

PUBLIC

DOCUMENT OF THE INDEPENDENT CONSULTATION  
AND INVESTIGATION MECHANISM

**ME-MICI002-2012**

**COMPLIANCE REVIEW REPORT**

**MAREÑA RENOVABLES WIND PROJECT**

**(ME-L1107)**  
**(2644/OC-ME)**

This document was prepared by Victoria Márquez-Mees, Director of MICI

Under the Access to Information Policy, this document is subject to Public Disclosure.



## **THE COMPLIANCE REVIEW PROCESS OF THE MICI**

The purpose of the proposed Compliance Review is to investigate the allegations of Requesters who claim that their rights or interests have been, or are expected to be, adversely affected in a direct, material, and substantial way by acts or omissions of the Inter-American Development Bank, as the result of the Bank's noncompliance with one or more of its Relevant Operational Policies in connection with the operation. The objective of the Compliance Review investigation is to establish whether (and if so, how and why) a particular act or omission of the Bank's with respect to the Bank-financed operation has resulted in a breach of its ROP, thus causing (real or potential) direct, substantial, and adverse effects on the Requesters.

Compliance Review is an exercise in factual investigation. It is designed to help the Board of Executive Directors promote the observance of the Bank's Operational Policies, reinforce the positive outcomes of development in Bank-financed operations, and foster institutional learning. The Compliance Review only address the Bank's compliance with the ROP, and does not draw any conclusions regarding the actions of any party other than the Bank in matters concerning the respective Bank-financed operation.

## **ACKNOWLEDGEMENTS**

The MICI wishes to thank the support and patience of the Requesters, the Client, Management and the Board of Executive Directors during this long investigative process that coincided with diverse institutional events at the Mechanism. This work would not have been possible without the collaboration of all Parties.

To the Requesters and their representative, Leonardo Crippa from Indian Law Center, we thank them for their trust, availability and support during the process. We wish to particularly acknowledge the help received from requesters and community members at the Tehuantepec Istmus during the investigative mission undertaken by the Panel members. Also, our thanks to Civil Society Organizations' representatives with whom we met and from whom we obtained different perspectives of the process.

To Management, our thanks because at every step, they maintained their willingness to meet with us, provide information and support our fact checking.

Also our thanks to the IDB Mexico Chair, and the Mexican Federal and State Officials for their openness and support for this process from the start.

We wish to thank the members of the Panel: Rosemary Brusewitz, Korinna Horta y Mario Epstein for their detailed investigative work. Also our thanks to case officers Ashley Morse and Julio Patiño who supported the processing of this case all through the Compliance Review Phase. Without doubt, our acknowledgement to the all staff at MICI for their support in the process who in their different roles helped achieve this outcome.

In sum, the MICI recognizes the environment of collaboration, support and institutional maturity that allowed this indagatory process to take place and hopes that its results add to the richness that the Bank's work provides to the Latin America and Caribbean Region.

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Annex II	Requesters' Observations to the Preliminary Draft of the MICI's Compliance Review Report on the Mareña Renovables Wind Project (ME-L1107) in Mexico

### ELECTRONIC LINKS

1. Request filed by the Indian Law Resource Center on behalf of the Requesters  
<https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=37520692>
2. Determination of Eligibility for the Consultation Phase  
<https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=38811285>
3. Determination of Eligibility for the Compliance Review Phase  
<https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=38068277>
4. Recommendation for a Compliance Review and Terms of Reference for Loan 2644A/OC-ME  
<https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=39499203>
5. Project Abstract – Mareña Renovables  
<https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=36416890>
6. Environmental and Social Strategy (ESS) – Mareña Renovables  
<https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=36416994>
7. Environmental and Social Management Report (ESMR) – Mareña Renovables  
<https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=36537741>
8. Presentation for communities  
<https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=37531846>
9. Compliance Review Mission Agenda  
<https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=40395187>
10. Bibliography  
<https://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=40381701>

## ACRONYMS AND ABBREVIATIONS

APIITDTT	Assembly of Indigenous Peoples of the Isthmus of Tehuantepec in Defense of Land and Territory
CAP	Corrective Action Plan
CFE	Federal Electricity Commission
Client	Mareña Renovables Capital SAPI de CV SOFOM WNR and/or Macquarie Mexican Infrastructure Fund
EA	Environmental Assessment
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
ERM	Environmental Resources Management [consulting company]
ESAP	Environmental and Social Action Plan
ESG	Environmental Safeguards Unit of the IDB
ESMP	Environmental and Social Management Plan
ESMR	Environmental and Social Management Report
ESS	Environmental and Social Strategy
FEMSA	Fomento Empresarial Mexicano
IDB	Inter-American Development Bank
IIE	Electrical Research Institute
ILO	International Labor Organization
INAH	National Institute of Anthropology and History
INEGI	National Institute of Statistics and Geography
ISMP	Integrated Social Management Plan
LAWEA	Latin American Wind Energy Association
MICI	Independent Consultation and Investigation Mechanism
OR	Operating Regulations
OS	Open Season
PROCEDE	Program for the Certification of Ejido Land Rights and the Titling of Urban House Plots
Project	Mareña Renovables Wind Project, which includes the San Dionisio and Istmeño Wind Farms, the 52 km transmission line, the docking stations, and the access roads
QRR	Quality and Risk Review
RAN	National Agrarian Registry
ROP	Relevant Operational Policies
SCF	Structured and Corporate Finance Department of the IDB
SEMARNAT	Department of the Environment and Natural Resources
SSF	Safeguard Screening Form
TL	transmission line

## EXECUTIVE SUMMARY

### A. The Project

On November 23, 2011, the Bank's Board of Executive Directors approved the loan for the "Mareña Renovables Wind Project" (ME-L1107), financed under the Bank's private sector window. The project consisted of the construction and operation of the 396 MW "Mareña Renovables Wind Power Project" in the La Ventosa region of the State of Oaxaca in Mexico, which has some of the best wind energy resources in the world. The project would supply electricity to private companies under a legal arrangement of self-supply. At the time of its preparation and approval, the project was the second self-supply project to be financed starting with the construction, as well as the largest wind energy project to be developed in Latin America.

The project design includes two proposed wind farms "San Dionisio" and "Santa María" (previously called Istmeño) located in neighboring communities: San Dionisio del Mar, located in an area referred to as Barra de Santa Teresa, and Santa María del Mar, located in the Isthmus of Tehuantepec. The project consisted of five components: (1) erection of 132 Vesta V90 wind turbines with a capacity of 3 MW each (102 in San Dionisio and 30 in Santa María); (2) construction of three substations: Virgen del Carmen in Santa María and Tileme in San Dionisio, which will be connected by a submarine cable (less than 1 km long), and one substation in Santa Teresa; (3) construction of a 52 km transmission line from the Santa Teresa substation to the CFE substation in Ixtepec, to be connected to the national grid; (4) installation of six docking stations to facilitate maritime access to both sites; and (5) civil engineering works such as the construction of new access roads and improvement of existing ones.

The project was classified as a Category "A" operation in view of the high likelihood of significant negative environmental impacts and associated social impacts.

### B. The Request

The MICI received the request on December 26, 2012, which was filed by Mr. Leonardo Ariel Crippa on behalf of 232 residents of seven communities of the Isthmus of Tehuantepec: Santa María Xadani, San Mateo del Mar, Colonia Álvaro Obregón, San Francisco del Mar, San Dionisio del Mar, Juchitán de Zaragoza, and Unión Hidalgo. The Requesters asked that their identities be kept confidential for fear of retaliation and coercion.

The Requesters alleged that they have suffered, and continue to suffer, incremental harm to their traditional culture and their way of life as a consequence of the planning, construction, and future operation of the project in five aspects:

- a. **System of self-government and physical integrity.** The request asserted that various members and leaders of San Dionisio del Mar and San Mateo del Mar had had their safety threatened, had been cut off from access to basic services, and even had been physically attacked because of their opposition to the Project.
- b. **Land, territory, and resources.** The Requesters alleged that the construction and operation of the project would affect the special relationship that the communities maintain with their territories, which include land, lagoons, and the ocean. They additionally



maintained that the construction of the transmission lines and the expansion of existing access routes would lead to the partitioning of communal lands and changes in their traditional use; the infringement and invasion of indigenous lands; the loss of identity and customs among members of the communities due to the migration of third parties with different cultural values, and social impacts arising from vehicular traffic and the transport of heavy machinery.

- c. **Way of life, cultural integrity, and traditional knowledge.** The request alleges that the project would affect the cultural heritage of the local communities. The Requesters also expressed fear that the construction and operation of the project on these lands would directly affect all of the indigenous communities because it would limit their access to the land; this would affect their cultural integrity because Barra de Santa Teresa and Punto Tileme are meeting places for the celebration of traditional ceremonies, and the sacred lands would be violated.
- d. **Environment and Biodiversity.** The Requesters maintained that the construction and future operation of the project would cause environmental harm in an area of rich biodiversity, resulting in material adverse effects on their lands and their way of life, which depends in large part on fishing in nearby lagoons. They stated that mangroves had been destroyed, causing irreversible harm to the lagoon area.
- e. **Food security and traditional subsistence economy.** The request stated that fishing—a subsistence activity in the communities—would be irreversibly affected by the transmission lines running under the lagoons and the wind turbines. This would exacerbate the poverty that already exists in the area.

### C. Processing by the MICI

On December 1, 2014, the Bank's the Board of Executive Directors approved in a formal session the Recommendation for a Compliance Review and Terms of Reference which focused on determining the Bank's compliance with Policies OP-703, OP-102, and OP-765 within the framework of the operation in question and any potential connection to the harm alleged by the Requesters.

Processing by the MICI consisted of carrying out the investigation from January to September 2015, by a Panel composed of Mary Rose Brusewitz as Chairperson, Korinna Horta, and Mario Epstein, assisted by personnel from the Secretariat of the MICI. The investigation involved: i) a detailed study of the Bank's records relating to the project; ii) interviews with Bank staff in Washington, D.C. as well as in Mexico, City; iii) the review of documentation relevant to the case, including both internal Bank documents and outside documents, and iv) a country mission to Mexico from March 22 to April 2, 2015. The mission included visits to the project area and the towns located within its area of influence, meetings with Requesters, members of the affected population, and local and international civil society organizations, as well as meetings with the Client, officials from the Federal Departments of Energy, Environment, and Treasury, and officials from the State Secretariats of Government and Indigenous Rights of the State of Oaxaca.

In the second stage, from September 2015 to March 2016, the Director of MICI, Victoria Márquez-Mees, worked on the completion of the the Compliance Review Report. Under the Policy Establishing the MICI (GN-1830-49) in April 2016, the draft version of this Report was circulated a 45 calendar-day period to Management and the Requesters for comments (see Annexes I and II). Upon receipt of these inputs, adjustments considered relevant by the MICI were made in the final document. The Report was then translated to English and distributed to the Board of Executive Directors for consideration.

## D. Principal Findings

Details of the findings can be found in Section II.The Investigation of this Report. Notwithstanding, for summary purposes, the table below shows the main findings:

**Summary of Main Findings**

Operational Policy	Findings
Environment and Safeguards Compliance (OP-703)	<p><b>The Bank complied totally or partially with the obligations set in directives B.2, B.3, B.5 and B.7 of OP-703.</b> It must be underscored that the Bank complied by classifying the operation as a Category “A” Project. Also, it complied in requiring the Client to produce environmental and social studies compatible with said Category “A”nd which constituted a robust frame of environmental risk management.</p> <p><b>However, it did not comply totally or partially with the obligations set in directives B.2, B.3, B.4, B.5 and B.6 of OP-703</b> in relation to the timely availability of information, the setting of adequate conditions to undertake the public consultations required for a category “A” project and for informing how the Project would address the environmental and social risks identified as fundamental to the communities of the area.</p> <p>In a related fashion, it failed to identified non-compliance with local legislation and failed to enforce the Client’s compliance with local norms.</p> <p>As regards the identification of social risks and Client capacity to manage said risks, the Bank failed to identify in a timely fashion the conflictivity of the area and the impact it could have in the Project’s viability. Due to this, the mitigation actions that it eventually tried to implement were reactive, insufficient and untimely.</p>
Access to Information (OP-102)	<p><b>The Bank did not comply with the obligation of disclosing the environmental and social Information of the Project</b> which are of compulsory disclosure for non-sovereign guaranteed operations.</p> <p>In particular, of a total of <b>22</b> documents that constituted the environmental and social framework of the Project, only <b>5</b> were disclosed in the Bank’s website and of those five, access to one of the them had not been enabled.</p>
Indigenous Peoples (OP-765)	<p><b>The Bank did not comply with the obligation of</b> ensuring that good faith consultation and negotiation processes with the affected indigenous groups took place and sensitive to the sociocultural context, by only partially disclosing the scope of the Project, excluding the social impact assessments and its mitigation plans.</p> <p>The disclosure of the limited amount of information publicly available to the communities was done after the Project was approved by the Board and therefore it would not be compliant with the principle of prior consultation set in ILO’s Convention 169, of which the country is a signatory. In addition, contact was centered on agrarian community leaders excluding other members of the communities and in contravention of the communal decision making structure of the indigenous peoples.</p> <p>In spite of the indigenous nature of the communities the information provided was not presented in culturally appropriate formats (language, disclosure methos and time provided for consideration).</p>

## E. Conclusions

The investigation found compliance failures and omissions with respect to various obligations contained in Operational Policies OP-703, OP-102, and OP-765. Those omissions resulted in the project being notable mainly for the opacity of its preparation and execution, in clear violation of the principles of transparency that distinguish the IDB Group. The Bank's Operational Policies clearly state the information disclosure obligations and the times at which such disclosure should occur; nevertheless, in the case of the "Mareña Renovables Wind Project," the Bank omitted to comply with them, and no legitimate reasons were found for such omission. The right to access to information imposes upon the States—and by extension upon entities such as the IDB Group that operate with public funds—the obligation to provide the public with the maximum amount of information proactively, at least with regard to: (a) proposals or investments, and (b) information required for the exercise of other rights.

Consultation is one of those rights whose exercise requires the disclosure of information; in the case of the Mareña Renewables Wind Project, the disclosure obligations established in the relevant operational policies were not complied with. Neither did the Bank comply with the provision of information in the places, languages and format that would allow for good faith negotiations and therefore it must be concluded that the consultation process did not adhere to the requirements of Policies OP-703 and OP-765.

Best practices in this matter establish that for a consultation to be effective, it must be based on the prior disclosure and dissemination of relevant, transparent, objective, meaningful and easily accessible information which is in a culturally appropriate local language(s) and format and is understandable to Affected Communities<sup>1</sup>.

The investigation confirmed the depth and breadth of the environmental analysis and the mitigation plans devised under the Bank's guidance. Nevertheless, with the exception of the effects on fishing activity, significant limitations were observed in the analysis of the social impact. This project was a first in multiple arenas: the largest in Latin America, the first located in close proximity to the ocean, the first to be built on land actively under communal management (not *ejido* land, as noted in the project documents) and the first to be inaccessible by land due to territorial conflict among communities. The identification of social impacts, the mitigation plan, the raising of awareness, and socioculturally appropriate consultation with the affected population was extremely important in a project of the scale, location, and historical context of the Mareña Renovables Wind Project.

The number of particular characteristics of the project, in addition to these omissions, resulted in the erosion of trust in the Huave communities with respect to the Client's ability and willingness to address the impacts that the project would create, and led some community members to oppose the project and file the complaint with the MICI.

In regard to the alleged harm to the biodiversity of the region, the MICI's findings with respect to the identification of environmental risks, their mitigation plans, lead to the inference that the project had a robust mitigation and compensation plan with respect to impacts on the area's flora and fauna; and

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<sup>1</sup> IFC, Performance Standards on Environmental and Social Sustainability, Consultation section, paragraph 30.

that correctly implemented, it would not only not have caused the harm alleged but would have also protected biodiversity better than before.

Regarding the alleged harm to food security, the MICI's findings identified that the Bank had given this issue high priority. When the project was suspended, it was in the process of finalizing, together with the Client, a compensation plan for fishermen to offset the negative impacts on fishing during the project's construction. Accordingly, regarding fishing as an income-generating activity, the MICI does not find that the identified instances of noncompliance gave rise to the harm alleged. Nevertheless, we must note that there was no specific mitigation/compensation plans prior to the approval of the project, or even for more than a year after that time. Not having information about how this would be addressed requires us to validate the presumption of harm to the communities regarding the impact of the project on their principal source of food and income.

We must also note that, in spite of identifying adverse effects on the communities' way of life, cultural integrity, and traditional knowledge, there were no specific plans to mitigate those risks. In particular, the Bank does not seem to have taken measures to ensure access to Barra for ceremonial purposes, nor to have any considerations with respect to the cosmovision of the indigenous communities and their connection to the water.

In view of the above, it is our opinion that the indigenous communities of the Isthmus do in fact face the risk of losing their identity and customs. This refers in particular to the loss of the principles of community governance and the common good in favor of development and decision-making schemes focused on the individual, which creates a gap between the beneficiaries (landowners) and non-beneficiaries (those who do not own land) of development. Nevertheless, we cannot say that this is a direct harm of the project; rather, it is due more generally to the intense and rapid wind development in the Isthmus region.

As to the threat to the physical integrity of the project's opponents, the MICI is of the opinion that this was not the result of the Bank's omissions with respect to its Operational Policies currently in force. The MICI has not found adequate provisions to guide Management's actions in situations of social conflict. Remaining on the sidelines as an observer of violent events is not the best alternative, and inaction could even exacerbate the social conflict.

## **F. Recommendations**

The MICI considers that the breadth of a compliance investigation process such as the one presented herein is not limited solely to reporting on the actions of the Bank with respect to a specific operation—although that in itself is highly valuable; rather, it is also useful to see the findings as knowledge tools and lessons that support the Bank’s continual improvement process. It is precisely within this framework that the MICI was created in 2010 as an outcome of the Agenda for a Better Bank. As Management notes in its response to this draft, there are areas that have been strengthened or that are in the process of being strengthened as a result of different experiences; others still require a little more attention.

In this spirit, two sets of recommendations are presented to the Board of Executive Directors for consideration: the first are recommended actions related to the project and the affected communities; the second set of recommendations are general in nature, and aim not only to promote lessons that can be extrapolated to future operations but also to ensure that compliance is ensured in the portfolio of existing projects before a case comes to the MICI.

### **Recommendations Specific to the Mareña Renovables Wind Project**

In the Projects section of the Bank’s website, the status and documentation of the Mareña Renovables Wind Project have been combined with those of the Eólica del Sur project, even though they are two totally different projects. We suggest creating two separate registries and reporting the current status of the Mareña Renovables Wind Project.

This report has noted the existence of a number of documents referring to the environmental and social assessment and mitigation plan that the Bank had required of the Client. We suggest publishing the 22 documents subject to mandatory disclosure in the new registry.

Clarify with the Client the status of the usufruct contracts with the communities of San Dionisio, Santa María, Charis Ejido, and Zapata Ejido, and urge them to clarify the situation with the communities, particularly with the community of Santa María, which was in favor of the project and has been directly affected by its suspension.

### **General Recommendations to the Bank**

Based on this report and the experience derived from other MICI cases, we underscore the importance of having solid capacity for the assessment of social impact. The Bank can improve its action and standardize accomplishments with respect to the assessment of environmental impact. The social license to operate—that is, the acceptance or approval of a project by a local community—is emerging as a critical factor for the success of development projects. Increasingly, companies view the attainment of the social license as an important aspect of the management of environmental and social risks. Furthermore, going beyond the minimum regulatory requirements is an important component of establishing a company’s reputation. We respectfully suggest taking measures to enhance the framework of the Operational Policies in their social perspective. The Bank has either prepared or supported excellent sources of guidance and reinforcement in this regard, such as the document for which it provided funding to have translated into Spanish, entitled “Social Impact

Assessment: Guidelines for assessing and managing the social impacts of projects,”<sup>2</sup> the purpose of which is to advise different actors on the best practices expected in social impact assessment and management processes, particularly in development projects; and the “Guidelines on Consultation and Stakeholder Engagement in IDB Projects” prepared by the Bank’s Environmental Safeguards Unit in July 2013. These documents, among others, could serve as a guide for a review of the directives and potentially of the Environment and Safeguards Compliance Policy (OP-703).

Regarding the Access to Information Policy (OP-102), we suggest including the timeline for the disclosure of certain documents consistent with the directives included in other Operational Policies with respect to the matter of disclosure. We additionally suggest the revision of Annex II of that policy to clarify that the disclosure list for private sector operations includes the framework for environmental and social assessment and management consistent with the definition provided in the Environment and Safeguards Compliance Policy, in particular with regard to the environmental and social management plans.

In terms of strengthening observance of the Access to Information Policy (OP-102), we suggest that the External Auditor’s Office perform an audit of disclosure practices so that instances of noncompliance can be corrected in advance, thus affirming the Bank’s commitment to transparency and access.

It should be noted that the language of the Policy on Indigenous Peoples (OP-765), unlike that of other policies, does not offer clear guidance on its application. Also, from the time of its approval, there has been significant evolution in the way in which projects involving indigenous communities are managed. Therefore, it would seem advisable to recommend that it be revised and updated in order to strengthen management capacity in this area.

Finally, the project has shown that there are gaps in the standards of the Bank that offer guidance on how the Bank should operate in the presence of significant environmental and/or social conflicts. We suggest drafting a guide that will address these situations and enhance the Bank’s response capacity in keeping with its mission to improve lives in the region.

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<sup>2</sup> Vanclay, Frank, et al. April 2015, available at: [http://www.iaia.org/uploads/pdf/SIA\\_Guidance\\_Document\\_IAIA.pdf](http://www.iaia.org/uploads/pdf/SIA_Guidance_Document_IAIA.pdf)

## I. INTRODUCTION AND CONTEXT

### A. Introduction

- 1.1 On December 26, 2012, the MICI received a Request concerning the “Mareña Renovables Wind Project” (ME-L1107), a non-sovereign guaranteed operation to be developed in Mexico and approved by the Bank’s Board of Executive Directors on November 23, 2011. The request was filed by Mr. Leonardo Crippa of the Indian Law Resource Center of the United States (“the Representative”), on behalf of 232 members of seven indigenous communities located in the Isthmus of Tehuantepec in the State of Oaxaca, Mexico and organized under the Assembly of Indigenous Peoples of the Isthmus of Tehuantepec in Defense of Land and Territory (“the Requesters”). The Requesters asserted that they had been, and would be, directly and materially harmed by the project in view of the construction of the infrastructure needed to establish a wind farm, transmission lines, and jetties on the communities’ lands. They also allege adverse effects arising from the operation of the turbines and the access routes. They allege that all of this was the result of the failure to engage in consultations with the communities.
- 1.2 The request was received while the Policy Establishing the MICI (GN-1830-49) was in force, and in accordance with the sequential processing provided for in that Policy, the request was transferred to the Consultation Phase on January 7, 2013, where it was declared ineligible for that Phase by the then-Project Ombudsperson<sup>3</sup> on February 1, 2013.<sup>4</sup>
- 1.3 At the Requesters’ wishes, the request was transferred to the Compliance Review Phase on March 8, 2013, and was declared eligible for that Phase on September 8, 2013 by the then-Chairperson of the Panel.<sup>5</sup> Once declared eligible, the Compliance Review Panel, composed of Mary Rose Brusewitz (Panel Chairperson from October 2013 to September 2015), Korinna Horta (Panel member from October 2010 to September 2015) and Mario Epstein (Panel member from October 2010 to September 2015), was in charge of submitting the recommendation for an investigation to the Board of Executive Directors, which approved it on December 1, 2014.
- 1.4 This Report presents the findings of the investigation conducted by the Compliance Review Panel and the Director of the MICI, who assumed responsibility for the investigation and the final report starting in October 2015. The investigation focused on determining, based on the evidence, whether the Bank complied with its Relevant Operational Policies in connection to the allegations made in the request; and, for those instances of noncompliance it identified, issuing a determination as to whether they caused or could have caused the real or potential harm alleged by the Requesters.

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<sup>3</sup> Ms. Isabel Lavadenz served as the Project Ombudsperson of the Consultation Phase from September 2010 to August 2013.

<sup>4</sup> The case background and public documentation on its processing by the MICI are available in the case record, accessible through the virtual Public Registry.

<sup>5</sup> Mr. Werner Kiene served as Chairperson of the Compliance Review Panel from October 2010 to September 2013.

- 1.5 The report is structured as follows: section I describes the project, summarizes the Requesters' claims, explains the geographical, legal, and social context of the area and presents the historical background of the project; section II focuses on the investigation, the findings, and the determinations regarding compliance with the three Relevant Operational Policies examined; section III contains the general conclusions on compliance and the connection of any noncompliance to the alleged harm; and section IV presents recommendations aimed at strengthening the observance of the Operational Policies in the design, preparation, implementation, and supervision of projects financed by the Bank. There are also two annexes containing the comments of Management and the Requesters to this report; a draft version was distributed to the parties, and they had 45 calendar days to review and comment on it.

