

ANNEX 11

THE INDEPENDENT CONSULTATION AND INVESTIGATION MECHANISM OF THE INTER-AMERICAN DEVELOPMENT BANK

INTRODUCTION

This section assesses the Independent Consultation and Investigation Mechanism (MICI) of the Inter-American Development Bank (IDB). It uses a standardised assessment framework, based on the UNGPs, which is available in Annex 2. This assessment framework clarifies how each of the UNGP criteria was operationalised for the purpose of assessing individual mechanisms. The assessment is based on the following sources: information made publicly available through the MICI¹ and IDB² websites; IDB's operational policies;³ and one CSO response to a survey that was distributed to seek input from users of the Mechanism (see Annex 3). This means the analysis is mainly a policy analysis and not a comprehensive assessment of the actual practice (policy implementation) by the Mechanism and the DFI.

MECHANISM AT A GLANCE

The IDB's independent accountability mechanism, the MICI, became operational in 2010 and provides dispute resolution and compliance review functions. The MICI Policy was most recently updated in December 2014. This policy created a new governance structure: the MICI office operates under the supervision of the MICI Director, who is chosen by the Board of Executive Directors, to which he/she reports directly. The MICI Director is assisted by two coordinators: The Consultation Phase Coordinator and the Compliance Review Phase Coordinator. In addition, the office has support and operational staff, who report to the Director. During the research period, the MICI was operating under transitional governance. At the time of writing, the new structure was not yet fully operational. The new Director assumed office on 16 August 2015, and the Coordinators were in the process of being selected.

TABLE 1: MICI/IDB CASE ATTRITION

TOTAL COMPLETED CASES	FOUND ELIGIBLE	REACHED SUBSTANTIVE PHASE	ACHIEVED RESULTS
84	14	10	9

TABLE 2: MICI/IDB PERFORMANCE INDICATORS

	RESEARCH PERIOD	TOTAL
CASES FILED	10	90 ⁴
CASES CLOSED WITHOUT REACHING SUBSTANTIVE PHASE ⁵	10	74
CASES ACHIEVING RESULTS	0	9

KEY FINDINGS AND RECOMMENDATIONS

The MICI has undergone significant changes in the last five years. The new policy overhauled its structure, which will hopefully make it more efficient and effective, but it also introduced changes that make it less accessible. Very few recommendations made by CSOs during the recent MICI review were adopted, undermining civil society's confidence in the MICI's independence. Given its significant caseload, the relatively few cases that have produced results to date are a worrying indicator of the effectiveness of the MICI in providing remedy for those adversely affected by IDB investments. It is too early to tell whether the new MICI policy will reverse this trend.

Table 3 on the next page contains the recommendations derived from the UNGP assessment that follows. The recommendations describe the reforms needed to the policy and practice of each actor, the IAM and the DFI. It should be noted, however, that the power to implement some of these recommendations regarding the IAM rests with the DFI's Board of Directors.

UNGP ASSESSMENT

LEGITIMACY

IAM: In general, the MICI rules regarding hiring and post-employment criteria are in line with other DFIs. The MICI's new policy establishes that Bank staff may not serve in the MICI until three years have lapsed since the end of their employment with the Bank; and that the MICI Director and the Phase Coordinators may not work at the Bank in any capacity after their terms are over.⁶ Moreover, all MICI staff are subject to the Bank's policies and code of ethics, requiring them to act in a manner that does not give rise to any conflict of interest or jeopardise the objectivity or integrity of the MICI.⁷ In a few cases, users felt that the MICI was not capable of dealing with complaints in a fair manner, and was not open for feedback on these issues. There is no system by which the

