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26 December 2012

Ms. Victoria Márquez-Mees  
Executive Secretary  
Independent Consultation and Investigation Mechanism  
1300 New York Ave., N.W.  
Washington, D.C. 20577

**RE: Request for Consultation and Compliance Review  
Mareña Renovables Wind Project ME-L1107**

Dear Ms. Márquez,

1. The Assembly of Indigenous Peoples of the Isthmus of Tehuantepec and the Indian Law Resource Center are writing to you and, through you, the appropriate person within the Independent Consultation and Investment Mechanism (Mechanism), in order to submit this Request for Consultation and Compliance Review (Request) regarding the Mareña Renovables Wind Project ME-L1107 (Project), financed by the Inter-American Development Bank (Bank). We do so because the Project adversely, directly, and materially affects the Ikojts (also known as Huave) and Binniza (also known as Zapotecas) indigenous communities located on the Isthmus of Tehuantepec, State of Oaxaca (Oaxaca), United Mexican States (Mexico).

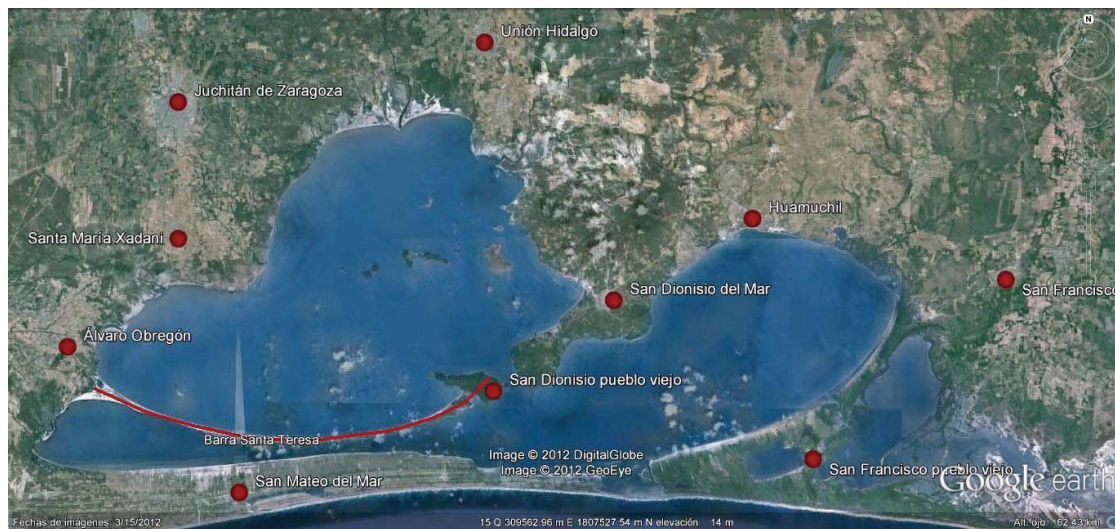
## ELIGIBILITY

2. This Request meets the eligibility criteria set forth in Sections 40, 56 et seq. of the Policy Establishing the Mechanism (Mechanism Policy), as explained below.

## I | Requesters and representative

3. The indigenous communities of Santa María Xadani (Binniza), San Mateo del Mar (Ikojts), Colonia Álvaro Obregón (Binniza), San Francisco del Mar (Ikojts), San Dionisio del Mar (Ikojts), Juchitán de Zaragoza (Binniza), and Unión Hidalgo (Binniza) request the intervention of the Mechanism for all administrative effects in the Bank. All these communities are located on the Isthmus of Tehuantepec (Isthmus), Oaxaca, Mexico, which is the country where the Project will be implemented.

**Fig. 1: Communities of the Isthmus of Tehuantepec. Source: Google**



4. The Ikojts and Binniza communities are intimately linked to the Barra de Santa Teresa (Barra), one of the areas of the Project. The Barra constitutes the center of the territory of these communities in geopolitical, economic, and cosmological terms. Traditionally, the communities control the lagoons surrounding the Barra, particularly from the archeological site of Tepeguazontlan (San Dionisio del Mar Pueblo Viejo), which is strategically located on the Barra dividing the Tileme Sea from the Upper Lagoon. From this point, the communities control inter-lagoon traffic because the Barra ends in a point (overlook) from which one can view the mouth of the bar connecting the lagoons with the sea, the Barra de San Mateo and Santa María, and the Barra de San Francisco del Mar, as well as the island of Cerro Cristo and the shore of the Upper Lagoon.

5. The communities have a special cultural, spiritual, and physical relationship with the land, natural resources, waters, lagoons, and sea shaped by the Barra. Punto Tileme, one of the most important sacred sites, where the communities hold their traditional ceremonies, is located within the Barra. In addition, all along the Barra there are numerous sites and camps where rites are held to pray and express gratitude for fishing, as indicated by the place-names of these sites. They are all connected by paths that the communities travel in the ancestral tradition as part of pilgrimages to Punto Tileme and the shores of the Lagoons.

6. The Barra is a meeting place of the communities for small-scale fishing and developing traditional knowledge. The communities' worldview regarding the lagoons includes profound traditional knowledge—e.g., ethnoastronomy, fishing techniques, nighttime navigation, and trade routes to the coast of Chiapas and the Pacific Mountains of Oaxaca. The communities consider the moon to be an expression of divinity—each lunar cycle delineates three times that the communities consider most favorable for fishing. Also noteworthy is knowledge of the biological cycles of shrimp and the wealth of plankton that make it possible for shrimp protolarva to grow more than ten meters below the floor of the lagoon.

7. The requester communities represent a very special indigenous culture adapted to the unique maritime to continental transition environment. The communities arrived in the region of the Isthmus around 1200 A.D. from a South to North migration on the American continent. Since then, the communities have developed knowledge specific to that unique environment, which has allowed traditional trading of agricultural products and maritime/lagoon products among all of them. Each of the communities speaks the native language, Ikojts or Binniza, as the case may be.

