

## NOTE

### WHEN DEVELOPMENT HARMS THOSE IT SEEKS TO HELP: THE INTERNAL ACCOUNTABILITY MECHANISM AT THE INTER-AMERICAN DEVELOPMENT BANK

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#### INTRODUCTION

In 2007, the city of São José dos Campos, Brazil,<sup>1</sup> applied for a loan through the Inter-American Development Bank (IDB) to conduct an urban restructuring project.<sup>2</sup> The city sought to improve environmental quality; expand public transportation and improve roadway safety; and increase the number of families with access to garbage pickup, sewage sanitation, and paved roads.<sup>3</sup> Two of the project's main goals were to resettle families from areas that lacked sufficient sanitation services and were prone to flooding, and to create a nature reserve, both for environmental protection and to increase city residents' access to environmental recreation.<sup>4</sup> One of the at-risk communities was the neighborhood of Banhado, which is located in a floodplain, lacks sewage sanitation infrastructure, and has a large number of illegal water and electrical hookups.<sup>5</sup> Under the development plan, families from Banhado were to be relocated to safer housing, and the land they left behind was to be used for the nature reserve and a new highway.<sup>6</sup> In 2010, the IDB approved an US\$85.7 million loan to help finance the project, which had

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1. São José dos Campos is largely a rural municipality with 611,000 inhabitants living approximately fifty miles northeast of São Paulo, Brazil. INTER-AM. DEV. BANK, PERFIL DE PROYECTO BRAZIL [PROJECT PROFILE BRAZIL] 1 (2007), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=1195893> [<https://perma.cc/R42S-CC92>].

2. *Id.* at 2.

3. *Id.*

4. INTER-AM. DEV. BANK, ASSESSMENT REPORT SÃO JOSÉ DOS CAMPOS URBAN STRUCTURING PROGRAM 5–6 (2012), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=36831831> [<https://perma.cc/UJ4V-3WT5>] [hereinafter SÃO JOSÉ DOS CAMPOS URBAN STRUCTURING PROGRAM].

5. *See id.* at 5–6, 14.

6. *Id.* at 6.

a total budget of US\$178 million.<sup>7</sup>

Cosme Vitor, a resident of São José dos Campos, initially became alarmed after he witnessed the city, as a part of ongoing urban development, resettle 450 families into apartments with minimal infrastructure nearly ten miles away from their original homes, outside of the city limits.<sup>8</sup> Forty families that refused to leave their homes were removed by police force.<sup>9</sup> Vitor saw this as an overt attempt to remove poor families from the city limits, replacing the existing community with facilities that would benefit wealthy residents, like new apartment buildings, commercial spaces, and the nature reserve.<sup>10</sup> As urban development progressed, residents in the community of Banhado watched as the government closed local public services and then encouraged residents to buy apartments in another part of town by offering financing for the purchase.<sup>11</sup> The city demolished the houses of residents who left, leaving the debris in piles where the houses had stood and creating hazardous conditions for neighboring properties.<sup>12</sup>

The city did not consult residents before planning to resettle the community, nor did officials inform residents of their rights to be compensated for relocation.<sup>13</sup> Residents who purchased the new apartments not only needed to make monthly payments on the new homes, but also had to pay higher prices for water, gas, electricity, mandatory condominium fees, and public transportation.<sup>14</sup> The location of the new apartments also interfered with access to some public services and employment opportunities.<sup>15</sup> However, Cosme Vitor was not without recourse to influence this international development

7. *São José dos Campos Urban Structuring Program Project Detail*, INTER-AM. DEV. BANK, <http://www.iadb.org/en/projects/project-description-title,1303.html?id=BR-L1160> [https://perma.cc/L7BM-P3VL] (last visited Apr. 29, 2017).

8. Cosme Vitor, *Request Translated from Portuguese BR-MICI006-2011*, INTER AM. DEV. BANK (June 10, 2011), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=37425538> [https://perma.cc/BD6V-BLKN].

9. *Id.*

10. *See id.*

11. SÃO JOSÉ DOS CAMPOS URBAN STRUCTURING PROGRAM, *supra* note 4, at 3 (citing closure of a childcare facility).

12. *Id.* at 16.

13. *Id.* at 3. When a bank-financed project results in involuntary displacement, the International Development Bank (IDB) requires that the project include a plan for compensation and rehabilitation that provides options for full replacement value of any assets lost, including both tangible assets and intangible assets such as social and cultural assets. Anne Deruyttere et al., INTER-AM. DEV. BANK, INVOLUNTARY RESETTLEMENT OPERATIONAL POLICY AND BACKGROUND PAPER 4 (1998), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=2032100> [https://perma.cc/974D-XC7V]. Project funds also provide compensation for new housing. *See id.* at 23, 29.

14. SÃO JOSÉ DOS CAMPOS URBAN STRUCTURING PROGRAM, *supra* note 4, at 4.

15. *Id.*

project. After Vitor contacted the IDB's project management, he and a local citizens group lodged a complaint, or a "request," with the IDB's Independent Consultation and Investigation Mechanism (MICI).<sup>16</sup>

In 2010, the same year the IDB approved funding for the São José dos Campos project, the IDB established MICI as the culmination of previous steps to increase the IDB's "transparency, accountability, and effectiveness."<sup>17</sup> MICI is one of at least eleven internal accountability mechanisms at various development financial institutions around the world such as the World Bank, the Asian Development Bank, and the European Bank for Reconstruction and Development.<sup>18</sup> These internal accountability mechanisms were created in response to criticisms leveled at development finance institutions in the 1980s and 1990s for implementation of development projects that caused serious harms to local people,<sup>19</sup> like the infamous Narmada Dam Project in India.<sup>20</sup> Internal accountability mechanisms are designed to perform one or both of two possible functions: first, they serve as a resolution mechanism to alleviate the harm to local groups; and second, they provide an independent mechanism to investigate allegations made by parties harmed by institution-financed activities.<sup>21</sup> MICI can conduct either or both functions, depending on the request and on whether the first function

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16. Vitor, *supra* note 8.

