

September 16, 2011

Via Electronic Mail

IDB Headquarters
1300 New York Avenue
N.W. Washington, D.C.
20577 USA

Re: Concerns regarding the Independent Consultation and Investigation Mechanism (MICI)

Dear President Moreno and Members of the IDB Board of Executive Directors:

We are group of civil society groups that have been closely following the Independent Consultation and Investigation Mechanism (“MICI”) since it went into effect September 2010. Many of us were involved in the review of the mechanism and have an interest in seeing it successfully work in practice. We are reaching out to alert you to concerns with the MICI policy, and its interpretation and implementation to date. Based on our observations and careful analysis, we would like to offer the following suggestions that would improve the functioning of the MICI and help it to better achieve its goals.

Among our concerns, four problematic trends stand out and require your immediate attention: lack of outreach by the MICI, exclusion criterion that are presenting barriers to access to the MICI, barriers to Compliance Review, and lack of transparency. To address these concerns, we recommend that outreach be conducted immediately, that the provision on parallel proceedings be amended or a policy be adopted to clarify its interpretation, that the provision requiring sequencing of the MICI be amended, and that the MICI policy be amended to improve internal and external transparency. We urge you to take action to address these problems, which are detailed below.

The Need for Outreach

First and foremost, it has been clearly demonstrated that there is an urgent need for the MICI to conduct outreach. At the most basic level, most project-affected people and communities are unaware of the MICI’s existence. For those who are aware of the MICI, the policy is still vague and complex, limiting access to the mechanism. Consequently, there is a need for dissemination of information about the MICI throughout the region using a number of formats. In particular, the MICI should distribute user-friendly guides in workshops for directly affected people and civil society organizations. Support and infrastructure to assist with MICI outreach is available: many local NGOs in IDB project areas would be happy to participate in MICI workshops and then circulate information to communities. Information could also be distributed through the already established CONSOCs.

Problematic Exclusion Criterion

Civil society organizations in the region and individual requesters believe that the MICI policy's exclusion criteria in paragraph 37(i) are counterproductive to the functioning of the mechanism. The policy reads, "Neither the Consultation Phase nor the Compliance Review Phase will be applied to ...Requests that raise issues under arbitral or judicial review by national, supranational or similar bodies." We have spoken with requesters who have expressed concern about the implications of this policy, which unduly limits access to the MICI, and the overly broad interpretation of this policy, which presents yet further barriers. We are happy to share specifics upon request.

Among the reasons that this provision is problematic include the following:

- The provision is vastly overbroad with regard to exclusion of complaints to the MICI seeking Consultation. If the "issues" raised in the complaint are also related to "issues" raised by regulators, government prosecutors, a local ombudsman's office or other body, the provision could potentially be used as an excuse to reject the complaint. If the requesters themselves have not lodged the same or equivalent complaint seeking the same remedy in another forum (i.e. the other "issue" may not relate to the requesters nor the IDB), there should be no reason to consider rejection of a MICI complaint. Even if the same issue is raised in another forum by the same requesters, this should be only a factor taken *into consideration* if it appears that addressing the issue in the MICI Consultation Phase would be impossible due to a forthcoming decision that would address the requesters' exact concerns.
- Furthermore, the references to "issues" and "other similar bodies" are vague and are subject to abuse that would unduly limit access to the mechanism. The interpretation of these terms, which could vary wildly, is not transparent.
- Project-affected communities cannot be expected to rely solely on the MICI for addressing their grievances. The MICI Consultation Phase process and domestic judicial proceedings are both time-intensive, thus imminent harm cannot wait to exhaust each grievance recourse mechanism one at a time. For example, if a community files a complaint with a local court and for years receives no response due to either judicial inefficiency, corruption or other problems, it is unjust to use that complaint as a basis to deny access to the MICI Consultation Phase, which might remain the only forum for addressing the dispute.
- The provision should *never be applied to requests for Compliance Review*. By definition, Compliance Reviews address allegations that the IDB has failed to comply with its own policies and procedures and thus serves as a tool of the IDB board and the requesters. There is no other type of complaint mechanism, judicial or non-judicial, that has the mandate or power to address these types of violations. Therefore, paragraph 37(i) should be clarified to exclude requests for Compliance Review.