8. The Assembly of Indigenous Peoples of the Isthmus in Defense of Land and Territory (Assembly) represents a coming together of local indigenous communities, including the communities submitting this Request. The Assembly was formed in 2007 and since then has been advocating for the defense of rights to the land, territory, and natural resources of the communities affected by wind energy megaprojects promoted by domestic and transnational private sector operators. The following principles govern the work of the Assembly: community organization centered on reciprocity, ethnic identity, “tequio” (mutual assistance among communities on matters of common interest, e.g. construction and maintenance of paths traveled on pilgrimages and used to transport products), enjoyment of community life, petitions to state authorities, and use of legal remedies.

9. Representatives and members of the requester communities appoint Leonardo A. Crippa, Attorney, of the Indian Law Resource Center (Center), as their representative in the procedure before the Mechanism. Evidence of this is provided with the attached authorization document.<sup>1</sup> To this end, the following contact information is presented:

Leonardo A. Crippa  
Senior Attorney  
Indian Law Resource Center

[REDACTED]  
[REDACTED]  
U.S.A.

Tel. [REDACTED]  
Fax [REDACTED]  
Email [REDACTED]

## II | Confidentiality

10. The communities request strict confidentiality as to the identity of their representatives, as stated in the attached authorization document. This request reflects not only the gravity of the situation faced by the communities, but the express request of their representatives, who wish to avoid the usual attempts at corruption.

<sup>1</sup> Annex 1: Authorization document, 17/12/2012.

### III | Bank-financed operation

11. According to the available public information, the Operation in question is the Mareña Renovables Wind Project, which is identified under the following number: ME-L1107.<sup>2</sup> The Project was approved on 23/11/2011<sup>3</sup> and its Proponent is the Macquarie Mexican Infrastructure Fund.<sup>4</sup> This Project will take place in Mexico, is in the energy sector, was classified under Category “A,” and is now in execution.<sup>5</sup> Lastly, this Project involves the construction not only of a wind farm, but of transmission lines, as explained below.

12. The Project wind farm will be built on two principal bases. The first base, San Dionisio del Mar, will be on the Barra between the Upper Lagoon and the Lower Lagoon in the municipio of San Dionisio del Mar, and will involve the construction of 102 wind turbines occupying a total of 37.86 hectares.<sup>6</sup> The second base, Santa María del Mar, will be on the lands of Santa María del Mar, where 30 wind turbines will be built along 57.38 hectares.<sup>7</sup>

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<sup>2</sup> Inter-American Development Bank (hereinafter IDB), ME-L1107: Mareña Renovables Wind Project – Project description, information available at <http://www.iadb.org/en/projects/advanced-project-search,1301.html?query=&adv=true&Country=ME&tab=2&pagePIP=1&pageAPP=1&order=asc&sort=country&page=2> (last accessed 15/12/2012).

<sup>3</sup> *Ibid.*

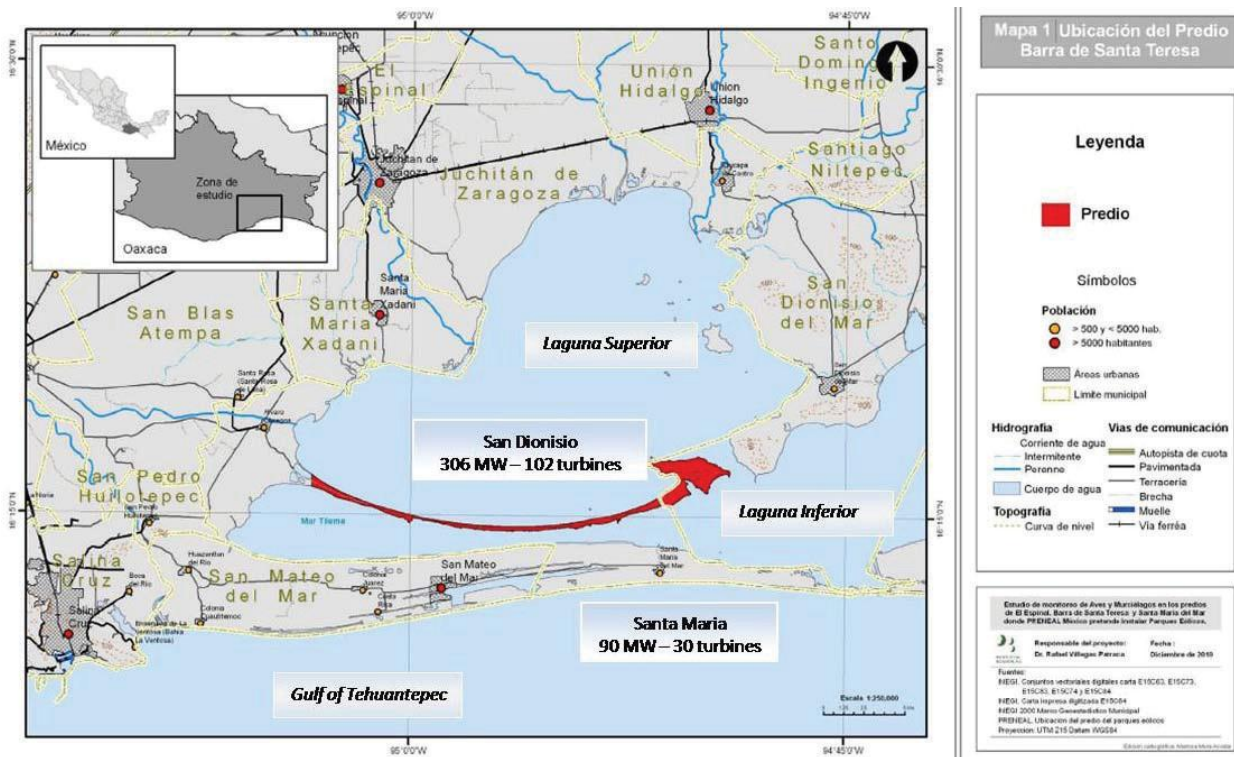
<sup>4</sup> IDB, ME-L1107: Mareña Renovables Wind Project, information available at <http://www.iadb.org/en/projects/project-description-title,1303.html?id=ME-L1107> (last accessed 15/12/2012).