17. INTER-AM. DEV. BANK, POLICY OF THE INDEPENDENT CONSULTATION AND INVESTIGATION MECHANISM OF THE IDB 5 (2015), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=40792853> [https://perma.cc/CED6-NJS4] [hereinafter 2015 IDB MICI POLICY]. In December 2015, the Independent Consultation and Investigation Mechanism (MICI) was also given authority to hear complaints related to activities at the Inter-American Investment Corporation (IIC), a member of the IDB that focuses on private sector investment. See INTER-AM. DEV. BANK, POLICY OF THE INDEPENDENT CONSULTATION AND INVESTIGATION MECHANISM OF THE IIC 1 (2015), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=40151002> [https://perma.cc/3C4E-A247] [hereinafter 2015 IIC MICI POLICY]; *About Us*, INTER-AM. DEV. BANK, <http://www.iadb.org/en/mici/about-us,1758.html#> [https://perma.cc/6JUB-DV4J] (last visited Apr. 29, 2017); *About Us*, INTER-AM. INV. CORP., <http://www.iic.org/en/who-we-are/about-us#.WDruMKIrKRs> [https://perma.cc/DH62-M25Z] (last visited Apr. 29, 2017). This Note focuses only on MICI's activities under its IDB mandate.

18. See VIOLET BENNEKER ET AL., *GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE* 14, 19 (Caitlin Daniel et al. eds., 2016), [http://grievancemechanisms.org/resources/brochures/IAM\\_DEF\\_WEB.pdf](http://grievancemechanisms.org/resources/brochures/IAM_DEF_WEB.pdf) [https://perma.cc/9LMC-LBL5].

19. Suresh Nanwani, *Directions in Reshaping Accountability Mechanisms in Multilateral Development Banks and Other Organizations*, 5 *GLOB. POLICY* 242, 242 (2014).

20. The Narmada Dam project in India became an international controversy when the World Bank provided financing to the Indian government for ongoing work to build a series of dams along the Narmada River. See *Narmada: A History of Controversy*, BBC NEWS (Nov. 16, 2000), [http://news.bbc.co.uk/2/hi/south\\_asia/1026355.stm](http://news.bbc.co.uk/2/hi/south_asia/1026355.stm) [https://perma.cc/45B7-LCX9]. Critics argued that the project would displace two hundred thousand people, increase insect-borne diseases, and cause seismic instability and earthquakes. *Id.*

21. Nanwani, *supra* note 19, at 242.

results in a successful resolution.<sup>22</sup>

The IDB has shown ongoing interest in improving MICI. For example, the IDB is one of only two development finance institutions that entirely replaced its original accountability mechanism, and the current MICI structure and powers were revised in 2014 to eliminate duplicative processes, increase certainty for outcomes, and reduce processing times.<sup>23</sup> However, MICI's structure still suffers from significant unresolved flaws that impede improved outcomes for requesters and interfere with IDB transparency and accountability.<sup>24</sup>

First, the IDB still lacks an overall system to track petitions that are transferred to other oversight entities within the IDB.<sup>25</sup> Second, the number of cases that have successfully proceeded through the entire process since the new structure was established has not substantively changed.<sup>26</sup> Third, under the current structure, if a requester agrees to a resolution with local and IDB actors, MICI cannot conduct an investigation into whether the IDB failed to comply with its internal policies, depriving the IDB of feedback on potentially noncompliant activity.<sup>27</sup> Therefore, in order to improve outcomes for petitioners and transparency within the IDB, the IDB Board of Executive Directors should first establish a system to track all requests submitted to MICI, even if the request is transferred to another IDB entity; and second, revise MICI's 2014 Policy so that MICI may impose binding obligations on

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22. 2015 IDB MICI POLICY, *supra* note 17, at 5, 13.

23. Nanwani, *supra* note 19, at 242; INTER-AM. DEV. BANK, THE INDEPENDENT CONSULTATION AND INVESTIGATION MECHANISM 2014 ANNUAL REPORT 4 (2014), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=39678426> [<https://perma.cc/DZ5P-RXTW>] [hereinafter MICI 2014 ANNUAL REPORT].

24. VIOLET BENNEKER ET AL., GLASS HALF FULL? THE STATE OF ACCOUNTABILITY IN DEVELOPMENT FINANCE ANNEX 11: THE INDEPENDENT CONSULTATION AND INVESTIGATION MECHANISM OF THE INTER-AMERICAN DEVELOPMENT BANK, 3–4 (Caitlin Daniel et al. eds., 2016), <http://grievancemechanisms.org/resources/brochures/glass-half-full>.

25. See INTER-AM. DEV. BANK OFF. OF OVERSIGHT & EVALUATION, MIDTERM EVALUATIONS OF IDB-9 COMMITMENTS: EVALUATION OF THE INDEPENDENT CONSULTATION AND INVESTIGATION MECHANISM 2 (2013), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=37647033> [<https://perma.cc/G5JB-458V>] [hereinafter OVE EVALUATION OF MICI]. MICI must record requested that were referred instead of being registered and the chronological record typically notes which entity the request was referred to. 2015 IDB MICI POLICY, *supra* note 17, at 9–10. See, e.g., *Adaptation to Climate Change of the Fishery Sector and Marine-Coastal Ecosystem*, INTER-AM. DEV. BANK, <http://www.iadb.org/en/mici/complaint-detail,19172.html?ID=MICI-BID-PE-2017-0113> [<https://perma.cc/8VMW-Y7B9>] (last visited May 7, 2017). However, no other entity at the IDB has a processing system that is transparent to the public, as is the case with MICI's public registry, and so outside observers cannot track the ultimate outcome of the request. *Oversight and Audit*, INTER-AM. DEV. BANK, <http://www.iadb.org/en/about-us/oversight-and-audit,18247.html> [<https://perma.cc/9LJJ-WU4W>] (last visited Apr. 29, 2017).

26. MICI 2014 ANNUAL REPORT, *supra* note 23, at 2.

27. See 2015 IDB MICI POLICY, *supra* note 17, at 16.

relevant parties and conduct investigations into whether the IDB violated its internal policies, regardless of the outcome of consultation between the parties.

Part I of this Note discusses the importance of internal accountability mechanisms within development finance institutions and the role of the IDB in Latin America. Part I also explores the new structure of MICI, and discusses case outcomes both before the change of policy and under the present policy. Part II of this Note recognizes the improvements that the IDB has made in MICI's structure between the 2010 Policy and 2014 Policy. Part II then addresses the problems that MICI has faced with processing requests in a timely manner and enforcing MICI recommendations within the IDB. Part II suggests changes to the 2014 Policy that would improve processing time and enforcement of MICI determinations. Finally, this Note briefly concludes with a discussion of how MICI's success at addressing these flaws will impact the international community by serving as a model for other regional and global development finance institutions.

