

**CONSULTATION PHASE
DETERMINATION OF ELIGIBILITY**

TO: Victoria Márquez-Mees, Executive Secretary
FROM: Isabel Lavadenz Paccieri, Project Ombudsperson
CC: Independent Consultation and Investigation Mechanism
REFERENCE: Termoeléctrica Del Golfo, S.A. de C.V., 1223 A/OC-ME
COUNTRY: Mexico
DATE: 18 August 2011
**ELIGIBILITY
DETERMINATION:** The Request is **Ineligible** for the Consultation Phase

I. Summary of the Request

- 1.1 On 27 June 2011, Mr. Ernesto Márquez Torres, Mr. Samuel Celio Martínez, and Mr. Efraín Pozos Adrián, representing the *Ejido* [cooperative farm] Council of the Las Palmas *Ejido* of Taumín Municipio, San Luís Potosí, Mexico, (the Requesters), submitted to the Independent Consultation and Investigation Mechanism (ICIM)¹ a Request concerning potential adverse environmental impacts caused by the commissioning of the thermoelectric companies “Termoeléctrica Del Golfo, Sociedad de Responsabilidad Limitada de Capital Variable” (TEG), and “Termoeléctrica Peñoles, Sociedad de Responsabilidad Limitada de Capital Variable” (TEP), located in Taumín Municipio, where they were constructed and financed under project ME-218 with funds from loan 1223/OC-ME of the Inter-American Development Bank (IDB).
- 1.2 This case was already processed through the former mechanism, the Independent Investigation Mechanism (IIM), but the Requesters have submitted this new request on the grounds of “new evidence and circumstances” that were apparently not available at the time the Final Report of the Investigative Panel was submitted to the Board of Executive Directors in accordance with the process in place at that time for the IIM.

¹ The terms: Mechanism, Management, Executive Secretary, Project Ombudsperson, Panel, Mechanism Policies, Eligibility, Consultation Phase, Assessment, and any other relevant term included in this memorandum will have the meaning assigned in the Policy establishing the Independent Consultation and Investigation Mechanism (ICIM), approved on 17 February 2010, and available at the following address: www.iadb.org/icim.

1.3 This Request makes the following allegations:

- 1.3.1 On 16 August 2001 the document “Bases for Cooperation to Contribute to the Protection of the Environment surrounding the Termoeléctrica Del Golfo SRL de CV facilities currently under construction in the Taumín Municipio, San Luis Potosí” was signed, and includes an Annex 1 “Environmental Conditions Matrix” and an Annex 2 “Self-regulation Matrix.” This document (Bases for Cooperation) was signed by the Ministry of the Environment and Natural Resources, the Federal Attorney for Environmental Protection (PROFEPA), the Government of the State of San Luis Potosí, and the companies “Termoeléctrica Del Golfo, Sociedad de Responsabilidad Limitada de Capital Variable,” and “Termoeléctrica Peñoles, Sociedad de Responsabilidad Limitada de Capital Variable.” The Requesters allege that, to date, they are unaware of complete and strict compliance with the aforementioned conditions, and such noncompliance apparently could cause or may be causing them severe damages.
- 1.3.2 They also make reference to the use of *petroleum coke* fuel. This fuel is used by thermoelectric companies in their industrial processes. The Requesters allege that the use of coke causes them harm because it is known that it can impact health,² natural resources, agriculture, and their livestock. They add that, to date, it is unknown whether an official Mexican standard exists for the use of coke, and that, even were an official standard to exist, it is unknown whether its application in the context of the plants would be restricted to regulatory compliance.
- 1.3.3 In order to substantiate their claims, the Requesters submit a copy of a writ of *amparo* [action for enforcement of rights] filed against the city council and the companies AES Corporation, Termoeléctrica Del Golfo, Termoeléctrica Peñoles, and Cemex México for using coke or coke ash to repair streets, for which they were granted in court a permanent injunction suspending works. The report by the official expert assigned to the *amparo* proceeding is also attached.
- 1.3.4 They further allege that the companies mentioned in the paragraph above may be discharging hot water from their condensers into the Choy and Tampaón Rivers flowing through the Las Palmas *Ejido*, in Taumín, San Luis Potosí, apparently without the proper permits and without measuring the environmental impacts that such discharges could cause. On this point they transcribe recent studies conducted by an expert in the field.
- 1.4 In light of these circumstances, they request ICIM involvement “in the interest of transparency and access to environmental information, which is the Institution’s policy...whenever an omission on the part of the Bank is discovered in relation to the Bank-financed Operation.”

² They state that there is evidence of impacts on health based on similar situations in Venezuela, Chile, and other countries.



The acts, omissions, and impacts alleged in the Request and described in the preceding paragraphs presumably refer to application of the IDB's Environment and Safeguards Compliance Policy (Operational Policy OP-703) and Access to Information Policy (Operational Policy OP-102).