<sup>5</sup> IDB, ME-L1107: Mareña Renovables Wind Project – Project description, *supra* note 2.

<sup>6</sup> IDB, Mareña Renovables Wind Project: Environmental and social strategy 1-2, 19/09/2011, <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=36416994>.

<sup>7</sup> *Ibid.*



**Fig. 2: Location of Wind Farm. Source: IDB**

13. In addition to the above, the Project requires the construction of transmission lines, widening of existing access routes, and the construction of new access routes. For example, from the Santa Teresa substation, a transmission line 52 kilometers long and 25 meters wide will be built, connecting the Project with the existing national grid at the Ixtepec substation.<sup>8</sup> New access routes will also be constructed on the Barra.<sup>9</sup>

<sup>8</sup> IDB, Mareña Renovables Wind Project (ME-L1107): Environmental and social management report (ESMR) 4, 21/11/2011, <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=36537741>.

<sup>9</sup> *Ibid.*

**Fig. 3: Location of Transmission Lines. Source: IDB**



#### **IV | Detriment to the Requesters**

14. Several requester communities have already been affected adversely, directly, and materially due to the Project, while others will be, if no corrective action is taken. In general terms, these impacts arise from everything involved in assembling the infrastructure necessary both for the wind farm and for the transmission lines, which will be done on the communities' lands. In addition, various impacts will derive from the operation *per se* of the access routes and wind turbines on these lands. It must be noted that

the impacts to be described could have been prevented by holding consultations with the communities, which never occurred in due time and manner.

15. *Prima facie* and without prejudice to other impacts as the Mechanism may determine in due course, the communities are facing and/or will face the impacts indicated below. These impacts are occurring and/or would occur as a corollary to the failure to comply with the social and environmental safeguards contained in the following Operational Policies: (1) OP-102 Access to Information; (2) OP-703 Environment and Safeguards Compliance Policy; (3) OP-704 Disaster Risk Management Policy; (4) OP-765 Indigenous Peoples Policy (Indigenous Policy); (5) OP-710 Involuntary Resettlement. Specifically, this Request addresses failure to comply with the Indigenous Policy.

- (i) *System of self-government and physical integrity.* 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 have affected and continue to affect both the system of self-government and the physical integrity of all the communities and their leaders. For example, on 21/01/2012, the Mayor of San Dionisio del Mar threatened community members and inhabitants of San Dionisio del Mar (article from the newspaper, *La Jornada*, attached).<sup>10</sup> On 14/05/2012, the Governor of Oaxaca even threatened them with bloodshed, saying: "blood could flow if you don't stop being so stubborn" (article from *La Jornada* attached).<sup>11</sup> These threats have entailed: (1) more than 40 indigenous people subjected to a criminal proceeding for various complaints filed by the Mayor and his collaborators<sup>12</sup> (list of complaints attached);<sup>13</sup> (2) basic services cut off for indigenous community members who speak out against the Project—e.g., medical services, ambulance service, government social subsidies to women and the elderly; (3) physical attacks on community authorities who question the Project—for example, on 25/08/2012, a community member seeking to defend his territory was brutally beaten by a sympathizer of the Mayor, and once taken to a clinic was denied any medical treatment.

We have been informed of: (1) similar actions perpetrated against leaders and members of other requester communities, particularly against San Mateo del Mar; and (2) known hit men looking for the most prominent leaders of the communities. Note that the Office of the Ombudsman for Human Rights of the People of Oaxaca issued an early warning, due to attacks on a caravan of people from other communities who were headed to the community of San Dionisio del Mar to provide support in the serious situation that community is facing (article from

<sup>10</sup> Annex 2: *La Jornada*, Assembly of San Dionisio del Mar forced the municipio to tear up the document signed, 24/01/2012.

<sup>11</sup> Annex 3: *La Jornada*, "Denuncian comuneros ikoots amenazas del gobernador de Oaxaca" [Ikojts community members report threats from Governor of Oaxaca], Gabino Cue, 09/08/2012.

<sup>12</sup> *Ibid.* (indicating that at the meeting of 14/05/2012, the Governor of Oaxaca threatened that he "could enforce the more than 40 arrest warrants he held" for criminal complaints against the community members opposing the wind farm on the Barra de Santa Teresa).

<sup>13</sup> Annex 4: List of community members and inhabitants of San Dionisio del Mar subject to criminal complaints.

*Oaxaca Entrelineas* attached).<sup>14</sup> All this indicates an immediate need to prevent greater damage to the communities' system of self-government and to their representatives.

- (ii) *Land, territory, and resources.* Both the assembly and the use of the infrastructure needed for the transmission lines and the wind farm will affect the special relationship that the communities maintain with their territories—these include lands, lagoons and sea around the Barra (*see* paragraphs 3-7). It should be noted that these communities have collective rights over their lands as officially recognized by Mexico (collective “ejidos”). It should be added that based on this interference a domestic court was led to order the outright suspension of licenses and permits government agencies granted for this Project, precisely due to violation of the Community of San Dionisio Del Mar's collective rights of ownership, possession, and use over their lands in the Barra (*See* Section XIV).