## I. BACKGROUND

### A. *Development Finance Institutions in the International Human Rights System*

International development institutions are intergovernmental organizations traditionally concerned with global or regional economic development and combating poverty and inequality.<sup>28</sup> Development institutions continue to face criticism regarding the negative impact that institutionally funded development projects can have on the lives of local people.<sup>29</sup> Development institutions' policies and practices generally intersect with human rights in three major ways: funding projects that directly or indirectly violate human rights; lending money to governments that have committed or continuously commit human rights violations; or refusing to directly support human rights through the institution's own activities.<sup>30</sup>

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28. KATIE WILLIS, *THEORIES AND PRACTICE OF DEVELOPMENT* 3 (2d ed. 2011).

29. *See generally* ARTURO ESCOBAR, *ENCOUNTERING DEVELOPMENT: THE MAKING AND UNMAKING OF THE THIRD WORLD* (2d ed. 2012) (discussing international development as a method for Western countries, particularly the United States, to maintain hegemony in the postcolonial world through cultural imperialism). *See* CALIT A. SARFATY, *VALUES IN TRANSLATION: HUMAN RIGHTS AND THE CULTURE OF THE WORLD BANK* 2 (2012); OVE EVALUATION OF MICI, *supra* note 25, at 2.

30. SARFATY, *supra* note 29, at 2. International development generally refers to economic or human development on a global scale, although there are many theories as to what "development" means or should mean. WILLIS, *supra* note 28, at 2–8. Development projects similarly may encompass a wide range of activities from building infrastructure like dams, roads,

Because the international human rights system focuses on holding state actors—rather than intergovernmental organizations—accountable for respecting, protecting, and fulfilling individuals' human rights, international development institutions face no binding international legal obligation to respect human rights.<sup>31</sup> Further, intergovernmental organizations are not subject to any external international mechanisms to ensure accountability and are often immune from suit in the countries where they operate.<sup>32</sup> Although there has been little action from international development institutions to formally acknowledge human rights obligations,<sup>33</sup> many institutions, including the World Bank and the IDB, have created internal accountability mechanisms that focus on compliance with the institutions' own policies.<sup>34</sup> Since human rights accountability falls to the organizations themselves, these accountability mechanisms must be both transparent to civil society observers and effective in addressing the needs of people who may be impacted by the organization's projects.<sup>35</sup>

### B. *The Inter-American Development Bank in Latin America*

The IDB is the oldest and most well-established of the world's regional development banks.<sup>36</sup> Created in 1959 by the Organization of American States, a regional organization that consists of thirty-five independent states in the Americas, the IDB's purpose is to "contribute to the acceleration of the process of economic and social development of the member countries, individually and collectively."<sup>37</sup> There are a total of forty-eight member countries, of which twenty-six are borrowing

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or housing to reducing inequality through procurement of supplies and training for medical facilities and schools. *See generally id.* (explaining international development's history, modern trends, theories, and methodologies).

31. MARKUS KALTENBORN, SOCIAL RIGHTS AND INTERNATIONAL DEVELOPMENT: GLOBAL LEGAL STANDARDS FOR THE POST-2015 DEVELOPMENT AGENDA 50 (2014).

32. Enrique R. Carrasco et al., *Governance and Accountability: The Regional Development Banks*, 27 B.U. INT'L L. REV. 1, 5 (2009); Nanwani, *supra* note 19, at 242.

33. For example, the World Bank does not acknowledge any human rights obligations; the organization only allows human rights to play a rhetorical role rather than a policy role in regular operations. *See SARFATY, supra* note 29, at 2.

34. Nanwani, *supra* note 19, at 242.

35. *See id.* at 242–43.

36. INTER-AM. DEV. BANK, 2014 ANNUAL REPORT: THE YEAR IN REVIEW ii (2015), <https://publications.iadb.org/bitstream/handle/11319/6855/2014%20Annual%20Report.%20%20The%20Year%20in%20Review.pdf?sequence=13> [<https://perma.cc/UTF3-ESSZ>] [hereinafter 2014 ANNUAL REPORT].

37. Agreement Establishing the Inter-American Development Bank [IDB] art I, § 1, (Dec. 30, 1959), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=781584> [<https://perma.cc/28F8-R9C4>] [hereinafter Agreement Establishing the Inter-American Development Bank].

members from Latin America and the Caribbean.<sup>38</sup> Between 1959 and 2014, the IDB approved US\$249 billion in financing, grants, and guarantees to support projects throughout Latin America and the Caribbean.<sup>39</sup> In 2014 alone, the IDB approved US\$13.8 billion in loans, grants, and guarantees to this region.<sup>40</sup>

The highest authority within the IDB is the Board of Governors, composed of one member appointed by each member country for a five-year term.<sup>41</sup> Directly under the Board of Governors is the Board of Executive Directors (Board), which is responsible for oversight of the day-to-day conduct and operations of the IDB.<sup>42</sup>

The IDB has made significant strides over the past few decades to improve its human rights accountability and transparency. For example, it has improved its document disclosure policies<sup>43</sup> and has instituted internal policies that account for environmental preservation,<sup>44</sup> indigenous rights,<sup>45</sup> involuntary resettlement issues,<sup>46</sup> and gender equality considerations.<sup>47</sup> However, there has still been criticism that these mechanisms fail to adequately address both human rights and environmental concerns.<sup>48</sup> In 1994, the IDB attempted to address continued criticisms by creating an Independent Investigation

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38. 2014 ANNUAL REPORT, *supra* note 36, at ii. Unlike the World Bank's charter, the IDB charter specifies that borrowing members—countries of Latin America and the Caribbean—must hold a majority of the voting power in the IDB. See Agreement Establishing the Inter-American Development Bank, *supra* note 37, at Annex A.

39. 2014 ANNUAL REPORT, *supra* note 36, at ii.

40. *Id.* at 5. Comparatively, the World Bank, the world's largest development lender, approved US\$60 billion in global loans, guarantees, investments, and grants in 2015, US\$10 billion of which were to countries in Latin America and the Caribbean. THE WORLD BANK, THE WORLD BANK ANNUAL REPORT 2015 4 (2015), <http://www.worldbank.org/en/about/annual-report> [<https://perma.cc/4CW2-XJN9>].