## **B. The project <sup>6</sup>**

- 1.6 On November 23, 2011, the Bank's Board of Executive Directors approved the loan for the "Mareña Renovables Wind Project" (ME-L1107) for an amount of up to \$1,060,000,000 Mexican pesos to finance the project under the Bank's private sector window. The project was to be developed by the Macquarie Mexican Infrastructure Fund (FIMM), Macquarie Asset Finance Limited (a subsidiary of Macquarie Group Limited), and FEMSA. The borrower was the multipurpose finance company Mareña Renovables Capital S.A.P.I. de C.V. SOFOM ENR, acting as the builder and owner of the assets for the operation of the wind farm and two operating companies, Energía Eólica Mareña and Energía Alterna Istmeña, responsible for all of the obligations, rights, and permits required to run the project, and for supplying electricity under a self-supply system.
- 1.7 The project consisted of the construction and operation of the 396 MW Mareña Renovables Wind Power Project, in the La Ventosa region of the State of Oaxaca in Mexico, which has some of the best wind energy resources in the world. The project would supply electricity to subsidiaries and affiliates of Fomento Económico Mexicano, S.A.B. de C.V. ("FEMSA") and to the Cuauhtémoc Moctezuma Brewery ("CCM") under a legal arrangement of self-supply. At the time of its preparation and approval, the project was the second self-supply project to be financed starting with the construction, as well as the largest wind energy project to be developed in Latin America.
- 1.8 The project was classified as a Category "A" operation in view of the high likelihood of significant negative environmental impacts and associated social impacts.
- 1.9 The project design includes two proposed wind farms "San Dionisio" and "Santa María" (previously called Istmeño) located in neighboring communities: San Dionisio del Mar, located in an area referred to as Barra de Santa Teresa, and Santa María del Mar, located in the Isthmus of Tehuantepec. The project consisted of five components: (1) erection of 132 Vesta V90 wind turbines with a capacity of 3 MW each (102 in San Dionisio and 30 in Santa María); (2) construction of three substations: Virgen del Carmen in Santa María and Tileme in San Dionisio, which will be connected by a submarine cable (less than 1 km long), and one substation in Santa Teresa; (3) construction of a 52 km transmission line from the Santa Teresa substation to

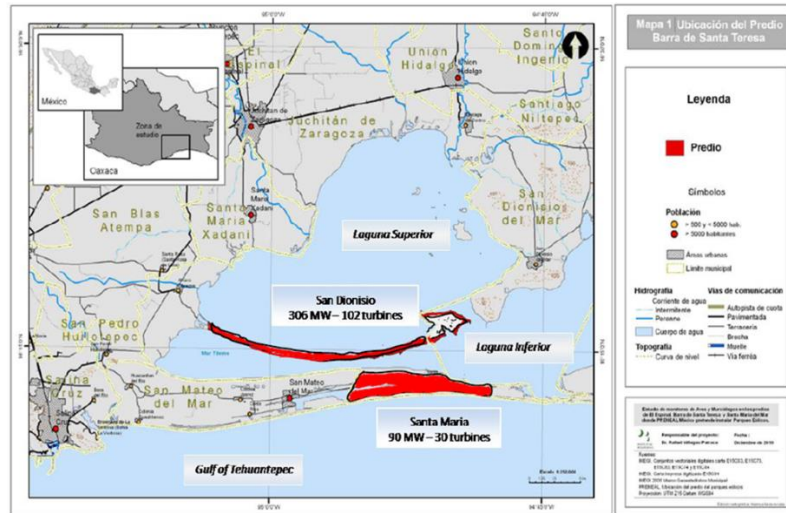
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<sup>6</sup> The information in this section has been extracted from the Project Summary and the Environmental and Social Management Report, both of which are public documents available on the Bank's website in English only.



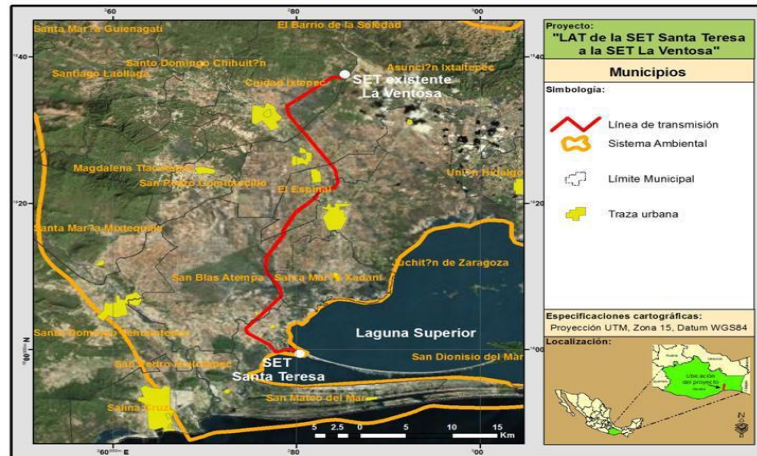
the CFE substation in Ixtepec, to be connected to the national grid; (4) installation of six docking stations to facilitate maritime access to both sites; and (5) civil engineering works such as the construction of new access roads and improvement of existing ones. (See Figures 1 and 2).

**Figure 1.**  
**Project location**



Source: ESMR, November 2011.

**Figure 2.**  
**Transmission line route**

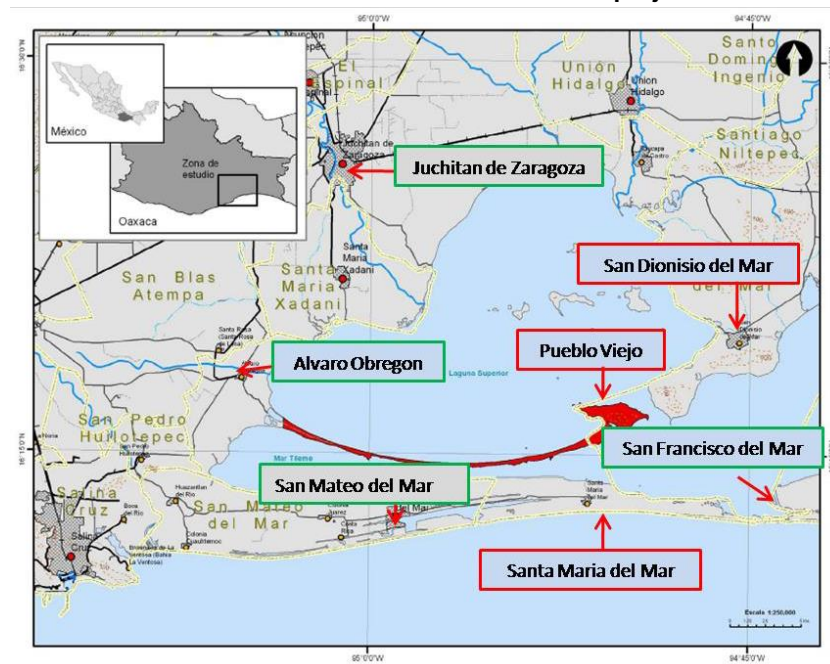


Source: ESMR, November 2011.

- 1.10 According to the ESMR, the direct area of influence, defined as the area which will be directly impacted by Project's construction and operation, included the communities of San Dionisio del Mar and Santa María del Mar outlined in red in Figure 3. The direct area of influence also included the access easement required for the 52km of transmission line between the wind farm and the CFE substation. The areas of indirect influence, shown inside the green boxes, included San Mateo del Mar, San Francisco del Mar, Álvaro Obregón, and Juchitán de Zaragoza.

**Figure 3.**

### Areas of influence identified in the project



Note: The communities marked in red were identified as areas of direct influence; the communities marked in green were identified as areas of indirect influence.  
Source: ESMR, November 2011.

### C. The Request and Allegations of the Requesters

- 1.11 The MICI received the request on December 26, 2012, which was filed by Mr. Leonardo Ariel Crippa on behalf of 232 residents of seven communities of the Isthmus of Tehuantepec: Santa María Xadani, San Mateo del Mar, Colonia Álvaro Obregón, San Francisco del Mar, San Dionisio del Mar, Juchitán de Zaragoza, and Unión Hidalgo. The Requesters asked that their identities be kept confidential for fear of retaliation and coercion.
- 1.12 As shown in Chart 1, 30% of the Requesters were inhabitants of San Dionisio del Mar (area designated by the project as the direct influence area), while 70% lived in other towns identified by the project within the indirect influence area. Of this latter group, 30% of the Requesters reported that they were residents of San Mateo del Mar, a community adjacent to the community of Santa María del Mar. None of the Requesters reported belonging to Santa María del Mar.

**Chart 1.**  
**Geographic Distribution of the Requesters**

Community	# Requesters by Community	% by community with respect to total
San Dionisio del Mar	70	30%
San Mateo del Mar	69	30%
Juchitán	23	10%
Santa María Xadani	21	9%
Unión Hidalgo	21	9%
Col. Álvaro Obregón	21	9%
San Francisco del Mar	7	3%
Total	232	100%

Source: Request

- 1.13 Regarding the stated distribution by occupation, 61% reported that they were “comuneros” (communal landholders) and 12% reported being fishermen (see Chart 2). The classification “other” includes teachers, housewives, and small landowners.

**Chart 2.**  
**Distribution of Requesters by Stated Occupation**

Type of occupation reported	San Dionisio del Mar	San Mateo del Mar	Juchitán	Santa María Xadani	Unión Hidalgo	Col. Álvaro Obregón	San Francisco del Mar	Total by reported occupation	% with respect to total
Comuneros	16	69	16	21	19	0	0	141	61%
Fishermen	6	0	3	0	0	15	3	27	12%
Others	48	0	4	0	2	6	4	64	28%
Total	70	69	23	21	21	21	7	232	100%

Source: Request

- 1.14 The Requesters alleged that they have suffered, and continue to suffer, incremental harm to their traditional culture and their way of life as a consequence of the planning, construction, and future operation of the project in five aspects:
- System of self-government and physical integrity.** The request asserted that various members and leaders of San Dionisio del Mar and San Mateo del Mar had had their safety threatened, had been cut off from access to basic services, and even had been physically attacked because of their opposition to the Project.
  - Land, territory, and resources.** The Requesters alleged that the construction and operation of the project would affect the special relationship that the communities maintain with their territories, which include land, lagoons, and the ocean. They additionally maintained that the construction of the transmission lines and the expansion of existing access routes would lead to the partitioning of communal lands and changes in their traditional use; the infringement and invasion of indigenous lands; the loss of identity and customs among members of the communities due to the migration of third parties with

different cultural values, and social impacts arising from vehicular traffic and the transport of heavy machinery.

- c. **Way of life, cultural integrity, and traditional knowledge.** The request alleges that the project would affect the cultural heritage of the local communities. The Requesters also expressed fear that the construction and operation of the project on these lands would directly affect all of the indigenous communities because it would limit their access to the land; this would affect their cultural integrity because Barra de Santa Teresa and Punto Tileme are meeting places for the celebration of traditional ceremonies, and the sacred lands would be violated.
- d. **Environment and Biodiversity.** The Requesters maintained that the construction and future operation of the project would cause environmental harm in an area of rich biodiversity, resulting in material adverse effects on their lands and their way of life, which depends in large part on fishing in nearby lagoons. They stated that mangroves had been destroyed, causing irreversible harm to the lagoon area.
- e. **Food security and traditional subsistence economy.** The request stated that fishing—a subsistence activity in the communities—would be irreversibly affected by the transmission lines running under the lagoons and the wind turbines. This would exacerbate the poverty that already exists in the area.

1.15 In addition to the allegations presented in the request, during the investigation mission and in their comments to the draft of this report, the Requesters expressed fears regarding the impact that the jetties and the continuous movement in the area would have in terms of access to this traditional fishing area, limitations on boat traffic due to schedules barring fishing vessels in the lagoon during specific times, and the reduction in fish stocks due to the movements of infrastructure transport barges. They also underscored that the indigenous communities would lose control of this marine territory, for both ceremonial and productive purposes.

#### **D. Geographic and Social Context**

- 1.16 The Isthmus of Tehuantepec region is located in the southeastern part of the State of Oaxaca and is the second largest region in the state, with 595,433 inhabitants according to the 2010 INEGI census. It is geographically attractive given its proximity to both the Gulf of Mexico and the Pacific Ocean, which has been important for trade and communication.
- 1.17 The cultural wealth of the Isthmus is reflected in its indigenous peoples, and 50% of its municipalities are self-identified as indigenous according to Mexico's National Commission for the Development of the Indigenous Peoples. The project's area of influence is home to Ikoot (Huave) and Zapoteca communities.
- 1.18 The lagoon system of the Isthmus—which includes the municipalities of San Francisco del Mar, San Dionisio del Mar, Juchitán, Santa María Xadani, Unión Hidalgo, Tehuantepec, and San Mateo del Mar—is where the four Ikoot or Huave indigenous communities are located: Santa María del Mar, San Mateo del Mar, San Dionisio del Mar, and San Francisco del Mar.

- 1.19 In view of their environmental conditions, the Ikoot are one of the few indigenous groups in Mexico whose fundamental means of subsistence is fishing. While the cultures of other indigenous peoples of Mesoamerica revolve around maize, water and the wind are the key connectors of Huave economy and mythology.<sup>7</sup>
- 1.20 Álvaro Obregón is a district within the Municipality of Juchitán de Zaragoza whose population is mainly Zapotec. The main productive activities in Álvaro Obregón are agriculture and fishing. The fishermen are generally not organized and they use more limited technology. Therefore, they engage in more traditional fishing methods, staying close to the coastlines of Laguna Superior, Laguna Inferior, and Barra de Santa Teresa. This type of fishing is mainly for their own consumption, and any surplus is sold within the community. It is important to note that the only land access to the wind farms is through this district, and the jetties would be installed there.
- 1.21 A number of important religious and cultural sites are located in the lagoon area and Barra de Santa Teresa, and the indigenous communities undertake pilgrimages to those sites.
- 1.22 Local inhabitants have found archaeological remains in the area of Santa María del Mar, where a site known as “Loma Antigua,” found to contain clay jars, pots, masks, and even human remains, has been preserved. This community is a municipal agency of Juchitán. Santa María del Mar has not been accessible by land since 2009 due to a boundary conflict with San Mateo del Mar.

## **E. Legal Context of Landholding**

- 1.23 There are three kinds of legal land ownership in Mexico: (i) public property subject to administrative laws and regulations; (ii) agrarian property (communal/*ejido* property) subject to the Agrarian Law and its regulations; and (iii) private property subject to civil and commercial laws and regulations.
- 1.24 Around 75% of the 9.5 million hectares that make up the State of Oaxaca are communal property subject to the Agrarian Law. This fact has significant implications for the establishment of the wind farms, since the social management of the process is especially complex in the southern Isthmus area.
- 1.25 The Mexican Agrarian Law includes two types of agrarian property: *ejidos* and communities. The *ejido* is a type of rural property that entails the collective use of the land by its owners (*ejidatarios*). It is a social interest legal entity with rights over the assets and properties assigned to it by law or acquired by other means. The *ejidatarios* have use and usufruct rights over the lands within the *ejido*, including the communal lands. This use and enjoyment is governed by the internal regulations of each *ejido* and by the Agrarian Law. The principal purpose of the *ejido* is to meet the needs of the *ejidatarios* through the use of the land. This land can be used for agricultural, ranching, or forestry purposes.

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<sup>7</sup> UNESCO, Mexico – Huave Peoples.

- 1.26 The community is a population center with legal personality and ownership of the land with agrarian rights over its lands and assets. As a productive entity, it has structures of governance regulated by the Agrarian Law and the customs and practices of the owners of the community<sup>8</sup> (communal landholders). Depending on the nature of the population and the decision of the communal landholders, the community may be referred to as agrarian or indigenous.
- 1.27 Under Article 21 de the Agrarian Law, the structure of governance of an *ejido* or community must be established by the Assembly, the Managing Board, and the Supervisory Board. The Assembly is the highest decision-making body, and all of the *ejidatarios* (or communal landholders) participate in it. The Agrarian Law dictates the way in which the Assembly operates, its area of competence, the rules for convening the Assembly, and the decision-making requirements. The Managing Board is the Assembly's implementing authority, and is also responsible for representing and administering the *ejido* (community), and the Supervisory Board is in charge of reviewing the operation and accounts of the Managing Board.
- 1.28 The *ejidos* and/or communities have three types of land: (i) land for human settlement; (ii) land for collective use; and (iii) land divided into parcels. The members of an *ejido* or community can enter into agreements about the land for collective use and the land divided into parcels in accordance with the internal regulations of the respective *ejido* or community. Such agreements require the prior authorization of the Assembly and may not have a duration of more than 30 years. Articles 23 to 28 of the Agrarian Law (1992) regulate this process.

## **F. Wind Development on the Isthmus**

- 1.29 Mexico's principal wind resource is located on the Isthmus of Tehuantepec, in Oaxaca. This coastal plain also has areas of high, moderate, and low winds, which together allow for the installation of wind turbines classified as Class I, II, and III, or Special Class, according to the association LAWEA in its report on wind energy in Latin America for the 2009-2010 period.
- 1.30 In the southern part of the Isthmus, the wind development projects began studying the area and taking steps to reserve land years ago. However, in most of the cases the initiation of operations has been very recent. Between 1995 and 2005, only the experimental wind farm that the CFE installed in La Venta, Juchitán was operating.
- 1.31 The development of this industry has been directly affected by the conditions of land ownership and related conflicts in the Isthmus region. In particular, wind development projects have had both positive and negative effects on the economic structure. Leaseholders are the main beneficiaries of the wind farms, although to different degrees depending on the individual negotiations with the companies. In the meantime, the rest of the area's population is excluded from the development of the industry both in terms of information and direct economic benefit.
- 1.32 There are currently 15 wind farms in operation, occupying 60,000 hectares of land. In every case there has been local opposition in the form of blockades demanding better contractual

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<sup>8</sup> The Register of *Ejidatarios* or Communal Landholders includes the land owners, and they are the ones who can participate in the *Ejidatario* or Communal Landholder Assemblies. This register does not include other members of the community.

conditions and requests for compensation to offset the adverse effects. An organized movement has taken shape in opposition to wind energy investment, aiming for the communities of the Isthmus “to regain control of their territories and collective rights and demand a moratorium on wind development on the Isthmus.”<sup>9</sup> There are many different reasons for the opposition, but the main arguments put forth by the population are as follows:

- a. The failure to create sufficient, stable, and permanent employment opportunities in the operational phase of the project.
- b. The low remuneration offered by the company for the reservation of land prior to installation and operation, as well as for the leasing of lands housing the turbines and associated facilities for 30-year periods. In particular, the opposition arises from the discrepancy between this remuneration and the international standard.
- c. The socioeconomic differences that the development has created in the communities by solely benefitting the leaseholders.
- d. The loss of farming as a vocation in the area, leaving farmers out of work and forcing them to migrate, and the effects on the food system tied to their culture of self-subsistence.
- e. The disintegration and division of *ejidos* and communities due to a lack of information and the diminished value placed on consensus at assemblies to make decisions related to the wind projects.
- f. The absence of information and consultation processes consistent with the fact that the region’s population is indigenous. In particular, the lack of consideration for the provisions of ILO Convention 169 regarding consultations and free, prior, and informed consent.
- g. The implementation of projects alien to their cosmovision and ancestral customs.

## **G. The project prior to the Bank’s involvement**

- 1.33 The history of the project goes back several years before the involvement of the Client and the Bank. Knowing what actions were carried out during that time is essential to understanding the subsequent evolution of the project and its eventual suspension in Barra de Santa Teresa.
- 1.34 In October 2000, with the support of the IIE, the Oaxaca State government organized an “International Colloquium on Wind Power Development Opportunities in La Ventosa, Oaxaca,” which was followed by later events on the “Wind Power Development of the Wind Corridor of the Isthmus of Tehuantepec.” As a result of these discussions, projects materialized for the region with national and international companies, and were registered under the Clean Development Mechanisms within the framework of the Kyoto Protocol.<sup>10</sup> These companies included Preneal, a Spanish company incorporated in 1996. Preneal’s corporate purpose is the

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<sup>9</sup> Forum: “Indigenous Communities, Self-determination, and Energy Sovereignty.” Assembly in Defense of the Land and Territory of Juchitán and the National Community Network for Renewable Energy (RENACER). August 21-23, 2009.

<sup>10</sup> Environmental Impact Assessment of the Istmeño Wind Farm.



development and operation of renewable energy projects, and it began its international expansion in 2003.<sup>11</sup>

- 1.35 In 2004, the Preneal Group began operations on the Isthmus to develop two wind farms with the objective of supplying wind-based electric power, through self-supply, to several companies in the FEMSA Group and to the Cuauhtémoc Moctezuma Brewery (Heineken Mexico).<sup>12</sup> According to the documentation reviewed,<sup>13</sup> in view of the existing wind potential in Barra de Santa Teresa, the Preneal Group initiated contact that year with the authorities of San Dionisio del Mar, Santa María del Mar, San Mateo del Mar, and San Francisco del Mar in order to determine the viability of developing wind farms in their communities. During those initial contacts, the community of San Francisco del Mar stated that it was not interested, so the conversations continued only with the other three. Preneal later gave up on its interest in San Mateo because of strong opposition to wind energy in that community, in addition to an internal territorial conflict with the community of Santa María del Mar in 2007. This resulted in the concentration of Preneal's business in San Dionisio del Mar and Santa María del Mar, respectively, and the company reached separate usufruct agreements with those communities for the establishment of the San Dionisio and Istmeño Wind Farms.
- 1.36 Chart 3 presents the main events that took place during the development of the wind farms by Preneal.

**Chart 3.**  
**Timeline of Events 2003 - 2010**

<b>2003</b>	
April	Preneal Group begins operations on the Isthmus
<b>2004</b>	
October 17	First Communal Property Assembly of San Dionisio del Mar
October 26	Second Communal Property Assembly of San Dionisio del Mar
November 7	Third Communal Property Assembly of San Dionisio del Mar approving the usufruct contract with Preneal Mexico, S.A. de C.V.
November 8	Signature of the usufruct contract by the Managing Board and the Communal Property Supervisory Board San Dionisio del Mar with Preneal Mexico S.A. de C.V.
<b>2005</b>	
July 13	Preneal Mexico, S.A. de C.V. assigns rights to the usufruct contract with San Dionisio to Vientos del Istmo S.A. de C.V.
September	Regional Forum against the Isthmus of Tehuantepec wind project
<b>2006</b>	
February	First Open Season process
July 8	Communal Property Assembly of Santa María del Mar and approval of the usufruct contract with Preneal Mexico, S.A. de C.V.
<b>2008</b>	
October 17	Filing of the Environmental Impact Statement on the Istmeño Wind Farm to SEMARNAT
<b>2009</b>	
January 26	SEMARNAT gives notice of denial of authorization of the project in view of defects in the EIS for the Istmeño Wind Farm
February 13	The Communal Property Assembly of San Dionisio del Mar approves

<sup>11</sup> Preneal's website, accessed on January 10, 2016.

<sup>12</sup> "Preneal Cierra la Venta de dos Proyectos Eólicos en Oaxaca," March 18, 2011. Press release issued by the Preneal Group, available on its website: [www.preneal.es](http://www.preneal.es)

<sup>13</sup> Istmeño and San Dionisio Wind Farms: Community Consultation prior to August 2011, On Common Ground, September 2011.



	amendments to the usufruct contract
May 25	Resubmission of the Environmental Impact Statement for the Istmeño Wind Farm to SEMARNAT
June	Filing of the Environmental Impact Statement for the San Dionisio Wind Farm to SEMARNAT
August	Forum on “Indigenous communities, Self-determination, and Energy Sovereignty” organized by the Assembly of Indigenous Peoples of the Isthmus of Tehuantepec in Defense of Land and Territory
<b>2010</b>	
January 29	SEMARNAT authorizes the Environmental Impact Statement for the San Dionisio Wind Farm
February 3	SEMARNAT authorizes the Environmental Impact Statement for the Istmeño Wind Farm
September 20	Vientos del Istmo S.A. de C.V. transfers the rights to the usufruct contract with San Dionisio to Energía Eólica Mareña, S.A. de C.V.

Source: Internal, based on different documents obtained during the investigation

- 1.37 As the timeline shows, the process for the development of the wind farms in the communities of San Dionisio (San Dionisio) and Santa María del Mar (Istmeño) and the negotiation of each one was carried out independently of each other. The processes undertaken separately by each community are presented below.

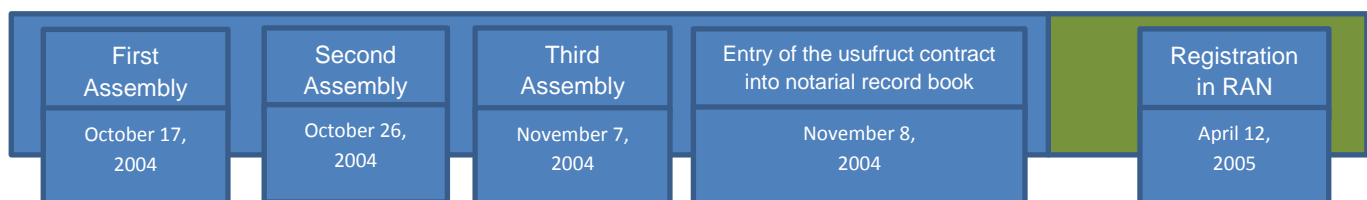
### **1. San Dionisio del Mar Wind Farm**

- 1.38 The Municipality of San Dionisio has 5,165 inhabitants, 51% of whom speak an indigenous language. The principal towns within the municipality are Huamúchil and San Dionisio Pueblo Viejo, which has a ritual site called Cerro Cristo where people gather every year to say prayers, taking flowers and incense with them and playing indigenous music on drums made of wood and deerskin.
- 1.39 The community of San Dionisio del Mar was legally established by presidential decree in February 1970, granting 512 communal landholders the use and ownership of 18,223 hectares of land located in the Municipality of San Dionisio del Mar in the State of Oaxaca, Mexico. In 2001, the PROCEDE program for the certification of communal lands certified that 1,027 communal landholders were the collective owners of the land.
- 1.40 Preneal began formal negotiations with San Dionisio to secure usufruct agreements in mid-2004. Following initial contacts with the authorities of the Managing Board and the Land Reform Protection Agency, the communal authorities convened a Communal Assembly to inform the communal landholders about the project and ask for their decision with respect to the matter. In the meantime, Preneal continued to contact community leaders and authorities.
- 1.41 On October 17, 2004, the First Assembly was held at the San Dionisio del Mar Communal House by invitation of the Chairman of the Communal Property Managing Board, and was attended by 217 communal landholders out of a total of 1,027 (21.2%). It was held in order to hear the presentation of the Preneal representative who had been invited to explain the details of the wind potential of the communal lands of San Dionisio (Barra de Santa Teresa) and propose entering into a usufruct agreement to exploit that potential. According to the minutes of the meeting, and in response to the attendees' express question regarding the impact on birds and on the lagoons, the Preneal representative reportedly stated that the environmental impact

studies would be completed prior to the start of any construction and that they would be supervised by SEMARNAT. During the Assembly, Preneal reportedly offered to build a road through Barra de Santa Teresa that could be used by the community. It also invited the Communal Commission and the Supervisory Board to visit La Venta, and to visit wind farms in Spain. Given that the Assembly failed to meet the requirements for a quorum established in the Agrarian Law, the meeting was reportedly adjourned with the agreement to announce a second meeting for October 26.<sup>14</sup>

- 1.42 The Second Assembly was held on October 26, 2004, and attended by 216 communal landholders out of a total of 1,022 (21.03%). It was also attended by members of the Supervisory Committee of San Dionisio del Mar, a representative of the government of Oaxaca, and members of the Committee of Elders and Teachers, the Municipal President, and a representative of the Land Reform Protection Agency. At that session, the Preneal representative announced the company's intention to establish, develop, and operate wind farms on the communal lands of San Dionisio del Mar. He also stated that the company was in the process of obtaining the necessary permits and licenses and therefore was interested in acquiring usufruct rights to the land, assessing its usefulness and, if applicable, installing wind turbines, anemometric towers and other infrastructure needed for the activity at its convenience. The Assembly decided that a subsequent meeting was necessary to examine the usufruct agreement and its advantages and disadvantages, and scheduled it for November 7, 2004.
- 1.43 The Third Assembly was held on November 7, 2004, with 368 of 1,022 (36%) communal landholders in attendance. At this meeting, the Managing Board was authorized to sign a usufruct agreement and collect the rent, usufruct income, and other revenues established in the agreement on behalf of the community. The Assembly would agree on the use and application of the funds obtained from the reservation of 1,643 hectares.
- 1.44 On November 8, 2004, the minutes of the assembly and the usufruct contract between the community of San Dionisio del Mar and Preneal S.A. de C.V. were entered into the notarial records of the notary public. On April 12, 2005, the contract was registered in the National Agrarian Registry (see Figure 4).