Lastly, construction of transmission lines, expansion of existing access routes, and construction of new access routes is estimated to entail: (1) the partition of community lands and change in their traditional use; (2) trespass and invasion of indigenous lands, (3) accelerated acculturation—loss of identity and customs in community members due to the entry into their territories of third parties bringing other cultural values; and (4) social impacts on children and adults unaccustomed to vehicular traffic and the transport of heavy machinery, among other impacts.

- (iii) *Way of life, cultural integrity, and traditional knowledge.* Both the wind farm and the transmission lines will affect the particular cultural heritage of these communities, whose way of life and traditional knowledge are based on their characteristic adaptation to the maritime to continental transition environment (*See* paragraphs 2-4). Special consideration should be given to sacred sites and pilgrimage routes on the Barra and other Project areas, which play a central role in the cultural and spiritual life of the communities.
- (iv) *Environment and biodiversity.* This is a Category “A” project. The wind towers/turbines are estimated to produce considerable adverse effects on the rich biodiversity both in the lagoons (Upper Lagoon and Lower Lagoon) and in the maritime zone adjacent to the Barra. Mexico recognizes these areas as priority conservation zones based on their biodiversity. The plant life on the Barra will be considerably affected, in that each wind tower needs 2,000 squares meters of vegetation-free land around it. It is expected that herbicides will be used to achieve this. Note that the Barra is weak in terms of soil layers and is approximately 108 meters wide, so that it is imperative to evaluate cumulative effects on the Barra. There are 200 meters between one tower and the next and access routes must be added to this, so that the impact will be more than invasive of the plant habitat and land animals.

Related to the above, there will be adverse impacts on migratory birds colliding with the wind turbines—the Isthmus has been classified by Birdlife International

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<sup>14</sup> Annex 5: *Oaxaca Entrelineas*, “Emite Ombudsman alerta temprana por “caravana de solidaridad” a San Dionisio del Mar, en el Istmo de Oaxaca” [Ombudsman issues early warning on “solidarity caravan” to San Dionisio del Mar, on the Isthmus of Oaxaca], 10/10/2012.



as an endemic bird area. A specific bat species (lesser long-nosed bat) will be considerably affected because it is on the list of vulnerable species, and impact on this species has not been considered in the Project's public documents. Note that in the context of the study for another wind project being carried out in Juchitán de Zaragoza, Oaxaca, the World Bank has identified considerable adverse impacts on the environment and biodiversity.<sup>15</sup>

Lastly, adverse impacts are expected on the land, lagoon, and maritime flora and fauna based on transmission lines to be constructed above ground (due to soil erosion, noise, dust, and interruption of normal animal movement), particularly the floor of the lagoon. Note that on 23/08/2012, the Mareña Renovables wind company entered the Barra, particularly San Dionisio del Mar, through a neighboring community, to begin construction of the wind farm, clearing the mangroves and irreparably harming the lagoon area.

- (v) *Food security and traditional subsistence economy.* Fishing is the subsistence and economic activity these communities have carried out since their millennial settlement on the Isthmus. It is estimated that the transmission lines running under the lagoon and the wind turbines will irreversibly affect the Barra, which is formed by a sensitive sandbar and mangroves dividing the lagoons. This will undoubtedly affect its fragile ecosystem consisting of the biological cycle of the fish, shrimp, and plankton typical of the lagoons and sea adjacent to the Barra. All of this will adversely and directly affect both the source of food and the source of income for the members of these communities. Note that these communities are very poor.

## V | Earlier efforts to call Management's attention to the situation

16. We have been informed that the communities have been calling IDB Management's attention to the situation since early October, in that the communities' representatives have contacted Bank officials to arrange a face-to-face meeting to discuss their concerns regarding the Project.

17. The latest call for Management's attention was a meeting held on 09/11/2012 at the Bank's offices in Mexico City. An article from *La Jornada* is attached.<sup>16</sup> The communities' representatives met with: (1) Mercedes Araoz, IDB Representative in Mexico; (2) Miguel Coronado, Operations Chief; (3) Jeff Easum, Project Team Leader; (4) Maria Elena Castro, Social Sector Specialist; and (5) Valeria Enríquez, Civil Society Liaison. In addition, the following staff from IDB headquarters in Washington, D.C. attended the meeting via teleconferencing: (1) Genevieve Beaulac, Environmental and Social Safeguards Unit; and (2) Rachel Robboy, Structured and Corporate Financing Department. At this meeting, the communities' representatives delivered to these officials a document signed by two thousand community members, explaining their reasons for

<sup>15</sup> World Bank, Energy Unit, Sustainable Development Department Latin America and the Caribbean Region, *Greening the Wind: Environmental and Social Considerations for Wind Power Development in Latin America and Beyond*, June 2011, Annex 1: Case study, Mexico La Venta II Wind Power Project, pp. 104-107.

<sup>16</sup> Annex 6: *La Jornada*, "'Ignora' funcionaria del BID argumentos contra parque eólico" [IDB official 'unaware' of arguments against the wind farm], 10/11/2012.

rejecting the Project.<sup>17</sup> That document is attached.<sup>18</sup> They also stated that their communities were never consulted regarding the Project and, when the IDB representatives were asked for documentation on any consultation, all dialogue shut down and the communities' representatives were not provided with any documentation.<sup>19</sup> It should be noted that this would seem to violate safeguards contained in Operational Policy OP-102 on Access to Information.

18. More than a month and a half has passed since that meeting without any response from Management. In fact, Bank officials have still not shared with the representatives any documentation on any consultation with the communities, or any minutes from the meeting indicated above, even though the representatives have been promised those minutes. It should be added that, since that meeting, those officials have exhibited a "closed and high-handed" attitude regarding the concerns of the communities' representatives.<sup>20</sup>

## EXCLUSIONS

19. As explained below, none of the exclusions established in Section 37 et seq. of the Mechanism Policy affects this Request.