TABLE 3: RECOMMENDATIONS DERIVED FROM UNGP ASSESSMENT

	MICI	IDB
LEGITIMACY	<ul style="list-style-type: none"> MICI should establish an advisory group composed of external stakeholders, including CSOs. 	<ul style="list-style-type: none"> Include CSOs in the selection process for the MICI Director. Ensure the independence of the MICI's staff by not interfering in the handling of complaints.
ACCESSIBILITY	<ul style="list-style-type: none"> Allow complaints to be submitted prior to project approval. Explicitly allow complaints to be submitted in the language of the complainant. Continue to improve the different tools to make the Mechanism more accessible for communities (for example, through the MICI's website). 	<ul style="list-style-type: none"> Require clients to disclose the availability of the Mechanism to project-affected communities.
PREDICTABILITY	<ul style="list-style-type: none"> Adhere to deadlines. Provide regular updates to complainants about the status of their cases. Monitor implementation of agreements reached through problem-solving for as long as necessary. For compliance reviews, monitor the project until all instances of non-compliance have been remedied. 	<ul style="list-style-type: none"> Clearly identify who complainants should contact to discuss their concerns prior to submitting a complaint.

	MICI	IDB
EQUITABILITY	<ul style="list-style-type: none"> The policy should provide that complainants have an equal opportunity to review and comment on MICI reports. Disclose the final Compliance Review report to the complainants at the same time it is sent to the Board. 	<ul style="list-style-type: none"> Management should consult with complainants in the development of Management Action Plans. Provide the MICI with sufficient resources to support all its work.
TRANSPARENCY	<ul style="list-style-type: none"> Update information on pre-2015 complaints. 	<ul style="list-style-type: none"> Ensure that all relevant project information is available online.
RIGHTS COMPATIBILITY	<ul style="list-style-type: none"> Develop protocols to prevent and address reprisals against complainants. 	<ul style="list-style-type: none"> Commit not to finance activities that would cause, contribute to or exacerbate human rights violations. Require clients to assess the human rights impacts of their operations. Develop procedures to address reprisals against complainants.
LESSONS LEARNED	<ul style="list-style-type: none"> Undertake regional consultations during reviews of the Mechanism. Analyse and document lessons learned from cases. Strengthen mandate to allow policy reviews without the involvement of the Board. 	<ul style="list-style-type: none"> Bank should be required to report regularly on the lessons learned from MICI cases. Commit not to provide additional financing for similar activities to clients found to be in non-compliance until the non-compliance has been remedied.

MICI receives external advice or guidance, such as an external stakeholder advisory group.

DFI: According to the new policy, the MICI reports directly to the Bank's Board of Executive Directors and is functionally independent from the Bank's Management; and the MICI Director and Phase Coordinators "in general" will be chosen from outside the Bank.⁸ Regarding the selection of the MICI Director, he/she will be appointed by the Board from a list of eligible candidates presented to it by a selection panel designated by the Board.⁹ Although during the 2013-2014 review of the MICI, civil society requested that external stakeholders be involved in the selection of the MICI Director, the Bank conducted an internal and closed process without external participation. Although not required by the MICI policy, there were external stakeholders included in the selection process for the Phase Coordinators, which is the responsibility of the MICI Director.¹⁰ Although it is not yet known how the MICI will work in practice under this new policy, the previous experience with the 2010 policy has cast doubt on the independence of MICI's staff in relation to the IDB's Management. According to users, the Mechanism was not sufficiently independent from Bank's staff, which interfered in the mechanism's handling of complaints.

ACCESSIBILITY

IAM: One of the main objectives of the recent review was to make the Mechanism more accessible to users, as some found the previous procedures difficult to follow and too burdensome, even while they found it easy to contact the MICI for questions or advice. In theory, the new policy tries to facilitate access to the Mechanism. For instance, it includes a Model Form Letter for Requesters in the Annexes of the policy.¹¹ The Model Form letter is also available for download on the MICI website,¹² but not easily visible for users. Although the new policy is perhaps slightly easier to understand than the older one, it is still problematic. There are still many barriers to filing, including significant new ones introduced by the new policy. For example, the new policy limits accessibility by not allowing complaints about projects that have not yet been approved, and it also incorporates requirements that make the submission of complaints more complicated. Regarding languages, the policy states that all MICI reports will be published in Spanish and English and when a complaint is from a Portuguese or French speaking country, the reports will also be issued in the relevant language.¹³ In its comments on a draft of this report, the MICI clarified that, although the policy does not so require, it will accept and respond to complaints in any language of the region.¹⁴ Regarding the website, the information available on MICI's website is accessible in three of the four official languages of the Bank: English, Spanish and Portuguese, but not in French.