**Figure 4.**  
**Timeline of Negotiations and Signature of the Usufruct Contract with**  
**the Community of San Dionisio del Mar**



- 1.45 A number of amendments were later made to the usufruct contract, as follows:

<sup>14</sup> Information extracted from the usufruct agreement signed with San Dionisio del Mar.

- On July 13, 2005, Preneal, S.A. de C.V. assigned the rights to the usufruct contract to the company Vientos del Istmo, S.A. de C.V, and that change was recorded in the RAN on February 7, 2006.
- On February 13, 2009, the Communal Property Managing Board of San Dionisio convened an Assembly to approve the amendment of the usufruct contract. With 156 communal landholders (15%) in attendance, changes were approved with respect to the remuneration to be received. The minutes and agreements were notarized on March 24, 2009, and recorded in the RAN on December 3, 2010.
- On September 20, 2010, Vientos del Istmo S.A de C.V. transferred the rights to the usufruct contract to the company Energía Eólica Mareña, S.A. de C.V. The Communal Property Managing Board was given notice of the transfer on October 29, 2010 before a notary public and was recorded in the RAN on November 24, 2010.

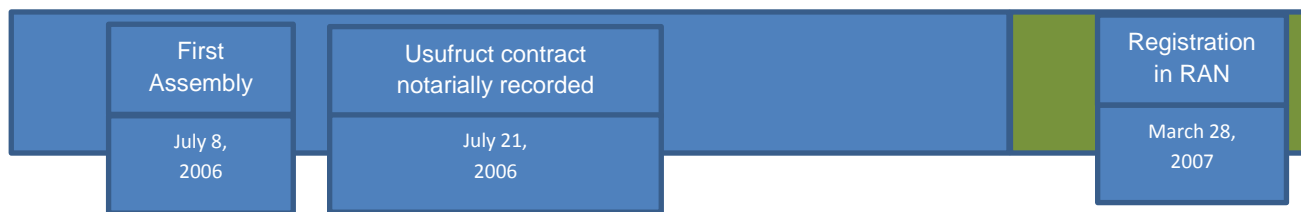
## **2. Santa María del Mar Wind Farm**

- 1.46 Santa María del Mar is an indigenous municipality of Juchitán de Zaragoza that has 771 inhabitants, 49% of whom speak the indigenous language. The only way to access the town by land is by a dirt road that crosses through the municipalities of San Mateo del Mar, San Pedro Huilotepec, and Salina Cruz. Since 2009, this fact has been the source of significant social conflict between residents of Santa María del Mar and San Pedro Huilotepec and residents of San Mateo del Mar. Boundary disputes have resulted in armed confrontations and injuries, and the complete territorial isolation of Santa María del Mar, as the inhabitants of San Mateo del Mar have blocked any kind of transportation. Consequently, Santa María is only accessible by water.
- 1.47 The community of Santa María del Mar was legally incorporated by presidential decree in August 1984, once 169 communal landholders showed evidence of having occupied the communal lands since time immemorial. The presidential decree acknowledges the existence of 3,773 hectares of communal lands under the jurisdiction of the Municipal Agency of Santa María del Mar. The communal land area excluded the urban area occupied by the town of Santa María del Mar, which is a municipal agency of the Municipality of Juchitán de Zaragoza, State of Oaxaca, Mexico. In 1999, the PROCEDE program for the certification of communal lands certified 129 communal landholders as the collective owners of the land.
- 1.48 According to the documentation reviewed, Preneal initiated contact with Santa María del Mar in 2006 with informal meetings at which company personnel gave an overview of the project and shared images and videos of wind farms in other countries in order to show that they were compatible with other productive activities. The needs of the community were made known at these meetings—in particular, potable water and the construction of alternative access roads into Santa María, as the traditional access route was blocked because of the territorial dispute with San Mateo del Mar.
- 1.49 The First Assembly with the community was held on July 8, 2006, and was attended by 72 registered communal landholders out of a total of 129 (55.8%), which constituted the quorum required to make decisions at the first meeting. The Assembly resulted in an agreement (with the approval of 65 of the 72 communal landholders present) on the terms of remuneration for

the usufruct of 2,000 hectares of communal lands for a 30-year period, which would entail a guaranteed fixed annual payment during the reserve period and the payment of a percentage of the gross income derived from the power generation once the project was in operation. It also contained a clause providing annual education support for students from the community, with increases to keep pace with inflation. Additionally, the contract provided for the installation of a water desalination plant to supply the community with potable water. According to the agreement, the community retained the right to develop all kinds of productive activities on those lands, so long as they did not interfere with the usufruct.

- 1.50 The minutes of the assembly and the usufruct contract between the community of Santa María del Mar and Preneal S.A. de C.V. were recorded by a notary public on July 21, 2006, and the contract was recorded in the National Agrarian Registry on March 28, 2007 (see Figure 5).

**Figure 5.**  
**Timeline of Negotiations and Signature of the Usufruct Contract with**  
**the community of Santa María del Mar**



- 1.51 The following changes were made subsequent to the signature of the usufruct contract:

- On June 23, 2005, Preneal, S.A. de C.V. assigned the rights to the usufruct contract to the company Energía Alternativa Istmeña, S.A. de C.V., and an assembly was held on May 9, 2009, at which 91 of the 129 recognized communal landholders (70.54%) gave their approval. They also approved changes in the remuneration to be received. The minutes and amendments were certified before a notary public on October 21, 2009.
- On December 6, 2010, a Third Assembly was held at the request of Energía Alternativa Istmeña to increase the usufruct area by 261 additional hectares. This expansion was approved by 94 of the 129 recognized communal landholders (70.86%).

### 3. Transmission Rights

- 1.52 As part of this process, the first Open Season (OS)<sup>15</sup> period for the acquisition of transmission capacity rights began in February 2006, and 12 self-supply projects were registered, including the two wind farms owned by Preneal.
- 1.53 In 2008, Preneal began the work to identify the land required for laying the transmission line and the types of property involved in the easement, but it did not complete the program for the

<sup>15</sup> The private developers reported their electric transmission and transformation requirements in the Open Season plan, based on which the Federal Electricity Commission drafted the respective infrastructure design and determined its total cost, to be prorated among the developers.

acquisition of rights. The process to identify properties for the easement was only reinitiated in 2010 by CFE.

- 1.54 Due to the 2009 financial crisis and opposition from groups of residents in the local communities affected, a number of the projects included in the first OS were delayed. These included Preneal's two wind farms.
- 1.55 The opposition to the two wind farms was spearheaded by members of the community of San Dionisio, who filed complaints against Preneal alleging irregularities in the negotiation of the usufruct agreements in violation of the Mexican Constitution and ILO Convention 169. These claims were supported by the APIITDTT, and members of other communities eventually joined the opposition.
- 1.56 Finally, on March 18, 2011, the Preneal Group announced in a press release that it had closed on the sale of the two wind farms to the Mexican consortium comprised by the Macquarie Mexican Infrastructure Fund, FEMSA, and Macquarie Capital.

## II. THE INVESTIGATION

- 2.1 In a formal session held on December 1, 2014, the Bank's Board of Executive Directors approved the Recommendation for an Investigation, the Terms of Reference of which focused on determining the Bank's compliance with policies OP-703, OP-102, and OP-765 during the operation in question and any potential connection to the harm alleged by the Requesters.
- 2.2 The Panel composed of Chairperson Mary Rose Brusewitz, Korinna Horta, and Mario Epstein, assisted by personnel from the MICI Secretariat, conducted the investigation from January to September, 2015. At the end of that period, the Panel's chairperson submitted a preliminary report on the findings to the Director of the MICI. In accordance with the Transition Plan (MI-48-1) the Director then assumed responsibility for finalizing the investigation and presenting its findings to the Board of Executive Directors for its consideration.
- 2.3 The investigation involved a detailed study of the Bank's records relating to the project, interviews with Bank staff in Washington, D.C. as well as in Mexico, City, and the review of documentation relevant to the case, including both internal Bank documents and outside documents.<sup>16</sup> The Panel, accompanied by Case Officers Ashley Moore and Julio Patiño, conducted a country mission to Mexico from March 22 to April 2, 2015. The mission included visits to the project area and the towns located within its area of influence, meetings with Requesters, members of the affected population, and local and international civil society organizations, as well as meetings with the Client, officials from the Federal Departments of Energy, Environment, and Treasury, and officials from the State Secretariats of Government and Indigenous Rights of the State of Oaxaca.<sup>17</sup>
- 2.4 During the mission, the members of the Panel held meetings with members of the communities of San Dionisio, Pueblo Viejo, San Mateo, Santa María Xadani, San Francisco del Mar, Álvaro Obregón, and Juchitán de Zaragoza. They also visited Barra de Santa Teresa, where they were able to verify the presence of indigenous ceremonial sites, as well as the fishing activity in that area.



<sup>16</sup> The bibliography provides the complete list of documents consulted pursuant to the investigation.

<sup>17</sup> The agenda of the mission can be accessed through the "Electronic Links" section.

## A. The Bank's Involvement

- 2.5 The Bank's involvement in the project began in late 2010, when the SCF asked the ESG to begin preparing the eligibility documents for the operation. Chart 4 presents a detailed timeline of the Bank's actions (in bold) from that date to the time at which the Client decided not to proceed with the development of the wind farms in the communities of Santa María del Mar and San Dionisio del Mar (February 2013), given that the opposition movement blocked access to the project site starting in October 2012. Other related events that took place during this period are also included (in blue).

**Chart 4.**  
**Timeline of Events: December 2010 – February de 2013**

<b>2010</b>	
December 10	Bank's analysis process begins
<b>2011</b>	
January 11	Eligibility Review Meeting finding the project eligible by consensus
March 18	Announcement confirming purchase of Preneal Mexico S.A. de C.V. assets by Mareña Renovables S.A. de C.V.
June 24	EIS for the project "Transmission lines from Santa Teresa substation to La Ventosa substation" filed with SEMARNAT
August 2	Assembly of the community of San Dionisio del Mar Pueblo Viejo rejecting the wind project
August 8	Assembly of the community of Pueblo Viejo rejecting the wind project
August 10	ESG asks Client to allow it to carry out the due diligence mission
August 11	Initiation of consultation and information activities and renegotiation of usufruct agreements is reported
August 19	General Assembly of the town of San Dionisio del Mar, also attended by residents of the municipal agencies of Pueblo Viejo and Huamúchil, agreeing not to grant permission for change in land use, demanding that SEMARNAT turn over the EIS, that the RAN turn over the minutes from the 2004 assembly on the grounds that the project affects the entire population of San Dionisio and not just the communal landholders
August 29	Due diligence mission begins
September 3	Assembly of communal landholders agrees to suspend all soil mechanics work in Barra de Santa Teresa in order for a general assembly to make a decision regarding the project
September 7	SEMARNAT authorizes EIS for the project "Transmission lines from Santa Teresa substation to La Ventosa substation"
September 12	Mandate Letter is signed
October 4	Amendments to the "San Dionisio Wind Farm" project to protect identified mangrove area filed with SEMARNAT
October 14	SEMARNAT authorizes EIS for the project "Docking stations of the Istmeño Wind Farm project"
October 24	QRR session of the Bank
November 8	Distribution of the loan proposal for the "Mareña Renovables Wind Project" to the Board of Executive Directors for its consideration
November 11	ESMR is published on the Bank's website
November 23	<b>The Bank's Board of Executive Directors approves the project</b>
<b>2012</b>	
January 21	General Assembly of communal landholders agreeing to reject the use license issued by the Municipal Authority and another assembly is announced
January 29	General Assembly of communal landholders – second meeting refusing to recognize the usufruct contract signed on November 8, 2004, alleging the violation of the right to



	free, prior, and informed consultation
January 29	Communal landholders and residents of San Dionisio occupy City Hall
February 2	First meeting of communal landholders of San Dionisio with representatives of the Oaxaca State government to request their intervention
February 7	Second meeting of communal landholders of San Dionisio with representatives of the Oaxaca State government to request their intervention
February 8	Residents of San Dionisio file motion before the state legislature to revoke the mandate of the Mayor of San Dionisio del Mar for harassing and threatening residents
February 23	Financial closure of the operation
March	Residents of San Dionisio renew dialogue with representatives of the government of Oaxaca
March 7	First disbursement is made
March 23	Third meeting of communal landholders of San Dionisio with representatives of the Oaxaca State government to request their intervention
March 28	Seven communal landholders from San Dionisio file petition with the Agrarian Tribunal seeking to nullify and suspend the assembly minutes and usufruct contract of 2004
April 16	Second disbursement is made
April 18	A community watch group from San Dionisio questions the presence of personnel from the company and from Vestas. Both parties make allegations of harassment and the company withdraws from the area
April 19	Ministerial Police report to the community of San Dionisio
April 20	Members of the Zapata <i>Ejido</i> (Álvaro Obregón) hijack trucks belonging to the company and others and threaten their representatives
May 2	The Client notifies the Bank and other financing entities of the blockade and expulsion of workers
May 14	Meeting of the Communal Landholders' Commission of San Dionisio with the Governor of the State of Oaxaca
May 15	Third disbursement is made (no subsequent disbursements are made)
May 15, 21, 28	Communal Landholders' Commission meets with the Land Reform Protection Agency to request that a General Assembly be convened in order to call for the election of new communal authorities prior to the financial report of the outgoing authorities
May 20	March of fishermen from San Dionisio, San Mateo del Mar, and Juchitán in the city of Juchitán to condemn the project and ask the Governor to protect their livelihood
June 2	Request to the state legislature of Oaxaca to audit the Mayor of San Dionisio del Mar for misuse of public funds
June 23	Residents return the hijacked trucks following negotiations with state government authorities, which include the concession of social projects
June 26	The Bank and other financing entities are notified that residents of the Emiliano Zapata <i>Ejido</i> will not block travel through their territory
July 26	Environmental and Social Due Diligence Report drafted by the consulting firm ERM
August 7	SEMARNAT approves changes to the EIS
August 9	Governor of the State of Oaxaca publicly denounced for threats to the dialogue commission
August-September	Members of the Zapata <i>Ejido</i> (Álvaro Obregón) set up a blockade
August 21	Public complaints of threats to women, communal landholders, fishermen, and various organizations
August 25	A communal landholder is physically attacked by other members of the community
August 26	Attacks among members of the community watch group and representatives of the municipal agency



September	Andrew Chapman is appointed Executive Director of the project
September 1	The Client hires expert Dr. Latapí to draw up the Compensation Plan
September 1	Communal Assembly of San Dionisio in support of the project. Opposition protests by other residents
September 14 - 15	I Meeting of the Ikojts Nation in Resistance
September 15	Residents write to the Bank requesting the immediate cancellation of the operation
September 17	Municipal police presence in the project area
September 25	Second International Renewable Energy Forum 2012
September 28	The Bank receives a letter from residents of the area dated September 15 requesting the immediate cancellation of the operation
September 29	Criminal complaint is filed alleging the assault of one of the project's opponents
October 10	Residents of the Isthmus region travel to Mexico City to protest against the project, blocking avenues across from the Bank's Country Office
October 31 to November 2	Roadblocks at the entrance to Barra de Santa Teresa in Álvaro Obregón and destruction of machinery and equipment. Nine people are arrested
November 9	Meeting at the Bank's Country Office with some of the signatories of the letter sent to the Bank
November 20	Press conference
December 26	<b>MICI receives the request</b>
<b>2013</b>	
January	Roadblock remains in place at the only land entrance to the project in Álvaro Obregón
February 14	Mareña informs the financing entities of the closure of its offices in Oaxaca and the suspension of operations on site
February 28	The Client decides not to continue with the project

Source: IDB and other public sources identified by the MICI

## **B. Findings of the Investigation**

- 2.6 This section presents the findings of the investigation conducted by the MICI with respect to each one of the allegations made in the request based on the Terms of Reference approved by the Board of Executive Directors<sup>18</sup> for Operational Policies OP-703, OP-102, and OP-765. For each one of these three Policies, we present in sequence: (a) the allegations of the Requesters; (b) the provisions of the pertinent policy; (c) the actions taken by the Bank in relation to the policy directives, and (d) the opinion of the MICI with respect to the Bank's compliance.

### **1. Regarding the Environment and Safeguards Compliance Policy (OP-703)**

#### **a. Allegations of the Requesters**

- 2.7 The request alleges a number of negative effects on the communities within the project area in view of impacts not identified by the Bank, and therefore not addressed, in terms of environment and biodiversity, cultural heritage, health and food security, and traditional subsistence economy. It also asserts that the Bank failed to require an assessment that would identify, in a timely and effective manner, the adverse impacts the Requesters would suffer as a result of the construction of the transmission lines, expansion of existing roads, and construction of new access routes.
- 2.8 Regarding environment and biodiversity, the Requesters alleged that the project would create "considerable adverse impacts on the rich biodiversity of the lagoons (Laguna Superior and Laguna Inferior) and in the maritime area adjacent to Barra." They were particularly concerned about the adverse impacts the project could have on migratory birds at risk of colliding with turbines as well as on bats, given that these concerns were not addressed in the project's public documents. They also cited potential adverse impacts on land, lagoon, and marine flora and fauna from the construction of the transmission lines.
- 2.9 In reference to social aspects, the Requesters maintained that the construction of the transmission lines, the expansion of existing access routes, and the construction of new access routes would affect children and adults unaccustomed to vehicular traffic and the transport of heavy machinery, among other impacts.
- 2.10 With respect to food security and traditional subsistence economy, the Requesters noted that fishing is the subsistence activity of the communities affected by the project. They maintained that fishing would be affected by the transmission lines and the turbines, which would be detrimental to "the fragile ecosystem of the lagoons and sea adjacent to Barra," and these communities' source of food and income would therefore be affected.

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<sup>18</sup> Recommendation for a Compliance Review and terms of reference for loan 2644A/OC-ME, Mareña Renovables Wind Project, Revised Version. Document MI-32-4.

### **b. What does Operational Policy OP-703 provide?**

- 2.11 OP-703 establishes that the safeguards apply throughout the project cycle to ensure the environmental sustainability of all Bank-financed operations. The Bank takes a precautionary approach to prevent negative environmental impacts. When they are unavoidable, the Bank-financed operations require mitigation measures. For impact that cannot be fully mitigated, compensation or offset mechanisms should be implemented. The Bank works with borrowers to manage environmental risks effectively and to help develop environmental management capacity, as agreed. If the Bank finds that the risks are too great, it will support the proposed investment only when a risk mitigation plan has been agreed.
- 2.12 OP-703 defines the term “environment” is defined in its broadest sense, and includes physical/chemical factors (geophysical), biological factors (biotic), and associated social factors (anthropic). In this respect, the policy encompasses social, cultural, and economic aspects to the extent that they are derived from geophysical and/or biotic changes associated with a particular operation.
- 2.13 Subsection c (paragraphs 2.15 to 2.61) present the findings of the investigation with respect to the directives of OP-703 pertinent to the allegations made in the request in the order in which they are examined: Directive B.3, Directive B.4, Directive B.5, Directive B.6., Directive B.7, Directive B.9, Directive B.2, and Directive B.1. At times the findings are pertinent to one or more directives of a policy. In such cases, we will aim to address the matter in detail in the section where it is most relevant, and use references to that information in the other related sections.
- 2.14 Subsection d (paragraphs 2.62 to 2.74) presents the opinions of the MICI with respect to compliance with those directives.

### **c. MICI findings in reference to compliance with OP-703**

- 2.15 **Directive B.1 – Bank policies.** Policy Directive B.1 of OP-703 establishes that the Bank will only finance operations and activities that comply with the directives of Policy OP-703 and are consistent with the relevant provisions of other Bank policies. The findings with respect to compliance with this directive are detailed for each one of the relevant policies in this section.
- 2.16 **Directive B.3. Screening and Classification.** The application of OP-703 in the framework of any operation begins with the screening and classification of the operation at the design phase pursuant to Directive B.3 as follows:
- Screening will be carried out early in the preparation process. The screening process will consider potential negative environmental impacts whether direct, indirect, regional, or cumulative in nature, including environmentally related social and cultural impacts, of the operation and of its associated facilities if relevant.
  - Bank operations will be classified according to their potential impact so that the appropriate environmental assessment or due diligence requirements are selected for the operation. The operation's environmental impact classification will be publicly disclosed according to the Access to Information Policy (OP-102).

- 2.17 Directive B.3 also establishes that any operation that is likely to cause significant negative environmental and associated social impacts, or have profound implications affecting natural resources, will be classified as Category “A,” and that they need to be accompanied with high-risk safeguards. These kinds of operations require an **environmental impact assessment** when they are investment projects. In the case of some high-risk operations that, in the Bank’s opinion, raise complex and sensitive environmental, social, or health concerns, the Client should establish an advisory panel of experts who provide guidance for the design and/or execution of the operation on issues relevant to the EA process,<sup>19</sup> including health and safety.
- 2.18 The screening process has two objectives:<sup>20</sup> (i) to assist in the classification of a Bank-financed operation, and (ii) to assist in the identification of potential environmental risk factors. To this end, the Bank completes a safeguard screening form identifying the potential environmental and related sociocultural risks and impacts of the operation. On December 22, 2010, the project was classified as Category “A”,<sup>21</sup> in view of “the scale of the wind farm, the importance of bird migration routes at the project sites, and the potential cumulative impact on birds given the number of wind farms in the area of La Ventosa.”<sup>22</sup>
- 2.19 As part of this screening process, the team completed the safeguard screening form, which triggered the applicability of the following OP-703 directives: B.1 Bank Policies, B.2 Country Laws and Regulations, B.3 Screening and Classification, B.5 Environmental Assessment Requirements, B.6 Consultations, B.7 Supervision and Compliance, B.9 Natural Habitats and Cultural Sites, B.11 Pollution Prevention and Abatement. In addition, the project triggers the application of OP-765 on Indigenous Peoples, “given the presence of *ejidos* in the area of the wind farm.”<sup>23</sup>
- 2.20 Regarding the project’s associated facilities<sup>24</sup> (TL, access routes, and docking stations), the Bank’s documentation referring to the screening (SSF and ESS) identifies the need to evaluate the mitigation and compensation framework and the measures to be implemented in relation to users of the land along the TL.
- 2.21 In relation to the access roads, the ESS identifies the need to improve access roads to enable the transportation of heavy equipment.<sup>25</sup>

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<sup>19</sup> According to OP-703, EA is a generic term covering various types of assessment processes such as EIA, SEA, SCA, environmental analysis and environmental audits. Section VI of Definitions for OP-703.

<sup>20</sup> Guidelines for the implementation of the Environment and Safeguards Compliance Policy, pp. 23-24.

<sup>21</sup> According to the studies of the consulting firms hired during the due diligence process, they considered that the risk level of the operation did not warrant that classification.

<sup>22</sup> Mareña Wind Energy Project, Environmental and Social Strategy para. 2.3, p. 2.

<sup>23</sup> Mareña Renovables Wind Project Screening Form.

<sup>24</sup> Associated facilities are defined in OP-703 as new or additional works and/or infrastructure, irrespective of the source of financing, essential for a Bank-financed project to function.

<sup>25</sup> EAS, para. 4.4.