## VI | Responsibility of third parties

20. The effects on the requester communities indicated in Section IV are due to omissions by the Bank as indicated below. These omissions occurred both during the design of the Project and when initiating its implementation and are determinants of the Bank's liability. As indicated above, this Request pays particular attention to failure to comply with the Indigenous Policy. All this is without prejudice to other omissions and/or actions attributable to the Bank, such as failure to comply with other Operational Policies indicated here (*See* Section IV) that the Mechanism may identify in due course.

21. Regarding the design of the Project, we note failure to comply with these safeguards:

- (i) *Absence of preliminary consultations with indigenous communities.* The requester communities were not consulted regarding this Project. The Bank has failed to require and verify that these consultations were appropriately carried out since the initial phases of the Project cycle—i.e., the design phase. Note that in early August 2011 (three months before the Bank approved the Project), the communities began to speak out against the Project—i.e., the Community of San Dionisio del Mar.

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<sup>17</sup> *Ibid.*

<sup>18</sup> Annex 7: Communities Document, 03/11/2012.

<sup>19</sup> *See* Annex 6.

<sup>20</sup> *Ibid.*

Relevant community minutes are attached.<sup>21</sup> Thus, the failure to require and verify these consultations deprived the Bank of relevant information when the time came to approve the Project.

Everything presented above clearly refutes the assertion reflected in the public documents of the Project indicating that: (1) consultations were held during the Project preparation phase;<sup>22</sup> and that (2) there is no opposition to the Project among the “indigenous groups.”<sup>23</sup> If these last two points were true, as the Project documents would have it, we would not now be dealing with the considerable adverse impacts mentioned (See Section IV) or legal actions submitted at the national and international level to protect both the communities’ collective rights over their lands and the right to life and personal integrity of their members (See Section XIV).

This omission in itself already involved a failure to comply with the Indigenous Policy. This is because that omission precluded any inclusion of suitable measures to prevent and/or minimize potential adverse and particularly significant impacts in the context of the Project design.<sup>24</sup> It is for this reason that now, at the start of the Project implementation phase, both the Project Proponent and the Bank are already facing considerable and undeniable adverse impacts (*See* Section IV).

- (ii) *No comprehensive assessment of the seriousness of adverse impacts on the communities.* The Bank failed to require a serious assessment of adverse impacts on the communities potentially affected by construction of transmission lines, expansion of existing access routes, and construction of new access routes. The Bank’s own public document erroneously identifies only the area where the wind farm will be constructed as a direct area of influence, overlooking the area where the transmission lines will be constructed.<sup>25</sup> That document even expressly recognizes that the specific impacts on the area of the transmission line are completely unknown.<sup>26</sup>

The above leads to a failure to identify, in a timely and effective way, the *direct* adverse impacts on the communities located where the transmission lines will be constructed. In violation of the Indigenous Policy,<sup>27</sup> this omission by the Bank

<sup>21</sup> On 02/08/2011, the Community of San Dionisio Pueblo Viejo held an Assembly in which it decided on total rejection of the Project. It should be emphasized that, besides community members and inhabitants of San Dionisio Pueblo Viejo, those in attendance included municipal authorities, assistants of the Communal Properties Commission, and members of the Assembly. Annex 8: Minutes from the Community of San Dionisio Pueblo Viejo, 02/08/2011. On 19/08/2011, a General Assembly met in the Community of San Dionisio del Mar, with its two Municipal Agencies: Pueblo Viejo and Huamuchil, the Mayor, the Treasurer, the Municipal Secretary representing the Mayor, during which the people decided against the Project in the Barra. Annex 9: Minutes from the Community of San Dionisio Pueblo Viejo, 19/08/2011.

<sup>22</sup> IDB, Environmental and social management report (ESMR), *supra* nota 8, paragraph 64.

<sup>23</sup> *Ibid.*, paragraph 73.

<sup>24</sup> IDB, Indigenous Peoples Policy OP-765, July 2006, Section IV: Safeguards in Bank operations (indicating specific safeguards against adverse impacts).

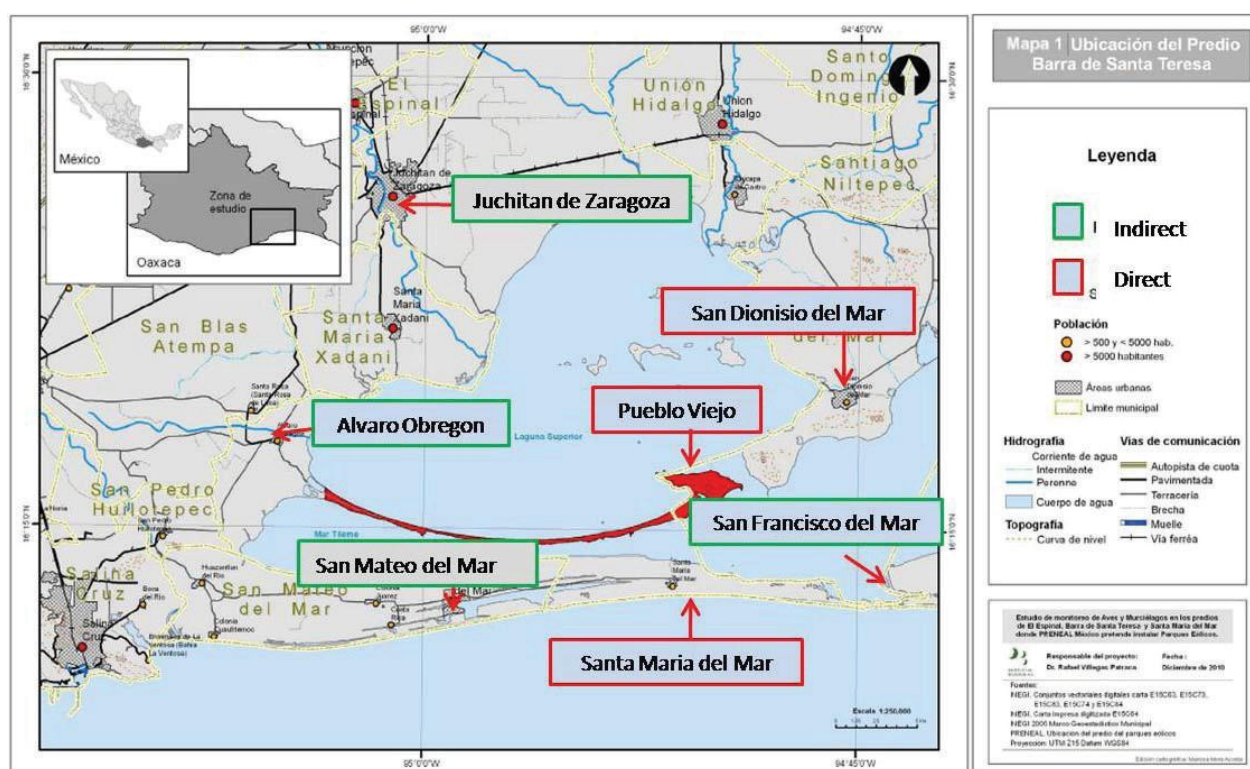
<sup>25</sup> IDB, Environmental and Social Management Report (ESMR), *supra* nota 8, paragraph 12.

