

PUBLIC

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

**ME-MICI001-2011
MEXICO. TERMoeLECTRICA DEL GOLFO PROJECT**

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COMPLIANCE PHASE ELIGIBILITY DETERMINATION

FROM: Werner Kiene, Chair of the Compliance Review Panel
TO: Board of Executive Directors
CC: MICI
REFERENCE: Case ME-MICI001-2011
PROJECT: Termoeléctrica del Golfo, S.A. de C.V., 1223A/OC-ME (ME0218)
COUNTRY: México
DATE: November 15, 2011

1. Summary

- 1.1. On 10 June 2011, the Independent Investigation Mechanism¹, received a Request filed by Ernesto Márquez Torres, Samuel Celio Martínez, and Efraín Pozos Adrián, representing the Council of *Ejido* [cooperative farm] *Las Palmas*, municipality of Tamaúín, in the state of San Luis Potosí, México (hereinafter the Requesters).
- 1.2. The Request follows up on an earlier submission to ICIM's predecessor mechanism, alleging harm due to IDB's failure to adequately supervise the design and implementation of the Project. The Request alleges that new evidence had surfaced indicating that the IDB-financed Termoeléctrica del Golfo Project had adversely impacted the environmental, health and social conditions of the land and people of Ejido las Palmas.
- 1.3. Because of the allegations of health issues brought forward by the Requesters, the Compliance Review Team reviewed with care the information made available both from the Bank and the Requesters, and from other sources. In conclusion, **the Chair of the Panel, in line with the Policies of the Mechanism and without any judgment on the merits of the Complaint, determines that the Request is ineligible for a Compliance Review by the Panel. The reasons for this determination are summarized in Section 7.3**

¹ The terms: Mechanism, MICI, ICIM, Management, Executive Secretariat, Project Ombudsperson, Panel, Mechanism Policy, Eligibility, Consultation Phase, Assessment and any other relevant term in this memorandum shall have the meaning assigned to them in the Independent Consultation and Investigation Mechanism (ICIM) Policy approved on February 17, 2010.



2. The Project

- 2.1. The Termoeléctrica del Golfo Project is a private sector energy loan project partly financed by the Inter-American Development Bank (IDB) (hereinafter the IDB or the Bank) in November 1999.² “Termoeléctrica Del Golfo, Sociedad de Responsabilidad Limitada de Capital Variable” (TdG), and “Termoeléctrica Peñoles, Sociedad de Responsabilidad Limitada de Capital Variable” (TEP) constituted together the Executing Agency (EA) of the Project.
- 2.2. The implementation of the Project involved the construction, operation and maintenance of a 230 MW Circulating Fluidized Bed (“CFB”) petroleum coke power plant in the Mexican State of San Luis Potosí. The Project also included the construction of an electrical transmission line from the project site to the CFE Anáhuac Potencia Substation, a railway spur from the project site to the existing railway to facilitate fuel delivery, a pipeline to deliver raw water from the Rio Tampoan to the project site, and a pipeline to discharge treated wastewater to the Tampoan River.

3. ICIM actions thus far

- 3.1. On June 10, 2011, the Requesters sent the Request to the ICIM through the IDB Country Office in Mexico indicating their desire to proceed with a Compliance Review. On June 27, 2011 the case was logged as “Received by ICIM”. On July 28, 2011, it was transferred to the Ombudsperson.
- 3.2. On August 18, 2011 the Project Ombudsperson issued the Eligibility Memorandum declaring the Request ineligible for purposes of the Consultation Phase and the Request was transferred to the Compliance Review Panel on August 22, 2011.
- 3.3. Pursuant to Section 55 of the ICIM Policy, the Panel Chairperson reviewed this Request independently of the determination of the Project Ombudsperson. To ensure due diligence to the Requesters’ concerns, the Panel extended the eligibility determination process through November 15, 2011.