- 2.22 With the Category “A” classification, the Bank determined that the project would require a more extensive environmental impact assessment process in keeping with the requirements of the policy. This classification was also made public as stipulated in the Access to Information Policy.
- 2.23 **Directive B.5 - Environmental Assessment Requirements.** Policy Directive B.5 of OP-703 establishes that:
- Preparation of environmental assessments and associated management plans and their implementation are the responsibility of the borrower, but the borrower must meet the standards established by the Bank for their preparation.
  - The Bank is responsible for reviewing these products and the Bank’s approval of the operation will consider the quality of the environmental assessment process and documentation, among other factors.
- 2.24 Directive B.5 also provides that “The EIA process includes, as a minimum: screening and scoping for impacts; timely and adequate consultation and information dissemination process; examination of alternatives including a no project scenario. The EIA should be supported by economic analysis of project alternatives and, as applicable, by economic cost-benefit assessments of the project’s environmental impacts and/or the associated protection measures. Also, due consideration will be given to analyzing compliance with relevant legal requirements; direct, indirect, regional or cumulative impacts, using adequate baseline data as necessary; impact mitigation and management plans presented in an ESMP; the incorporation of EA findings into project design; measures for adequate follow-up of the ESMP’s implementation. An EIA report must be prepared with its ESMP and disclosed to the public prior to the analysis mission, consistent with the Disclosure of Information Policy (OP-102).”<sup>26</sup>
- 2.25 “The ESMP must include: a presentation of the key direct and indirect impacts and risks of the proposed operation; the design of the proposed social/environmental measures to avoid, minimize, compensate and/or mitigate the key direct and indirect impacts and risks; the institutional responsibilities to implement these measures, including, where necessary, institutional development, capacity building and training; the schedule and budget allocated for the implementation and management of such measures; the consultation or participation program agreed for the operation; and the framework for the monitoring of social and environmental impacts and risks throughout the execution of the operation, including clearly defined indicators, monitoring schedules, responsibilities and costs. The ESMP should be ready for, and reviewed during, the analysis/due diligence mission.”<sup>27</sup>
- 2.26 **Environmental Impact Assessment.** As mentioned in other sections (paragraph 1.9), **the project had five components:** (1) San Dionisio Wind Farm; (2) Istmeño Wind Farm; (3) a 52 km transmission line from the Santa Teresa substation to the CFE substation in Ixtepec, to be connected to the national grid; (4) installation of six docking stations to facilitate maritime access to both sites; and (5) civil engineering works such as the construction of new access roads and improvement of existing ones. Each component was evaluated individually, resulting in a total of

<sup>26</sup> Environment and Safeguards Compliance Policy, March 2006.

<sup>27</sup> Id.

**eight EIA** for the Bank to consider. Chart 5 lists the **eight EIA** and the dates of filing and approval by the competent environmental authority for each one.

**Chart 5.**  
**Mareña Renovables Wind Project: List of Environmental Impact Assessments**

Project Name	Filing Date	Approval Date
Istmeño Wind Farm	May 25, 2009	February 3, 2010
San Dionisio Wind Farm Project for the Construction, Assembly, Launch, and Operation of a Wind Energy Farm	June 25, 2009	January 29, 2010
Transmission Lines from the Santa Teresa Substation to the La Ventosa Substation	June 24, 2011	September 7, 2011
Docking Stations for the San Dionisio Wind Farm Project	September 5, 2011	October 14, 2011
Docking Stations for the Istmeño Wind Farm Project	September 5, 2011	October 14, 2011
Access Roads to the Wind Farms	August 24, 2011	October 19, 2011
Roads Inside the San Dionisio Wind Farm	August 24, 2011	October 19, 2011
Roads Inside the Istmeño Wind Farm	August 24, 2011	October 19, 2011

Source: *Gaceta Ecológica*, SEMARNAT

- 2.27 Between March and April 2011, ESG reported that it had completed an in-depth review of the EIA of the two existing wind farms, as well as of the conditions set in the environmental license issued by SEMARNAT in 2010. In its review, Management stated that it had identified gaps with respect to Directive B.5 and therefore required the Client to:
- a. Engage in consultations, because the EIA were not available at the time the usufruct contracts were negotiated with the communities of San Dionisio and Santa María, and therefore the consultations held were not consistent with the provisions of OP-703 since the communities could not have been informed of the scope, impacts, and operation of the project;
  - b. Produce environmental impact assessments for the transmission lines and for the 6 docking stations provided for in the project;
  - c. Finalize the negotiation of the easement agreements for the route of the transmission line.
- 2.28 Between June and October 2011, the EIA of the transmission line, the docking stations, and the access roads were filed and approved by the respective state and federal environmental authorities.
- 2.29 In terms of the analysis for their preparation and their final content, the **eight EIA** are consistent with the requirements of the national environmental laws. However, because they do not fully address the requirements established in Directive B.5, supplemental documentation on social assessments, management plans, and consultation processes is required in order to have an environmental impact assessment plan consistent with the Bank's directive for a Category "A" project.
- 2.30 **Environmental and Social Management.** Directive B.5 also establishes that the borrower will draft the environmental and social management plan as an integral part of the environmental impact assessment or as a separate document containing the requirements derived from the

environmental analysis. The plans must describe the mitigation measures and monitoring requirements agreed during the environmental assessment and establish the framework for their application.

- 2.31 According to the documentation reviewed, including the contract for the operation, and interviews with Management, the environmental and social management of the project is not reflected in a single plan; rather, it consists of several plans and policies required of the Client, which have been prepared to address the different impacts identified in the EA process. Chart 6 lists the preparation of the main studies, plans, and policies of the project's environmental management in chronological order.

**Chart 6.**  
**Environmental and Social Management Plan: List of Project Plans**

<b>Topic</b>	<b>Date</b>
Study on the Exploitation of Fishing Resources within the Huave Lagoon System	March 2009
Archaeological Feasibility Study on the Ixtepec – Huilotepec power transmission line and on the San Mateo del Mar Wind Farm and transmission line	May 2009
Archaeological feasibility study on the wind farm and transmission line of Barra de Santa Teresa, San Dionisio del Mar, Oaxaca	July 2009
Istmeño Wind Farm Environmental Compensation Program	June 2010
Monitoring of birds on the Santa María Wind Farm and El Espinal	March 2011
Monitoring of birds on the San Dionisio Wind Farm	March 2011
Study of bats in Santa María	March 2011
Isthmus Sparrow Conservation Plan	May 2011
Population-based Study and Action Program for Conservation of the Marine Turtle Habitat in San Mateo and Santa María	May 2011
Population-based Study and Action Program for Conservation of the Olive Ridley ( <i>Lepidochelys olivacea</i> ) Marine Turtle Habitat in San Dionisio	May 2011
Population-based Study and Conservation Plan for the Cinnamon-tailed Sparrow and its habitat in San Dionisio del Mar	May 2011
Population-based Study and Conservation and Management Plan for the Tehuantepec Jackrabbit in Espinal and Santa María	June 2011
Population-based Study and Conservation and Management Plan for the Tehuantepec Jackrabbit in San Dionisio	June 2011
Study on bats in San Dionisio	July 2011
El Istmeño Wind Farm – Hydrological study and water level estimation	August 2011
Integrated Social Management Plan	November 2011
Environmental and Social Action Plan	December 2011
Bibliographic review of the effects of noise from vessels to be used in the San Dionisio Wind Farm and Istmeño Wind Farm projects on marine fauna	2012
Mangrove management program in Cabo Santa Teresa, Oaxaca	2012
Fishing Assessment	December 2012
Fishing Activities Strategy and Plan of Action	March 2013

Source: Various documents, IDB

- 2.32 The ESMR, disclosed on November 22, 2011, stated with regard the project's impact on fishing that: "Fishing is the most important activity for all Mareño communities; fishing areas for each community are well delimited and the project is taking measures to avoid and minimize impacts. Nevertheless, the transportation of heavy equipment and materials as well as increased maritime traffic during construction represent a potential risk to fishing activities that has not yet been fully assessed."<sup>28</sup> It also stated that the Client would prepare a mitigation and compensation plan to address any potential impacts on fishermen, and that those activities were expected to fully recover once construction was completed.
- 2.33 According to the documentation reviewed, in March 2012, the Bank asked the Client to hire an expert consultant to develop a compensation plan for fishermen and engage in consultations based on that plan. The process for hiring the expert was completed in September 2012, nearly a year after the project was approved by the Board of Executive Directors. During this time the Bank had set the condition that the Client could not begin maritime operations until the compensation plan was ready and had been disclosed to the affected communities.<sup>29</sup> The diagnostic assessment was finalized in December 2012, but given the definitive suspension of the project in February 2013, the compensation plan was not completed and it was never disclosed.
- 2.34 **Disclosure of the EIA.** Directive B.5 stipulates the timeline for the disclosure of documents defined in the Access to Information Policy (OP-102) stipulating that the EIA and its respective ESMP must be "**disclosed to the public prior to the analysis mission.**". The analysis mission was conducted from August 30 to September 2, 2011, and the first two EIA of the San Dionisio and Istmeño Wind Farms were published on the Bank's website on October 11 and 18, 2011. The 6 remaining EIA<sup>30</sup> were never disclosed; nor were the environmental and social management plans.
- 2.35 Management indicates that the disclosure of the two EIA was delayed because "the Client objected to the publication of the documents related to the project prior to the signature of the Mandate Letter."<sup>31</sup> No explanations have been received as to why the rest of the documents were not disclosed.
- 2.36 **Directive B.4 - Other Risk Factors.** This directive establishes that, in addition to the risks posed by environmental impacts, the Bank will identify and manage other risk factors that may affect the environmental sustainability of its operations. These risk factors may include elements such as the governance capacity of executing agencies/borrowers and of third parties, sector-related risks, risks associated with highly sensitive social and environmental concerns, and vulnerability to disasters. Depending on the nature and the severity of the risks, the Bank will engage with the executing agency/borrower and relevant third parties to develop appropriate measures for managing such risks.

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<sup>28</sup> ESMR, p. 17, para. 34.

<sup>29</sup> Information extracted from the CAP, 2012.

<sup>30</sup> See Chart 5 for the list of the Project's EIA.

<sup>31</sup> Joint Response of BID-CII Management to the Preliminary Draft Compliance Review Report on the Mareña Renovables Wind Project (ME-L1107) in Mexico.



- 2.37 According to the Implementation Guidelines for OP-703, Directive B.4 is interpreted as referring to other types of risks that are not impact-based for which an environmental assessment may not necessarily be the most relevant tool. As part of the screening process of an operation, the project teams will also identify if there are any potential key or significant risk factors other than environmental and associated social impacts that may jeopardize the environmental feasibility of the operation. Specifically, “projects may be of higher risk due to controversial environmental and associated social issues such as projects unfairly affecting certain segments of society [...] or activities in areas of suspected human rights violations.”<sup>32</sup>
- 2.38 The fundamental finding is that this directive was not triggered in the design and screening phase, or formally in the other phases of the project cycle. In its comments to the draft of this document, Management states that “during the preparation of the project, and based on the Bank’s analysis, there was no indication that the project would pose any of these factors [“other types of risks that are not impact-based for which an environmental assessment may not necessarily be the most relevant tool”<sup>33</sup>], including “risks associated with highly sensitive social and environmental concerns,” as defined in OP-703, Directive B.4, and in the Implementation Guidelines for OP-703.
- 2.39 At the design and screening phase, according to the documentation reviewed, the ESG indicated during the January 2011 eligibility session that the team should be aware that there were sensitive social issues in the area given the existing tensions between landowners and developers in other wind projects. Nevertheless, it found that the issue was being adequately addressed by the Client’s hiring of an expert consulting firm specializing in these issues.
- 2.40 The operation’s financial closure document (February 2012) mentions the Assembly held in January 2012 in San Dionisio where the decision was made to revoke the usufruct contracts because consultations had not taken place. The Bank found at that time that this could potentially affect at least one of the wind farms. In addition, Management was aware of the different incidents in opposition to the project, including the fact that access to the project area was blocked and that there had been violent confrontations among members of the communities.
- 2.41 The timeline of events shown in Chart 4 reflects a number of conflicts, assaults, and blockades that were taking place in connection with the project and with wind development in the region during the Bank’s involvement in the project. The various documents of the Bank and the consulting firms show that they were aware of the tensions and disputes in the area prior to the Bank’s involvement. Indeed, in January 2012, in view of the ongoing tensions and opposition to the project, the Client acceded to the Voluntary Principles on Security and Human Rights at the request of the Bank and in July 2012, Management recommended that the Client hire a consulting firm specializing in social risk assessment and conflict management as a way to address the problem.

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<sup>32</sup> Implementation Guidelines for the Environment and Safeguards Compliance Policy, p. 29.

<sup>33</sup> Directive B.4.

- 2.42 In October 2012, Management found that the social situation had deteriorated to the point that it posed a risk to the continuation of the project. Accordingly, it began to develop a CAP with the objective of providing guidance to the Client on actions needed to prevent greater escalation of the social tensions. The CAP included specific actions regarding consultation and the design of the compensation plans for the communities; the status of the environmental and cultural permits; the social investment and community development plan, and information disclosure and transparency. The CAP was sent to the Client in November 2012 for its review; however, at that time, access to the project site remained blocked and the conflict in the project area was such that in February 2013 the Client decided to withdraw the project from the area.
- 2.43 **Directive B.6 – Consultations.** OP-703 establishes with respect to Directive B.6 that as part of the environmental assessment process, Category “A” and “B” operations will require consultations with affected parties<sup>34</sup> and consideration of their views. It also stipulates that consultations with other stakeholders may be undertaken in order to consider a broader range of expertise and perspectives. In particular, Category “A” operations should have at least two consultation processes during project preparation, the scoping phase of the environmental assessment or due diligence processes, and the review of the assessment reports. For consultation purposes, Directive B.6 states that information should be provided in the locations, languages, and formats to allow for affected parties to be meaningfully consulted, to form an opinion, and to comment on the proposed course of action. Finally, it establishes that the EIA and/or other relevant environmental analyses will be made available to the public consistent with the Bank’s Disclosure of Information Policy (OP-102). During project execution, affected parties should be kept informed of those project-related environmental and social mitigation measures affecting them, as defined in the ESMP.
- 2.44 For purposes of illustration, Chart 7 presents the definitions of information and consultation set forth in the Implementation Guidelines for OP-703 that the Bank uses as a guide for compliance with Directive B.6.

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<sup>34</sup> Affected parties are defined in Policy OP-703 as individuals, group of individuals or communities who may be directly impacted by a Bank-financed operation. Such impacts may be positive or negative. Affected parties may designate representatives as part of the consultation process.

**Chart 7.**  
**Definitions of Information and Consultation**

<b>POLICY DIRECTIVE B.6</b> <b>Consultations</b>
<p>Conceptually, there are three levels of interaction between project proponents and affected parties: <i>information, consultation and participation</i>. This Policy only refers to the first two.</p> <ul style="list-style-type: none"> <li>• Information is the first and essential step in communication. The information presented must be appropriate, meaning relevant, understandable to the recipient, precise, and timely. Dissemination of information is passive, requiring no dialogue between the disseminator and the recipient.</li> <li>• Consultation consists of a constructive dialogue between the affected parties and the project proponent, where each actor listens to the others opinions, concerns, expectations and proposals. Meaningful consultations and consideration of each other's views imply that the parties involved are willing to be influenced in their opinions, activities and plans, and to consider them to a reasonable extent, resulting in concrete actions that take other parties' concerns into account. This process is required for all Category "A" and "B" operations.</li> </ul>

Source: Implementation Guidelines for the Environment and Safeguards Compliance Policy, IDB, May 2007

- 2.45 As stated in other sections, the Bank's review found shortcomings with respect to consultations and information disclosure. In particular, the Bank determined during the due diligence process that, because the 2004-2006 assemblies were held mainly for purposes of securing the usufruct contracts, they were not consistent with the Bank's policies on consultations. In addition, because the EIA were not available at that time, the Bank concluded that the communities had not been properly informed of the scope of the project, its impacts, and the management of those impacts. Consequently, the Bank asked the Client to engage in consultations with the potentially affected communities.
- 2.46 The investigation included a review of the records<sup>35</sup> of information and consultation activities that the Client reported to have conducted. From August to November 2011 (that is, until the operation was approved by the Board of Executive Directors) they report a total of 26 meetings (see Chart 8): ten in San Dionisio, five in Santa María, ten in Álvaro Obregón (Charis and Zapata *ejidos*), and one in San Mateo. According to the same records, most of those meetings were either informational or concerned the negotiation of the usufruct agreements. The records also show that practically all of the meetings were with *ejido* or municipal authorities or leaders. No attendance lists or minutes of what took place at the meetings have been found; nor is there any information about whether those meetings led to specific actions pertaining to consultations. As far as any photographic record, only photographs of events related to the delivery of aid have been identified.

<sup>35</sup> The records list the meetings held with different parties and on different issues between August 2011 and January 2013.

Chart 8.

**Record of Information and Consultation Activities**  
**Summary: August – November 2011**

#	Date	Community	Activity	Participants	Issue
1	August 13	Santa María del Mar	Informational Meeting	General Assembly with authorities and communal landholders	Project status update and matters related to clarification of usufruct payments
2	August 18	Santa María del Mar	Informational Meeting	Municipal Representative of Santa María	Permission and clarification of road use in San Dionisio
3	September 2	Santa María del Mar	Consultation	Members of the community (fishermen) and authorities	Project status update and consultation with the community
4	September 24	Santa María del Mar	Informational Meeting	<i>Ejido</i> leaders and other communal landholders	Project status update and consultation with the community
5	November 17	Santa María del Mar	Consultation	110 Members of the community and authorities	Project status update and consultation with the community
	<b>December 9</b>	<b>Santa María del Mar</b>	<b>Summary of the EIA of the Istmeño Wind Farm provided to communal authorities of Santa María</b>		
6		San Mateo del Mar	Consultation	Community members and authorities of San Mateo	Tour of the project site with the community of San Mateo to show space and boundary areas
7	August 12	San Dionisio del Mar	Informational Meeting	<i>Ejido</i> authorities	Project status update and consultation with the community
8	August 19	San Dionisio del Mar	Bilateral Meeting	Municipal Representative of Pueblo Viejo	Situation in San Dionisio –Pueblo Viejo
9	August 25	San Dionisio del Mar	Informational Meeting	Members of the community and local authorities	Information update
10	September 3	San Dionisio del Mar	Consultation	Municipal authorities of Pueblo Viejo, Huamúchil, and San Dionisio, and 46 community members and leaders	Consultation, information, and review of the usufruct agreement
11	September 19	San Dionisio del Mar – Pueblo Viejo	Consultation	Municipal Representative and communal landholders	Consultation, information, and introduction of Corporate Responsibility team
12	September 22	San Dionisio del Mar	Informational Meeting	Mayor of San Dionisio and council members	Review of the usufruct agreement with authorities
13	September 28	San Dionisio del Mar	Informational Meeting	Municipal authority, community authorities, PCCF fishing cooperative, representative of the council of elders and members of the community	Review of the usufruct agreement and project information update
14	October 2	San Dionisio del Mar	Informational Meeting	Local authorities, community representatives and 43 community members	Review of the usufruct agreement and project information update
15	November 11	San Dionisio del Mar	Informational Meeting	Municipal authority and 32 community members	Consultation and information
	<b>November 16</b>	<b>San Dionisio del Mar</b>	<b>Summary of EIA of the San Dionisio Wind Park Provided to communal authorities</b>		
16	September 19	Charis <i>Ejido</i>	Informational Meeting	Managing Board Authorities	Information on road construction within the <i>ejido</i>
17	September 21	Zapata <i>Ejido</i>	Informational Meeting	Managing Board Authorities	Information on road construction within the <i>ejido</i>
18	September 21	Charis <i>Ejido</i>	Informational Meeting	Managing Board Authorities	Information on the project

#	Date	Community	Activity	Participants	Issue
19	September 28	Santa Rosa de Lima	Informational Meeting	Shuanas <sup>36</sup>	Clarification of information
20	October 8	Zapata <i>Ejido</i>	Informational Meeting	Managing Board Authorities	Road construction
21	October 9	Charis <i>Ejido</i>	Informational Meeting	Chairman of the Managing Board	Road construction
22	October 14	Santa Rosa de Lima	Informational Meeting	Shuanas	Clarification of information
23	October 15	Salinero	Informational Meeting	Salinera del Istmo	Information on road use in Álvaro Obregón
24	October 19	Álvaro Obregón	Informational Meeting	Managing Board Authorities and <i>Ejidatarios</i>	Information on road use in Álvaro Obregón
25	November 1	Zapata <i>Ejido</i>	Informational Meeting	<i>Ejido</i> leader and community	Consultation on access roads and negotiations for right of way agreement for the access roads
26	November 6	Álvaro Obregón	Social Investment	Office of the Mayor of Juchitán and Municipal Representative from Álvaro Obregón	Tour of the route to Barra de Santa Teresa
	<b>March 6, 2012</b>	<b>Charis</b>	<b>Summary of the EIA provided to <i>ejido</i> authorities</b>		

Source: Macquarie

- 2.47 These findings confirm the information presented in the section of the ESMR<sup>37</sup> on public consultation, which reports that the communities have received information on the project's objective and scope, and that the consultations have been focused on ensuring the land usufruct contracts and the right of easement. Nevertheless, the ESMR also states that the defects in the consultation process were remedied by public informational meetings held during September 2011 with all of the communities in the project's direct area of influence,<sup>38</sup> so that when the project was approved by the Board of Executive Directors, the Bank had determined,<sup>39</sup> based on the records submitted by the Client, that the requirement to engage in consultations had been satisfied.
- 2.48 In its comments to the draft version of this document,<sup>40</sup> Management remarked that the requirement to hold two consultations during the project's preparation had been met prior to the approval of the operation and included a chart summarizing some of the information that was presented earlier in Chart 8. It additionally commented that the EIA had reportedly been published by SEMARNAT on its website and were available to the public. Finally, it added that adequate information was provided regarding the environmental impacts of the wind farms,

<sup>36</sup> The function of the *shuanas* is to disseminate the customs and traditions of the neighborhoods they are elected to represent. In Tehuantepec they are the moral authorities of the neighborhoods and they preserve the traditions and customs that have been passed down through generations. After the mayor, they are the highest authority of each neighborhood. They are considered the custodians of customs, and their social function is to lead the ceremonial organization of the Zapotec culture during festivals and to maintain daily customs.

<sup>37</sup> ESMR, para. 64, p. 28.

<sup>38</sup> ESMR, paras. 64-66, p. 28

<sup>39</sup> ESMR, section VI about Public Consultations

<sup>40</sup> Joint Response of BID-CII Management to the Preliminary Draft Compliance Review Report on the Mareña Renovables Wind Project (ME-L1107) in Mexico, section III.1.

transmission line, docking stations, and access roads in a PowerPoint presentation created by the Client for the communities.<sup>41</sup>

2.49 However, based on the same records used to create Chart 8 for the pertinent period, it was found that:

- a. The summaries of the EIA pertaining to the wind farms and the transmission line were provided to community authorities subsequent to those activities (see boldface text in Chart 8 showing the date on which it was provided to each community).
- b. Each community received only the EIA of the component that directly involved that particular community, and none received summaries of the other EIA.
- c. No information has been found in the documentation reviewed with respect to the disclosure and consultation of the EIA in connection with the docking stations and the changes to the access roads.
- d. No documentation has been found with respect to the disclosure of the social risk management plans and baselines prior to the operation's approval by the Board of Executive Directors on November 23, 2011, even though there was a robust social management and consultation plan (ISMP) dated November 2011.
- e. The summaries did not include information on the social assessments and the environmental and social management provided for in the project; nor were any records found regarding consultation on the social management assessments and plans.
- f. No documentation has been found with respect to the disclosure and consultation of the social risk management plans and baselines prior to the operation's approval by the Board of Executive Directors on November 23, 2011, even though there was a robust social management and consultation plan (ISMP) dated November 2011.
- g. The presentation prepared by the Client in Spanish did not include information on the environmental impacts and mitigation measures, and makes no mention of the docking stations or the maritime transport activities.
- h. Most of the meetings focused solely on the local authorities, on the presumption that they would inform the rest of the community.
- i. Most of the meetings aimed to provide information rather than to engage in consultation.
- j. No attendance lists were found, or records of the information gathered at the meetings, or the considerations made as a result of the inputs received.

2.50 Regarding the content of the EIA, the investigation found that the EIA of the Istmeño Wind Farm authorized by SEMARNAT included the installation of turbines not only in Santa María del Mar—as proposed in the approved project design—but also in San Mateo del Mar and El

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<sup>41</sup> The presentation is available in the “Electronic Links” section.

Espinal. This same discrepancy was found in the September 2011 EIA of the docking station on the Istmeño Wind Farm.<sup>42</sup>

- 2.51 It is understood that the project for the Istmeño Wind Farm was amended after the preparation and approval of the EIA in 2009 because the people of San Mateo expressed that they were not interested in having turbines installed in their community. However, we have been unable to find updated documentation on the EIA or notices to the environmental authority (see section on Directive B.2 regarding country laws) about the adjustments in the implementation area. In Management's response to the draft version of this document, it stated that, "it acted prudently in disclosing the EIA that included the areas of San Mateo and El Espinal, since they could have been developed in a second phase of the project... and [therefore] demonstrates the Bank's commitment to transparency."<sup>43</sup>
- 2.52 Finally, it is important to mention that the Requesters provided recordings to the MICI in which members of the community provided accounts of the intimidation to which they were subjected because of their opposition to the project. This was later substantiated during the mission with information provided by members of the communities concerning violent acts that took place among community members for vocalizing their opposition or support for the project since the early stages of its preparation.
- 2.53 **Directive B.7 – Supervision and Compliance.** The Bank will monitor the executing agency/borrower's compliance with all of the safeguards stipulated in the loan agreement and project operating or credit regulations. Safeguard requirements, such as those in an ESMP, must be incorporated into the project contract documents, its operating or credit regulations, or the project bidding documents, as appropriate, setting out as necessary milestones, timeframes, and corresponding budgetary allocations to implement and monitor the plan during the course of the project. Safeguard indicators, as appropriate, should be clearly defined in the logical/results framework, followed-up in project monitoring reports, and reviewed in the mid-term reviews and project completion reports. Compliance with safeguard commitments and identification of unexpected safeguard issues will be analyzed, reviewed, and reported as part of the Bank's administration and portfolio review missions. Category "A" projects will be reviewed at least annually to assess safeguard compliance. Whenever ex-post evaluations are conducted, these will evaluate the sustainability outcomes of an operation.
- 2.54 The set of plans and policies prepared as part of the environmental and social management framework were documented in the loan contract as part of the environmental and social obligations to be met by the project during the construction and operation phases. In particular,

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<sup>42</sup> "The **Istmeño Wind Farm** project entails the construction and operation of a Wind Farm with the installation of 174 wind turbines and two electric substations with a total capacity of 394.98 MW, to be distributed to two sites in the Isthmus of Tehuantepec. The first site consists of the properties called Santa María del Mar and San Mateo del Mar (with 76 and 65 wind turbines, respectively, and one electric substation with a generating capacity of 320.07 MW), and the second site is called El Espinal (with 33 wind turbines and one electric substation with a generating capacity of 74.91 MW), with a total affected surface area of 4,767 ha, in an Environmental System equivalent to 82,723.40 ha." (Statement regarding docking station of the Istmeño Wind Farm Project, September 2011).