<sup>26</sup> *Ibid.*, paragraph 30.

<sup>27</sup> IDB, Indigenous Peoples Policy OP-765, *supra* note 24.

deprives those communities of due protection. Clearly, this will not adequately prevent or mitigate the adverse impacts indicated. (See Section IV).

**Fig. 7: Direct and Indirect Area of Influence of the Project. Source: IDB**



22. Project implementation failed to comply with these safeguards:

- (i) *No consultations with the communities.* The Bank failed to confirm that consultations were conducted with the affected communities after approval of the Project on 23/11/2011.

The Communities were never consulted at this stage of the Project. Thus, for example, the Bank has not noticed that, contrary and subsequent to the prior decision made by the Community of San Dionisio del Mar against the Project (19/08/2011),<sup>28</sup> the Mayor of San Dionisio del Mar, on his own initiative, authorized the Project Proponent to change the soil use on the Barra (21/01/2012).<sup>29</sup> Hours after that authorization and on the same date, at a meeting with the people of San Dionisio del Mar and the representatives of the Project Proponent, the Mayor revealed that unilateral decision, provoking discontent among the people. As a result, the Mayor had to tear up the document with the authorization in question, and the people demanded that its decisions be respected thereafter. The related Minutes of the Agreement is attached.<sup>30</sup>

<sup>28</sup> See available information at note 21.

<sup>29</sup> See Annex 2.

<sup>30</sup> Annex 10: Agreement Minutes, 21/01/2012.



Due to the Mayor's unilateral authorization, on 06/02/2012 the community filed a motion with the Congress of Oaxaca to revoke the mandate of the Mayor, regarding which no decision has yet been made. The motion is attached.<sup>31</sup> Since then, community members who have demonstrated against the Project have been subject to threats, intimidation, and judicial prosecution (See Section IV). This is so much the case that at a meeting with the Project Proponent and Oaxaca officials on 07/11/2012, members of the community pleaded that criminal proceedings not be filed against them. Minutes are attached.<sup>32</sup>

Undoubtedly, this omission entailed a failure to comply with the Indigenous Policy in that, when starting to implement the Project, key consultations with the communities on potential adverse impacts were not verified,<sup>33</sup> nor was evidence demanded regarding agreements reached with the respective communities regarding particularly significant adverse impacts.<sup>34</sup> Clearly, we disagree with the conclusion regarding "absolute compliance" with the Indigenous Policy set forth in the Project document.<sup>35</sup> Under no circumstances can the apparent individual agreements reached regarding "usufruct rights" with a few members of some communities<sup>36</sup> be equated with the collective consensus of all the requester communities regarding the implications of the Project as a whole, particularly regarding its adverse impacts. For obvious reasons, isolated communications regarding individual agreements on "usufruct rights" can never be equated with a process of consultation with the communities regarding the collective adverse impacts of the Project including such agreements.

23. Lastly, after studying the effects on the requesters and the Bank's omissions, it becomes relevant to ask ourselves whether we are dealing with a Project that excludes the Ikojts and Binniza communities from its benefits for ethnic reasons. Note that in all the public documents of the Project not one reference is made to the indigenous communities as beneficiaries of the Project's benefits in terms of wind energy. However, there is considerable emphasis on the benefit that the Project would provide for private sector companies in this area. If this is true, in accordance with the Indigenous Policy, the Bank should never have financed this Project.<sup>37</sup>

## VII | Relation to host country laws or policies

24. This Request does not call on the Mechanism to consider any matter related to the laws, policies, or regulations of the State, borrower, or executing agency. Note that the

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<sup>31</sup> Annex 11: Motion to Revoke Mandate, 06/02/2012.

<sup>32</sup> Annex 12: Minutes of requester communities, 07/11/2012.

<sup>33</sup> IDB, Indigenous Peoples Policy OP-765, *supra* note 24, Section V: Implementation (indicating the operational measures for the approval, execution, and supervision of Bank projects).

<sup>34</sup> *Ibid.*

<sup>35</sup> IDB, Environmental and social management report (ESMR), *supra* note 8, paragraph 73.

<sup>36</sup> *Ibid.*, paragraph 73.

<sup>37</sup> IDB, Indigenous Peoples Policy OP-765, *supra* note 24, Section V: Implementation (indicating the operational measures for the approval, execution, and supervision of Bank projects), p. 9.

motivation for this Request is clearly the Bank's failure to verify strict compliance with its relevant Operational Policies.

