

March 22, 2018

María Camila Barriga
Consultation Phase Case Office
MICI

Dear María Camila,

Comments on the Draft Guidelines for the Consultation Phase and the Draft Terms of Reference for the Roster of Process Facilitation Experts

Thank you for the opportunity to review and comment on these documents. As we expressed during the informative session, we believe that these Guidelines are a positive development and our comments are mostly minor. We have set out those comments in the below tables.

Draft Guidelines for the Consultation Phase

Paragraph	Comment
Acronyms and Abbreviations	
“IDB Group”	The definition currently says the Inter-American Investment Corporation. Should it instead refer to IDB Invest?
“Parties”	The definition of does not match the MICI-IDB Policy because it fails to mention Executing Agencies (it uses the narrower MICI-IIC definition instead). The MICI-IDB Policy defines Parties as “The Requesters, Management, the Borrower, the Client and/or the Executing Agency, if applicable”.
II. Objective	
2.1	<p>We discussed during the informative session that this document is primarily intended to serve MICI staff however a more simplified guide may be developed to share with community complainants and their advisors.</p> <p>We have a suggestion for any simplified guide. We have commented to MICI in the past that their approach to the Consultation Phase (as set out in these guidelines) leads to a very robust discussion of process, design and overall strategy (such as the agenda, goals, structure, and ground rules of the dialogue) very early in the process, even before the first dialogue session takes place. This requires the community requesters to be highly organized, to ensure that they have discussed and determined their system of representation and decision-making, and to ensure that they are ready to defend their interests if the other parties are seeking to narrow the agenda or to impose more restrictive procedural rules.</p> <p>Accordingly, for any manual/guide that is prepared for communities, we recommend that it identify a range of procedural and structural questions or issues that communities should consider, as early as possible, to ensure that</p>

	they are ready to discuss those questions and issues and defend their interests during the assessment phase and early process design.
III. Principles for Managing Cases During the Consultation Phase	
	<p>We support the suggestion made by our colleagues during the informative session that the Guidelines should refer to harm avoidance, mitigation and remedy as one of the principles informing case management during the Consultation Phase. We suggest that the new principle read: “Harm avoidance, mitigation and remedy: CP processes should have as their primary goal the avoidance, mitigation and/or remedy of harm caused or threatened by the Project. Dialogue should be oriented towards this goal.”</p> <p>Alternatively, paragraph 1.1 could be amended by adding “to avoid, mitigate and/or remedy harm caused or threatened by the project” after “the process” in the final sentence so that it reads: “<i>In the specific case of CP, MICI operates as an impartial third party that searches for consensual solutions between the Parties involved in the process, to avoid, mitigate and/or remedy harm caused or threatened by the Project.</i>”</p>
IV. General Considerations for Case Management	
4.9	In this paragraph, you refer to the Executing Agency but not the Client. Is that deliberate?
4.11	We support the suggestion made by our colleagues in the informative session that this paragraph be clarified to make it clear that it refers to translation of essential <i>project or technical</i> documents.
4.12	This paragraph currently refers to “impartial and <i>equal</i> ” treatment of Parties. We suggest that impartial and “equitable” or “fair” treatment is more appropriate in the context of asymmetrical power relations between the parties, as will be inevitable in MICI’s Consultation Phase. Equal treatment in such asymmetrical situations may not guarantee a fair process.
4.13	Add “or she” after he – in the final sentence for gender neutrality.
4.19	It would be useful to clarify that the Parties may also propose to include third parties and that their inclusion requires consensus agreement.
V. Stages	
5.2(b)	Again, the Guidelines currently refer to the Executing Agency but not Client. We expect it should be Executing Agency and/or Client.
5.4(b)	<p>When referring to capital-P “Parties” it is difficult to distinguish who would be considered a primary and a secondary Party. Perhaps “parties” was intended here in the lowercase-p “parties” sense?</p> <p>In the English translation, civil society organization should be abbreviated to “CSO”.</p>
5.4(c)	“Temporarily” should be deleted as mitigation steps may be long-term.
5.4(d)	Should “parties” in this sentence be capital-P “Parties”?
5.4(e)	It may be useful to qualify this paragraph to recognize that the Parties may choose to reserve one or more of these topics for further discussion during the dialogue process itself.