<sup>43</sup> See Annex 1, Joint Response of IDB-IIC Management to the Preliminary Draft of the MICI's Compliance Review Report on the Mareña Renovables Wind Project (ME-L1107).

the ESAP specified a schedule of actions to be taken with the objective of closing the gaps identified in the EIA process with respect to policies, organizational capacity, information disclosure and consultation, management programs, working conditions, land acquisition, economic displacement, and compensation plans for living conditions.

- 2.55 At different points during the project, the Bank also required the preparation of a set of plans to address and mitigate environmental and social risks, which were included in the loan contract as part of the environmental and social obligations to be met by the project during the construction and operation phases. The contract also established the supervision plan to be followed by the Bank to ensure compliance with the environmental and social safeguards.
- 2.56 Finally, the Bank provided for mandatory compliance with any Corrective Action Plan required to address potential instances of noncompliance. The Bank did in fact issue a CAP<sup>44</sup> during the execution period, dated November 16, 2012, and was in the process of monitoring compliance when the project was suspended.
- 2.57 **Directive B.2 – Country Laws and Regulations.** Policy Directive B.2 of OP-703 establishes that the Bank will require the Client for that operation to ensure that it is designed and carried out in compliance with environmental laws and regulations of the country where the operation is being implemented, including national obligations established under ratified multilateral environmental agreements. It further establishes that the Bank will define appropriate measures to comply with Directives B.1 and B.2.
- 2.58 The investigation found two pertinent issues related to compliance with national law: the first, mentioned earlier, concerns the implementation area described in the EIA of the Istmeño Wind Farm authorized by SEMARNAT, and disclosed by the Bank. While the EIA provided for the location of towers not only in Santa María but also in San Mateo and El Espinal, the project approved by the Bank did not include the latter locations.
- 2.59 A review of the official EIA approval letter issued by SEMARNAT in 2010<sup>45</sup> showed that it contained the legal requirement that SEMARNAT had to be notified of any change to the project evaluated to ensure that the same authority would determine whether those changes affected the assessment. However, no evidence was found of notification to the authority, and in fact, the EIA of docking stations filed in 2011 still included San Mateo del Mar and El Espinal as areas slated for the installation of turbines—even though throughout 2012, according to a document

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<sup>44</sup> The Corrective Action Plan is a plan to “correct or remedy the harm and adverse consequences caused by the project.”

<sup>45</sup> Official Letter S.G.P.A./DGIRA.DG.0588.10 of February 3, 2010 concerning the authorization of the EIS for the Istmeño Wind Park establishes that: “Fifth.- the applicant must notify the DGIRA [Office of Environmental Risk and Impact of SEMARNAT] prior to any amendment of the project evaluated, in accordance with the terms provided in the applicable environmental law, to allow for a timely determination of the appropriate course of action. Therefore, the applicant should submit the comparative technical, legal, and environmental analysis of the authorized project as well as the changes to be made (environmental conditions of the site, environmental impacts, mitigation measures, and expected scenarios), with which the DGIRA will be able to analyze whether the requested changes will alter the original assessment of the project, for purposes of determining the appropriate course of action...”

Seventh.- The applicant must adhere to the description contained in the EIS-R, the additional information, the information referring to the additional information, the plans included therein...”



consulted,<sup>46</sup> requests were submitted to the authority for the approval of changes to 7 of the 8 EIA for other reasons, and the 2012 CAP stipulated that the Client needed to take action by January 2013 to clarify the area to be used by the Istmeño Wind Farm. There was no evidence that this was done before the project was suspended, and it was certainly not done prior to the approval of the project or the disbursements made.

- 2.60 The second issue concerning compliance with national law is also related to the 2010 EIA and the obligation under the national environmental laws to publish the existence of the EIA in a newspaper with statewide circulation in order to notify affected populations. According to the documentation reviewed, the MICI found that in 2010 the authority published the processing of the two EIA in SEMARNAT's Ecological Gazette (digital edition), but Preneal failed to publish a summary in a newspaper with statewide circulation as required under Mexican environmental laws in such cases. Article 34(II) of the General Law of Ecological Balance and Environmental Protection of Mexico (see Chart 9 for the respective summary) requires local disclosure, and compliance with that obligation gives affected populations (in this case, indigenous communities located in marginalized areas) the opportunity to know about expected environmental impacts and to exercise their right to demand the disclosure of the EIA in their local areas in order to be informed and even request public hearings. In the case of the EIA of the San Dionisio and Istmeño Wind Farms, the affected populations were not able to exercise this right.
- 2.61 In addition, according to the legal documentation reviewed, the failure to disclose information by this means could be grounds for the invalidation of the respective environmental authorization pursuant to a November 16, 2011 decision of the Supreme Court of Mexico which held that an Environmental Impact Authorization issued without publishing a summary of the environmental impact assessment in a newspaper widely circulated in the state in which the project will be developed can be declared null and void.<sup>47</sup> This was an additional vulnerability in the sustainability of the project.

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<sup>46</sup> Memorandum of legal opinion of the Galicia Law Firm, November 13, 2012.

<sup>47</sup> Supreme Court of Mexico, Constitutional Case 89/2010

**Chart 9.**  
**National Law on Environmental Obligations concerning Environmental Impact Assessments and their Disclosure**

General Law of Ecological Balance and Environmental Protection  
 New Law published in the Official Gazette on January 28, 1988

ARTICLE 34.- Once the Department receives an environmental impact statement and opens the file referred to in Article 35, the Department shall make such statement available to the public so that it can be consulted by any individual.

The promoters of the work or activity may request that the information included in the file be kept confidential because its public disclosure may affect industrial property rights and the secrecy of the commercial information provided by the interested party.

The Department, at the request of any person or company from the community in question, may conduct a public consultation pursuant to the following bases:

I.- The Department shall publish the request for authorization in environmental impact matters in its Ecological Gazette. In addition, the promoter shall publish, at its own expense, a summary of the work or activity plans in a widely-circulated newspaper in the respective state within five days of the date on which the environmental impact statement is submitted to the Department;

II.- Any citizen, within ten days of the publication of the project summary under the above terms, may ask the Department to make the environmental impact statement available to the public in the respective state;

III.- In case of works or activities that may cause significant ecological imbalances or harm to public health or ecosystems, pursuant to the provisions established in the regulations to this Law, the Department, in coordination with local authorities, may organize a public information meeting in which the promoter shall explain the technical environmental aspects of the work or activity involved;

IV.- Any interested party, within twenty days of the date on which the Department discloses the environmental impact statement to the public pursuant to the terms of section I, may suggest the implementation of additional prevention and mitigation measures, as well as remarks deemed appropriate, and

V.- The Department shall add the remarks of the interested parties to the respective file and include, in any decision it may issue, the public consultation process conducted and the results of the remarks and proposals submitted in writing.

Article amended OG 13-12-1996

Source: Official Gazette

#### d. Determination of compliance with OP-703

- 2.62 According to the findings of the MICI's investigation in relation to the application of the Environment and Safeguards Compliance Policy (OP-703) by the Bank's Management, the project triggered various directives of this policy, and given the scope of the approved investigation, its focus was on determining compliance in relation to directives B.1 to B.7. The opinion of the MICI with respect to the Bank's compliance with those directives is presented below.
- 2.63 According to the findings of the investigation, the MICI believes that the Bank complied with Directive B.3 (Screening and Classification) and B.7 (Supervision and Compliance). In our opinion, the Bank correctly classified the operation as Category "A" "due to the scale of the wind park, the 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 the potential cumulative impacts on avian fauna given the presence of numerous other wind parks in the region."<sup>48</sup>
- 2.64 We also find that the Bank established a supervision plan consistent with the requirements of Directive B.7 by including measures in the different legal instruments that that would make it possible to monitor the implementation of the project and the plans to mitigate the risks identified. The assessment of the sufficiency of that supervision plan and its eventual implementation goes beyond the scope of this investigation, since the Client decided to cancel the execution of project ME-L1107 for the San Dionisio and Istmeño Wind Farms before the construction phase began, as it was unable to access those sites due to the roadblock initiated in 2012 by members of the local indigenous communities.
- 2.65 In relation to the provisions of Directives B.1, B.2, B.4, B.5, and B.6, the MICI is of the opinion that the investigation's findings lead to the conclusion that the Bank failed to observe those directives as follows:
- 2.66 **Directive B.4 Other Risk Factors.** As stated in the sections above, the project was to be implemented in an area where there was considerable social unrest and where opposition to wind development had already begun prior to the Bank's involvement and increased sharply thereafter. In addition, the project was presented as the largest in Latin America and the first to be established on communal lands near the coast where the survival of the communities is highly dependent on fishing. All of this gave rise to "very sensitive social and environmental concerns"<sup>49</sup> in the Isthmus region liable to adversely affect the environmental and social sustainability of the project. Because the directive was not triggered, the Bank failed to take advantage of the opportunities that the project preparation stage offered to address/mitigate the risks arising from it. Even though it later required the Client to take a number of actions to identify and address these risks, those actions were reactive, were applied to late, and were ineffective in view of the escalation of conflict once the project was approved. The MICI is of the opinion that the timely identification of those risks, as established in Directive B.4, as well as the

<sup>48</sup> Para. 2.3 of the Environmental and Social Strategy (ESS), available in the "Electronic Links" section.

<sup>49</sup> Directive B.4 Other Risk Factors, Environment and Safeguards Compliance Policy, March 2006.

pertinent mitigating actions, would have enabled the Bank to more effectively support the Client's ability to manage them.

- 2.67 **Directive B.5. Environmental Assessment Requirements.** It is the opinion of the MICI that compliance with Directive B.5 was partial. The directive was observed to the extent that environmental impact studies were required during the project preparation and execution, creating valuable information for the design of the project's environmental framework. In addition, even considering that the project location had already been defined almost entirely prior to the Bank's involvement, the EIA and the conditions set by the environmental authority for their approval led to adjustments and modifications to the design of the components; the scale of the wind farms was reduced, and new access alternatives were included to mitigate some of the identified impacts, including the redesign of the route for the transmission lines. Changes were also made to the location of the turbines to avoid affecting archaeological sites (INAH conditions) and to mitigate the impact on the area's flora and fauna (such as mangroves and the jackrabbit habitat), and the maritime routes were designed to avoid negative effects on areas that were culturally sensitive for the indigenous communities. The environmental and social management plans were robust and comprehensive, and included mitigation activities clearly consistent with the identified risks. For instance, with respect to effects on fishing, the Bank sought to ensure the implementation of a compensation plan that, in its opinion, would address the temporary effects that the area's fishermen would experience during the construction period. It also demanded that the usufruct agreements be revised to improve compensation to the communal landholders. In all of the above, the Bank complied with what Directive B.5 requires for Category "A" projects.
- 2.68 Nevertheless, the Bank failed to comply with this directive regarding the timely and comprehensive disclosure of the environmental assessment process, which also had a negative effect on the consultation processes. Specifically, the requirement of Directive B.5 to "disclose [the EIA and its respective ESMP] to the public prior to the analysis mission" was not met. The analysis mission was carried out from August 30 to September 2, 2011, and the first two EIA of the San Dionisio and Istmeño Wind Farms were disclosed through the Bank's website on October 11 and 18, 2011. The remaining six EIA were never released; nor were the environmental and social management plans. Disclosure prior to the analysis mission was not complied with, and any disclosure made after that date, took place only 30 days prior to the approval of the project in spite of the fact that the disclosed information was available since 2009. The importance of disclosing the environmental and social information in its entirety during the preparation stage is established in OP-703 so that affected populations can be informed about the project and its scope, as well as the way in which negative impacts are being addressed. The concerns of the affected population, as well as the risk of erroneous perceptions of the project, are thereby reduced. In this case, the information gaps created by this noncompliance during the preparation stage increased uncertainty among the population, generating erroneous perceptions of the project and its impacts.
- 2.69 This failure to timely and completely disclose the framework of the environmental and social assessment of the project also undermined the possibility of shaping the project with inputs from the affected communities.

- 2.70 **Directive B.2. Country Laws and Regulations.** With respect to Directive B.2, the MICI finds that no action by the Client or the Bank from the beginning of its involvement could have remedied the omission to disclose the EIA in a newspaper with statewide circulation, in terms of compliance with the law. Nevertheless, the MICI is of the opinion that the risk created by the omission should have been reported to the Board of Executive Directors at the time of the operation's approval, since it directly affected the viability of the project. It also should have been explicitly considered within the risk management plan and implementation of mitigating measures.
- 2.71 Regarding the requisite approval of changes to the implementation area provided for in the EIA of the Istmeño Wind Farm (2009) and of its jetties (2011), the MICI finds that, even though different Bank instruments included the obligation to comply with local laws, the Bank failed to observe this directive with respect to the modification of the area of implementation set forth in the EIA by failing to require that the Client comply with the environmental laws and by accepting the September 2011 EIA of the jetties with an implementation area that was different from that of the project. These discrepancies in documentation have, at a minimum, created uncertainty among the affected communities, in particular for the community of San Mateo, which had clearly expressed its rejection of the project since before the Bank's involvement. In the opinion of the MICI, both omissions with respect to the local laws directly affected the disclosure and consultation processes with the affected populations.
- 2.72 **Directive B.6. Consultations.** With respect to this directive, the MICI agrees with Management that the assemblies held in 2004 and 2006 did not satisfy the requirements of the Bank in relation to the consultations. However, the MICI disagrees with Management to the extent that it finds that the informational activities conducted prior to the November 2011 approval of the operation did meet those requirements. The MICI is of the opinion that, even though in November 2011 a consulting firm issued the Integrated Social Management Plan that included robust consultation plans, in particular with respect to the effects on fishing, Directive B.6 was not observed during the **project preparation stage, as required for Category "A" projects** in terms of providing the information in the locations, languages, and formats to allow for affected parties to be meaningfully consulted, since:
- a. The affected populations did not have complete information about the Project, its impacts, and the mitigation plans that would have allowed them to participate productively in the consultations. The dates on which the communities received the summaries of the EIA were either subsequent to or just prior to the project's approval. In no case did the communities receive the comprehensive summary of the eight EIA and their respective mitigation plans.
  - b. There is no evidence that the reported informational and consultation meetings have enabled the affected parties to comment on the proposed course of action, or of how it would have informed the plans. During the investigative mission to the project area the different communities (not just the Requesters) stated that they had not received information or had the opportunity to have their concerns addressed.
  - c. The material that Management offers as sufficient and appropriate for the consultation process is limited to one PowerPoint presentation in Spanish that does not discuss the potential adverse environmental and social impacts, or the proposed mitigation alternatives. In

view of the fact that the population in the area is primarily indigenous, the format and language cannot be considered to be compatible with the culture.

- d. The MICI has recordings in which members of the community provide accounts of the intimidation to which they have been subjected for opposing the project, and additional information was obtained during the mission about violent acts among members of the community for this same reason. Such an environment certainly limits participation in open consultation processes.

2.73 In addition, in spite of the fact that there were disclosure actions after the project's approval and throughout 2012, Directive B.6 is clear with respect to the timing and purpose of consultations. As established by the Bank:

*The people that may be directly or indirectly affected by a project or other activities supported by the Bank have a basic right to know what will happen and have a right to express their opinions and be heard. [...] people should be able to receive accurate, comprehensible information about the objectives, scope, timing, and potential impacts and risks associated with a project. It means that they will be given the opportunity to express their concerns, fears, and doubts, will be allowed to share their knowledge, insights, and understanding, and will be able to recommend modifications or changes in the operation. It also means that their concerns, fears, and recommendations will be seriously considered and, wherever possible, addressed.<sup>50</sup>*

2.74 In short, it is the opinion of the MICI that the absence of complete and accurate information, as well as the failure to disclose that information in a timely manner, prevented compliance with Directive B.6 on consultations. The affected population was unable to participate effectively in a consultation process because it did not have all of the information related to the project and its impact. The availability of information and the timeliness of consultation actions are two fundamental issues in the process provided for by OP-703. However, the population's concerns about the project at its preparation stages could not be resolved and, upon the project's approval by the Board of Executive Directors, the affected populations could hardly find credible consultation actions concerning a project that—from their perspective—had already concluded its design phase and was beginning construction without having considered the inputs they may have wanted to contribute.

## **2. Regarding the Access to Information Policy (OP-102)**

### **a. Allegations of the Requesters**

2.75 The request stated that the communities were not consulted and that information about the project was not disclosed. It also mentions the meeting held with Bank staff at the Country Office in Mexico in November 2012, when they requested documentation related to the consultations that may have been held. They allege that said information had not been turned over by the time the request was submitted to the MICI, even though the Bank personnel had agreed to do so.

### **b. What does OP-102 provide?**

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<sup>50</sup> Guidelines on Consultation and Stakeholder Engagement in IDB Projects, VPS/ESG, IDB, July 2013, p. 3.

- 2.76 The objective of the Access to Information Policy is to enhance accountability and effectiveness in development. Through implementation of this policy the Bank seeks to demonstrate its transparent use of public funds, and by deepening its engagement with stakeholders, to improve the quality of its operations and knowledge and capacity-building activities. The policy is based on the following principles:
- 2.77 Principle 1: Maximize access to information. The Bank reaffirms its commitment to transparency in all of its activities and therefore seeks to maximize access to any documents and information that it produces and to information in its possession that is not on the list of exceptions. Further, so long as the Bank is not legally obligated to non-disclosure, and has not received information with the understanding that it will not be disclosed, information on the list of exceptions will be disclosed in accordance with timelines and procedures specified for that purpose.
- 2.78 Principle 2: Narrow and clear exceptions. Any exceptions to disclosure will be based upon the possibility, narrowly and clearly defined that the potential harm to interests, entities or parties arising from disclosure of information would outweigh the benefits, that the Bank is legally obligated to non-disclosure, or has received information with the understanding that it will not be disclosed. The Bank may, in exceptional circumstances, decide not to disclose information that would be normally accessible if it determines that the harm that might occur by doing so will outweigh the benefits of access. The Bank may also, in exceptional circumstances, make available to the public information ordinarily excluded from disclosure when it determines that the benefit would outweigh the potential harm.
- 2.79 Principle 3: Simple and broad access to information. The IDB will employ all practical means to facilitate access to information. Guidelines for maximizing access to information will include clear and cost-effective procedures and timelines for processing requests and will be based on use of a system for classifying information according to its accessibility over time.
- 2.80 Principle 4: Explanations of decisions and right to review. When denying access to information the Bank will provide an explanation for its decision. Requesters who believe they have been denied access to information in violation of the policy will have the right of review of such decisions by an interdepartmental Access to Information Committee chaired by the Office of the Presidency. In the event that the requesters are denied access to information by the Committee, they may have further redress through review by an external panel established by the Bank for that exclusive purpose.
- 2.81 The policy also contains exceptions, including for information related to non-sovereign guaranteed operations. Information and documents related to non-sovereign guaranteed operations or provided to the Bank in connection with such operations, other than: (i) information listed in Annex II of the policy and (ii) information with respect to which the respective borrower has expressly consented to disclosure (see Chart 10).

**Chart 10**  
**Information to be Disclosed in Relation to Non-sovereign Guaranteed Operations (Annex II)**

<ul style="list-style-type: none"> <li>• Initial project abstracts</li> <li>• Environmental and Social Strategies</li> <li>• Environmental impact assessments</li> <li>• Strategic environmental analyses</li> <li>• Environmental analyses</li> <li>• Environmental and social management reports</li> <li>• Abstracts of approved projects</li> </ul>
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Source: Access to Information Policy, 2010

2.82 The policy also provides disclosure requirements for borrowers in paragraph 5.2: “Borrower disclosure practice. The Environment and Safeguards Compliance Policy (GN-2208-20, paragraph 4.20) provides that ‘as part of the environmental assessment process...appropriate information will be provided in location(s), format(s) and languages(s) to allow for affected parties to be meaningfully consulted.’ Management’s annual reports to the Board on implementation of the Access to Information policy will review the practices of borrowers with respect to the disclosure of environmental and social assessments related to Bank-financed projects.”<sup>51</sup>

**c. MICI findings in reference to compliance with OP-102**

2.83 The MICI’s findings with respect to compliance with this policy are framed by the disclosure obligations that OP-102 establishes for non-sovereign guaranteed operations such as the one at issue in the instant case. They also include considerations with respect to compliance with other ROP, in particular in relation to the timeliness of disclosure and the accessibility of information.

2.84 Chart 11 shows the project documents that are subject to mandatory disclosure under OP-102, the language in which each document was available, and whether it was published on the Bank’s website, as well as the date of disclosure. It is important to underscore that even though the ESMP does not appear on the list of information to be disclosed in the case of non-sovereign guaranteed operations, there is an obligation to release it pursuant to Directive B.5 of OP-703: “An EIA report must be prepared with its ESMP and disclosed to the public prior to the analysis mission, consistent with the Disclosure of Information Policy (OP-102);”<sup>52</sup> and consistent with the practice of the Bank established in its Guidelines that “A standard EIA report contains sufficient details under the main sections as listed below: ... Section 7 Environmental and Social Management Plan (ESMP).”<sup>53</sup>

2.85 Of the 22 documents listed as subject to mandatory disclosure, only five were disclosed. Of those five documents, only two were released in the language of the country in which the project was to be executed (Spanish). In addition, as mentioned above, the EIA of the Istmeño Wind Farm (as well as the EIA of the docking stations of the Istmeño Wind Farm) published on the

<sup>51</sup> OP-102, paragraph 5.2, p. 4.

<sup>52</sup> OP-703, Directive B.5, p. 11.

<sup>53</sup> Implementation Guidelines for OP-703, Annex II, section A.8, para. 11.



website showed a much larger geographic area for the Istmeño Wind Farm than the project area approved by the Bank, and included the communities of San Mateo del Mar and El Espinal as turbine installation areas.

- 2.86 Even though the Bank's website currently has a link to the ESAP (equivalent to the ESMP), it is not a working link because the file permissions have not been set to allow public access. Finally, none of the other plans contained in the project's environmental and social management plan (paragraphs 2.23-2.35) were disclosed by the Bank on its website. It bears noting that the CAP drafted in November 2012 required the Client to disclose those plans and hold presentation sessions, but this was not done.

**Chart 11.**  
**Environmental Documentation on the Project to be Disclosed**  
**in accordance with Annex II of OP-102**

	<b>Project documents</b>	<b>Annex II</b>	<b>Language</b>	<b>Date of disclosure on the Bank's website</b>
1	Initial project abstract	Initial project abstract	English	September 19, 2011
2	Environmental and Social Strategy	Environmental and social strategy	English	September 19, 2011
3	EIS Istmeño Wind Farm	Environmental impact assessment	Spanish	October 11, 2011
4	EIS San Dionisio Wind Farm	Environmental impact assessment	Spanish	October 18, 2011
5	EIS Transmission lines from Santa Teresa substation to La Ventosa substation	Environmental impact assessment	Spanish	Not disclosed
6	EIS Docking stations of the San Dionisio Wind Farm project	Environmental impact assessment	Spanish	Not disclosed
7	EIS Docking stations of the Istmeño Wind Farm project	Environmental impact assessment	Spanish	Not disclosed
8	EIS Access roads to the wind farms	Environmental impact assessment	Spanish	Not disclosed
9	Roads inside the San Dionisio Wind Farm	Environmental impact assessment	Spanish	Not disclosed
10	Roads inside the Istmeño Wind Farm	Environmental impact assessment	Spanish	Not disclosed
11	Integrated Social Management Plan	Environmental impact assessment	English	Not disclosed
12	Environmental and Social Action Plan	Environmental impact assessment	English	Posted but not accessible
13	Monitoring of birds on the Santa María Wind Farm	Environmental impact assessment	Spanish	Not disclosed
14	Study on bats in Santa María	Environmental impact assessment	Spanish	Not disclosed
15	Study on bats in San Dionisio	Environmental impact assessment	Spanish	Not disclosed
16	Population-based Study and Action Program for Conservation of the Marine Turtle Habitat in San Mateo and Santa María	Environmental impact assessment	Spanish	Not disclosed
17	Population-based Study and Action Program for Conservation of the Marine Turtle Habitat in San Dionisio	Environmental impact assessment	Spanish	Not disclosed

	Project documents	Annex II	Language	Date of disclosure on the Bank's website
18	Population-based Study and Conservation and Management Plan for the Tehuantepec Jackrabbit in Espinal and Santa María	Environmental impact assessment	Spanish	Not disclosed
19	Population-based Study and Conservation and Management Plan for the Tehuantepec Jackrabbit in San Dionisio	Environmental impact assessment	Spanish	Not disclosed
20	El Istmeño Wind Farm – Hydrological study and estimation of water levels	Environmental impact assessment	Spanish	Not disclosed
21	Mangrove management program in Cabo Santa Teresa, Oaxaca	Environmental impact assessment	Spanish	Not disclosed
22	Environmental and Social Management Report	Environmental and social management report	English	November 22, 2011

#### **d. Determination of compliance with OP-102**

2.87 According to the findings of the MICI's investigation, the Bank failed to comply with the obligations established in OP-102 for non-sovereign guaranteed operations because:

- It failed to disclose all of the documents subject to mandatory disclosure pursuant to Annex II of OP-102.