41. Agreement Establishing the Inter-American Development Bank, *supra* note 37, art. VIII, § 2. The IDB Board of Governors retains all powers that it does not delegate, but it may delegate almost all of its powers to the Board of Executive Directors (Board). *Id.*

42. *Id.* art. VIII, § 2–3.

43. INTER-AM. DEV. BANK, ACCESS TO INFORMATION POLICY (2010) <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=39430487> [<https://perma.cc/LQ3N-BAWN>].

44. INTER-AM. DEV. BANK, ENVIRONMENTAL AND SAFEGUARDS COMPLIANCE POLICY (2006), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=39430535> [<https://perma.cc/Y5SX-BPKB>].

45. See INTER-AM. DEV. BANK, OPERATIONAL POLICY ON INDIGENOUS PEOPLES (2006) <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=39430632> [<https://perma.cc/B3DT-VVU8>].

46. See INVOLUNTARY RESETTLEMENT OPERATIONAL POLICY AND BACKGROUND PAPER, *supra* note 13.

47. INTER-AM. DEV. BANK, OPERATIONAL POLICY ON GENDER EQUALITY IN DEVELOPMENT (2010), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=39430647> [<https://perma.cc/ZPY6-HRET>].

48. Carrasco, *supra* note 32, at 40.

Mechanism to enhance the transparency, accountability, and effectiveness of the IDB.<sup>49</sup> This Independent Investigation Mechanism allowed requesters, the harmed group, to raise a complaint with the IDB.<sup>50</sup> In 2010, after the Board mandated the creation of an “enhanced” accountability mechanism, a pilot program for the current MICI replaced the initial Independent Investigation Mechanism.<sup>51</sup> This Note refers to this pilot program as the 2010 Policy. In 2014, in accordance with the Board’s mandate that the pilot program be revised after five years, the IDB updated the policy outlining MICI’s structure, powers, and responsibilities; this Note refers to the revised program as the 2014 Policy.<sup>52</sup>

### C. MICI in the IDB and the 2014 MICI Structure

MICI is one of two independent oversight mechanisms at the IDB, both of which are accountable directly to the Board.<sup>53</sup> In addition to providing an independent mechanism to investigate allegations, MICI’s objectives also include providing the Board with information regarding such investigations and providing a forum of last resort to address petitioners’ concerns.<sup>54</sup> In this latter capacity, MICI accepts requests that allege present or future harms from any group of two or more individuals who reside in a country where an IDB-financed operation has been approved.<sup>55</sup> As with all internal accountability mechanisms, MICI only

49. 2015 IDB MICI POLICY, *supra* note 17, at 5.

50. *See id.*

51. INTER-AM. DEV. BANK, POLICY ESTABLISHING THE INDEPENDENT CONSULTATION AND INVESTIGATION MECHANISM 1 (2010), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=37940284> [<https://perma.cc/2H7D-KG29>].

52. *See* 2015 IDB MICI POLICY, *supra* note 17, at 5. These changes were made after the IDB Office of Evaluation and Oversight conducted a two-year review of MICI. *Id.*

53. *Id.* at 2. The second independent oversight mechanism at the IDB is the Office of Evaluation and Oversight, which is responsible for overseeing internal monitoring mechanisms, conducting ex post project evaluations, and ensuring that the IDB’s strategies, policies, and programs comply with the IDB’s objectives and mandate. *Oversight and Audit*, *supra* note 25. In addition to these two independent oversight mechanisms, the IDB also has a Sanctions System to prevent fraud and corruption, composed of the Office of Institutional Integrity, the Case Officer, and the Sanctions Committee. *IDB Sanction System*, INTER-AM. DEV. BANK, <http://www.iadb.org/en/about-us/idb-sanctions-system,8619.html> [<https://perma.cc/3DVP-BJNP>] (last visited Apr. 29, 2017). The Office of Institutional Integrity is directly answerable to the president of the IDB. *Id.*

54. 2015 IDB MICI POLICY, *supra* note 17, at 5. Before submitting a request to MICI, requesters must first attempt to resolve the alleged violations by contacting the project’s IDB management team; the IDB will not review requests pertaining to issues or matters that are under judicial or arbitral review in a member country. *Id.* at 10, 12.

55. *Id.* at 3. MICI does not accept anonymous requests; however, requesters may indicate a desire for anonymity if they fear retaliation, and MICI will then maintain the confidentiality of the requester’s identity. *Id.* at 8.

accepts requests that pertain to alleged violations of specific internal standards, or operational policies.<sup>56</sup> MICI evaluates the request to determine whether it falls within MICI's scope and contains all necessary information.<sup>57</sup> For requests that fulfill the necessary criteria, MICI provides two potential phases, and requesters may opt to engage in either or both phases.<sup>58</sup>

The first phase, called the Consultation Phase, serves as a form of voluntary mediation that brings together the relevant parties, including the requester, the IDB or multilateral investment fund manager who is in charge of the investment or financing, the client who receives the financing, and the entity that executes all or part of the operation.<sup>59</sup> The parties attempt to address the issues raised in a "voluntary, flexible, and collaborative manner."<sup>60</sup> In the second phase—the Compliance Review Phase—MICI investigates the IDB-financed project's processes to determine whether the IDB was noncompliant with its relevant operational policies, and whether the requesters' harm was a result of that noncompliance.<sup>61</sup> In spite of changes made between the 2010 Policy and the 2014 Policy, few requests enter the MICI process, and neither the Consultation Phase nor the Compliance Review Phase has a high rate of success in terms of outcomes in favor of the requesters.<sup>62</sup>

### 1. Initial Threshold: Registration and Eligibility Process and Results

For a request to be considered by MICI, it must first meet certain criteria to become registered and then meet a second set of similar criteria to be eligible to move into the Consultation and Compliance Review

56. These operational policies are standards that the Board has set and that apply to all bank personnel. *Relevant Operational Policies*, INTER-AM. DEV. BANK, [http://www.iadb.org/en/mici/operational-policies,20447.html?open\\_accordion=1](http://www.iadb.org/en/mici/operational-policies,20447.html?open_accordion=1) [https://perma.cc/KQ3N-FR3L] (last visited Apr. 29, 2017). The standards are used to evaluate the social and environmental impacts of potential projects and set requirements for public information and consultation for IDB-financed projects. *See id.* Some of the topics on which the IDB has standards relate to access to information, the environment and cultural heritage, involuntary resettlement, inclusion of indigenous peoples' issues, and gender equality. *See id.*; OPERATIONAL POLICY ON INDIGENOUS PEOPLES, *supra* note 45, at pmbl. It is beyond the scope of this Note to provide a detailed analysis of the human rights equivalence of each operational policy due to the length and complexity of each. To review the operational policies, see *Relevant Operational Policies*, *supra* note 56; 2015 IDB MICI POLICY, *supra* note 17, at 3; Nanwani, *supra* note 19, at 242–43.