² The Project was awarded on October 9, 1998, to a consortium consisting of Alstom (formerly GEC-Alsthom) and Sitré Energies, Inc. (the “Sponsors”) through an international bidding process called by *Cementos Mexicanos* (“Cemex”), a Mexican cement producer (the world’s fourth largest cement producer and the largest cement producer in the Americas). The Sponsors were to finance, construct, and develop the project through a Mexican Business Trust. Electricity will be sold under a 20-year Power Supply Agreement (“PSA”) to seven cement companies, all of them majority-owned subsidiaries of Cemex.

4. Harm and Compliance Issues of the Request

- 4.1. The Requesters allege that the use of pet-coke ashes and its unknown impacts causes them harm since it may have had negative consequences on human health, natural resources, agricultural, livestock and other economic activities. The Request also states that the use of pet-coke with a high sulfur content generates air emissions of sulfur dioxide, a pollutant that generates acid rain, is considered harmful to human health, vegetation, and metals.³
- 4.2. In addition, the Requesters indicate that it is as yet undetermined whether the use of pet-coke ashes in a road project is in compliance with the official Mexican standard for the use of pet-coke ash.
- 4.3. They consider the fly ash resulting from the operation of the power station as hazardous waste. To support this claim, the Requesters point to the expert opinion of an Officer from the Ministry of Environment and Natural Resources. The expert opinion, cited the 2006 federal Law adopted in Mexico, titled "*Ley General para la Prevención y Gestión Integral de los Residuos*" (General Law for the Prevention and Integral Management of Wastes)⁴ and concluded that "....hazardous waste by its nature is corrosive, reactive, explosive, toxic, flammable and biologically infectious, and may present a risk to the ecological balance, environment, and health of the general population."⁵

5. Legacy issues and their potential impact on statutes of limitation for Bank involvement

- 5.1. The Bank has statutory limits on its involvement with a specific investment; however, there may be circumstances where there could be a real need for the Bank's continued or re-activated involvement to help significantly mitigate social and environmental impacts that otherwise may be left unaddressed.
- 5.2. While the Panel's preliminary analysis of Bank records can be considered to show that the design and the implementation of this Project followed accepted regulatory and technical norms, it should be of concern to the Bank that the Requesters associate health issues in their community with the generation of pet-coke ash and its uses.
- 5.3. Because of the potential long gestation period of health impacts and the potential reputational risk for the Bank that could emanate from such impacts, the Panel took care to base its eligibility determination on a thorough analysis of the allegations brought

³ See Request number ME-MICI-001-2011, Termoeléctrica del Golfo-México (1223/OC-ME), June 10, 2011.

⁴ Ley General para la Prevención y Gestión Integral de los Residuos" (General Law for the Prevention and Integral Management of Wastes) (the "Waste Law NOM-052-SEMARNAT-2005"), (Hazardous Waste Classification NOM).

⁵ See Request number ME-MICI-001-2011, Termoeléctrica del Golfo-México (1223/OC-ME), June 10, 2011.

forth by the Request and the key argument advanced by the Requesters that there existed new evidence that would merit the conduct of a Compliance Review.

6. Examination of the Validity of New Evidence

- 6.1. The Requesters' assertions that there is new evidence have two dimensions: On one side is the allegation that there exists now new evidence on the potential health impact of pet-coke ash and its use in road construction. On the other side is the implied allegation that there is now new evidence that the Bank did not adhere to its operational policies in avoiding such alleged health hazards.
- 6.2. While the Panel respects the Requester's concerns about potential health issues, it is not mandated in the course of an eligibility determination to establish the biological, physical and chemical validity of this concern. The Panel can, however, sample the Bank's insistence on the Project's adherence to standard technical procedures in force during design and implementation. This gives the Panel an estimate of the likelihood of potential non-compliance and the resulting likelihood that there might be new evidence on the Bank's compliance that was not considered before.
- 6.3. The Panel consulted information contained in IDB policies and operational documents available to the ICIM, gathered additional information on the Project,⁶ established a dialogue with the relevant IDB Management units, and required additional information from the Requesters. To do justice to the alleged health issues underlying the Request, the Panel carried out desk research on this type of issues involved in similar projects; complaints about related health issues; environmental impacts; international standards; guidelines used by the International Finance Corporation; and regulations issued by the Secretariat of Environment and Natural Resources of Mexico.
- 6.4. The use of pet-coke generates bottom and fly ash as a result of the combustion process in the boilers. The Panel understands that commercial facilities for the disposal of the Project's combustion wastes were not available. Therefore, on-site ash-storage facilities were built. The Bank's monitoring and supervision reports refer to independent experts certifying that these storage facilities were constructed in line with industry-standard specifications to ensure appropriate disposal of the ashes and prevent negative environmental impact.
- 6.5. The Panel examined IDB reports on laboratory analyses performed in accordance with applicable Mexican and international standards that indicate that the petroleum coke fly and bottom ash produced by the plant could be expected to be within the permissible