### **3. Regarding the Operational Policy on Indigenous Peoples (OP-765)**

#### **a. Allegations of the Requesters**

- 2.88 The Requesters alleged a number of current and potential harms associated with the project, and asserted that those harms resulted from the lack of consultation consistent with the provisions of the Bank's Policy on Indigenous Peoples (OP-765). They alleged that the omission amounted to the Bank's noncompliance with the Policy since, in the early implementation of the project, the Bank failed to verify key consultations with the communities about potential adverse impacts; they further allege that the Bank did not request evidence of the agreements reached with the respective communities about particularly significant potential adverse impacts.
- 2.89 The request additionally asserted that the Bank had not verified during the project design and preparation stages whether the indigenous communities were opposed to the project. In support of this assertion, the Requesters submitted the minutes from three communal assemblies at which members of the communities of Pueblo Viejo, San Dionisio del Mar, and Álvaro Obregón objected to the construction of the wind farms.
- 2.90 In particular, they alleged that the project neglected to take account of the self-government and decision-making system of the local indigenous peoples, and that this omission gave rise to acts of intimidation and physical attacks against the Requesters. As evidence of this, they attached the minutes from two assemblies at which members of the communities of Pueblo Viejo, San Dionisio del Mar, and Huamúchil expressed their opposition to the installation of the wind farm in Barra de Santa Teresa.

- 2.91 The Requesters further alleged that the construction and operation of the project would affect the special relationship that the communities maintain with their territories, by partitioning community lands and changing their traditional use. The Requesters were also concerned over the loss of the cultural heritage and integrity of the area's indigenous communities due to project-related restrictions on access to the sites in Barra de Santa Teresa and Punto Tileme where they held their traditional ceremonies.
- 2.92 Finally, the Requesters alleged the potential loss of identity and customs among members of the communities due to the migration of third parties with different cultural values, and social impacts arising from vehicular traffic and the transport of heavy machinery.

**b. What does OP-765 provide?**

- 2.93 One of the objectives of the Bank's Policy on Indigenous Peoples is to support sociocultural development processes that are appropriate to the economy and governance of indigenous peoples, giving priority to territorial and cultural integrity, to a harmonious relationship with the environment, and to security in the face of vulnerability, while respecting the rights of indigenous peoples and individuals. Through this policy, the Bank also acknowledges the need to consolidate conditions that enable indigenous peoples to exercise the right to participate effectively in determining their own political, economic, social, and cultural future within the framework of participation in democratic systems and of the construction of multicultural states.
- 2.94 Regarding its application to the project cycle, la OP-765 provides requirements at the approval, execution, and supervision stages in order to take account of the perspectives of indigenous peoples.
- 2.95 At the programming stage, the Bank will review operations in order to: (i) determine whether indigenous peoples who might be affected are present and identify potential impacts and benefits for these peoples be they direct, indirect, cumulative or regional; and (ii) depending on the nature, scope, and intensity of the impacts and benefits identified, determine the level of analysis needed to address indigenous issues, including sociocultural analyses and consultation and good faith negotiation processes. If the project so warrants, the review will rely on experts in indigenous issues and, whenever possible, on inputs from the indigenous peoples who might be affected by the project. The findings of this review will be incorporated into the project concept document.
- 2.96 Once the decision has been made to proceed with the processing of a project with potential adverse impacts, the Bank will offer guidance and will verify, to its satisfaction and as early as possible in the project cycle, the project proponent's compliance with the following requirements:
- preparation of sociocultural evaluations as inputs for the loan document, analysis mission, and the project environmental and social review process;
  - implementation of socioculturally appropriate and duly documented consultation and good faith negotiation processes with the affected indigenous peoples, in relation to project design, analysis of alternatives, preparation, due diligence, and execution; and

- incorporation into the project of enforceable measures for mitigation, restoration, and compensation reflected in the content of the loan document and of project contractual documents, and detailed in plans for indigenous protection, compensation, and development or in other instruments in a timely manner.

- 2.97 In addition to the requirements set forth for those projects with particularly significant potential adverse impacts on indigenous peoples or groups, the Bank will require that the project proponent provide, no later than by the date of consideration of the operation by the Board of Executive Directors, evidence duly verified by the Bank and to the Bank's satisfaction of the agreements reached with the affected peoples.
- 2.98 The Bank will adopt supervision and evaluation measures designed to verify that the project proponent fulfill, to the Bank's satisfaction, the measures agreed to meet the requirements of this policy with respect to the project, including socioculturally appropriate mechanisms for the participation of indigenous peoples.

### **c. MICI findings in reference to compliance with OP-765**

- 2.99 The MICI's findings with respect to the Bank's compliance with the provisions of OP-765 focus primarily on the issue of consultation with the indigenous communities, given that, according to the request, the alleged harm would be the result of noncompliance with OP-765 in reference to this point. It is pertinent to note here that the Mexican Constitution recognizes the right of indigenous peoples and articulates this right in the National Indigenous Law. In addition, the Mexican State is a signatory to ILO Convention 169. Locally, the State of Oaxaca legally recognizes indigenous organizations and the application of "customs and practices"<sup>54</sup> as a form of community government in which municipal authorities are elected according to indigenous customs, as documented in the ESMR. In addition, the state government during that time had a solid indigenous agenda that included the "right of this type of community to be informed and consulted in accordance with the principles of the United Nations."<sup>55</sup>
- 2.100 Within this framework, as previously mentioned, the Bank's and the Client's involvement began in December 2010, nearly seven years after the project began. In the project preparation and identification document there are various references to the indigenous population in the area of influence, and the Bank therefore determined that: "the project has or may create minor negative impacts on indigenous communities."<sup>56</sup> In addition, the EAS issued in January 2011 notes that "the direct, indirect, and cumulative impacts of the project on the local communities will be evaluated during due diligence through a sociocultural assessment. It will also be verified

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<sup>54</sup> PRACTICES: Practices are a type of legal custom. The distinction between practices and legal custom lies in the fact that practices are the constant and prolonged performance of a certain procedure; however, there is no collective conviction that they are obligatory in nature.

CUSTOMS: Within indigenous communities, custom is the repetition of an act by a group that considers its practice to be obligatory, and over time it becomes a standard of conduct for its members, a rule in which tradition inherited from their ancestors and current circumstances are combined.

<sup>55</sup> ESMR, para. 25, p. 15.

<sup>56</sup> Safeguard screening

that the project has engaged in good faith negotiations with the affected *ejidatarios* for purposes of granting fair compensation and a satisfactory level of support to the project and the related mitigation measures.”<sup>57</sup>

- 2.101 According to the report on the due diligence mission conducted by the ESG from August 29 to September 8, 2011, the need for social baseline studies and a social impact assessment was confirmed, and a social impact management plan was developed based on those studies. The need to hold consultations and disclosure actions was also reiterated.
- 2.102 During the course of the investigation, the ISMP issued in November 2011 was found to contain the sociocultural assessment, which was based on the two following baseline studies:
  - Baseline Social Study of Communities in the Wind Project area, issued by On Common Ground Consultants Inc. in October 2011, supplemented by field studies conducted in September 2011 by Gloria Zafra of the Sociological Research Institute of the “Benito Juárez” Autonomous University in Oaxaca.
  - Baseline Social Study for the Santa Teresa – La Ventosa Transmission Line, issued by On Common Ground Consultants Inc. in October 2011.
- 2.103 The assessment identified a number of adverse social and economic impacts characterized as minor and short-term. However, the assessment also reported significant economic impacts created by the limitations on access to a number of resources (grazing land, fishing, and agricultural land) during the construction stage, impacts on local residents due to the presence of security teams in the area, and impacts affecting the social cohesion, worldview, and communal way of life of the local indigenous peoples. The ISMP also included a plan for the management of these impacts and recommendations for the consultation process on those plans.
- 2.104 Nevertheless, the documents reviewed were not found to contain any considerations for ensuring that the indigenous communities have access to Barra de Santa Teresa for ceremonial purposes. This limitation on access was underscored by the residents of the area who remarked during the investigative mission that anyone wishing to enter the project area was required to show official identification.
- 2.105 Regarding consultation, it was identified during the project preparation stage that there were gaps in terms of consultations with the communities, as well as a failure to disclose information and complaint procedures. There were also indications of a lack of engagement with the community and the opposition, including the absence of consultations focused on indigenous peoples, since the project’s interaction with the community at that time had focused on the communal and political authorities rather than on the community. The same thing occurred in relation to the transmission lines, where community engagement had been limited to securing agreements with the authorities for the right of way and changes in land use in that area, as it

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<sup>57</sup> EAS, para. 4.4, p. 6

was the access route to the project. Additionally, the inhabitants of Pueblo Viejo had not been approached.<sup>58</sup>

- 2.106 This situation continued to December 2011, when ERM<sup>59</sup> reported that community leaders knew of the project but members of the community maintained that they had not received information on the project since the last general assembly held a year earlier. The report also discussed the failure to communicate with members of the community, who at that time still thought that Preneal was the project developer. ERM acknowledged progress with respect to the development of a robust social management plan (ISMP) that included both the sociocultural assessment and proposed mitigation actions. However, at that time, they had not been disclosed to and consulted with the affected populations.
- 2.107 The ESMR also listed the following actions pending implementation after the project's approval: the updating of the land requirements according to the most recent project design and the use of this update to inform the communities and properly assess the social impacts; a social assessment that includes an analysis of the social context and a baseline study and assessment of potential impacts in the areas of fishing, agriculture, employment, living conditions, and others; the development of a Social Impact Management Plan including compensation plans, a plan on indigenous peoples and a monitoring and evaluation system to manage impacts during construction and operation; and the compilation and documentation of the consultations held to date, stipulating the need to differentiate consultations held with indigenous communities in order to form part of an Indigenous Plan. In the investigation process it was found that only some of these requirements were met prior to the project's suspension, but no evidence was found of consultations with the communities consistent with OP-765, that is, "socioculturally appropriate and duly documented consultation and good faith negotiation processes with the affected indigenous peoples, in relation to project design, analysis of alternatives, preparation, due diligence, and execution."<sup>60</sup> The ISMP detailed several special considerations that should be observed to that end, but no evidence has been found to indicate that this resulted in specific actions prior to the suspension of the project.
- 2.108 No evidence was found of disclosure materials or methods that took account of the indigenous character of the local population—that is, focused on verbal disclosure and in the indigenous languages of the communities. During the MICI's mission to the project area, residents also consistently stated that they had neither received information nor been consulted.
- 2.109 In relation to prior consent, during the course of the MICI's interviews with Bank staff, the interviewees responded that the obligation under OP-765 to obtain the consent of indigenous communities arises only in the case of significant adverse impacts that entail substantial risk to the physical, territorial, and cultural integrity of the indigenous groups affected. In the Bank's opinion, the project did not meet this definition, because:

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<sup>58</sup> ERM. Preliminary Environmental and Social Due Diligence Report on the ION Project in the State of Oaxaca, July 26, 2011.

<sup>59</sup> ERM. Environmental and Social Due Diligence Report on the ION Project in the State of Oaxaca, December 2, 2011.

<sup>60</sup> OP-765

*“1) it would not give rise to physical resettlement; 2) it would not entail the expropriation of land or changes in land use; 3) it focused on a specific geographical area, which would facilitate the implementation of mitigation measures; 4) it would allow for agricultural, grazing, and fishing activities to begin again after construction; 5) affected persons would be compensated; 6) it would generate income for the ejidos. Because the impacts were assessed as low intensity, geographically limited, reversible within a relatively short period of time, and subject to mitigation through known and easily implemented mitigation measures, this operation did not pose the risk of potential significant adverse impacts on the physical, territorial, or cultural integrity of the indigenous communities affected.”<sup>61</sup>*

- 2.110 The Bank also informed the MICI that the assemblies held in 2004 and 2007 demonstrated compliance with OP-765 as far as the requisite good faith processes consistent with the decision-making mechanisms of the indigenous communities. However, this assertion contradicts the position of the Bank at the beginning of the identification process, when it stated that the lack of complete information at the time of those assemblies and the fact that they had only been oriented toward the negotiation of the usufruct agreements prevented characterizing them as consultation processes according to the definitions used by the Bank (see paragraphs 2.43 to 2.52).
- 2.111 In relation to the adverse effects on fishing—an issue that is fundamental to the survival of the communities—the Bank did ensure that an assessment of those effects was performed and that compensation and disclosure plans were prepared, which were done between September 2012 and January 2013. Nevertheless, as the Bank itself remarked, the consultation on the Comprehensive Compensation Plan was not held in light of the suspension of the project and in any case those plans did not exist during the project preparation stage.
- 2.112 As discussed earlier, the Bank’s review found shortcomings with respect to consultations and information disclosure. In particular, during the due diligence process, the Bank determined that, because the assemblies held between 2004 and 2006 were designed mainly to secure the usufruct contracts they were not consistent with the Bank’s policies on consultation. In addition, given that the EIA were not available at that time, the Bank concluded that the communities had not been properly informed of the scope of the project, its impacts, and the management of those impacts. The Bank therefore requires that the Client hold consultations with the potentially affected communities.
- 2.113 The investigation included a review of the records of information and consultation activities that the Client reported to have conducted. From August to November 2011 (that is, until the operation was approved by the Board of Executive Directors) they report a total of 26 meetings (see Chart 8): ten in San Dionisio, five in Santa María, ten in Álvaro Obregón (Charis and Zapata *ejidos*), and one in San Mateo. According to the same records, most of those meetings were either informational or concerned the negotiation of the usufruct agreements. The records also show that practically all of the meetings were with *ejido* or municipal authorities or leaders. No attendance lists or minutes of what took place at the meetings have been found; nor is there any information about whether those meetings led to specific actions pertaining to consultations.

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<sup>61</sup> Bank Management’s response to the Panel during the investigation period.

As far as any photographic record, only photographs of events related to the delivery of aid have been identified.

- 2.114 Those findings confirm the information presented in the section of the ESMR on public consultation, which reports that the communities have received information on the project's objective and scope, and that the consultations have been focused on ensuring the land usufruct contracts and the right of easement. Nevertheless, the ESMR also states that the defects in the consultation process were remedied by public informational meetings held during September 2011 with all of the communities in the project's direct area of influence so that when the project was approved by the Board of Executive Directors, the Bank had determined, based on the records submitted by the Client, that the requirement to engage in consultations had been satisfied.
- 2.115 However, based on the same records used to create Chart 8 (immediately following paragraph 2.46) for the pertinent period, it was found that:
- a. The summaries of the EIA pertaining to the wind farms and the transmission line were provided to community authorities subsequent to those activities (see boldface text in Chart 8 showing the date on which it was provided to each community).
  - b. Each community received only the EIA of the component that directly involved that particular community, and none received summaries of the other EIA.
  - c. The summaries did not include information about the social assessments or the environmental and social management provided for in the project.
  - d. Most of the meetings focused solely on the local authorities, on the presumption that they would inform the rest of the community.
  - e. Most of the meetings aimed to provide information rather than to engage in consultation.
  - f. No attendance lists were found, or records of the information gathered at the meetings, or the considerations made as a result of the inputs received.
  - g. No records were found of any dissemination materials compatible with the customs, culture, language, and format of the affected indigenous communities.

#### **d. Determination of compliance with OP-765**

- 2.116 The MICI's determination of whether the Bank complied with the provisions of OP-765 with respect to consultations is framed by the stipulations of that policy, which include the observance of the country's national laws on matters concerning indigenous peoples and the provisions of ILO Convention 169, to which Mexico is a signatory. In this context, we cite the remarks of Professor S. James Anaya, UN Special Rapporteur on the rights of indigenous peoples, in his observations following a recent visit to the Juchitán area of Zaragoza by invitation of the Department of Energy: "Convention 169 and other sources of international law specify that consultation must be prior; that is, indigenous peoples have the right to participate actively in the decisions and actions that may substantially affect their lives, whether directly or indirectly [...]. Indigenous peoples are entitled to participate at different stages of the object of



the consultation, and not only in the manner of implementation of a project that is accepted and preferred by the company or by the State.”

2.117 The MICI is of the opinion that even though they complied with the national agrarian law, the assemblies held between 2004 and 2006 cannot be deemed to have complied with OP-765 in terms of achieving good faith agreements, since:

- a. The affected indigenous communities are composed of other members in addition to the land owners (communal landholders), which generally account for no more than 20% of the affected community/*ejido*.
- b. They did not have complete information on the project and its impacts and mitigating actions.

2.118 The MICI also finds that, in spite of having ensured that the project had different social assessments and management plans for the impacts identified, the Bank failed to comply with the **Policy on Indigenous Peoples** by failing to ensure that consultations and good faith negotiation processes were held with the affected indigenous people in accordance with the sociocultural context, for the following reasons:

- a. The project information was only disclosed partially and in some cases there were discrepancies between the information released and the information contained in the official documents (i.e., Istmeño EIA).
- b. The information released did not include the social assessments and impact analysis and mitigation plans even though that information was available.
- c. The information that was disclosed was released after the project was approved by the Board of Executive Directors, and therefore Convention 169 was not observed with respect to prior consultation.
- d. The project information that was disclosed was only sent to certain actors within the indigenous communities (authorities and communal landholders), to the exclusion of other members of the community (fishermen and persons other than communal landholders) and in violation of the communal decision-making structure of the indigenous peoples.
- e. The sessions held with members of the community were informational meetings rather than consultations, and there is no documentary evidence of who participated and what agreements were reached.

2.119 In sum, it is the opinion of the MICI that the Bank failed to comply with the Policy on Indigenous Peoples with respect to consultations and neglected to consider the cultural impacts on the communities and their decision-making processes related to environmental and social management.

### III. CONCLUSIONS

- 3.1 Section II presented a detailed analysis of the findings made during the investigation, in which the Bank was found to have committed omissions with respect to various obligations contained in Operational Policies OP-703, OP-102, and OP-765. Those omissions resulted in the project being notable mainly for the opacity of its preparation and execution, in clear violation of the principles of transparency that distinguish the IDB Group. The Bank's Operational Policies clearly state the information disclosure obligations and the times at which such disclosure should occur; nevertheless, in the case of the "Mareña Renovables Wind Project," the Bank omitted to comply with them, and no legitimate reasons were found for such omission.
- 3.2 The right to access to information imposes upon the States—and by extension upon entities such as the IDB Group that operate with public funds—the obligation to provide the public with the maximum amount of information proactively, at least with regard to: (a) proposals or investments, and (b) information required for the exercise of other rights.
- 3.3 Consultation is one of those rights whose exercise requires the disclosure of information. Effective consultation, as specified in the performance standards of the International Finance Corporation—which is a model for best practices in private sector financing—is considered as: "Effective consultation is a two-way process that should: (i) **begin early** in the process of identification of environmental and social risks and impacts and continue on an ongoing basis as risks and impacts arise; (ii) **be based on the prior disclosure and dissemination** of relevant, transparent, objective, meaningful and easily accessible information which is in a **culturally appropriate local language(s) and format** and is understandable to Affected Communities; (iii) focus engagement on those directly affected as opposed to those not directly affected; (iv) **be free of external** manipulation, interference, **coercion, or intimidation**; (v) enable **meaningful participation**, where applicable; and (vi) be **documented**. The client will tailor its consultation process to the **language preferences** of the Affected Communities, their decision-making process, and the needs of disadvantaged or vulnerable groups."<sup>62</sup>
- 3.4 In the case of the "Mareña Renovables Wind Project," the conditions for consultation established in Bank Policies were not met, and therefore it must be concluded that the consultation process did not adhere to the requirements of Policies OP-703 and OP-765.
- 3.5 The investigation confirmed the depth and breadth of the environmental analysis and the mitigation plans devised under the Bank's guidance. Nevertheless, with the exception of the effects on fishing activity, significant limitations were observed in the analysis of the social impact. This project was a first in multiple arenas: the largest in Latin America, the first located in close proximity to the ocean, the first to be built on land actively under communal management (not *ejido* land, as noted in the project documents) and the first to be inaccessible by land due to territorial conflict among communities. The identification of social impacts, the mitigation plan, the raising of awareness, and socioculturally appropriate consultation with the affected population was extremely important in a project of the scale, location, and historical context of the Mareña Renovables Wind Project.

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<sup>62</sup> IFC, Performance Standards on Environmental and Social Sustainability, Consultation section, paragraph 30.

- 3.6 The number of particular characteristics of the project, in addition to these omissions, resulted in the erosion of trust in the Huave communities with respect to the Client's ability and willingness to address the impacts that the project would create, and led some community members to oppose the project and file the complaint with the MICI.
- 3.7 In relation to the alleged harm in particular, the findings of MICI regarding the identification of environmental risks, their mitigation plans, and their relationship to the concerns about harming the biodiversity of the area lead to the inference that the project had a robust mitigation and compensation plan with respect to impacts on the area's flora and fauna; correctly implemented, it would not only not have caused the harm alleged but would have also protected biodiversity better than before.
- 3.8 Regarding the alleged harm to food security, the MICI's findings identified that the Bank had given this issue high priority. When the project was suspended, it was in the process of finalizing, together with the Client, a compensation plan for fishermen to offset the negative impacts on fishing during the project's construction. Accordingly, regarding fishing as an income-generating activity, the MICI does not find that the identified instances of noncompliance gave rise to the harm alleged. Nevertheless, we must note that there was no specific mitigation/compensation plans prior to the approval of the project, or even for more than a year after that time. Not having information about how this would be addressed requires us to validate the presumption of harm to the communities regarding the impact of the project on their principal source of food and income.
- 3.9 We must also note that, in spite of identifying adverse effects on the communities' way of life, cultural integrity, and traditional knowledge, there were no specific plans to mitigate those risks. In particular, the Bank does not seem to have taken measures to ensure access to Barra for ceremonial purposes, nor to have any considerations with respect to the cosmovision of the indigenous communities and their connection to the water.
- 3.10 In view of the above, it is our opinion that the indigenous communities of the Isthmus do in fact face the risk of losing their identity and customs. This refers in particular to the loss of the principles of community governance and the common good in favor of development and decision-making schemes focused on the individual, which creates a gap between the beneficiaries (landowners) and non-beneficiaries (those who do not own land) of development. Nevertheless, we cannot say that this is a direct harm of the project; rather, it is due more generally to the intense and rapid wind development in the Isthmus region.
- 3.11 As to the threat to the physical integrity of the project's opponents, the MICI is of the opinion that this was not the result of the Bank's omissions with respect to its Operational Policies currently in force. Nevertheless, it is important to underscore that MICI has not found adequate provisions therein to guide Management's actions in situations of social conflict. Remaining on the sidelines as an observer of violent events is not the best alternative, and inaction could even exacerbate the social conflict.

#### IV. RECOMMENDATIONS

- 4.1 The MICI considers that the breadth of a compliance investigation process such as the one presented herein is not limited solely to reporting on the actions of the Bank with respect to a specific operation—although that in itself is highly valuable; rather, it is also useful to see the findings as knowledge tools and lessons that support the Bank’s continual improvement process. It is precisely within this framework that the MICI was created in 2010 as an outcome of the Agenda for a Better Bank. As Management notes in its response to this draft, there are areas that have been strengthened or that are in the process of being strengthened as a result of different experiences; others still require a little more attention.
- 4.2 In this spirit, two sets of recommendations are presented to the Board of Executive Directors for consideration: the first are recommended actions related to the project and the affected communities; the second set of recommendations are general in nature, and aim not only to promote lessons that can be extrapolated to future operations but also to ensure that compliance is ensured in the portfolio of existing projects before a case comes to the MICI.

##### A. Recommendations Specific to the Mareña Renovables Wind Project

- 4.3 In the Projects section of the Bank’s website, the status and documentation of the Mareña Renovables Wind Project have been combined with those of the Eólica del Sur project, even though they are two totally different projects. We suggest creating two separate registries and reporting the current status of the Mareña Renovables Wind Project.
- 4.4 This report has noted the existence of a number of documents referring to the environmental and social assessment and mitigation plan that the Bank had required of the Client. We suggest publishing the 22 documents subject to mandatory disclosure in the new registry.
- 4.5 Clarify with the Client the status of the usufruct contracts with the communities of San Dionisio, Santa María, Charis Ejido, and Zapata Ejido, and urge them to clarify the situation with the communities, particularly with the community of Santa María, which was in favor of the project and has been directly affected by its suspension.

##### B. General Recommendations to the Bank

- 4.6 Based on this report and the experience derived from other MICI cases, we underscore the importance of having solid capacity for the assessment of social impact. The Bank can improve its action and standardize accomplishments with respect to the assessment of environmental impact. The social license to operate—that is, the acceptance or approval of a project by a local community—is emerging as a critical factor for the success of development projects. Increasingly, companies view the attainment of the social license as an important aspect of the management of environmental and social risks. Furthermore, going beyond the minimum regulatory requirements is an important component of establishing a company’s reputation. We respectfully suggest taking measures to enhance the framework of the Operational Policies in their social perspective. The Bank has either prepared or supported excellent sources of guidance and reinforcement in this regard, such as the document for which it provided funding to have translated into Spanish, entitled “Social Impact Assessment: Guidelines for assessing

and managing the social impacts of projects,”<sup>63</sup> the purpose of which is to advise different actors on the best practices expected in social impact assessment and management processes, particularly in development projects; and the “Guidelines on Consultation and Stakeholder Engagement in IDB Projects” prepared by the Bank’s Environmental Safeguards Unit in July 2013. These documents, among others, could serve as a guide for a review of the directives and potentially of the Environment and Safeguards Compliance Policy (OP-703).

- 4.7 Regarding the Access to Information Policy (OP-102), we suggest including the timeline for the disclosure of certain documents consistent with the directives included in other Operational Policies with respect to the matter of disclosure. We additionally suggest the revision of Annex II of that policy to clarify that the disclosure list for private sector operations includes the framework for environmental and social assessment and management consistent with the definition provided in the Environment and Safeguards Compliance Policy, in particular with regard to the environmental and social management plans.
- 4.8 In terms of strengthening observance of the Access to Information Policy (OP-102), we suggest that the Executive Auditor’s Office perform an audit of disclosure practices so that instances of noncompliance can be corrected in advance, thus affirming the Bank’s commitment to transparency and access.
- 4.9 It should be noted that the language of the Policy on Indigenous Peoples (OP-765), unlike that of other policies, does not offer clear guidance on its application. Also, from the time of its approval, there has been significant evolution in the way in which projects involving indigenous communities are managed. Therefore, it would seem advisable to recommend that it be revised and updated in order to strengthen management capacity in this area.
- 4.10 Finally, the project has shown that there are gaps in the standards of the Bank that offer guidance on how the Bank should operate in the presence of significant environmental and/or social conflicts. We suggest drafting a guide that will address these situations and enhance the Bank’s response capacity in keeping with its mission to improve lives in the region.

