bodies, and vice versa. In practice, strict interpretation of this exclusion criterion could represent an impediment—not always reasonable or fair—to requests’ access to the ICIM. To prevent this, the Ombudsperson has interpreted Article 37(i) broadly, considering not only the letter, but the spirit of the clause as framed by the objectives of the ICIM Policy as a whole.³²
32. Accordingly, in order to determine whether the exclusion under Article 37(i) is relevant to all or part of a Request, the Ombudsperson will first analyze the nature of the existing actions. Thus, Article 37(i) does not apply to administrative procedures, but to judicial and arbitral actions—in both the domestic and international spheres. This clause could also apply to proceedings before quasi-jurisdictional international bodies such as the Inter-American Commission on Human Rights and the United Nations human rights treaty bodies, provided that they can interfere in the Consultation Phase process, and vice versa. Secondly, the Ombudsperson will evaluate whether: (a) the object (facts and events) of the judicial or arbitral dispute is identical or significantly related to the object of the Request;³³ (b) if the parties to the dispute are identical to the parties to the Request and are playing similar roles (claimant v. respondent), and (c) whether the referenced dispute is active or inactive, whether it has been formally or informally suspended. Lastly, based on the criteria indicated, the Ombudsperson will examine whether any of his or her actions, in the context of the Consultation Phase, could directly interfere with the pending dispute, or vice versa.
33. Following the above criteria, the Ombudsperson will conclude whether Article 37(i) of the Policy is applicable to the Request by reason of any of the four disputes mentioned (*supra* paragraph 30).
34. **Petition for Revocation of Power of Attorney.** Representing the General Assembly of the People of San Dionisio del Mar, on 8 February 2012, 15 members of that community, including some of those who are now Requesters appearing before the ICIM, submitted a Petition for Revocation of Power of Attorney to the Constitutional Legislature of the State of Oaxaca against the Mayor and the Treasurer of the City of San Dionisio del Mar. The petition was

³² In this regard, the first version of the “Guidelines for Implementing the Policy Establishing the ICIM,” sent to the IDB Board of Executive Directors in February 2012, recognizes the need to interpret Article 37(i) not only in a literal sense, but in conjunction with the other provisions of the ICIM Policy. Based on the observations of the Executive Directors, this version of the Guidelines is being reviewed by the Mechanism team.

³³ The classical analysis of *litispendencia*, or the time during which a case is pending (identity of parties, object, and legal substance), is not fully applicable to the examination of Article 37(i) of the ICIM Policy, in that the legal substance of the judicial and arbitral actions is not the same as the legal basis that can trigger the Mechanism, i.e., the Bank’s Operational Policies.

based, among other facts and events, on the conduct of those officials in relation to the Project. Inasmuch as this involves an administrative procedure, the Ombudsperson summarily dismisses the application of Article 37(i) and will not examine the other aspects of the dispute in question.

35. **Request for Interim Equitable Relief.** On 29 August 2012, the Assembly of Indigenous Peoples of the Isthmus of Tehuantepec in Defense of Land and Territory and attorneys Maribel González Pedro and Ricardo Lagunes Gasca (“petitioners”) sought interim equitable relief from the Inter-American Commission on Human Rights (IACHR, or the “Commission”) on behalf of the Ikojts indigenous community of San Dionisio del Mar (“proposed beneficiaries”) in relation to the Mexican State. That request seeks, inter alia, interim equitable relief from the IACHR to: (a) prevent irreparable harm to the territory and natural resources of the Barra Santa Teresa; (b) protect and safeguard the beneficiaries’ right to life and personal integrity, and (c) order the Mexican State to immediately suspend the concessions and permits granted to the company in charge of the Project. To demonstrate the imminent risk to the IACHR, as well as the gravity and urgency of the situation, the petitioners cited, among other facts and events, the alleged failure to engage the community in free, prior, and informed consultation; alleged threats and intimidation against members of the community by municipal authorities and the State of Oaxaca; alleged consequences of the high social and cultural impact on the indigenous community, and irreparable harm to their territory as a result of the Project.³⁴
36. On 24 September 2012, the IACHR requested additional information from the petitioners, including information on: (a) the universe of beneficiaries of the relief sought; and (b) chronological and individualized details on the circumstances of method, place, and time of the alleged threats, harassment, and acts of violence against the beneficiaries.³⁵ On 19 October 2012, the petitioners submitted a brief responding to the IACHR’s communication. That document also would appear to be signed by the General Assembly of the People of the Ikojts Community of San Dionisio del Mar, in its capacity as proposed beneficiary. However, there is no record of the members and/or representatives of that Assembly. In their brief, the petitioners indicate that the universe of proposed beneficiaries corresponds to the entire population of San Dionisio del Mar, including therefore some Requesters.³⁶ In their chronological narration of the facts, in addition to the alleged threats, harassment, and acts of violence against the proposed beneficiaries, the petitioners cited facts and events related to the alleged failure to