## **VIII | Actions that do not relate to the Bank-financed operation**

25. Absolutely all of the actions made known to the Mechanism by means of this Request are strictly related to the Bank-financed Project.

## **IX | Procurement decisions or processes**

26. None of the actions addressed in this Request relates to procurement decisions or processes.

## **X | Matter already reviewed by the Mechanism**

27. The matter presented for the Mechanism's consideration has not yet been reviewed.

## **XI | Request filed more than 24 months after the last disbursement**

28. We do not know the date of the last disbursement or whether or not there are pending disbursements to be made by the Bank. This is because such information is not public. We only know the Project approval date (23/11/2011) as well as the amount financed by the Bank (US\$74.99 million).<sup>38</sup>

## **XII | Questions of ethics or fraud by Bank employees**

29. None of the actions submitted for consideration by the Mechanism relates to questions of ethics, fraud, or corruption of Bank employees. Neither are there any other matters subject to the scrutiny of other Bank bodies.

## **XIII | Request without substance**

30. Under no circumstances can this Request be considered without substance or intended to gain a competitive business advantage. On the contrary, as indicated in the reasons presented in the area of impacts on the requester communities and omissions by the Bank, among other sections of this Request, this involves a Bank-financed operation where there has been a failure to verify compliance with existing social and environmental safeguards in applicable Operational Policies both in the preparation phase and in the implementation of the Project.

## **XIV | Issues under arbitral or judicial review**

31. None of the issues raised in this Request is under arbitral or judicial review by national, supranational, or similar bodies that would bar action by the Mechanism.

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<sup>38</sup> IDB, ME-L1107: Mareña Renovables Wind Project – Project Description, *supra* note 2.

However, due to the violations of rights that implementation of the Project is producing to the detriment of the requester communities, legal actions have been filed at the national and international level. As explained below, none of these actions bars action by the Mechanism, because there is no identity of parties, object, and legal basis between these actions and this Request. The analysis of these three elements is not capricious; on the contrary, it reflects a normal test used by the courts to determine whether *litispendencia* exists between one proceeding and another.<sup>39</sup>

*“Amparo” petition for constitutional relief before domestic court*

32. Firstly, members of the Community of San Dionisio del Mar first filed an “amparo” petition for constitutional relief last month with the Seventh District Court of Oaxaca. On 06/12/2012, the Court granted interim equitable relief in favor of San Dionisio del Mar within the context of this amparo proceeding. The decision is attached.<sup>40</sup> Note that the Court 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 [petitioners] of the agrarian properties, with respect to the lands located on the Barra Santa Teresa covering an area of 1,643 hectares, 46 ares, and 72,768 centiares.”<sup>41</sup>

33. In the event that this appeal proceeding is considered pending, it should be emphasized that: (1) there is *no* identity whatsoever between that proceeding and this proceeding before the Mechanism for the reasons explained below; and (2) under no circumstance can consultation and/or verification by the Mechanism interfere in the amparo proceeding, considering the interim equitable relief already granted. Note that in similar situations but with two pending judicial proceedings (one similar to amparo) in Colombia, the Project Ombudsperson proceeded with the Consultation Phase, inasmuch as there was no possibility of reciprocal interference.<sup>42</sup>

- (i) The parties involved are not the same. Only one community filed the amparo petition (San Dionisio del Mar),<sup>43</sup> *not* the seven requester communities. Indirectly,

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<sup>39</sup> See, Case Baena Ricardo et al. v. Panama, Inter-American Court of Human Rights (Ser. C No. 61), 18/11/1999.

<sup>40</sup> Annex 13: Armando Olivera Pérez et al. for amparo, Seventh District Court of the State of Oaxaca (No. 20667), 06/12/2012.

<sup>41</sup> *Ibid.*, p. 12.

<sup>42</sup> Project Ombudsperson, Assessment report. San Francisco–Mocoa Alternate Road Construction Project, CO-MICI001-2011, Dec. 2011, pp. 30-31.

<sup>43</sup> Annex 13, p. 1-4.

the amparo petition was brought against 12 government agencies,<sup>44</sup> *not* against the Project Proponent *nor* the Bank.

- (ii) The object is not the same, either, “object” being understood as the facts and events of the case.<sup>45</sup> The amparo proceeding addresses only events that occurred in a specific period of time, consisting of the acts of State agencies (licenses and permits) that infringed on the collective rights of San Dionisio del Mar over its lands.<sup>46</sup> In contrast, the proceeding before the Mechanism covers a longer period of time, inasmuch as it addresses: (1) events prior to the acts of those state agencies—i.e., the design of the project by the Proponent, approval and disbursements made by the Bank; (2) events subsequent to the acts of State agencies in question—i.e., requester communities’ efforts to call Bank Management’s attention to the matter, and any response by Management, *inter alia*.
- (iii) The legal basis is not the same—“legal basis” being understood as legal arguments and violations of rights.<sup>47</sup> The arguments made in the amparo petition are based on protecting the right of ownership, possession, and special protection for the lands, territories, and natural resources of San Dionisio del Mar, which are protected by the Mexican Constitution and treaties ratified by Mexico.<sup>48</sup> The legal basis of this proceeding before the Mechanism lies in preventing further damage to the requester communities in the light of the social and environmental safeguards contained in the relevant Operational Policies, such as prior consultation with indigenous communities as argued in this Request, among other safeguards cited herein.