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<sup>63</sup> Vanclay, Frank, et al. April 2015, available at: [http://www.iaia.org/uploads/pdf/SIA\\_Guidance\\_Document\\_IAIA.pdf](http://www.iaia.org/uploads/pdf/SIA_Guidance_Document_IAIA.pdf)

## Annex I <sup>64</sup>

### Joint IDB-IIC Management response to the draft ICIM's Compliance Review report for the Mareña Wind Power Project (ME-L1107) in Mexico

IDB and IIC Management ("Management") would like to thank the ICIM for the good cooperation during the compliance review on the above-mentioned project.

#### **In summary, Management responds as follows to the main findings by the ICIM:**

Management notes the ICIM findings that include:

- a. The Bank correctly classified the operation as Category "A" (para 3.20<sup>65</sup>).
- b. The environmental and social management plans were robust and comprehensive and included mitigation activities clearly consistent with the identified risks (para 3.34).
- c. The Bank relied on a supervision framework that was commensurate to the identified risks (para 3.62).

In other words, the ICIM findings confirm that the environmental and social risks were adequately screened; adequate environmental and social management plans encompassing the key environmental and social impacts and risks were developed; and that the supervision framework designed for this operation was appropriate.

The ICIM points out Bank omissions in disclosure, transparency and consultation, which, in the ICIM's opinion, resulted in the Bank's non-compliance with some requirements of OP-703, OP-102 and OP-765 and contributed to exacerbating existing conflicts between members of the affected communities and opposition to the Project (para 4.6).

**In regards to the specific ICIM findings for the Mareña project, Management disagrees with certain parts of the analysis and conclusions presented by the ICIM given the following: i) the Bank met all requirements of OP-703 except for the timing of disclosure of the Environmental Impact Assessments (EIA) on the IDB's website (which did not have material implications on the transparency of the consultation process as the EIAs had already been made publicly available); ii) the consultation process (starting in August 2011 and continuing until the project implementation was halted in 2013) was fully consistent with the requirements of OP-765; and iii) the Bank's close work with the Borrower helped to ensure transparency and a good faith consultation process with all affected communities. The increase in conflict between members of the communities and opposition to the project cannot be ascribed to the IDB's actions or an omission of Bank actions.**

While Management agrees with the ICIM that IDB's efforts to support the client's capacity in mitigating social risks proved to be limited in its effectiveness in a situation of escalating conflict, it considers that such limited effectiveness did not result from non-compliance with IDB policies. Management recognizes that the Bank could have more systematically documented the consultations, including the information that was presented and

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<sup>64</sup> The comments presented in this Annex were made to the Draft Compliance Review Report; therefore, references may not match this final version of the Report.

<sup>65</sup> Since an English version of the draft report was not available to Management at the time of drafting this response, all paragraph references refer to the Spanish draft version. Quotes from the draft report have been translated by the Response team and might present some divergences from the official English translation expected to be available by the time of distribution.

available at the time, and the outcome of each meeting. It should also have disclosed on its website other EIAs and Environmental Analyses, such as the EIAs for the transmission line, mooring docks and access roads, when they became available.

Management continuously strives to improve the application of its processes and procedures. Management recognizes that documentation and disclosure issues have been identified through previous and ongoing ICIM investigations, signaling a need to reinforce the Bank's processes and ensure improvement on these dimensions going forward. With this in mind, the IDB Group has initiated a review of its processes with the intent of improving its performance.

In the following sections, more detail is included regarding the findings and comments by the ICIM:

**I. On compliance with OP-703 (Environment and Safeguards Compliance Policy), Directive B.5 (Environmental Assessment Requirements):**

In reference to the ICIM draft report, para 3.35: *"In that sense, the Bank complied with the provisions of Directive B.5. However, the Bank did not comply with the provisions of this directive in regards to the timely and comprehensive disclosure of the environmental assessment process."*

The ICIM bases this finding on two observations:

1. The analysis mission took place before the two EIAs were disclosed on the IDB's website;
2. The Bank did not publish on its website the EIAs for the transmission line, mooring docks and access roads.

Management recognizes that the analysis mission took place about one month before the two EIAs were disclosed on the IDB's website. The reason for this procedural deviation from Directive B.5 was explained at the Board Meeting when the Project was approved.<sup>66</sup> The Mandate letter, which is a prerequisite for the due diligence mission, was signed on September 12, 2011. As explained at the Board meeting, the client objected to a publication of project related documentation before the signing of the Mandate Letter. Management determined that although the Mandate Letter had not been signed, it would be beneficial to commence the due diligence process, including the analysis mission, given the complexities of this Category "A" project. As a result, the Bank was able to provide technical guidance on a number of issues earlier on, including the carrying out of new consultations, the hiring of in-house staff for environmental and social matters, the renegotiation of land agreements; and it was able to request and review a number of additional studies.

The requirements of Directive B.5 serve to ensure a consultation is meaningful, and that relevant information is available to the communities. In that regard, the EIAs "Parque Eólico Istmeño"<sup>67</sup> and "Parque Eólico San Dionisio del Mar"<sup>68</sup> were disclosed on SEMARNAT's website in 2008 and 2009, respectively, and therefore had been disclosed to the public prior to the due diligence/analysis mission. Thus, the information provided through the

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<sup>66</sup> Committee of the Whole, Minutes of the 23 November 2011 Meeting: "Management explained that it had not been possible to disseminate the environmental impact studies earlier because, as requested by the borrower, such studies could be made public only after the documentation to begin project preparation had been signed by the borrower and the Bank."

<sup>67</sup> <http://sinat.semarnat.gob.mx/dgiraDocs/documentos/oax/estudios/2008/200A2008E0007.pdf>

<sup>68</sup> <http://sinat.semarnat.gob.mx/dgiraDocs/documentos/oax/estudios/2009/200A2009E0023.pdf>

EIAs was available to the affected communities and wider public in an appropriate language at a very early stage of project development, satisfying in substance the requirements of Directive B.5.

The environmental assessment reports for the ancillary facilities of the Project (transmission line, mooring docks and access roads) were also disclosed to the public on SEMARNAT's website<sup>69</sup>. In relation to the absence of their publication on the IDB's website, please refer to the comments (page 9, below) on compliance with the Access to Information Policy (OP-102).

**Management therefore considers that the Bank complied in substance with Directive B.5 of OP-703. The procedural deviation related to conducting the due diligence/analysis mission approximately one month prior to the publication of the EIAs on the IDB's website did not have material implications on the consultation process.**

## **II. On compliance with OP-703, Directive B.4 (Other Risk Factors):**

In reference to the ICIM draft report, para 3.38: *"The main finding is that the directive was not triggered."*

and para 3.44: *"In sum, despite its prior experience in financing wind farms in the area and having at its disposal different sources of information from the moment the operation was identified, the Bank failed to identify in a timely manner the risks associated with the social concerns of the communities around the project area and thereby failed to comply with the provisions of Directive B.4. However, it is also important to note that at later stages, the Bank sought to design, together with the client, appropriate measures to manage such risks, but these lacked effectiveness given the heightened level of conflict. The ICIM considers that a timely identification of these risks and of relevant mitigating actions would have allowed the Bank to support more effectively the capacity of the client to manage them. In particular it would have served to give due priority to the different actions of analysis, definition, disclosure and consultation required in reference to the envisioned mitigation and compensation."*

Directive B.4 is meant to address *"other types of risks that are not impact-based, for which an environmental assessment may not necessarily be the most relevant tool,"* typically risks to the environmental sustainability of the project that are outside of the direct control of the client, such as third-party risks, sector-related risks, and risks associated with highly sensitive environmental and social concerns. During project preparation and based on the Bank's analysis, there was no indication that the Project would present any of those other risk factors, including *"risks associated with highly sensitive environmental and social concerns"* as defined in OP-703, Directive B.4<sup>70</sup> and OP-703 Implementation Guidelines, such as: *"environmental justice issues, activities of suspected human rights violations, GMOs, or human genetic research."* On the contrary, construction of the other two large wind farms financed by the IDB in adjacent areas in the State of Oaxaca (approved in 2009) was almost completed at the time, without having raised any highly sensitive social concern or having faced social protest.

**Management considers that its determination at the time of project preparation that Directive B.4 did not apply was appropriate and reasonable on the basis of the situation and information available at the time of project preparation.**

<sup>69</sup> See also the report of the Mexico Representation at the UN for a full account of the process: [https://spdb.ohchr.org/hrdb/22nd/Mexico\\_29.01.13\\_\(36.2012\).pdf](https://spdb.ohchr.org/hrdb/22nd/Mexico_29.01.13_(36.2012).pdf). See in particular references to disclosure of the various EIAs (MIAs) on pp. 6-8 of the report.

<sup>70</sup> "In addition to risks posed by environmental impacts, the Bank will identify and manage other risk factors that may affect the environmental sustainability of its operations. These risk factors may include elements such as the governance capacity of executing agencies/borrower and of third parties, sector-related risks, risks associated with highly sensitive environmental and social concerns, and vulnerability to disasters."



The fact that Directive B.4 was not applied during preparation does not mean that the IDB failed to identify social impacts and risks associated with the Project as part of the usual environmental and social due diligence process. Social impacts and risks, particularly the existing conflict between the Santa Maria and San Mateo communities, were in fact extensively reported in the Environmental and Social Management Report (ESMR), which states explicitly that those might have negative repercussions on the Project. Paragraph 50 of the ESMR in particular notes that:

*“The lack of an integral social management plan and inadequate management capacity to address social issues may create negative social impacts during implementation. The main risks are the following:*

*Social stratification: The flow of external income generated by the Project can cause additional resources for “comuneros” with whom the agreements have been signed but not necessarily for the whole population. The risk of creating two different social groups: those who will benefit from increased benefits and the rest of the local population is present;*

*Inadequate resources management: The increase in municipal, communal and family income can have negative consequences if resources are not used in sustainable activities or are misused. The lack of transparency and accountability can lead to corruption and frustration; the Project can be blamed by these negative outcomes while the communities suffer the consequences of the failures to promote local development;*

*Political activity: The political environment in the Tehuantepec Isthmus is complex and Project’s management will be under pressure from different political groups. The alignment, real or apparent, to any such group can affect credibility and alienate the Project from the communities;*

*Communication issues: In a region characterized by political and social rivalries, the lack of a communication strategy can result in misinformation, negative rumors and mistrust towards the Project.*

*Increasing social conflicts: It is prudent to be aware that the conflict between Santa Maria and San Mateo rather than being solved would likely escalate, fueled by opposition political groups operating in the region”.*

As a result, an Integrated Social Management Plan was developed by the client with the support of the international consulting firm “On Common Ground Consultants Inc.”<sup>71</sup>. Weaknesses in the client’s capacity to manage these social risks were also identified early in the preparation process, documented in the ESMR, addressed in the legal documentation and closely monitored throughout project implementation, as recognized in the ICIM report. The Bank believes it to be part of its role and added value to support clients in improving and deepening their environmental and social management capacity, and this was the approach taken on the Mareña project - by providing guidance on improving relevant systems and procedures, as well as strong support on the design and implementation of the consultation activities.

**Management therefore considers that during project preparation the Bank adequately identified social concerns of affected communities and weaknesses in client’s capacity to address those concerns. Management agrees that the effectiveness of IDB’s efforts during project implementation to support the client’s capacity to manage those social concerns and to mitigate social risks proved to be limited in a situation of escalating conflict; but considers that such limited effectiveness did not result from any non-compliance with IDB policies, including Directive B.4 of OP-703. Rather, it can be attributed to the evolution of a political and social conflict that went beyond the project and beyond the sphere of influence of the client and of the IDB.**

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<sup>71</sup> <http://oncommonground.ca/>

### III. On compliance with OP-703, Directive B.6 (Consultations):

**III.1.** In reference to the ICIM draft report, para 3.56: *“The ICIM considers that, even though robust consultation plans existed specifically for the impact on fishing activities, Directive B.6 has not been complied with during the project preparation phase in regards to ensuring good faith consultations due to:*

- a) The affected communities did not have complete information about the project, its impacts and mitigation plans that would allow them to participate in the consultation*
- b) There is no evidence that the reported information and consultation meetings allowed affected parties to comment on the proposed course of action.”*

**During due diligence, the Bank found that prior consultations had not been adequate for the purpose of compliance with OP-703,** and therefore reached agreement with the client on a strengthened and adequate consultation process. Implementation of this consultation process was initiated in August 2011 and included 138 consultation meetings until the project was stopped in 2013. Some additional consultation activities were planned but remained incomplete due to the halt of the project; however all affected parties had been consulted before that.<sup>72</sup>

Directive B.6 of OP-703 requires that *“Category “A” operations will be consulted at least twice during project preparation, during the scoping phase of the environmental assessment or due diligence processes, and during the review of the assessment reports. (...) For consultation purposes, appropriate information will be provided in location(s), format(s) and language(s) to allow for affected parties to be meaningfully consulted, to form an opinion and to comment on the proposed course of action. EIAs and/or other relevant environmental analyses will be made available to the public consistent with the Bank’s Disclosure of Information Policy (OP-102).”*

**Prior to the Project’s approval on November 23, 2011, OP-703 thus required at least two open consultation meetings with community members. Two consultations occurred with each of the directly affected communities,** as indicated in the table below.

Community	Date	Format	Number of participants
San Dionisio del Mar	09/03/2011	Update of project status and consultation with community	46
San Dionisio del Mar	10/02/2011	Update of project status and consultation with community	43
Santa María del Mar	09/24/2011	Update of project status and consultation with community	N/A
Santa María del Mar	11/17/2011	Update of project status and consultation with community	110
Álvaro Obregón	09/21/2011	Update of project status and consultation with	N/A

<sup>72</sup> Please see Annex, “Groups consulted (2011-13)”

		community	
Álvaro Obregón	10/15/2011	Consultation with community – focus on access road	N/A

In total, 138 consultation meetings (63 in San Dionisio del Mar, 33 in Santa María del Mar and 42 in Alvaro Obregón by the Mareña Community Relations Team) were carried out, both before and after the Board approval.

The Project's EIAs had been disclosed on SEMARNAT's website, and were publicly available. In addition, appropriate information<sup>73</sup> was provided on environmental impacts related to the wind power farms, the transmission line, docking stations and access roads.

The affected communities were able to participate substantially in the consultations and had the opportunity to comment on the proposed course of action, as evidenced by the following requests made during the meeting with the San Dionisio del Mar community<sup>74</sup>:

- Request for the provision of local employment during construction and operation
- Request for the maintenance of existing economic activities of the local people (fishermen/compensation)
- Request to ensure no environmental impacts to land and to the fishing activities
- Definition of community programs and projects to be fostered and sponsored by Mareña Renovables
- Request for a percentage increase of the payment for land lease
- Request for support for youth, women and elderly people
- Request for Mareña Renovables to help to improve basic service facilities in the community e.g. water, schools and electricity supply

Many ideas brought forward during the consultations were implemented or underway at the time the project was halted, from smaller actions directly provided to the communities (such as the repairs of a 3km long rural road at Alvaro Obregon, the signing of an employment agreement between Vestas/Union and the San Dionisio Community, school grant aids delivered to 21 institutions, and others<sup>75</sup>) to bigger undertakings such as social programs and the Compensation Plan for Affected Parties<sup>76</sup>. The Bank worked closely with the client on establishing the latter, which lays out comprehensive compensation measures for different areas, including particularly those for fishermen. The plan could not be implemented due to the suspension of the project.

**In summary, affected parties were consulted twice during project preparation and numerous times thereafter; they had access to appropriate information and had the opportunity to comment on the proposed course of action as evidenced above. Management therefore considers that, as reported in the Project's ESMR, at the time of approval the Project was in compliance with OP-703, Directive B.6.**

Management recognizes that it could have better and more systematically documented the format of the consultations and its results and inputs; the information presented and available at the time of the consultation;

<sup>73</sup> As reflected in the slides presented to communities during the meetings, which describe the project and its ancillary facilities, their main environmental impact and proposed mitigation actions. This presentation ("*PWP Presentation para Comunidades*") was shared with the Panel.

<sup>74</sup> "Environmental and Social Compliance Report – Q12012".

<sup>75</sup> Istmeño and San Dionisio Wind Farm Community Relations Report August 2011-September 2012

<sup>76</sup> Proyecto Eólico Istmeño & San Dionisio, Borrador Plan Integral de Compensación por Afectación (PCA)

and the content and outcome of each meeting. Those lessons learned have since been incorporated by the IDB Group in the development and implementation of the public consultation activities in the preparation of other wind projects and as discussed are the basis for the review and improvement of these processes generally.

**III.2.** In reference to ICIM draft report, para 3.57: *“Also, even if outreach activities were recorded after approval of the project and throughout the year 2012, the objective of these activities was informative and not consultative; and therefore they cannot be considered to meet the requirements for a consultation.”*

**Management considers that the consultation process carried out during the project implementation was designed to achieve full compliance of the Project with OP-765 and, until the project implementation was stopped, was carried out in good faith and in line with consultation requirements of OP-765. For more detail, see below the observations in the paragraph “On compliance with OP-765”.**

#### **IV. On Compliance with OP-703, Directive B.2 (Country Laws and Regulations):**

**IV.1.** In reference to ICIM draft report, para 3.67: *“In the consideration of the ICIM, even though the Bank included the obligation to comply with local law in various instruments, the Bank did not take effective measures to ensure compliance with the local regulations in regard to the modification of the area of implementation of the EIAs.”*

The ICIM bases this finding on the fact the project described in the EIAs approved by SEMARNAT is more extensive (e.g. includes more wind generators) than the project approved by the Bank and the EIAs were not adjusted to consider the actual (reduced) size of the project.

**Management considers that, in line with OP-703, the Bank followed a precautionary approach and disclosed the full EIA, including for the San Mateo del Mar and El Espinal sites, which, while not eventually included in the project approved by the IDB, could have been developed in a second phase of the project. Providing more information than strictly necessary is not considered to be inconsistent with IDB's policies, on the contrary, it demonstrates the Bank's commitment to transparency.**

Management understands that the concern expressed by the ICIM of having too much information is related to reducing and avoiding confusion. The ESMR, which was disclosed to the public, clearly described the project approved by the Bank and its components (which did not include San Mateo del Mar and El Espinal). Thus, the scope of the project approved by the IDB was very clearly described in the publicly available documents. The information provided by the client during the consultation process also included a clear and unambiguous description of the scope of the project and of its components (see “PWP Presentation para Comunidades” shared with the Panel).

**IV.2.** In reference to ICIM draft report, para 3.68: *“In regard to the lack of disclosure of the EIAs in 2009-2010, no action by the client or the Bank from the time it got involved could have rectified the omission in terms of compliance with the legislation. However, the ICIM considers that the Board should have been notified at the time of approval of the operation of the risk generated by the omission, seeing as it impacted the viability of the project directly. It should have also been explicitly considered in the risk management scheme and the implementation of mitigation measures.”*

The ICIM bases this finding on the fact the Environmental Impact Authorizations for the project were issued on January, 29, 2010 and February 3, 2010 respectively, with no extract of the environmental impact assessment

having been published in a newspaper widely circulated within the state of Oaxaca. The EIAs were nonetheless publicly available on SEMARNAT's website at that time.

In terms of compliance with environmental laws of Mexico, on November 16, 2011, Mexico's Supreme Court issued a ruling that resolved that an Environmental Impact Authorization that is issued without an extract of the environmental impact assessment having been published in a newspaper widely circulated within the state where the project will take place may be declared null and void. **As this ruling of Mexico's Supreme Court occurred after the Loan Proposal and ESMR were circulated to the Board**, this risk was not reflected in these documents. Management did consider that this raised the possibility that the validity of the Environmental Impact Authorizations could be challenged by the Municipalities of Juchitán de Zaragoza and San Dionisio del Mar. Had the legal challenge to the validity of the authorizations occurred, Management would have taken the necessary actions to ensure that the project would be in compliance with national laws. This did not prove necessary, as the validity of the Environmental Impact Authorizations has not been legally challenged by the municipalities of Juchitán de Zaragoza and San Dionisio del Mar.

The EIAs and subsequent modifications and additions to the EIAs were all approved by SEMARNAT, which provided the required Environmental Impact Authorizations. During due diligence, the Independent Environmental and Social Consultant, ERM, did not identify any material areas of environmental or social non-compliance with Mexican law.

**Management considers that the Bank performed appropriate due diligence to ensure that the Project was designed and carried out in compliance with the environmental laws and regulations of the country and complied with Directive B.2 of OP-703.**

**IV.3.** In reference to ICIM draft report, para 3.69: *"The ICIM considers that both omissions regarding local legislation directly impacted the process of outreach and consultation with the affected populations."*

Management considers that the conclusion that providing more information than strictly necessary had negatively affected the disclosure and consultation process is unfounded, as the exact scope of the project was publicly communicated. In addition, the omission of publication of an extract of the EIA in a widely circulated newspaper in 2010 would have only been relevant if one of the communities had challenged the legal validity of the environmental authorizations. Moreover, the conclusion was not material in view of the significant disclosure and consultation efforts that were initiated in August 2011 and continued until the project was halted in 2013. Those were well above what was required by local regulations.

#### **V. On compliance with OP-102 (Access to Information Policy):**

In reference to ICIM draft report, para 3.88: *"According to the findings of ICIM's investigation, the Bank failed to comply with its obligations under OP-102 for non-sovereign guaranteed operations since:*

- *Not all mandatory documents were disclosed according to Annex II of OP-102.*
- *The Bank failed to ensure dissemination of information in places, formats and languages that would allow affected parties to participate meaningfully in the consultation activities."*

In regards to the first point, the Bank disclosed on its website the key documents required by Annex II of OP-102 for non-sovereign guaranteed operations, including the Project Abstract, the Environmental and Social Strategy (ESS), the two EIAs: "Parque Eólico Istmeno" and "Parque Eólico San Dionisio del Mar", and the Environmental and Social Management Report (ESMR).

However, Management agrees that under the Policy the Bank, in addition to disclosing the EIA for the principal elements of the project, should have also disclosed the EIAs for the transmission line, mooring docks and access roads; the Integrated Social Management Plan; and additional environmental studies and management plans that were produced on bats, birds, jackrabbits, turtles and mangroves.

In this regard, lessons learned have already been incorporated into the preparation of the successor project Eólica del Sur, for which all available environmental and social studies have been published [by the Bank](#), and into the general process review mentioned before.

As to the second argument, OP-102 does not provide format, place or language requirements for information to be disclosed by the Bank. The obligation set by section 5.2 of this Policy relates to Management's obligation to annually present to the Board of Executive Directors a review of the practices of borrowers with respect to the disclosure of environmental and social assessments related to Bank-financed projects, which is done consistently in its Access to Information Policy Implementation Report. The scope of the Access to Information Policy encompasses the Bank's, not the Borrowers, obligations to classify its information and to disclose it to the public. This Policy does not apply to information Borrowers must make accessible to affected parties in order to perform public consultations. This is covered by OP-703, Directive B.5.

#### **VI. On compliance with OP-765 (Operational Policy on Indigenous Peoples):**

**VI.1.** In reference to ICIM draft report, para 3.117: *"The ICIM considers that the assemblies of 2004 and 2006, even if they had complied with the national agrarian legislation could not have been considered in compliance with OP-765 in terms of reaching good faith agreements because:*

- a. Impacted indigenous communities are not limited to the landowners (comuneros) only*
- b. Full information about the project and its impacts and mitigating actions was not available."*

Management agrees that the Project was not in full compliance with OP-765 at the time of the early consultations of 2004/06 nor at the time of Board approval. This was clearly reported in the ESMR (which is part of the Loan Proposal), which noted that the Project was expected to be in full compliance with OP-765 "once the Company has finalized its consultation activities with Indigenous Peoples prior to construction." The Environmental and Social Action Plan and the Corrective Action Plan, both contractually enforceable, included specific additional consultation activities, for instance with affected fishermen.

**VI.2.** In reference to ICIM draft report, para 3.118: *"However, the ICIM also considers that the Bank, despite having assured that the project was based on various social assessments and management plans of the impacts identified, did not comply with the Policy on Indigenous Peoples by not ensuring that consultation and good faith negotiation processes were carried out with the affected indigenous peoples, commensurate with their socio-cultural context for the following reasons:*

- a. The project information was disclosed only partially and in some cases the information disclosed presented discrepancies with that reflected in the official documents (eg. Isthmian EIA).*
- b. The disclosure did not include social assessments and impact analyses and mitigation plans despite this information being available.*
- c. The disclosure of the information that was disclosed was made after Board approval, and as such would not be in compliance with the provisions of Convention 169 concerning prior consultations.*

- d. *The project information disclosed only reached certain actors within the indigenous communities (authorities and landowners), excluding other community members (those who are not landowners; fishermen) and contrary to the structure of communal decision making of indigenous peoples.*
- e. *The sessions held with community members were informative and not consultative in nature; and no documented evidence is available regarding participation and agreements reached.*

**Management considers that the consultation process agreed with the client was designed to achieve full compliance of the Project with OP-765 and, until the project implementation was stopped, was carried out in good faith and in line with consultation requirements of OP-765:**

- 1) Through multiple focus groups, **the consultation process was inclusive** of all communities in the Project's direct and indirect areas of influence, including those without landownership and fishermen.<sup>77</sup> For fishermen in particular, the Consultation Plan prepared with the input of Dr. Andrés Latapi Escalante, a reputable anthropologist, clearly specified the groups to be affected by the Project and to be further consulted. A comprehensive compensation plan for fishermen and other affected parties was, as mentioned above, almost finalized by the time the project was stopped.
- 2) **The process as designed and carried out was consultative** and not just informative, as demonstrated through the concerns raised during the meetings, the input into the design of the proposed social program such as support to the construction of a water supply plant, local employment, the discussion of mitigation alternatives to address potential impacts (e.g. fishing days lost for fishermen), etc. Management notes that the Bank sought to ensure the development of a compensation plan to address the temporary impact experienced by fishermen of the area during the construction period, and required the revision of the usufruct agreements to ensure adequate compensation to *comuneros* (para 3.34), which were two key concerns raised during the consultation process.
- 3) Appropriate safeguards were incorporated in the legal documentation of the Project to **ensure that no adverse impacts materialized before the consultation process was finalized**. The Environmental and Social Action Plan explicitly prohibited commencement of construction prior to the finalization of consultation activities and this prohibition was reinforced in the Corrective Action Plan. In reference to the ICIM conclusion in para 3.118e,, Management would like to clarify that IDB's project cycle and approval date are irrelevant in terms of compliance of the Government of Mexico with its obligations under ILO 169.