Already case BR MICI001: Program for Social-Environmental Recovery of the Serra do Mar was deemed ineligible for Consultation on the basis of this criterion. Additionally, eligibility of the Rodoanel case in Brazil submitted May 13, 2011 has yet to be determined due to questions concerning parallel proceedings. Moreover, there is at least one Request to the MICI—one regarding the San Francisco-Mocoa Highway IDB project—that has not even been publicly acknowledged because it was deemed ineligible due to parallel proceedings. That is the only one we know of, which is to say there may be more. It is evident that this exclusion criterion is bringing about serious and potentially irreversible harm.

A problem with paragraph 37(i)'s vagueness, described as a general matter above, is already causing abuses in interpretation in practice:

- Case BR MICI001 was deemed ineligible for Consultation on the basis of judicial proceedings unrelated to the IDB project. However, neither Requesters nor their representatives have been involved in any parallel proceedings related to this case. This is an example of a dangerous over application of the policy that deprives the IDB and the requesters the right to address these problems in a timely manner before they escalate.
- The present interpretation of paragraph 37(i) has also barred progress in the Rodoanel case. Thus far, continuous delays in determination of eligibility can be attributed to requests by the Ombudsperson for further documentation concerning potential parallel proceedings. Currently, only hearings within the legislature have taken place. If this can be construed as arbitral process, the policy is discouraging communities from alerting domestic authorities to harm that could be avoided if they want to access the MICI.

The MICI staff should be prohibited from implementing the policy as to make the MICI unusable or as a false alternative to domestic or other judicial remedy. Remedies sought in judicial proceedings do not provide the same redress as the requesters seek from the MICI. Moreover, it is impossible for parallel proceedings to hamper the Consultation or Compliance Phases. At most, parallel proceedings would require extra sensitivity during mediation in the Consultation Phase. Parallel proceedings *cannot* interfere with the goals or process of a Compliance Review, since the goal of that process is an examination of the IDB's compliance with its own obligations, which the IDB argues cannot be adjudicated in other fora (which is one of the justifications for creation of an IDB accountability mechanism). Any concern about parallel proceedings is misplaced, as evidenced by the World Bank Group's Compliance Advisor/ Ombudsman ("CAO"), which in its ten years has *never* excluded a request on the grounds of parallel proceedings despite cases in courts or other judicial bodies related to the topics discussed in CAO complaints. This exclusion criterion must be amended prior to the commencement of MICI's review in September 2012.

Limits on Access to Compliance Review

The purpose of Compliance Review is for the Board of the IDB to receive independent information regarding violations of the Bank's own policy. This goal is currently not being achieved for several reasons.

First, access to compliance review is hindered by the design of the mechanism. The MICI policy inhibits requesters from directly using the Compliance function, without first completing the Consultation Phase. This delays the ability of the Board to address urgent policy violations, allowing harm to persist and become more serious. Exhausting the Consultation function prior to being able to access Compliance Review is especially frustrating for requesters who have explicitly expressed that they are not interested in Consultation. Between the 15 days for eligibility determination (with unlimited extensions) and the 45-day pause for problem solving with Management, we have observed extensive delays before reaching Compliance that are unnecessary and counter-productive. While extensions for eligibility determination and the 45-day problem-solving pause are appropriate in some cases, the goals of Compliance Review are thwarted if the requesters do not want Consultation. We provide some examples below.

- In case PR MICI002: Program to Improve Highway Corridors, the requesters stated that they were not amenable to Consultation and wished to proceed directly to Compliance Review. Even though the complaint was clearly not eligible according to criterion 40(g) of the policy (“Requests shall be deemed eligible for the Consultation Phase if the parties are amenable to a Consultation exercise”), the determination of eligibility was extended for more than two weeks beyond the allotted 15 days. During this time, the project was and still is in motion, continuing to cause harm.
- In a complaint regarding loans for the northern section of the Brazilian Rodoanel Project, the requester only asked for Compliance Review and objected outright to Consultation. Despite this, eligibility determination has been extended at least four times so far, in total a delay of 10 weeks, on the basis that there was a need for further documentation. However, since the case did not meet criteria 40(g), *assessing any further criteria is irrelevant* and will be completed independently by the Panel.