57. 2015 IDB MICI POLICY, *supra* note 17, at 6–7, 12.

58. *Id.* at 9.

59. *Id.* at 3, 14.

60. *Id.* at 6.

61. *Id.*

62. *See Chronological Registry*, INTER-AM. DEV. BANK, <http://www.iadb.org/en/mici/chronological-public-registry,1805.html> [https://perma.cc/325W-T2GF] (last visited May 7, 2017).

Phases.<sup>63</sup> MICI first determines whether the request pertains to a subject covered by another IDB oversight entity, in which case MICI does not review the request and instead refers the request to the correct office.<sup>64</sup> Once transferred, neither MICI nor the Board tracks the request's process or outcome.<sup>65</sup> If the request properly falls under MICI's jurisdiction and contains all required information, the request then undergoes an eligibility determination.<sup>66</sup> Under the previous 2010 Policy, requests underwent two separate eligibility determinations, one for the Consultation Phase and a second for the Compliance Review Phase.<sup>67</sup> However, the 2014 Policy streamlined this process so that there is only one eligibility determination, which is made after registration and before the request moves into the requested phase.<sup>68</sup>

Once a request is submitted, the MICI director must make one of three determinations within five business days.<sup>69</sup> The director must: (1) issue a notice of registration; (2) ask for any required information missing from the request, in which case, the requester will have ten business days to provide that information; or (3) forward the request to the appropriate unit within the IDB if the allegations fall within the scope of a different IDB office.<sup>70</sup> After a request has been registered, MICI conducts a more

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63. 2015 IDB MICI POLICY, *supra* note 17, at 7–8, 12. To become registered, the request must include: (1) the names and contact information of the requesters, who themselves must either be or represent two or more residents of the country where the IDB operation is being or will be implemented; (2) a description of the IDB operation; (3) “an allegation that the IDB failed to correctly apply one or more of the operational policies”; and (4) a description of the efforts made to address the concerns with the managers of the operation. *Id.* at 7–8. To become eligible, the request must: (1) be filed by two or more individuals who reside in the country where the IDB-financed operation is implemented who have been or will be affected; (2) identify the approved IDB-financed operation; (3) describe the harm that has or could result from failure to comply with a relevant operational policy; and (4) describe the efforts made to address the concerns with the managers of the operation and the results of those efforts. *Id.* at 12.

64. *Id.* at 9–10. Requests that MICI may transfer because the allegation involves a subject covered by other IDB entities include: allegations of fraud, corruption, ethical violations, or particular actions by IDB employees; allegations unrelated to operations, including internal finance or administration matters; or challenges to procurement processes or decisions. *Id.* MICI will also exclude: requests that it previously reviewed, absent additional evidence or circumstances unavailable at the time of the original request; requests that raise issues currently before judicial or arbitral review within any IDB member country; or requests related to IDB operations that have not been approved or that closed over two years prior. *Id.* For those requests pertaining to operations that have not yet been approved, MICI will forward the request to the operation's managers, who must then submit a response to MICI's director. If the project moves forward for approval, a summary of the request must be included in the project document. *Id.*

65. See OVE EVALUATION OF MICI, *supra* note 25, at 27.

66. 2015 MICI POLICY, *supra* note 17, at 10–11.

67. POLICY ESTABLISHING THE INDEPENDENT INVESTIGATION AND CONSULTATION MECHANISM, *supra* note 51, at 6–7, 9–10.

68. See 2015 IDB MICI POLICY, *supra* note 17, at 5, 12–13.

69. *Id.* at 11.

70. *Id.*

thorough investigation and will solicit a response from the IDB operation's managers, who have twenty-one days to respond.<sup>71</sup> In the response, the operation's managers may ask MICI to suspend the eligibility process for up to forty-five business days, and MICI may grant the request if the management team sets out a specific plan to modify the IDB-financed project's activities.<sup>72</sup> Without a suspension, MICI has twenty-one days after receipt of the managers' response to make an eligibility determination.<sup>73</sup>

Very few requests proceed past both the registration and eligibility processes.<sup>74</sup> Of the thirty requests made in 2015 and 2016 under the 2014 Policy, only three have proceeded past both initial thresholds and entered into the MICI process.<sup>75</sup> Four were transferred to the Office of Procurement, four were transferred to the Office of Institutional Integrity, one was transferred to the Ethics Office, and two were withdrawn by the requesters, one of which because the concern was resolved through administrative means.<sup>76</sup> Five were registered, but were not eligible, because the requests failed to show a link between the harm and the operation, the issue was under legal review elsewhere, the requesters failed to contact the operation's managers prior to submitting the request to MICI, or some combination of these factors.<sup>77</sup> Another was registered, but was not eligible, because the request was submitted more than twenty-four months after the last disbursement to the project.<sup>78</sup> One was registered, but was not eligible because two of the three requesters successfully engaged in mediation with the project management team.<sup>79</sup>

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71. *Id.* The investigation may include review of the response from the operation's managers, project documentation, and any information provided by the requesters, and may also involve an on-site visit to the country where the project is being implemented. *Id.* at 13.

72. *Id.* at 12.

73. *Id.* Under the 2010 Policy, there were few limits on the time period permitted for activities, and extensions could be granted by individuals within MICI. MICI 2014 ANNUAL REPORT, *supra* note 23, at 8. The current 2014 Policy requires the MICI director to receive the Board's approval on a "no objection" basis before granting a deadline extension. 2015 IDB MICI POLICY, *supra* note 17, at 22.

74. *Chronological Registry*, *supra* note 62 (MICI received thirty complaints but only three made it through both processes).

75. *See id.* (noting Rural Land Titling & Registration Project in Peru - Third Phase; Downtown Redevelopment, Modernization of Metropolitan Public Transport, and of Government Offices Project; and Reventazon Hydroelectric Power Project as the only requests in 2016 and 2017 that proceeded past both initial thresholds).