⁶ The information review by the Compliance Review Panel are the IDB's Operational and Legal documents, including the Environmental Reports such as the Environmental and Social Management Report (ESMR) of October 1999, the Environmental en Social Management Plan (ESMP), and the Environmental Completion Certificate and the Environmental and Social Monitoring Report for the year 2005 of the Termoelectrica del Golfo project -1223 A/OC-ME (ME0218).

limits established for reactivity, corrosiveness, explosivity and toxicity, and could be considered non-hazardous.

- 6.6. The Panel also learned that the IDB obtained from the Executing Agency certification that the ashes created through the operation of the plant are not hazardous.⁷ Another independent report examined by the Panel certified that the Project was constructed and operated in compliance with the Mexican environmental laws.⁸
- 6.7. Project completion documents examined by the Panel show that the Bank received reports from independent experts that the handling of the fly ashes resulting from the operation of the plant corresponded to international and Mexican standards.
- 6.8. The Requesters refer to the expert opinion as a demonstration of new evidence of the hazardous nature of the pet-coke ashes. The expert opinion is based on references in the 2005⁹ version of *“Ley General para la Prevención y Gestión Integral de los Residuos”*, while the certification documents supplied to the Bank during construction and operation of the Project refer to the 1993 version of this law¹⁰.
- 6.9. The Panel undertook a comparison between the 1993 and 2005 versions of the *“Ley General para la Prevención y Gestión Integral de los Residuos”* and could not identify a difference in the relevant sections of the two versions that could support an assertion of new evidence.
- 6.10. Based on this review of past and new information the Panel concluded that while it fully respects the Requesters concerns about their community’s health situation, the information asserted to be “new” cannot be considered new evidence for the purposes of this eligibility determination for a possible Review of the Bank’s compliance with its own Operational Policies.

7. Eligibility Review

- 7.1. The Panel has the duty to determine whether the Request satisfied the eligibility criteria for a formal investigation. During this eligibility review process the Panel followed Section 30, 31, 37, and 56 of the ICIM Policy.

⁷ See “Certification of Non-hazardous Condition of the Coke Ashes provided by the Subsecretaria de Gestion para la proteccion ambiental de la Direccion General de Gestion Integral de Materiales y Actividades riezgsas. Mexico D.F. June 7, 2005.

⁸ See the Environmental Consultant Completion Certificate, by Van Ekambaran, Ph. D. Vice President of URS Corporation. January 16, 2007. Termoeléctrica del Golfo PO-1223/OC-ME.

⁹ See Law “NOM-052-SEMARNAT-2005” Mexican Law that establishes the characteristics of hazardous waste and the limits that make a hazardous waste. June 23, 2006 Section 5.5. p. 8, and 4.

¹⁰ See Law “NOM-052-SEMARNAT-1993” Mexican Law that establishes the characteristics of hazardous waste and the limits that make a hazardous waste. October 23, 1993, p. 3, 4 and 5.