DFI: According to the new policy, the MICI Office has a mandate to conduct public outreach throughout Latin America and the Caribbean and to ensure that information about the Mechanism is integrated into Bank activities and publications. Management is required to support MICI's efforts to publicise its availability,¹⁵ but it is not clear how this is

operationalised. The MICI's webpage can be accessed through the Bank's homepage within one click, which ensures visibility. It is not clear if the IDB's policies require its clients to disclose the availability of the MICI to project-affected communities.

PREDICTABILITY

IAM: One of the main problems with the 2010 policy was that few specific deadlines were set for each stage. In fact, previous experiences show significant, unexplained delays at all stages and a failure of the Mechanism to meet its deadlines. The new policy establishes clear time periods for all stages of the process, which is a positive change and improves the predictability of the process. However, it also states that the MICI Director may extend the deadlines for as long as is strictly necessary to ensure the full and proper processing of complaints.¹⁶ As there have been no complaints filed since the new policy took effect, it is not possible to determine whether the deadlines are actually respected in practice. Users report that under the previous policy there were significant delays and a lack of communication with complainants regarding the status of their cases.

The MICI does have a monitoring mandate, however, the duration of the monitoring is subject to the approval of the Bank and is limited to no more than five years.¹⁷ For compliance review, the MICI can only monitor the implementation of the Management Action Plan.¹⁸

DFI: The new policy also describes specific procedures and time periods for the Bank's Management and/or Board for responding to complaint processes both in eligibility and Consultation/Compliance Review Phases. It is yet to be seen how this will work in practice. As complainants are required to first raise their concerns with Management before filing a complaint, it is important that the Bank establishes clear and easy-to-follow procedures so that complainants know who to contact within Management.

EQUITABILITY

IAM: MICI's equitability is compromised as, according to the new policy, the complainants do not have the same opportunities to review the draft reports that the Bank has. The new policy provides complainants with the opportunity to comment, at the same time as management, on the Terms of Reference (TOR) and the draft report for Compliance Review.¹⁹ In contrast, on completion of the Consultation Phase process, the MICI will send the Board and Management a report on the results of the process, and only after consideration by the Board will the report be made available to the complainants and published on the Public Registry.²⁰ In its comments on a draft of this report, the MICI indicated that, although the policy does not provide for it, complainants do have an equal opportunity to review and comment on the draft Consultation Phase reports. Moreover, with regard to the Compliance Review Phase, the new policy establishes that the MICI will submit its final report to the Board, attaching as annexes the comments by the

complainants and Management, who will make the final decision regarding any actions that may be deemed appropriate or necessary. Only after the Board approves them will the MICI inform the complainants of the Board's decision and any action plan prepared. Apart from the process of reviewing draft reports, users found that the process equitable in that the Mechanism respects the role of complainants' advisors and representatives.

DFI: Management does not consult with complainants in developing an action plan in response to the MICI's findings of non-compliance. Thus, there is no guarantee that corrective steps would actually address the concerns of the complainants. It is unclear whether the IDB provides MICI with sufficient resources to support all its work. Even though the MICI's budget has increased during recent years (from US\$431,145 in 2010 to US\$2,554,421 in 2015),²¹ it is not clear, given the case load, whether this is sufficient to cover its costs in terms of staff, translators, site visits and outreach, among others. In this sense, and despite the constant increase in its budget, users reported that the mechanism, in some cases, provided insufficient resources for an informed and effective participation by complainants.