76. *Chronological Registry*, *supra* note 62.

77. *Chronological Registry*, *supra* note 62.

78. INTER-AM. DEV. BANK, ELIGIBILITY DETERMINATION MEMORANDUM PORCE III HYDROELECTRIC POWER PLANT 6 (2016), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=40147659> [<https://perma.cc/S3MP-WG7M>].

79. Tietê Várzea Program, INTER-AM. DEV. BANK, <http://www.iadb.org/en/mici/complaint->

Of the final ten that were neither registered nor transferred, one was outside of MICI's scope because it was unrelated to a specific operation but rather related to IDB employee conduct, another only requested information, one was not registered because it was not funded by the IDB, and the last six were not registered, because the requesters failed to respond to a request for additional information.<sup>80</sup>

Under the previous 2010 Policy, there were a total of eighty-three requests, twenty-nine of which were registered.<sup>81</sup> Of the fifty-four requests not registered, the reasons and results were analogous to the reasons under the 2014 Policy.<sup>82</sup> Under the 2010 Policy, where MICI evaluated registered requests for separate eligibility at each phase, there were fourteen requests deemed eligible at the Consultation Phase and ten deemed eligible at the Compliance Review Phase.<sup>83</sup>

While the 2014 revisions addressed inefficiencies in these two threshold processes by imposing deadlines and streamlining two eligibility determinations into one, the changes to date fail to address criticisms that the IDB does not track requests that are transferred to other IDB entities.<sup>84</sup> This is significant because as of May 7, 2017, almost thirty percent of all requests under the 2014 Policy<sup>85</sup> were transferred to another IDB entity.<sup>86</sup> Failure to track and disclose the outcomes of transferred requests creates two problems. First, these failures interfere with transparency because public reporting is essential for external stakeholder oversight.<sup>87</sup> Second, failure to track requests obstructs outcomes for requesters when, as has happened, the entity to which the request was transferred fails to communicate with the requester regarding

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detail,19172.html?ID=MICI-BID-BR-2016-0106 [https://perma.cc/SY4J-UPXB] (last visited May 7, 2017).

80. See *Chronological Registry*, *supra* note 62.

81. MICI 2014 ANNUAL REPORT, *supra* note 23, at 2.

82. Of the fifty-four nonregistered requests, twelve requests dealt with excluded issues including fraud, corruption, noncompetitive bidding, and other prohibited practices; twenty-seven requesters either failed to contact the operation's management before putting a request before MICI or simply requested information; seven requests were not registered because the requesters failed to provide additional information upon request; seven requesters decided not to proceed; and one request pertained to an institution beyond MICI's mandate (the IIC). *Id.*

83. *Id.*

84. *Id.* at 7; see OVE EVALUATION OF MICI, *supra* note 25, at 17.

85. It is difficult to determine the exact number of requests transferred to other entities under the 2010 Policy because prior to 2015, MICI inconsistently disclosed registered requests and failed to provide information on approximately sixty percent of unprocessed requests on the public registry. See OVE Evaluation of MICI, *supra* note 25, at 16; BENNEKER, *supra* note 24, at 4.

86. As of May 7, 2017, there were 35 requests submitted according to MICI's chronological registry, of which 10 were transferred to other IDB entities, or 28.57%. See *Chronological Registry*, *supra* note 62.

87. See OVE EVALUATION OF MICI, *supra* note 25, at 27.

the petition.<sup>88</sup>

## 2. Phase I: Consultation Phase Process and Results

After a request is registered and deemed eligible it enters the Consultation Phase—unless the requesters have only asked for MICI to conduct the Compliance Review Phase.<sup>89</sup> If a requester opts out of the Consultation Phase at any point, the Consultation Phase will close and it cannot be reopened.<sup>90</sup> Requests that pertain to ongoing IDB-financed operations do not typically halt processing, execution, or disbursements for the project.<sup>91</sup> However, if MICI’s director determines that serious irreparable harm may result from continued execution of the operation, then he or she may make a recommendation to the Board to suspend the activity.<sup>92</sup> MICI has not made such a recommendation for any request to date, however.<sup>93</sup>

The objective of the Consultation Phase is to provide the parties with an unbiased, equitable opportunity to resolve the requesters’ concerns.<sup>94</sup> At the beginning of the Consultation Phase, MICI has forty business days to conduct an assessment.<sup>95</sup> The assessment should seek to understand the harm, gather information about the requesters and other stakeholders, and determine whether the parties will agree to engage in the resolution process using Consultation Phase methods.<sup>96</sup> If the assessment determines that parties are likely to agree to seek a resolution, the assessment should also determine the best process for addressing the violation of IDB policy.<sup>97</sup>

The Consultation Phase is entirely voluntary for all parties, and if the assessment determines that a collaborative resolution is not possible—because parties will not engage in consultation or will not likely come to an agreement—the Consultation Phase concludes immediately.<sup>98</sup> Further, even if all parties agree to engage in

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88. *See id.* at 17.

89. 2015 IDB MICI POLICY, *supra* note 17, at 5. Both the Consultation Phase and the Compliance Review Phase are optional, and the requester must specify in the request whether the group seeks one or both phases. *Id.*

90. *Id.*

91. *Id.* at 9.

92. *Id.*

93. *Chronological Registry*, *supra* note 62.

94. 2015 IDB MICI POLICY, *supra* note 17, at 14.

95. *Id.* at 15. The investigation may include reviewing documents, meeting with concerned parties, and visiting the project site. *Id.*

96. *Id.* at 5. Consultation Phase methods may include information gathering, joint fact finding, facilitation, consultation, mediation, and negotiation. *Id.* at 14.

97. *Id.*

98. *Id.*

consultation, any party may at any time unilaterally withdraw from the Consultation Phase.<sup>99</sup> If the MICI director finds the party that withdrew was essential to the process, then the Consultation Phase concludes immediately.<sup>100</sup>

If the process moves forward, MICI will work with the parties to create an agreement that explicitly outlines the collaborative resolution process and the methods for addressing the issues raised.<sup>101</sup> This process should result in a consensus-based resolution within twelve calendar months from the date of the assessment, although the MICI director may extend this term.<sup>102</sup> If the Consultation Phase does not result in an agreement, the Consultation Phase concludes.<sup>103</sup> If the parties reach an agreement that resolves the raised issues, MICI will work with the parties to create a monitoring plan, which MICI will oversee for a specified period up to five years.<sup>104</sup>

The Consultation Phase, when reached, does not usually result in a successful agreement.<sup>105</sup> Since 2010, only six of the fourteen requests that entered into the Consultation Phase actually reached an agreement.<sup>106</sup> Of the unsuccessful Consultation Phases, four concluded before reaching an agreement because an essential party withdrew from the negotiation process.<sup>107</sup> Another two were ineligible in part because an essential party refused to engage in consultation altogether.<sup>108</sup> One was withdrawn by the requesters after initial meetings under the Consultation Phase assessment exacerbated requesters mistrust of local parties.<sup>109</sup>

99. *Id.*

100. *Id.* at 14.