II. Project Background

- 2.1 On 17 November 1999 the Bank adopted Resolution DE-125/99, approving loan 1223/OC-ME, for the construction and operation of a 230 MW petroleum coke-fired power plant located in the Mexican state of San Luís de Potosí. The loan contract was signed on 15 March 2000, and the final disbursement was authorized on 7 February 2007.
- 2.2 On 11 August 2000 a local organization, “Rescate Ecológico de Taumín” [Taumín Environmental Rescue Association], submitted an investigation request to the IIM. This request called for an independent investigation of the Bank in three areas: (i) complaints related to the environment; (ii) complaints related to employment and national and local economic and social development; and (iii) complaints related to information, transparency, citizen participation, and public consultation.³ The first matter, addressing the environment, raised the same concerns contained herein: complaints relating to compliance with the environmental and social requisites established in Mexican law, technology and petroleum coke controls, and the project impacts on the Choy and Tampaón Rivers.
- 2.3 On 24 June 2002 the Board of Executive Directors authorized an independent investigation, and on 21 February 2003 the IIM sent its report to the President of the Bank.
- 2.4 On 14 March the Panel submitted its final report to the Board of Executive Directors, and on 14 April 2003 Management submitted its responses to the Panel's final report.⁴ In its final report, the Panel concluded, among other considerations, “...that the environmental issues raised in the complaints as of the date on which this report was written are unfounded, according to the best technical knowledge and environmental practices available...” It further reads that the Bank has the objective “to assist the member countries in solving their environmental problems and in developing projects to improve the environment.” This objective was relevant, reads the report, “...for the Bank's decision to finance a thermoelectric plant fueled with petroleum coke.... using this fuel solves a problem in Mexico since it eliminates an environmentally harmful byproduct of low-lead gasoline, in a productive and benign manner.”
- 2.5 On 17 July 2003 the panel report and Management's response were released to the public.⁵

³ To see the request go to <http://www.iadb.org/cont/poli/investig/teg/noticia17jul03.htm> available 18 August 2011.

⁴ Idem ut supra to access the Final Report and Management's Responses.

⁵ See <http://www.bicusa.org/en/Article.556.aspx> available 18 August 2011.



III. Eligibility Analysis

- 3.1 The Eligibility Analysis contained herein is conducted in accordance with the criteria established in Articles 40 and 37 of the Policy.
- 3.2 The Request submitted today to the ICIM is directly related to the exclusion described in Article 37(e), which states: “Neither the Consultation Phase nor the Compliance Review Phase will be applied to: ... a particular matter or matters that have already been reviewed pursuant to the Mechanism, or its predecessor, **unless justified by new evidence or circumstances not available at the time of the initial Request.**”
- 3.3 The requesters claim that there is new evidence or circumstances not available at the time the ruling was issued (the Panel’s final report in the IIM procedure), and that they are facing adverse environmental impacts caused to date by the commissioning of the thermoelectric power plants. As described in point I, this Request contains three complaints: (i) compliance with the obligations assumed in the document entitled “Bases for Cooperation”; (ii) the use of petroleum coke fuel and its harmful effects; and (iii) the discharging of hot water from the thermoelectric power plants’ condensers into the Choy and Tapaón Rivers.
- 3.4 As regards the first complaint, the Request does not contain information establishing whether there was noncompliance related to a failure to enforce any of the Bank’s Operational Policies, and whether or not the alleged noncompliance is inherent in the IDB-financed operation, as it was designed and implemented.
- 3.5 With respect to the use of coke, firstly, this was one of the matters addressed in the original complaint. Secondly, in this case, at issue is the use of coke to pave streets, which is not directly related to the project. Lastly, one of the expert reports includes technical arguments, which, to a certain extent, contradict the Requesters’ statements and do not demonstrate concrete and material damages to the population; in fact, the ruling states, among other things, “...that coke ash has been spread under the asphalt covering the streets in question, therefore not allowing the wind to disperse the ash in the vicinity to then be inhaled by or otherwise come into direct contact with the inhabitants.” When the expert was questioned about the impacts or risks to the health of the inhabitants of Las Palmas Ejido, she responded, “...that question would have to be answered by an expert in human health.”
- 3.6 The alleged “new evidence” is a ruling from an *amparo* proceeding against the use of coke for street repair. Notwithstanding the transcription of large sections of formal expert reports, the allegations are still very generic, and there is no way to directly infer that the potential and possible harmful consequences of using petroleum coke to pave the streets in question could be attributable to the project financed by the Bank as it was designed, in accordance with its scope, implementation, and/or acts or omissions. Moreover, the project referred to in this Request was closed in 2007, and the *amparo* was filed and a ruling was



issued in 2010, which makes any inference exceedingly difficult and also makes the exclusion contained in Article 37(f) applicable.⁶

- 3.7 Regarding the wastewater discharge into the Choy River, no link has been shown between the levels of pollution in question and acts or omissions at the time the project was financed by the Bank.
- 3.8 The matters addressed in the Request, which were processed in a timely manner by the IIM, include issues of a highly technical nature, requiring unequivocal evidence, proof, facts, or circumstances in order for this case to be taken up again. This is not the situation in the case of this Request.
- 3.9 For the reasons mentioned above, and in the absence of new evidence linking the impacts or risks being alleged today with acts or omissions of the project financed by the IDB, the exclusion contained in Article 37(e) of the ICIM Policy is applied.

IV. Conclusion

- 4.1 The Project Ombudsperson, in the exercise of her duties and under the authority granted her by the Policy, determines that the Request described herein is **Ineligible for the Consultation Phase**.
- 4.2 Within five business days, the Executive Secretary will post the notice of registration on the Registry and notify the Requesters, the Board of Executive Directors, the President, the project team, the Country Office, and the executing agency of this Determination.

Isabel Lavadenz Paccieri
Project Ombudsperson

⁶ Article 37: Neither the Consultation Phase nor the Compliance Review Phase will be applied to: f. Requests dealing with a Bank-Financed Operation that are filed after twenty-four (24) months of the last disbursement.