The consultation activities, particularly with fishermen, had not been finalized when the project implementation was stopped. It was a requirement that these be finished before any construction would have started. Since construction never started, there were no adverse material implications for the communities.

**Lessons learned have been incorporated in the preparation of the Eólica del Sur project, for which Management decided that consultations with affected indigenous communities should be completed before the project can be presented for approval.**

#### **On Section V, Recommendations:**

Management would like to note that the recommendations section was not part of the draft provided, such that no comments are possible regarding any potential recommendations in the final version of the ICIM's report at the time of preparing this response.

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<sup>77</sup> See Annex, "Groups consulted (2011-13)"

**ANNEX I:****Groups consulted (2011-13)****GROUPS CONSULTED****San Dionisio del Mar:**

Municipal Authorities  
Comuneros and representatives  
 Fishermen  
 Community members and leaders  
 School principals (head leaders) and teachers  
 Young groups and women  
 Opposition group

**Pueblo Viejo:**

Local authorities  
Comuneros and representatives  
 Fishermen  
 School principal  
 Community members and leaders  
 Opposition leaders

**Huamchil:**

Local authorities  
Comuneros and representatives  
 Fishermen  
 School principal  
 Opposition leaders

**Santa María del Mar**

Local authorities  
Comuneros and representatives  
 Fishermen  
 School principals  
 Community members and leaders  
 Outlet owners

**Álvaro Obregón**

Local authorities  
Ejidatarios and Ejido Leaders  
 Fishermen  
 School principals  
 Community members and leaders  
 Bypass neighbors  
Salinera del Istmo owner  
 Opposition groups

**Santa Blas Atempa**

Comuneros and representatives

**Santa Rosa de Lima**

Comuneros and representatives  
Shuanas group (elder group)

**El Espinal**

Land owners

**Asunción Ixtaltepec**

Ejidatarios and Ejido Leaders

**Ixtepec**

Comuneros and representatives

**Fisherman Cooperative and other**

Playa Vicente fisherman  
Copalito Cooperative  
Fueza del Pueblo Cooperative  
 Pueblo Viejo Cooperative (Mareña is helping  
 to form this cooperative)  
Huamuchil Cooperative



## Annex II <sup>78</sup>

### COMMENTS OF THE REQUESTERS TO THE DRAFT COMPLIANCE REVIEW REPORT ON THE MAREÑA RENOVABLES WIND PROJECT (ME-L1107)

#### **Victoria Marquez-Mees**

Director  
Independent Consultation and Investigation Mechanism  
1300 New York Ave., N.W.  
Washington, D.C. 20577

#### **RE: ME-MICI002-2012 Mareña Renovables Wind Project (ME-L1107)**

Dear Ms. Marquez-Mees,

1. The Indian Law Resource Center (Center) is writing to you, and thereby to the appropriate persons on the Compliance Review Panel (Panel) and in the Independent Consultation and Investigation Mechanism (Mechanism), to present our observations with regard to the Preliminary Draft of the Compliance Review Report (Draft) on the Mareña Renovables Wind Project (Project).

### **I | Observations**

2. In general terms, the Draft concisely and thoroughly addresses the findings of the Panel's investigation with respect to the Project. It reflects arduous office work and fieldwork,— i.e., the analysis regarding noncompliance with operational policies OP-703 Environment and Safeguards Compliance (see, section III.B.1 of the Draft) and OP-102 Access to Information (see, section III.B.2 of the Draft). The Center and the Requesting Communities are grateful for the work undertaken in this regard.
3. Nevertheless, we would like to see this Draft refer more to the perspective or opinion that the Requesting Communities conveyed to the Panel on the ground about the Project, especially with respect to its adverse impacts. This is of real significance in the framework for the analysis of compliance with Policy OP-765 on Indigenous Peoples. Undoubtedly, there has been a clear failure to provide information to those Communities about the evolution of the Project since its conception. In our opinion, the perspective of those Communities can supply relevant information that is missing from the official Project documents and complement the office work conducted, thus strengthening its conclusions.

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<sup>78</sup> The comments presented in this Annex were made to the Draft Compliance Review Report; therefore, references may not match this final version of the Report.

4. First, for instance, the perspective of the Community of San Mateo del Mar on the conflict created by the Project with the Community of Santa Maria del Mar is worth noting (*see*, paragraph 2.45 of the Draft). Its leaders informed the Panel that the usufruct contract signed between Preneal and the Community of Santa María del Mar covers land claimed by both communities (San Mateo del Mar and Santa María del Mar). For further information on the impact of that conflict on the fishermen of the Community of San Mateo del Mar, please listen to the interview with Elisario Fuantefello (attached).<sup>1</sup> Please also listen to the second part of the interview with Benito Canales Sijon, a member of the Community of San Mateo del Mar (attached),<sup>2</sup> who discusses not only how that dispute arose but also how the Project's entry into those lands has cemented that dispute and exacerbated the conflict and the prevailing tension between both Communities.
5. The lands in dispute have a special spiritual significance for the Community of San Mateo del Mar. As its leaders informed the Panel, not only have the remains of their ancestors been buried there since time immemorial but their guardian spirits also reside there. For additional information about this Community's worldview, please listen to the first part of the interview with Benito Canales Sijon, a member of the Community of San Mateo del Mar (attached).<sup>3</sup>
6. The usufruct contract in question resulted in the following adverse impacts, to the detriment of both Communities:
  - *Blocking of the access road to the lands in dispute.* Because of the spiritual importance of those lands, the Community of San Mateo del Mar cannot allow them to be subject to usufruct, or to the civil engineering works required for the construction of a wind farm. Because of this, in response to the signing of the usufruct contract between Santa María del Mar and Preneal, San Mateo del Mar set up a road block on the access road to protect those lands and preserve their spiritual significance for future generations.
  - *Conflict and tension between the two Communities.* These Communities are on their guard, given the ambiguity of the information on the status of the Project, to the extent that they assume that the construction of the wind farm might begin again at any moment. Just as the leaders of San Mateo del Mar informed the Panel, the roadblock remains in place to this day and will last until the usufruct contract is terminated.

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1 Annex 1: Interview with Elisario Fuantefello, member of the Community of San Mateo del Mar, February 11, 2013 (1 audio file).

2 Annex 2: Interview with Benito Canales Sijon, member of the Community of San Mateo del Mar, February 11, 2013 (2 audio files).

3 Annex 2: Interview with Benito Canales Sijon, member of the Community of San Mateo del Mar, February 11, 2013 (2 audio files).

- *Limits to free movement.* The conflict and prevailing tension make it impossible for the members and fishermen of San Mateo del Mar to travel freely to the waterway that connects the lower lagoon with the ocean. The situation is also keeping the members of Santa Maria del Mar from freely traveling by land through the municipality of San Mateo del Mar.
7. Second, we believe it is relevant to include the perspective of the Community of Juchitán de Zaragoza, among others, with respect to the acts of extortion, death threats, and persecution of its members. On repeated occasions, leaders and spokespersons for the Requesting Communities—especially the Communities of Juchitán de Zaragoza and San Dionisio del Mar—have been persecuted not only by hit men who wanted to kill them but also by sympathizers of the wind power company who wanted to buy them off with bribes. Because of this, the Requesting Communities asked for the identity of their representatives to be kept in strict confidentiality, as we stated in the complaint that was timely filed with the Mechanism.<sup>4</sup> For additional information about acts of extortion, corruption, and death threats, listen to the interview with Carlos Sanchez, a member of the Community of Juchitán de Zaragoza and coordinator of the Totopo Community Radio Station (attached).<sup>5</sup>

## **I.a | Access to Information**

8. The Draft reflects a clear omission in the provision of relevant information or documents about the Project to the Requesting Communities, most of which are required to be disclosed. Not only did the Bidder make that omission (*see, e.g.*, paragraph 3.47-3.50 of the Draft, especially Chart 8) but so did Management, by failing to publish key information and documentation on its website (*see, e.g.*, paragraph 3.86-3.88 of the Draft, especially Chart 10). Management was required to ensure that this information and documentation was provided to the Communities in all cases. In other words, the provision of information in these situations is mandatory, not voluntary.
9. This lack of information has affected not only the Project but also the Requesting Communities. Perhaps the remediation of this harmful effect as it relates to the Project is not necessary at this time to the extent that it is “closed.” However, the situation is absolutely different with respect to the Requesting Communities. Remediation for these Communities is not only extremely important but also essential for purposes of improving inter-community relations. The reason for this is that the harmful effects of the lack of information continue to occur, both within the Communities and in inter-community relations. At this point, there is considerable uncertainty in the Communities regarding the validity of the earlier usufruct contracts that bind some of them to the Bidder, as well as about the Project itself.

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<sup>4</sup> *See*, Indian Law Resource Center, Complaint submitted to the MICI, December 26, 2012, para. 10.

<sup>5</sup> Annex 3: Interview with Carlos Sanchez, Member of the Community of Juchitán de Zaragoza, Coordinator of the Totopo Community Radio Station, February 11, 2013 (2 audio files).

10. In connection with the above, we must not overlook the fact that the lives and humane treatment of numerous leaders and spokespersons of the Requesting Communities remain in jeopardy. All of this is a direct consequence of the substantial uncertainty mentioned above, as well as of the interest of criminal groups and hit men in continuing to benefit financially from intimidating and/or murdering the leaders and spokespersons of the Communities. In this regard, we refer to the abovementioned acts of extortion, death threats, and persecution of members of the Communities (*see, supra* paragraph 7).
11. Based on the foregoing, the Requesting Communities ask that all of the information and/or documents relevant to the Project not only be made public on the Bank's website but also be shared with them. All of this is a result, among other things, of the failure to comply with the policies applicable to the Bank and of the harm perpetrated to their detriment because of the Project. This information and/or documentation includes:
  - All of the Project's environmental documentation included in Chart 10 (*see*, paragraph 3.86) that is required to be released;
  - "Istmeño and San Dionisio Wind Farms: Community Consultation prior to August 2011, On Common Ground," September 2011 (*see*, paragraph 2.34, footnote 10);
  - Minutes of the QRR Session of October 24, 2011 (*see*, paragraph 3.4);
  - Environmental and Social Due Diligence Report prepared by the consulting firm ERM (*see*, paragraph 3.4);
  - Plans and studies mentioned in Chart 6 (*see*, paragraph 3.29);
  - ESMR (*see*, paragraph 3.30);
  - Diagnostic and Compensation Plan (*see*, paragraph 3.31);
  - Documentation on sensitive social issues produced by the consulting firm (*see*, paragraphs 3.38 and 3.41);
  - Corrective Action Plan (CAP) of November 2012 (*see*, paragraph 3.43);
  - Reports prepared by ERM (*see*, paragraph 3.106 and 3.107); and
  - Bank Management's Response to the Panel during the investigation period (*see*, paragraph 3.110).

## I.b | Recommendations

12. The Draft is incomplete because it does not contain any recommendations to the Bank's Board of Executive Directors. This omission significantly diminishes our feedback on a fundamental aspect of the report's content, to wit: recommendations concerning the preventive or corrective measures that the Board of Executive Directors could potentially approve, in order to be able to ensure their implementation.
13. For this reason, we must make some observations and suggestions here with respect to the "preventive or corrective" recommendations referred to in the Policy created by the Mechanism. All of this is without prejudice to the opportunity to comment and/or discuss any proposed recommendations that the Mechanism finds appropriate to suggest to the Bank's Board of Executive Directors.
14. The emphasis of our proposed recommendations is on the Requesting Communities. In other words, the emphasis is placed on those measures that the Bank could take, for purposes of not only remediating the adverse impacts that the Project had on the Communities but also stopping them. All of this is directly related to what we have stated herein with regard to the conflict created between two Communities (*see, supra*, paragraphs 4-6), the existing degree of uncertainty in all of the Communities with regard to the usufruct contracts and the status of the Project (*see, supra*, paragraph 9), and the need to prevent attacks on the lives and safety of the leaders and spokespersons of the Requesting Communities (*see, supra*, paragraphs 7, 10). In short, we are advocating the adoption of measures to help reverse the harmful effects of the Project and return things to their prior state.
15. Based on the foregoing, we find it necessary, *inter alia*, for the Mechanism to suggest to the Bank's Board of Executive Directors:
  - That the Bank communicate, officially and in writing, to the Requesting Communities the fact that the Project in question is not only "closed" but that it will not be carried out in the area and in the manner originally envisaged for the Mareña Renovables Wind Project. This communication should be addressed to the relevant authorities and institutions of each one of the seven Requesting Communities, including to their traditional authorities, fishing cooperatives, communal property authorities, and community assembly.
  - That the Bank communicate to the public in general, and to the Community of Santa Maria del Mar in particular, the fact that the Project in question is not only "closed" but that it will not be carried out in the area and in the manner originally envisaged for the Mareña Renovables Wind Project. This communication should be made through the major media outlets of the State of Oaxaca generally, and in the Isthmus of Tehuantepec in particular.
  - That the Bank urge the Project's Bidder to immediately terminate the usufruct contracts entered into with respect to both the Barra de Santa Teresa and the lands used and enjoyed by the Community of Santa María del Mar, which are claimed by the Community of San Mateo del Mar, as we explained in paragraphs 4-6 *supra*.

- That the Bank urge all of the agencies of the Mexican government that have granted permits in connection with the Project to immediately cancel all permits and/or authorizations relating to the Barra de Santa Teresa and the lands used and enjoyed by the Community of Santa María del Mar, which are claimed by the Community of San Mateo del Mar, as we explained in paragraphs 4-6 *supra*.
- That the Bank commission an in-depth study of the harm perpetrated with respect to the humane treatment (physical and mental) of the leaders and spokespersons of the Communities, to inter-community relations, and between Requesting and Non-Requesting Communities, and to the pecuniary (economic) and non-pecuniary (cultural and spiritual) welfare of the Communities as a result of this Project. This study should be assigned to the internal agency of the Bank that has the personnel best suited to work on social safeguards, and should be shared with Management for its consideration in similar Projects.
- That the Bank consider drawing up a compensation plan for the harm caused to the Requesting Communities. The abovementioned study could suggest compensation measures that the Bank could adopt as part of that plan. The enforcement of the compensation plan in question could be assigned to the internal agency of the Bank that drafted the previously suggested study on the harm caused to the Communities and/or the Mechanism.
- That the Bank disclose all information and/or documents relevant to the Project, especially those subject to mandatory disclosure, which Management failed to make sure were provided to the Requesting Communities, as we indicated in paragraph 11, *supra*.

## II | Petition

16. Based on the foregoing, we ask the Panel and the Mechanism:
1. To acknowledge that we have presented, in due time and form, the comments we consider pertinent with respect to the Draft;
  2. To acknowledge that we have presented, in addition to the remarks contained in this document, the detailed inputs inserted as comments to the Draft (attached).<sup>6</sup>
  3. To seriously consider including in the Draft the recommendations suggested herein (*see, supra*, paragraph 15); and
  4. To allow us, once the Panel and the Mechanism decide on the recommendations to be included in the Draft, to comment on and/or discuss them.

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<sup>6</sup> Annex 4: Inputs inserted as comments to the Draft.

Respectfully,



**Leonardo A. Crippa**  
Senior Attorney  
Indian Law Resource Center

#### **INPUTS INSERTED BY THE REQUESTERS AS COMMENTS TO THE DRAFT <sup>79</sup>**

##### **SECTION: INTRODUCTION AND CONTEXT**

#### **A. Regarding the Compliance Review Process of the MICI**

It should be specified that the lease contracts were signed without the assemblies of communal landholders convened for that purpose having reached the quorum required under the Agrarian Law, and therefore are illegal.

#### **B. The request**

**Paragraph 2.14.** The jetties and the continuous movement in this area will also affect their fishing activity. Additionally, as stated in the EIS, this area would be directly protected by the Department of the Navy, which would limit the fishermen's movement and access in this area and would also scare the fish away. The most important point is that it would take control of this territory away from the communities and turn it over to the company and the Department of the Navy.

#### **C. Legal Context of Landholding**

**Paragraph 2.26.** Only those who are registered in the Register of *Ejidatarios* or Communal Landholders kept by the National Agrarian Registry have the right to participate in the Assemblies of *ejidatarios* or communal landholders, which excludes the participation of the majority of the community's residents. In general, the percentage of *ejidatarios* or communal landholders is less than 20% of the total population. The most vulnerable sectors (landless families, women, etc.) do not tend to be included in the Register of *Ejidatarios* or Communal Landholders.

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<sup>79</sup> The Requesters' comments to the draft version of the Compliance Review Report on the Mareña Renovables Wind Project were sent to the MICI in two parts: the first was a formal document from the Requesters' representative, Mr. Leonardo Crippa of the Indian Law Resource Center, and the second part consists of comments made by the Requesters directly to the document. In order to facilitate the reading of those comments, the MICI has compiled them in this document making reference to the section and paragraph to which they pertain. The texts are an accurate transcription of the comments received.

#### **D. Wind Development of the Isthmus**

**Paragraph 2.30.** Above all, because the matter concerns indigenous peoples, at no time have the indigenous communities collectively granted consent for the wind farm; this is a serious and grave violation of indigenous rights and evidences that policy of exclusion, marginalization, and racism.

**Paragraph 2.31.d.** The loss of agricultural, livestock, and gathering activities not only creates unemployment but it also affects our traditional diet, because it weakens our market and regional economy and causes us to buy our food in stores that are also owned by the multinationals.

**Paragraph 2.31.f.** It is a project that is foreign to our belief system, which is different from the Western belief system, and we did not ask for it and we do not identify with it.

The companies see our territory as a space for energy production and commercialization, rather than as a space for the creation of a decent life for those who have traditionally resided there.

#### **E. The project prior to the Bank's involvement**

**Paragraph 2.33.** It fails to mention the process whereby the government of Oaxaca awarded "concessions" ("steps to reserve land," as the document calls it in paragraph 2.29) in a completely irregular and unlawful manner to the wind companies, granting them exclusive rights to obtain contracts in the territories of the communities of the Isthmus without having informed or consulted with those communities in advance. This distribution of territory was accompanied by strong pressure from the companies and Oaxaca government officials for the communities to grant long-term usufruct contracts or lease agreements under the terms dictated by the companies, as clearly exemplified by the case of the contract obtained by Preneal in San Dionisio del Mar. The Panel was informed during its investigation of this unlawful land allocation/concession process carried out by the government of Oaxaca.

#### **F. San Dionisio del Mar Wind Farm**

**Paragraph 2.39.** The company considers the environmental impact statement to be a mere requirement for the implementation of its project, without really considering that there are negative impacts for the communities, considering only the existence of the enormous wind potential to produce electricity.

**Paragraph 2.41.** The assemblies held in San Dionisio (with the participation of 21.2% of communal landholders at the first round, 21.03% at the second round, and 36% at the third round) and Santa María del Mar (with the participation of 55.8% of communal landholders at the first round) were not legally valid, given that none of these assemblies had the quorum required to make decisions with respect to the future or use of communal lands. (Technical point: the document refers to the First, Second, and Third Assembly in the case of San Dionisio del Mar. In point of fact, they were the First, Second, and Third Rounds of the same Assembly, with the same agenda. The Agrarian Law provides for a Second Round in the event that the requisite quorum is not reached in the First Round, but it does not mention holding a Third Round of a single Assembly).



## SECTION: THE INVESTIGATION

### A. Involvement of the Bank

#### Chart 4. Timeline: December 2010 – February 2013

On December 4, communal landholders of San Dionisio filed a federal petition for a constitutional remedy [*amparo*]; on December 7, the seventh district judge granted an injunction suspending the project and barring the company from beginning work, and the status quo was maintained.

On December 29, 2012, there was a confrontation in the community of San Dionisio del Mar at the communal property building, when the Managing Board attempted to hold an assembly of communal landholders to withdraw from the suspension granted by the court in the *amparo* proceedings.

On September 22, representatives of the CTM union, former mayors tied to the PRI, and company representatives agreed to do everything possible to start work in Barra Santa Teresa. Preneal representative Sergio Garza asserted that, “there’s no turning back, we’re going to go in, whatever it takes, but you are going to support us.”

On September 27, 2012, persons allied with the company attempted to enter Barra Santa Teresa, so communal landholders and other members of the indigenous community of San Dionisio, San Mateo del Mar, and San Francisco del Mar blocked the access routes.

On September 29, community members from the General Assembly of San Dionisio del Mar, Isaul Celaya, Blas Cabrera, and Benita Celaya, were struck by a pickup truck driven by Ernesto Juárez, advisor to the Mayor of San Dionisio del Mar, Miguel Castellanos.

On October 10, 2012, a shock group from the CTM and COCEI PT blocked the entrance of the caravan of solidarity with the Ikot people’s resistance that was headed to San Dionisio del Mar. They blocked the access route with rocks and sticks, and gasoline was thrown on the first two vehicles.

### B. MICI findings in reference to compliance with OP-703

**Paragraph 3.34.** What were those measures?

### C. Regarding the Environment and Safeguards Compliance Policy

**Paragraph 3.52.** As mentioned earlier, the community of San Mateo del Mar clearly expressed its objection to the project, from well before the presentation of the Environmental Impact Statement of the “Istmeño Wind Farm” project in 2009. That rejection was even prior to the conflict that arose between Santa María del Mar and San Mateo del Mar because of the inclusion of sacred lands in the usufruct contract signed by Santa María del Mar; according to paragraph 2.34 of the report that conflict began in 2007.

**Paragraph 3.63.** It should be specified that the lease contracts were signed without the assemblies of communal landholders convened for that purpose having reached the quorum required under the Agrarian Law, and therefore are illegal.

**Paragraph 3.70.** It is impossible to form an opinion about the assertions concerning the EIA and the environmental and social management plans, or the assertion that the Bank complied with the provisions of Directive B.5, including on these points, without having access to that documentation. Nor is it possible to form an opinion with respect to the demand for the revision of the usufruct agreements (paragraph 3.34) without knowing the content of that demand. We request all relevant information in order to be able to issue the respective opinions.

**Paragraph 3.73** As stated herein, the Barra area has a very fragile ecosystem that will be affected by any intervention, no matter how minimal. In addition, the intent was to control the entire territory in order to convert it into an industrial park, which would be incompatible with the management exercised by the indigenous peoples.

This wind farm was enormous, and the harm would be all-encompassing, to both the natural and social parts of the territory.

We did not have an erroneous understanding of the project. This incursion into our territory is not in our interest, and from the perspective of our belief system, they do not understand that we have different ways of seeing things.

#### **D. MICI findings in reference to compliance with OP-102**

**Punto 3. Regarding the Operational Policy on Indigenous Peoples (OP-765).** During its visit, the Panel heard testimony from numerous individuals concerning the physical attacks, arrest warrants, police repression, provocation, the deepening of social divisions, and other violations of the physical, cultural, and social integrity of the affected communities. This testimony should be properly reflected in the report, especially in relation to Bank Management's argument that it considers it unnecessary to obtain the agreement of the indigenous communities affected by the project given that "this operation did not pose the risk of potential significant adverse impacts on the physical, territorial, or cultural integrity of the indigenous communities affected" (paragraph 3.110). The (intentional?) ignorance displayed by Bank Management in its response to the Panel is surprising and extremely troublesome, given that the project was approved by the Board of Executive Directors after numerous violent incidents and multiple cases of severe police repression had occurred in the Isthmus of Tehuantepec against members of indigenous communities opposed to other wind projects, and as Chart 4 (paragraph 3.4) reflects, prior to the project's approval by the Board of Executive Directors on November 23, 2011 there were already clear indications that the affected communities rejected the project, and more than ample reason to foresee active resistance to the project with the resulting conflict and police repression.

## SECTION: CONCLUSIONS

**Paragraph 4.2.** It is impossible to make any statement regarding the assertions made in paragraphs 4.2 and 4.3 about harm to biodiversity and to food security not materializing, given that most of the documents on which these assertions are based have not been made public. Beyond that, it is contradictory to assert that the mitigation and compensation plans (still unknown to the affected communities) would have resolved these issues, given that they were prepared without the fair and active participation of the affected communities. Regardless of the content of the plans, that assertion contradicts the Bank's Policy on Indigenous Peoples.

**Paragraph 4.3.** The compensation plans are not of interest to the communities. What we want is respect for the management of our territory. In addition, those plans only covered the project's construction period, not its entire useful life. During this time, territorial control would be turned over to the company and to the Navy; there would be adverse effects on fishing, in addition to which fishermen would not have the freedom to move about their territory. This argument was reiterated but not heard by the investigative mission.

**Paragraph 4.4 and 4.6.** Harm in lifestyle, cultural integrity and traditional knowledge (paragraph 4.4) and physical integrity of the opponents (paragraph 4.6) are not limited to impacts on the Barra de Santa Teresa. The mere existence (even to date) of the contract between Preneal and Santa María del Mar, implies serious damage to all these factors, and also entails serious economic, social and public safety consequences.