101. *Id.* at 15.

102. *Id.*

103. *Id.* at 16.

104. *Id.*

105. See MICI 2014 ANNUAL REPORT, *supra* note 23, at 2; *Chronological Registry*, *supra* note 62.

106. See MICI 2014 ANNUAL REPORT, *supra* note 23, at 2; *Chronological Registry*, *supra* note 62.

107. See MICI 2014 ANNUAL REPORT, *supra* note 23, at 18, 22–23, 28.

108. See *Bolivia – La Paz Storm Drainage Program II*, INTER-AM. DEV. BANK (Mar. 27, 2014), <http://www.iadb.org/en/mici/complaint-detail,1804.html?ID=MICI-BO-2014-079> [<https://perma.cc/5J93-7GNL>]; ISABELA LAVADENZ PACCCIERI, INTER-AM. DEV. BANK, DETERMINATION OF ELIGIBILITY FOR THE CONSULTATION PHASE MEXICO, MAREÑA RENOVABLES WIND PROJECT 10 (2013), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=38811285> [<https://perma.cc/TM2D-BLK6>].

109. See FRANCISCO GIMÉNEZ-SALINAS, INTER-AM. DEV. BANK, ASSESSMENT REPORT OF THE CONSULTATION PHASE 1, 7, 10 (2016) <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=40711558> [<https://perma.cc/MK44-96CC>].

Even where parties agree to engage in the process of creating a resolution, parties do not face repercussions for failing to fulfill the resolution methods agreed upon at the beginning of the Consultation Phase.<sup>110</sup> For example, the request for the City of São José dos Campos Urban Structuring Program was filed in June of 2011 and entered into the Consultation Phase process in March of 2015.<sup>111</sup> However, by May of 2015 the requester withdrew because the municipal government of São José dos Campos did not fulfill the requirements that the parties had agreed upon for the dialogue.<sup>112</sup> This concluded the Consultation Phase for the request, and the requesters were left without an agreement to address the issues raised.<sup>113</sup> Further, even when all parties engage in the Consultation Phase and carry out agreed-upon steps towards a resolution, they are often unable to come to an agreement.<sup>114</sup>

The 2014 changes provided for the IDB project's management team to actively participate in negotiations and attempted to focus the Consultation Phases' processes on operational policy noncompliance.<sup>115</sup> Procedurally, the 2014 Policy also allowed requesters to opt out of the Consultation Phase and proceed directly to the Compliance Review Phase, so that requesters who believe their allegations will be best addressed by a timely Compliance Review Phase investigation can forego mediation.<sup>116</sup>

### 3. Phase II: Compliance Review Phase Process and Results

When a requester asks only for a compliance review, the Compliance Review Phase begins immediately after the eligibility determination has been made.<sup>117</sup> If a requester asks for both phases, the request moves into the Compliance Review Phase only if the Consultation Phase concludes without a successful resolution.<sup>118</sup> Like the Consultation Phase, an open investigation under the Compliance Review Phase of an ongoing IDB-financed operation does not halt processing, execution, or disbursements

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110. See 2015 IDB MICI POLICY, *supra* note 17, at 14.

111. *Brazil – São José dos Campos Urban Structuring Program*, INTER-AM. DEV. BANK 1, 3, <http://www.iadb.org/en/mici/complaint-detail,1804.html?ID=BR-MICI006-2011> [<https://perma.cc/3U7C-GAX9>] (last visited Apr. 29, 2017).

112. INTER-AM. DEV. BANK, CONSULTATION PHASE REPORT SÃO JOSÉ DOS CAMPOS URBAN STRUCTURING PROGRAM 2 (2015) <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=39789062> [<https://perma.cc/YGG8-EZW4>].

113. See 2015 IDB MICI POLICY, *supra* note 17, at 9.

114. See MICI 2014 ANNUAL REPORT, *supra* note 23, at 2.

115. *Id.* at 8.

116. See *id.*

117. 2015 IDB MICI POLICY, *supra* note 17, at 13.

118. *Id.* at 9, 17.

for the project absent extreme circumstances.<sup>119</sup>

Within twenty-one days of a request entering the Compliance Review Phase, the compliance review coordinator must work with the requesters and the IDB operation's management to prepare a recommendation, lists of the investigation's objectives and the items to be investigated, a proposed budget and timeline for the investigation, and a description of the pertinent IDB-financed operation.<sup>120</sup> MICI then submits its recommendation on whether to proceed with an investigation to the Board.<sup>121</sup>

If the Board approves the recommendation to investigate, MICI has six calendar months to complete the investigation unless a longer timeline was established and approved when MICI submitted its recommendation.<sup>122</sup> At the conclusion of the investigation, MICI drafts a document containing the findings of fact and recommendations, and the requesters and IDB project management team have twenty-one days to submit comments.<sup>123</sup> MICI considers these comments when drafting its compliance review report, and the report with both parties' comments is submitted to the Board within twenty-one days of receiving both sets of comments.<sup>124</sup> The Board has the final authority to mandate remedial or corrective actions that the IDB operation's management team must take based on the compliance review report.<sup>125</sup> MICI is then responsible for monitoring the implementation of such remedial or corrective measures for a period of up to five years.<sup>126</sup>

Very few requests enter the Compliance Review Phase, and of those that do, very few result in an investigation or Board action.<sup>127</sup> Of the ten requests eligible for the Compliance Review Phase, MICI recommended investigation for eight, of which the Board approved five.<sup>128</sup> Four of

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119. *Id.* at 9; see discussion *supra* Section I.C.2.