34. Lastly, it should be emphasized that the amparo proceeding should be seen by the Mechanism as a key factor for taking action on this Request, and *not* as an obstacle. This is because the interim equitable relief ordered by the domestic court, an independent Mexican body, clearly shows the rights violation that mere permits and licenses granted by state agencies produce to the detriment of the communities. Note that the judicial decision

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<sup>44</sup> These agencies are: (1) the Energy Regulatory Commission; (2) the Department of Communication and Transportation (SCT); (3) the General Directorate of Ports of the SCT; (4) the Department of the Environment and Natural Resources (SEMARNAT); (5) the General Directorate of the Federal Sea, Land, and Coastal Environments Zone of SEMARNAT; (6) the General Directorate for Forest and Soil Management of SEMARNAT; (7) the National Water Commission (CNA); (8) the General Technical Subdirector of CNA; (9) the SCT Delegation in the State of Oaxaca; (10) the Federal Delegation of SEMARNAT in the State of Oaxaca; (11) the General Directorate of Environmental Impact and Risk of the Office of the Undersecretary of the Environment and Natural Resources in the State of Oaxaca; and (12) the Municipal Council of San Dionisio del Mar, Oaxaca. *Ibid.*, pp. 4-5.

<sup>45</sup> Case Baena Ricardo et al. v. Panama, *supra* note 39, p. 53.

<sup>46</sup> Armando Olivera Pérez et al. for amparo, *supra* note 40, p. 12.

<sup>47</sup> Case Baena Ricardo et al. v. Panama, *supra* note 39, p. 53.

<sup>48</sup> Armando Olivera Pérez et al. for amparo, *supra* note 40, pp. 5-8.



in question was made in accordance with the Mexican Constitution,<sup>49</sup> as well as other domestic laws and treaties ratified by Mexico.<sup>50</sup> Clearly, these must be taken as assumptions relevant to negligence by the Bank in not verifying strict compliance with the safeguards contained in relevant Operational Policies. Failure to consider this Request by the Mechanism would connote, *inter alia*, questionable support for violation of the rule of law in the country where the Financed Operation is taking place.

*Request for interim equitable relief submitted to the Inter-American Commission on Human Rights*

35. Secondly, in August 2012 members of the Community of San Dionisio del Mar filed a request for interim equitable relief with the Inter-American Commission on Human Rights (Commission). This request is still under review.

36. As we indicated above, there is no identity whatsoever between the interim equitable relief proceeding before the Commission and this proceeding before the Mechanism. Note that interim equitable relief from the Commission did not represent an obstacle preventing the World Bank Inspection Panel, another accountability mechanism similar to the Mechanism, from investigating the failure to comply with safeguard policies in a project proposed by Panama that affected the Ngabe and Naso indigenous communities.<sup>51</sup>

- (i) The parties involved are not the same. Only one community sought interim equitable relief (San Dionisio del Mar), *not* the seven requester communities. As required, the interim equitable relief was sought against Mexico as a federal state, *not* against the Project Proponent *nor* the Bank.
- (ii) The object is not the same, either. The object of the interim equitable relief is a series of events (intimidation, death threats, illegitimate use of public force in favor of the Project) that seriously threaten the life and personal integrity of the members of San Dionisio del Mar. In contrast, the facts put before the Mechanism address all those acts and omissions committed by the Bank in the light of relevant Operational Policies and throughout the Project cycle. These failures have caused, and continue to cause, harm to the detriment of the requester communities.

<sup>49</sup> See, Art. 14 “... No person shall be deprived of freedom, property, or rights without a fair trial before previously established courts, complying with the essential procedural formalities and according to laws issued prior to the event.” See also, Art. 16. “No person shall be in his private affairs, or his home invaded, without a written order from a competent authority, duly explaining the legal cause of the proceeding.” See all, Art. 27 “... VII. The legal personhood of “ejido” and communal population groups is recognized, and their ownership over the land is protected, whether for human settlements or for productive activities (amended by decree published in Mexico’s official gazette, *Diario Oficial de la Federación*, on 06/01/1992); The law shall protect the integrity of the lands of indigenous groups lands (amended by decree published in *Diario Oficial de la Federación* on 06/01/1992).”

<sup>50</sup> See, Art. 21 of the American Convention on Human Rights. See also, Arts. 13, 14, 15, 16, 17, 18, and 19 of Convention 169 of the International Labour Organisation concerning Indigenous and Tribal Peoples in Independent Countries. See also, Arts. 13, 14, 15, 16, 17, and 18 of the United Nations Declaration on the Rights of Indigenous Peoples.

<sup>51</sup> Inspection Panel, Investigation report. Panama: Land Administration Project (loan 7045-PAN), 16/09/2010, Annex 2, p. 117.

- (iii) The legal basis is not the same, either. The arguments presented in the interim equitable relief are based on the serious situation faced by San Dionisio del Mar, and on the urgent need to prevent violation of the right to life and personal integrity protected by the American Convention on Human Rights, ratified by Mexico. The arguments made in this Request before the Mechanism lie in the failure to comply with safeguards contained in relevant Operational Policies—e.g., the absence of prior consultation with the requester communities, *inter alia*.

### PETITION

37. Based on the foregoing, we request that the Executive Secretary and, through her, the appropriate person within the Mechanism:

- (i) Consider this Request filed in due time and form by the requester communities indicated in Section I of this Request;
- (ii) Recognize the representative appointed by the communities, as indicated in Section I, for all purposes of this proceeding before the Mechanism, the Project Ombudsperson, and the Panel;
- (iii) Recognize the request for confidentiality as to the identity of the representatives of the requester communities, as indicated in Section II;
- (iv) Immediately perform the administrative acts necessary for a prompt determination of eligibility of this Request by the Project Ombudsperson;
- (v) Determine this Request to be eligible for all administrative purposes in the Consultation and/or Compliance Review Phase, as soon as possible, for the reasons presented in the Chapters on Eligibility and Exclusions of this Request, among other reasons deemed necessary to investigate; and
- (vi) In due course, determine failure to comply with the Operational Policies mentioned in Section IV, and as a result (1) determine the social and environmental harm; (2) call for all disbursements by the Bank in favor of the Proponent of the Project to be halted; and (3) as the case may be, determine the compensation necessary for the affected communities, among other corrective and nonrepetition measures deemed relevant by the Panel.

Respectfully submitted,



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