TRANSPARENCY

IAM: The transparency of the MICI is quite good, although there is room for improvement. The website currently publishes information on the complaints submitted, how they were handled, and their outcome; and users have stated that the Mechanism has kept them informed of the steps taken in the complaint process. The MICI maintains a case registry on its website and also publishes (online and in hard copy) annual reports with updated information about the cases.²² Additionally, most documents and information related to the complaints are accessible and easy to find. Despite this, survey respondents reported that the MICI did not always provide regular and updated information on the status of the cases. However, in its review comments of this section, MICI explained that limitations on the case progress was the result of its transition to a new policy and governance structure.²³

The registry for the period 2010-2014²⁴ does not include all the information on the cases that have not been processed,²⁵ representing more than 60% of the total. The MICI has improved this with the updated Public Registry²⁶ established under the new policy. Information on cases from 2015 is all available on the Public Registry, even those that are "not processed/not registered cases".

DFI: The Bank's website provides information on activities it finances through its project database, which is easily accessible through the IDB's webpage.²⁷ It also provides an easy-to-use search engine that allows filtering information by country, sector and status. Moreover, it is possible to ask the Bank for information regarding a specific project through its Access to Information Mechanism by filling in a simple Information Request.²⁸ Despite this, there is also room for improvement. Users expressed that the IDB was not

always forthcoming (for example, on the preparation of action plans) in its communication with complainants. Survey respondents also report that project information is not always complete or, at least, is difficult to find.

RIGHTS COMPATIBILITY

IAM: There are no human rights provisions expressly excluded from MICI's jurisdiction, but its mandate requires it to assess compliance with IDB's Operational Policies, which do not fully incorporate human rights standards. The fact that the MICI provides for confidentiality of complainants (but does not accept anonymous requests) contributes to the Mechanism's rights compatibility. Even though the Mechanism has the mandate to recommend suspension of the project if it believes there is risk of serious irreparable harm,²⁹ its investigation and recommendations are not binding on the Bank and the final decision always rests with the Board. Thus, the Mechanism is unable to ensure effective redress and remedies. Complainants report that they were not provided with the remedy they were looking for when they submitted the complaint. In some cases, the dialogue process was prematurely closed despite the fact that it was making progress. In other cases, the complaint did not result in a compliance investigation at all. And finally, there were cases with a strong (although very delayed) compliance investigation that revealed significant problems that did not result in changes on the ground, even though there had been an appropriate reaction by the Board and a commitment by Management to fix things.

DFI: The IDB's safeguard policies (OP-703 Environment and Safeguards Compliance Policy) do not make any explicit reference to human rights. Human rights are referenced once in the Implementation Guidelines for the Environment and Safeguards Compliance Policy.³⁰ There is also a specific mention of the UN Declaration of Human Rights, the American Convention on Human Rights, and the Inter-American Court of Human Rights in the Bank's Operational Policy on Indigenous People (OP-765).³¹

LESSONS LEARNED

IAM: The 2014 review of the Mechanism was required by the previous policy. The new MICI policy establishes that the next review will occur within five years following the new policy's entry into force, at a time and form determined by the Board.³² Although the public consultation held for the 2010 policy review was well received by civil society (it included public consultations throughout 12 countries and online during 2008-2009, in a process that resulted in more than 470 comments and suggestions that set the stage for MICI), the recent review was strongly criticised by civil society because of several irregularities.³³ The MICI does not have an advisory function, but the new policy establishes that the annual report may also discuss lessons learned, trends and systemic issues, and provide recommendations on preventing non-compliance and other advice that stems directly from MICI cases. According to users' experience with the old Mechanism, and the information found in the 2010-2013 annual reports of the MICI

(available through the website), the Mechanism did not seem to improve its practices in response to particular cases, or at least it is not clear how it improves its practices based on the results of the cases. Thus, the MICI may do much better to improve its own learning processes in addition to facilitating learning by the Bank.