³⁴ Cf. Request for Interim Equitable Relief by the Assembly of Indigenous Peoples of the Isthmus of Tehuantepec, Maribel Gonzalez Pedro and Ricardo Lagunes Gasca. 29 August 2012, p. 4 (Requesters’ Brief of 23 January 2013, Annex 3).

³⁵ Cf. Request for Information MC-304-12 of the Inter-American Commission on Human Rights, 24 September 2012 (Requesters’ brief of 23 January 2013, Annex 5).

³⁶ Cf. Response to Request for Information MC-304-12, submitted by parties seeking interim equitable relief, 19 October 2012 (Requesters’ brief of 23 January 2013, Annex 6).

- engage in consultation on the Project; the possible disruption of their livelihoods; the impacts on their land, territory, and identity, as well as archeological sites and other areas of cultural importance.
37. The ICIM does not have up-to-date information on the request for interim equitable relief, particularly as to a filing by the Mexican State in such regard. According to the Requesters, the request for interim equitable relief has not yet been decided by the Commission, nor has it been accompanied by a petition on the merits of the alleged violations of human rights. Based on the evidence available at this Eligibility stage, the Ombudsperson observes that the parties are not fully identical, given that only the Requesters from San Dionisio del Mar would be among the proposed beneficiaries. In addition, even though there was initially a great deal of similarity between the allegations before the IACHR and the issued indicated in the Request, the Commission in its request for additional information would seem to be focusing exclusively on the threats, harassment, and acts of violence. Thus, it is unclear how the granting of interim equitable relief—which does not correspond to a decision on the merits and would only deal with a small portion of the facts in the Request before the ICIM—could interfere in the Consultation Phase, and vice versa. **A more detailed review of this possible intervention could be performed during the Assessment stage; if such interference is found, the Ombudsperson would discontinue the Consultation Phase.** Accordingly, based on the evidence currently available, and so as to prioritize access to the Mechanism, the Ombudsperson deems that **Article 37(i) does not apply to the Request with regard to the Request for Interim Equitable Relief before the IACHR.**
38. **Invalidity Action against Acts of the Assembly.** In March 2012, seven members of the community of San Dionisio del Mar filed an action with the One-Judge Agrarian Tribunal of the 22nd District against: (a) the Community of San Dionisio del Mar (through the Communal Properties Commission);³⁷ (b) the Delegate of the National Agrarian Registry in the State of Oaxaca; (c) Preneal México S.A. de C.V., and its subsidiaries Energía Alternativa Istmeña and Energía Eólica Mareña; and (d) Vientos del Istmo S.A. de C.V. The petitioners sought to have declared null and void the resolutions of the General Assembly of the Community of San Dionisio del Mar dated 7 November 2004 and 13 February 2009, which resulted in the agreements for the usufruct contracts on communal lands for implementation of the Project. According to the petitioners, Preneal and its subsidiaries failed to properly provide information on the advantages and

³⁷ The Communal Properties Commission is the representative and administrative management body for the Assembly of Community Members, as established by the communal statute and custom. The Assembly is the supreme governing body of the farming community, in which all community members participate. Cf. Articles 21, 22, 99 and 107 of the Agrarian Law, published in Mexico's official gazette, *Diario Oficial de la Federación*, on 26 February 1992; the most recent amendment was published on 9 April 2012. Available at: <http://www.diputados.gob.mx/LeyesBiblio/pdf/13.pdf>. Last accessed: 30 January 2013.