5.4(g)	In the English version, “affecting” should be qualified by “negatively”, as affecting is a relatively neutral term.
5.5	1. Is MICI able to commit to “ <i>will aim to</i> ” circulate a draft version and “ <i>provide reasonable opportunity for comment</i> ” rather than “may circulate ...”? While we appreciate that a draft is not mandatory under the MICI Policies, it is best practice and better achieves MICI’s goal of transparency. 2. Should this say the “Executing Agency <i>and/or the Client</i> ”?
5.6	1. It is not clear to us what “criteria” means in this paragraph. Is this a translation issue? 2. It should say “if ... the Requesters opted at the beginning of the process for the Compliance Review Phase”, rather than “the Parties opted” as it is the Requesters that make election (consistently with paragraph 5.11).
5.8	The introduction to this paragraph should be qualified by “Taking into account the preferences of the Parties”.
5.8(b)	It may be useful to qualify this sub-paragraph to recognize that the Parties may choose to reserve one or more of these topics for further discussion during the dialogue process itself.
5.8(f)	Should this say capital-P “Parties”?
5.9	Should this say the “Executing Agency <i>and/or the Client</i> ”?
5.12	Should this say capital-P “Parties”?
5.15	Could the annual monitoring report also comment on compliance with the Reprisal Guidelines?
VI. Information Management	
	This section should also refer to the need to comply with any additional requirements in the Reprisal Guidelines.
VII. Conclusion of the Consultation Phase	
7.2	Could this category be clarified with the addition of: “ <i>the Parties have decided that they do not require a monitoring plan.</i> ”
7.4	We understood from the informative session that in the case of partial compliance, the final monitoring report would detail the level of compliance (for example as a percentage). This paragraph should be amended for consistency, as it currently says “MICI will prepare a final monitoring report detailing the agreements that have been fully complied with ...”.
7.7	Can this be qualified to add that “and the Parties agree with the Director’s decision”? Or at least that the Director will give the Parties’ views significant weight when making this decision?
7.8	Can this paragraph include: “however, the Parties will be given an opportunity to waive confidentiality so that maximum information can be shared with the CRP team.”?

Draft Terms of Reference for the Roster of Process Facilitation Experts

General objective	This currently refers to “the principles of impartial and equal treatment of parties ...” As explained above, in the context of asymmetrical party
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	relations as will be inevitable in MICI cases, we think it is more appropriate to refer to the principles of impartial and <i>equitable or fair</i> treatment of parties, as equal treatment may compound those asymmetries.
Professional and academic profile	<p>1. Does the requirement to have had experience in at least three countries <i>unnecessarily</i> inhibit the recruitment of those with deep local expertise, who have all the necessary qualifications for MICI assignments within their home country, purely on the basis that they have limited experience outside of that country? Why is international experience strictly necessary? We have worked with successful mediators/facilitators who did not have international experience (and who did not have seven years' prior experience, either, for that matter). What was critical to their success was their local expertise and their skill navigating the particular challenges that arise in a <i>community – company</i> conflict.</p> <p>2. Could we insert a qualification requiring the expert to have experience in disputes involving considerable asymmetries between the parties, including vulnerable and other marginalized groups, and to be able to demonstrate success facilitating the effective participation of those groups?</p>
Conditions for appointment	We question whether a term limit is necessary for roster experts, given that appointments are ad hoc and given that we understand from comments made by the Phase Coordinator that the pool of well-qualified facilitators is relatively limited. For these reasons, we are hesitant to exclude successful facilitators purely on the basis that they have already been on the roster for six years.

Sincerely,

Kindra Mohr and Lani Inverarity
Accountability Counsel