DFI: The MICI's annual report is sent to the Board for information,³⁴ but there is no requirement for the IDB Management or Board to respond by identifying how it will improve its policy and practice to take into account lessons learned from MICI's cases. Users expressed doubt that the IDB did improve its policies and practices as a result of the MICI's cases.

ANALYSIS OF COMPLAINTS CLOSED WITHOUT REACHING A SUBSTANTIVE PHASE

According to MICI's website, between 1 July 2014 and 30 June 2015, ten requests were deemed ineligible for both the MICI's Consultation and Compliance Review Phases or were otherwise closed without reaching a substantive phase of the complaint process.³⁵ Four of these cases were rejected because they concerned corruption or procurement issues, outside the mandate of the MICI.³⁶ Two others were also determined to be outside the Mechanism's mandate: one because MICI determined that the concerns described in the complaint do not relate to IDB-financed activities,³⁷ and another because MICI determined the complainant was only seeking information.³⁸ One case was closed because the complaint was incomplete, due to the lack of requisite information.³⁹ Another long-standing case concerning a project in Brazil, the Serra do Mar and Atlantic Forest Mosaics System Socio-environmental Recovery Program, was closed in November 2014 following MICI's recommendation not to undertake a compliance review.⁴⁰ Although the MICI mentioned multiple factors affecting its decision, the existence of parallel legal proceedings in Brazil was the principal justification for closing the case. As to the two remaining cases closed during the research period without reaching a substantive phase, the MICI provided no explanation for its determination.⁴¹

NOTES

- 1 See Independent Consultation and Investigation Mechanism [MICI], <http://www.iadb.org/en/mici/home.1752.html>.
- 2 See Inter-American Development Bank [IDB], <http://www.iadb.org/en>.
- 4 This number may differ from the 'total completed cases' in the previous table, because it includes all cases filed, including those pending a decision of the mechanism.
- 5 This row includes cases that were not registered, were found ineligible or were closed after being found eligible, but before reaching a substantive phase.
- 3 See IDB Operational Policies, <http://www.iadb.org/en/about-us/operational-policies-of-the-inter-american-development-bank.6127.html>.
- 6 MICI, *Policy of the Independent Consultation and Investigation Mechanism*, 17 (2014), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=39629936> [hereinafter MICI Policy].
- 7 *Id.*
- 8 *Id.*
- 9 *Id.*
- 10 MICI comments on draft report, received on 18 October 2015.
- 11 MICI Policy, *supra* note 6, at 23, Annex I.
- 12 See MICI, Model Form Letter for Requesters, <http://www.iadb.org/document.cfm?id=39437682>
- 13 MICI Policy, *supra* note 6, at 20.
- 14 MICI comments on draft report, received on 18 October 2015.
- 15 *Id.* at 19.
- 16 *Id.*
- 17 *Id.* at 12, 16.
- 18 *Id.* at 16.
- 19 *Id.* at 14-15.
- 20 *Id.* at 12.
- 21 MICI, Funding, <http://www.iadb.org/en/mici/funding.8161.html>
- 22 MICI Policy, *supra* note 6, at 19-20.
- 23 MICI comments on draft report, received on 18 October 2015.
- 24 See MICI, Registro Público Cronológico 2010-2014, <http://www.iadb.org/es/mici/registro-publico-cronologico-2010-2014.19181.html>.
- 25 The only information available is the Request Number, the name of the Request, and the date the complaint was received. There is no specific information about the complaint, or the reason of not processing the request. See *Id.*