7.2. The results of the Eligibility Review are summarized in the following table:

Eligibility Analysis		
ELIGIBILITY CRITERIA FOR A COMPLIANCE REVIEW PHAS (as specified in the ICIM Policy)	CRITERIA MET?	COMMENTS
56.a) The names and contact information for the Requesters are available;	YES	ICIM files contain information on names and contact of the Requester(s).
56.b) The names and contact information for the Representative, if any, and proof of the authorization are available;	YES	Although there is no letter of representation signed by the requesting organization during the Consultation Phase, it can be assumed that the representatives contacted during the consultation phase represent the citizens allegedly affected by the Project.
56.c) The Bank-Financed Operation(s) at issue has been identified;	YES	Termoeléctrica del Golfo Project 1223 A/OC-ME (ME-0218)
56.d) The Requesters resides in the country where the relevant Bank-Financed Operation is or will be implemented (or a qualified Representative has been appointed);	YES	The Requesters reside in Mexico.
56.e) None of the exclusions set forth in Section 37 applies;	NO	<u>Exclusion 37 (a) does not apply:</u> The Bank is responsible for the actions that are subject to the Request though co-financiers share in this responsibility <u>Exclusion 37 (b) does not apply:</u> The Request focuses on the Bank's omission in securing adherence to its Operational Policies. It does not relate exclusively to the laws, policies or regulations of Mexico and the executing agencies. <u>Exclusion 37 (c) does not apply:</u> The Request deals with issues arising from an Operation that was supported by the Bank together with co-financiers.

	<p>The Requesters' concerns are plausible and may be subject to Bank Operational Policies on Environmental and Social Safeguards, Disclosure of Information, Disaster Risk Management, and Involuntary Resettlement.</p> <p><u>Exclusion 37 (d) does not apply:</u> The Request does not address procurement issues.</p> <p><u>Exclusion 37 (e) does apply:</u></p> <p>i) A request relating to the same matters had been submitted to ICIM's predecessor organization(IIM). However, by alleging new evidence, the current Request cannot be <i>a priori</i> excluded on the grounds of the MICI Policy exclusion 37(e). Because of the potential health issues involved, the Panel examined the validity of the assertion of new evidence both from the perspective of alleged harm and alleged policy violated.</p> <p>ii) Without passing any judgment on the actual or potential health situation of the involved population, the Panel came to the conclusion that current and past technical opinion both in Mexico and elsewhere classifies petcoke ash as potentially hazardous, but not toxic. Thus, without judging in any way the merits of the claim, the allegations of potential health effects, cannot be considered new evidence.</p> <p>iii) On the other hand, current and past technical opinion both in Mexico and elsewhere clearly stipulate technical requirements for the storage of pet coke ash. In carefully examining the Bank's actions to ensure the proper storage of the pet coke ash generated by the Project, the Panel saw that IDB had obtained qualified technical certificates for the proper procedures to store the ash. Thus, there is no <i>prima facie</i> new evidence that the Bank was not in compliance with its own relevant policies.</p> <p>iv) Since from a procedural perspective there is no new evidence, the Panel concluded that the Request submittet to MICI on June 10, 2011, needs to be considered the "same matter that had been reviewed by the previous Mechanism (IIM).</p> <p><u>Exclusion 37 (f) does apply:</u> The Policy requires</p>
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		<p>the Panel to check whether the current Request is filed more than 24 months after the last disbursement.¹¹</p> <p>i) The marshalling of new evidence gives the Requesters the right to file a Request even after the two-year limitation.</p> <p>ii) On the other hand, the Panel came to the conclusion that new evidence did not exist, thus leading to the subsequent conclusion that a filing beyond the two-year limitation was not any longer an option..</p> <p><u>Exclusion 37 (g) does not apply:</u> The Request deals with operational issues germane to the Mandate of ICIM and is not subject to review by other bodies of the Bank.</p> <p><u>Exclusion 37 (h) does not apply:</u> The Request deals with feared or actual harm to the livelihood of the Requesters and has not been submitted to gain a competitive business advantage.</p> <p><u>Exclusion 37 (i) does not apply:</u> While the potential health impact of using pet coke ash for road construction has been subject to a legal proceeding in the municipal court, the Panel confirmed that this proceeding does not deal with the substance of the Bank's financing of the Termoelectrica Project.</p>
56. f) the Requester has reasonably asserted that it has been or could be expected to be directly, materially adversely affected by an action or omission of the IDB in violation of a Relevant Operational Policy in an Bank-financed Operation and has described in at least general terms the direct and material harm caused or likely to be caused by such action or omission in the Bank-financed operation	NO	<p>Given the Request's focus on the use of pet coke ash for municipal road construction and the Bank's apparent policy-conform monitoring of technical and legal norms for ash storage, the Requesters have not reasonably asserted that their livelihoods are being threatened by the Bank's failure to ensure adherence to its Operational Policies.</p>