- disadvantages of the wind park for the community, nor did they present the corresponding production-oriented project. They alleged that the resolutions had been adopted under pressure, taking advantage of the population's ignorance of the applicable regulations. The Court admitted the action on 23 April 2012 and subsequently ordered that the respondents be notified; it convened a hearing on 6 June 2012 and denied 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.
39. According to information from the Borrower, on 29 November 2012 a hearing was held in the context of that action, attended by respondents E.E. Mareñas and Preneal. The petitioners do not appear to have attended the hearing. Consequently, the Agrarian Tribunal did not accept the reasons they submitted to justify their absence. No further procedural steps have been taken since that order. The Requesters had no more details on this action, and indicated that it was pending a final decision.³⁸
40. With respect to the parties to the Invalidity Action, the Ombudsperson notes that: (a) some petitioners are also part of the group of Requesters from San Dionisio del Mar, and (b) the respondents Energía Alternativa Istmeña and Energía Eólica Mareña are the operators for the Project. These firms are owned by Mareña Renovables Holding S.A.P.I. de C.V., which also belongs to the owners of Mareña Renovables Capital, the Borrower (*supra* paragraph 12). Therefore, the parties to the Invalidity Action and the Request do not appear to be fully identical. The facts and events forming the basis for the Invalidity Action partially coincide with the allegations in the Request, particularly with respect to the alleged failure to consult with the community. Thus, a decision on the validity of the usufruct contract, taking into account the facts related to the consultations on the Project, would have consequences not only for the parties to the Invalidity Action but for the entire community of San Dionisio del Mar and the Borrower, not to mention other interested stakeholders.
41. At this stage, the Ombudsperson has sufficient evidence to determine that the course of, and especially the decision on the merits in, a domestic court proceeding could interfere in—or even interrupt—the process and outcome of a Dialogue in this case. The Invalidity Action has the potential of adversely affecting the relationship of trust between the Parties and equal footing for an equitable dialogue. In other words, the party whose claims are denied in the judicial proceeding will be subject to pressure when discussing and accepting agreements within the framework of the Dialogue. In addition, the domestic decision could order measures contrary to what the Parties agree upon in the Dialogue, and vice versa. Thus, it should be emphasized that, although the parties to the Invalidity Action and the Request are not fully identical, the Dialogue process is expected to address collective concerns that could have positive or

³⁸ Requesters' brief, 23 January 2013, p. 4.

- negative effects for the population of the seven communities, including those who filed the Invalidity Action. **The Ombudsperson concludes, therefore, that the exclusion under Article 37(i) of the Policy should apply to this Request.**
42. **Indirect “Amparo” Petition for Constitutional Relief.** In December 2012, 176 members of the community of San Dionisio del Mar, in their own name and substituting as representatives of the Communal Properties Commission (“Commission”), filed an “Amparo” Petition for Constitutional Relief with the Seventh District Court of the State of Oaxaca, against various state authorities that had granted permits, authorizations, concessions, and/or licenses (“permits”) for the execution of the Project.³⁹ The petitioners alleged that the acts of those authorities deprive them partially and definitively of their collective agrarian rights to the ownership, possession, use, and enjoyment of the communal lands located on the Barra Santa Teresa, which are important for the sustenance and cultural identity of the surrounding communities. Consequently, the petition seeks revocation of the permits for the wind park construction works.
43. The petitioners 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 (*supra* paragraph 38), 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 Energía Eólica Mareña S.A. de C.V. (“E.E. Mareña”), without free, prior, and informed consultation with the community.
44. On 6 December 2012, based on Article 233 of the 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.”⁴⁰ On 17 December 2012, the Office of the Clerk of the Seventh District Court, among other actions: (a) confirmed that the interim

³⁹ 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 for 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.

⁴⁰ Seventh District Court of the State of Oaxaca, Decision of 6 December 2012, Section II. Division: III-B. PRAL 739/2012, p. 12.

- equitable relief remained in effect; (b) identified E.E. Mareña as the affected third party, ordering that it be notified for the dispute; (c) ordered cessation of the substitute representation of the petitioners, inasmuch as the Communal Properties Commission of San Dionisio del Mar had entered an appearance in the case as representative of the petitioners/community members; and (d) denied the Commission's request to set aside the motion to suspend and order the dismissal of the case.⁴¹
45. On 31 December 2012, the original petitioners filed an appeal challenging the decision to revoke the substitute representation of the Commission. In turn, the Commission filed a brief with the Court on 2 January 2013, seeking dismissal of the Amparo Petition based on the decision of the General Assembly of Community Members of San Dionisio del Mar of 29 December 2012.⁴² On 3 January 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 10 January 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 16 January 2013 the Presiding Judge of the Three-Judge Circuit Court on Labor and Administrative Matters for the State of Oaxaca (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 the Amparo Petition filed with the Seventh District Court by the Commission.
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 6 December 2012, which are also pending decision by the TCCMTA.
47. In the Requesters' view, with the cessation of substitute representation, none of them would be party to the Amparo Petition. In turn, the Borrower pointed out that the petitioners in that action, including some Requesters, could continue in the case in their own right. This issue could only be resolved through an interpretation of Mexican law, which exceeds the mandate of the Ombudsperson. Notwithstanding this, the Ombudsperson observes that the Communal Properties Commission would have authority to represent the entire agrarian group of San Dionisio del Mar, whose members include not only the petitioners in the

⁴¹ Seventh District Court of the State of Oaxaca, Decision of 17 December 2012, PRAL. 739/2012 III-B.