- 26** See MICI, Registro Público Cronológico, <http://www.iadb.org/es/mici/registro-publico-cronologico.1805.html> (in Spanish).
- 27** IDB, Projects, <http://www.iadb.org/en/projects/projects.1229.html>.
- 28** IDB, Access to Information, <http://www.iadb.org/en/access-to-information.18645.html>.
- 29** MICI Policy, *supra* note 6, at 5.
- 30** "Projects may be of higher risk due to controversial environmental and associated social issues, such as projects unfairly affecting certain segments of society (including environmental justice issues) or activities in areas of suspected human rights violations, or addressing specific issues such as genetically modified organisms (GMOs), human genetic research, etc." IDB, *Implementation Guidelines for the Environment and Safeguards Compliance Policy*, 27 (2007), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=35597106>.
- 31** IDB, *Operational Policy on Indigenous People (OP-765)*, 2 (2006), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=39430632>.
- 32** MICI Policy, *supra* note 6, at 21.
- 33** See, e.g., Press Release, FUNDEPS, The IDB approves the ICIM's new policy. A weaker and less reliable Mechanism (2014), <http://www.fundeps.org/en/news/idb-approves-icim%E2%80%99s-new-policy-weaker-and-less-reliable-mechanism>.
- 34** MICI Policy, *supra* note 6, at 19-20.
- 35** Inter-American Development Bank, Independent Consultation and Investigation Mechanism, Public Registry, <http://www.iadb.org/en/mici/public-registry.1805.html?page=1&status=> (last visited 28 July 2015).
- 36** See Inter-American Development Bank, MICI, Brazil: Mario Covas Rodoanel Project - Northern Section (BR-LI296), MICI-BR-2015-0088, <http://www.iadb.org/en/mici/complaint-detail.19172.html?ID=MICI-BR-2015-0088>; Inter-American Development Bank, MICI, Argentina: Integrated Urban Solid Waste Management Program, <http://www.iadb.org/en/mici/complaint-detail.19172.html?ID=MICI-AR-2015-0084>; Inter-American Development Bank, MICI, Paraguay: Support for the Transmission System, <http://www.iadb.org/en/mici/complaint-detail.19172.html?ID=MICI-PR-2015-0086>; Inter-American Development Bank, MICI, Suriname: Support to Improve Sustainability of the Electricity Service, <http://www.iadb.org/en/mici/complaint-detail.19172.html?ID=MICI-SU-2015-0087>.
- 37** See Inter-American Development Bank, MICI, Argentina - AUSA Road Safety and Urban Mobility Program (MICI-AR-2014-081) (<http://www.iadb.org/en/mici/complaint-detail.1804.html?ID=MICI-AR-2014-081>) (including both the Compliance Phase and the Consultation Phase analysis).
- 38** See Inter-American Development Bank, MICI, Colombia: Strategic Public Transportation Systems, <http://www.iadb.org/en/mici/complaint-detail.19172.html?ID=MICI-CO-2015-0085>.
- 39** See Inter-American Development Bank, MICI, Brazil - Mario Covas Rodoanel Project - Northern Section (MICI-BR-2015-0090). See <http://www.iadb.org/en/mici/complaint-detail.19172.html?ID=MICI-BR-2015-0090>.
- 40** See Inter-American Development Bank, MICI, Brazil: Serra do Mar and Atlantic Forest Mosaics System Socio-environmental Recovery Program, <http://www.iadb.org/en/mici/complaint-detail.1804.html?id=BR-MIC1001-2010>; See also Document on the Independent Consultation and Investigation Mechanism, BR-MIC1001-2010, Recommendation for a Compliance Review and Terms of Reference: Reassessment and Closure (Oct. 22, 2014), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=39230587>.
- 41** See Inter-American Development Bank, MICI, Brazil: Integrated Urban Development and Social Inclusion Program of Aracaju (received 8/18/2014), <http://www.iadb.org/en/mici/chronological-public-registry-2010-2014.19181.html>; Brazil: Estrada Nova Watershed Sanitation Program (PROMABEN) (received 9/22/2014), <http://www.iadb.org/en/mici/chronological-public-registry-2010-2014.19181.html>.