In addition to the abuse of the unlimited extensions of time for eligibility determination, the *unspecified timeline* for revision of Terms of Reference (“TOR”) for Compliance Review is also hampering the effectiveness of the mechanism.

- In case BR MICI001: Program for Social-Environmental Recovery of the Serra do Mar, the requester received the TOR from the MICI on January 21, 2011, and the requester responded with comments two days later. Six months have passed and it is still unclear to the public or the requester whether the TOR was finalized or submitted to the Board.
- Similarly, in case PR MICI002, while comments to the TOR from the requesters and Management were completed by February 8, 2011, the request for a recommendation for Compliance Review was not submitted until June 6, 2011.

For projects in progress, such as PR MICI002, every delay in the MICI’s process equates to further harm to the communities lives and livelihood, and/or damage to the environment. Requests received prior to the approval of loans present opportunities for revising Project Proposals before damage is done. Request BR MICI001 was submitted in the pre-approval project phase, but due to the extensive delays in the MICI process, the project has now been approved and it will much more difficult to address the urgent problems raised in the complaint.

Second, the purpose of Compliance Review is further threatened because complaints are not immediately shared with the Compliance Review Panel. This practice is not a part of the MICI policy, but instead a personal decision on the part of the Ombudsperson. This decision does not serve the transparency needs of the MICI, the Bank, the Project-affected communities, or the public. Transparency not only supports the effectiveness of the mechanism to help affected communities, but also gives legitimacy to the IDB as an independent and accountable institution.

Transparency Issues

There are also striking problems with information disclosure and transparency of the MICI. In terms of MICI progress documents, the policy requires that the reasons for ineligibility for Consultation and Compliance Review phases (paras. 41, 57), Project Assessment Reports for Consultation (para. 45), Consultation Phase Reports (para. 51), and Panel Reports (para. 70) be made public on in the MICI Registry. Many of the required documents are made public on the Registry, but only after long delays and mostly after the proceedings are completed. Moreover, some documents listed on the website are password-protected. Examples include the Eligibility Determination for Consultation for AR MICI002 and the Eligibility for Determination for Compliance Review for BR MICI001. Why the MICI should list documents, but make them inaccessible is unclear. According the policy, reasons for eligibility as opposed to ineligibility are not explicitly required to be made public, however, we cannot see what motivation the MICI staff would have for concealing these documents. This decision undermines the legitimacy of the MICI.

The original requests are also not made public in the Registry; only summaries written by the Executive Secretary are offered, and *not even for every eligible case*. This is not dictated by the policy, but is instead a matter of interpretation. Section 36 states: “The Executive Secretary shall keep track of the number and nature of eligible and ineligible Requests and report on the same in the ICIM’s annual report and via the Registry[,]” and Section 39 states, “if a Request is deemed eligible, the Project Ombudsperson shall cause the Executive Secretary to promptly register it in the Registry.” First, not all ineligible requests in either number or nature are being made public. As example, the Request regarding the San Francisco-Mocao Road in Columbia previously mentioned cannot be found on the MICI website. Additionally, the cases listed in the Registry in comparison to the MICI Annual Report do not match one another. Second, we disagree with the Ombudsperson’s interpretation of the policy that only a summary of the Request instead of the original request should be posted to the Registry. A summary of the Request is merely an interpretation. From discussions with requesters, it is clear that there are discrepancies between the summaries and what is actually written in the complaints. This clearly undermines the legitimacy of the MICI and thus the IDB. This problem could be resolved if the policy was more clear.

We look forward to your response to our recommendations. As a development institution, we expect that the IDB will find our conclusions as concerning as we do. Please do not hesitate to contact us either individually or collectively to set a time to discuss these issues in further detail.

Sincerely,

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cc: MICI Executive Secretary, Consultation Phase and Compliance Review Staff
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Services Committee
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