¹¹ Information available to the Panel shows that the last disbursement of the Termoeléctrica del Golfo project was made on May 15, 2007 and the date of full repayment by the Borrower was made on September 24, 2007.

56.g) With respect to an issue raised in the Request, a Compliance Review may assist in determining whether (and if so, how and why) any Bank action or omission, in respect of a Bank-Financed Operation, has resulted in non compliance with a Relevant Operational Policy and direct, material adverse effects (potential or actual) to the Requesters; and	YES	The Requesters explicitly seek a compliance review to assist the parties involved in determining more precisely the background and nature of the Bank's alleged failure to enforce applicable Operational Policies. While a Compliance Review would clarify in more detail the nature of this Request, the Panel does not recommend such a step in light of the preceding analysis of procedural exclusions.
56.h) The Requesters has taken steps to bring the issue to the attention of Management. The Panel Chairperson shall consult with Management as to its response and if Management is involved in addressing the concerns raised, the Panel Chairperson shall allow forty-five (45) calendar days from the date of receipt by the Executive Secretary of the Request for purposes of the Compliance Review before it is deemed eligible. The Panel Chairperson may waive this requirement in his or her discretion if the 45-day period has been invoked by Management during the Consultation Phase.	YES	The Requesters have taken steps to bring their concerns to the attention of Management and requested that a Compliance Review be carried out.

8. Summary and Conclusions

8.1. While the Panel's preliminary analysis of Bank records can be considered to show that the design and the implementation of this Project followed accepted regulatory and technical norms, it is of concern that the Requesters associate health issues in their community with the generation of pet-coke ash and its uses.

8.2. The Panel notes that in spite of these concerns, the following important procedural considerations speak against the Panel's further involvement in this matter:

- a. The information provided by the Requester's cannot be considered new evidence for the purposes of declaring the Request eligible for a Compliance Review: There is no new information on the legal and technical standards in force at the time of Project design and implementation and there is no new information on the Bank's supervision of the adherence to these standards that could justify a declaration of eligibility for a Compliance Review.
- b. The present Request is a re-submission of the earlier Request since both sets of Requesters refer to pet-coke ash as a cause for their concerns. Based on the argument of new evidence, it could be considered eligible for a Compliance Review even if it were filed later than the two year statute of limitation. However, since there is not sufficient support for new evidence, the two-year limitation has to be applied.
- c. A further circumstance that obviate the declaration of eligibility for a Review of the Bank's compliance with its own Operational Policies emanates from the fact that the core of the present Request is addressed against the use of pet-coke ash as an asphalt-covered layer in a road construction project which is not related to the Bank's loan.

8.3. The Chair of the Panel, in line with the Policies of the Mechanism and without any judgment about the merits of the Request, determines therefore that **the Request is ineligible for a Compliance Review by the Panel.**

8.4. **The Panel wishes to express its appreciation** to the Requesters for providing explanations about the concerns that they have for themselves and for the health and safety of their community. The Panel also wishes to thank members of Management for explaining in detail the steps that IDB had undertaken to ensure that the Project would not lead to undesirable impacts.

9. Processing of the Eligibility Determination

As per the Mechanism's Policy, Paragraph 55, the Executive Secretariat will notify the Requesters, the Board, the President, Management and the Project Executing Agency or Borrower on the contents of this memorandum and post the notice of registration on the Registry within 5 business days of distribution to the Board.