⁴² Petition from the Communal Properties Commission of 2 January 2013 in Appeals Case 739/2012 before the Seventh District Court of the State of Oaxaca.

Amparo Petition, but all the inhabitants of that community. Thus, the role of the petitioners would not have changed, just their representatives in the case.

48. The Requesters also allege that the claim in the Amparo Petition has been satisfied and exhausted, inasmuch as the Judge had already summarily ordered the suspension of the acts that were the subject of the complaint. However, based on the documents from the proceeding, the Ombudsperson notes that interim equitable relief was ordered, which could be reversed during the course of the proceeding, particularly if the Court should reach a decision on the merits or on the Commission's motion to dismiss.
49. The Ombudsperson considers that, despite the fact that the parties in the Amparo Petition and the Request are partially identical, the outcomes of both proceedings could have consequences not only for each of the parties but for all the Requester communities and the Borrower. The objects of the two proceedings are partially identical and are closely related. Indeed, many of the arguments in the initial Amparo Petition have been reiterated in the Request. Thus, within the framework of that judicial action, the domestic courts would review and rule on facts and events that have also been made known to the Ombudsperson and would provide the framework for the Dialogue process. With the evidence available in the Eligibility stage, as in the Invalidity Action (*supra* paragraph 41), it can be inferred that the Amparo proceeding and decision could interfere with the Dialogue process, particularly in terms of the relationship of trust between the Parties, their equal footing, and the effectiveness of the dialogue itself and any agreements reached, should they contradict the ruling of the domestic court. Therefore, **the Ombudsperson concludes that the exclusion under Article 37(i) of the Policy must also be applied to the Request due to the Amparo Petition.**
50. The results of this Eligibility Analysis are given in the following table:

Summary of Eligibility Analysis		
Eligibility Criteria	Determination by Ombudsperson	Comments
Name and contact information of the Requester.	Meets the criteria	The names and contact information of the Requesters are recorded.
Names and contact information of the Representative, if any, and proof of the authorization.	Meets the criteria	The name and contact information of the Representative of the Requesters are recorded.

Project or operation duly identified.	Meets the criteria	Mareña Renovables Wind Project (Operation 2644A/OC-ME).
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 (and their Representative resides in Washington, D.C., United States).
None of the exclusions set forth in Section 37 applies.	Does not meet the criteria	Article 37(i) applies to the Request by virtue of the Invalidation Action and the Indirect “Amparo” Petition for Constitutional Relief.
The Requester has reasonably asserted that it could be expected to be adversely, directly, and materially affected by an action or omission of the Bank in violation of one or more Relevant Operational Policies.	Meets the criteria	The Requesters have sufficiently described the environmental and social impacts that, in their view, could occur as a result of the Project.
The parties agree to take part in a consultation or mediation process.	Does not meet the criteria	In their Request, the Requesters have sought to proceed to the Consultation Phase. The Borrower has stated that, at this time, it could not participate in a Dialogue Process.
The Requester has taken steps to bring the issue to the attention of Management.	Meets the criteria	The Requesters have sent letters to the IDB President and on 9 November 2012 met with the Project team and the IDB representative in Mexico.

V. Conclusion

51. The Project Ombudsperson, in the exercise of her duties and under the authority granted her by the ICIM Policy, determines that the Request described herein is **ineligible** for the Consultation Phase.
52. This Determination does not imply any definitive value judgment by the ICIM regarding the merits of the issues raised in the Request and does not preclude review of the Request by the Compliance Review Panel or its re-evaluation by the Mechanism, if any change occurs in the conditions that led the Project Ombudsperson to declare the Request ineligible.⁴³
53. The Executive Secretary will kindly proceed to notify the Requesters, the Board of Executive Directors, the President, the Country Office, the Project team, and the Executing Agency of this Determination, and will post this Determination of Eligibility on the Public Registry of the ICIM no later than five business days after its distribution to the Board of Executive Directors.

Isabel Lavadenz Paccieri
Project Ombudsperson

⁴³ In this regard, see Article 37(e) of the ICIM Policy, *supra* note 30.