120. 2015 IDB MICI POLICY, *supra* note 17, at 17. The requesters and the operation's management also have fifteen days after MICI prepares both a recommendation and a terms of reference to submit comments on the final document. *Id.*

121. *Id.* at 17. Comments from the operation's management will be included with the recommendation that is sent to the Board. *Id.* If the Board approves the investigation, an investigation team, or panel, will be formed. *Id.* The panel is composed of the compliance review coordinator and two independent experts hired from a list of technical experts. *Id.*

122. *Id.* at 18. As with other deadlines, the MICI director may extend this timeline if the Board's does not object to an extension. *Id.*

123. *Id.*

124. *Id.* at 17.

125. *Id.* at 20.

126. *Id.* at 16. In doing so, MICI must create a monitoring plan and timeline in consultation with the interested parties. *Id.* During monitoring, MICI must submit an annual report to the Board, which is also entered into a publicly available registry. *Id.*

127. See *Chronological Registry*, *supra* note 62.

128. MICI 2014 ANNUAL REPORT, *supra* note 23, at 2. Because two requests were merged

those five investigations have concluded, and only three resulted in action by the Board.<sup>129</sup> One request has been under investigation since December 6, 2016.<sup>130</sup>

The 2014 Policy prohibits some cases from moving into the Compliance Review Phase, and those that have moved into the Compliance Review Phase have suffered long delays.<sup>131</sup> For example, the Panama Canal Expansion Request, initially submitted in 2011, was deemed eligible for the Consultation Phase on February 9, 2012.<sup>132</sup> However, after this determination, the Panama Canal Authority, which received a US\$400 million loan from the IDB, refused to participate in negotiations.<sup>133</sup> This caused a five-month delay between the eligibility finding and the start of the Compliance Review Phase.<sup>134</sup> After MICI conducted the compliance review and submitted its

for the purposes of the Compliance Review Phase, there were seven recommendations representing eight requests to investigate. *Id.*; *Mário Covas Rodoanel – Northern Sections 1 and 2*, INTER-AM. DEV. BANK, <http://www.iadb.org/en/mici/complaint-detail,1804.html?ID=BR-MICI005-2011> [<https://perma.cc/8CW2-LEBJ>] (last visited Apr. 29, 2017).

129. MICI 2014 ANNUAL REPORT, *supra* note 23, at 2; *see, e.g.*, VICTORIA MÁRQUEZ-MEES, INTER-AM. DEV. BANK, FINAL DECISION BY THE BOARD OF EXECUTIVE DIRECTORS REGARDING THE COMPLIANCE REVIEW REPORT FOR CASE PN-MICI001-2010 (2012), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=38789753> [<https://perma.cc/HPZ3-7Y5X>] (accepting one of MICI's findings that the IDB violated internal policies, but rejecting another and refusing to address a third as outside the scope of the project); VICTORIA MÁRQUEZ-MEES, INTER-AM. DEV. BANK, FINAL DECISION BY THE BOARD OF EXECUTIVE DIRECTORS REGARDING THE COMPLIANCE REVIEW REPORT FOR CASE PR-MICI002-2010 (2013), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=37893902> [<https://perma.cc/W6GH-SV6R>] (rejecting MICI's finding that the IDB violated internal policies); VICTORIA MÁRQUEZ-MEES, INTER-AM. DEV. BANK, FINAL DECISION BY THE BOARD OF EXECUTIVE DIRECTORS REGARDING THE COMPLIANCE REVIEW REPORT FOR CASE PN-MICI002-2011 (2015), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=39773940> [<https://perma.cc/HXS9-FSAV>] (accepting MICI's finding that the IDB violated internal policies); VICTORIA MÁRQUEZ-MEES, INTER-AM. DEV. BANK, FINAL DECISION BY THE BOARD OF EXECUTIVE DIRECTORS ON THE COMPLIANCE REVIEW REPORT FOR THE MAREÑA RENOVABLES WIND PROJECT (2016), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=40671494> [<https://perma.cc/B8CJ-N7R7>].

130. *Bolivia - La Paz Storm Drainage Program II*, INTER-AM. DEV. BANK, <http://www.iadb.org/en/mici/complaint-detail,1804.html?ID=MICI-BO-2014-079> [<https://perma.cc/Y5AE-X7UQ>] (last visited May 7, 2017).

131. *See Chronological Registry*, *supra* note 62.

132. INTER-AM. DEV. BANK, CONSULTATION PHASE DETERMINATION OF ELIGIBILITY PANAMA CANAL EXPANSION (2027/OC-PN) 1 (2012) <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=38811944> [<https://perma.cc/3XNR-Z4XA>].

133. *See Panama - Panama Canal Expansion Program*, INTER-AM. DEV. BANK, <http://www.iadb.org/en/mici/complaint-detail,1804.html?id=PN-MICI002-2011> [<https://perma.cc/FS3W-XXS4>] (last visited Apr. 29, 2017); *PN-L1032: Corporate Loan to ACP to Support the Panama Canal Expansion Program*, INTER-AM. DEV. BANK, <http://www.iadb.org/en/projects/project-description-title,1303.html?id=PN-L1032> [<https://perma.cc/ZFV9-53ZH>] (last visited Apr. 29, 2017).

134. *See Panama - Panama Canal Expansion Program*, *supra* note 133.

findings to the Board, the Board determined that there had been a violation of IDB operational policies.<sup>135</sup> Specifically, the project had not followed operational policies that would have resulted in an accurate reflection of the seismic risks of the IDB-financed project.<sup>136</sup>

Of the seven requests ongoing in the MICI process at the time of the transition from the 2010 Policy to the 2014 Policy, two resulted in agreements at the end of the Consultation Phase and therefore were not eligible to move forward into the Compliance Review Phase under the new policy.<sup>137</sup> Of the remaining five ongoing requests in December 2014, two resulted in the Board finding that the IDB was noncompliant with its policies;<sup>138</sup> one is the São José dos Campos request, which was transferred to the Compliance Review Phase in August 2015 and the Board approved investigation on May 11, 2016;<sup>139</sup> one proceeded to investigation under the Compliance Review Phase and investigation ended September 30, 2016, but the panel report has not been issued;<sup>140</sup> and one entered the investigation stage of the Compliance Review Phase and has been in the investigation stage since December 6, 2016.<sup>141</sup>

The main changes the 2014 Policy made for the Compliance Review Phase are discussed above, specifically: elimination of a separate eligibility determination; allowing requesters to skip the Consultation

135. See FINAL DECISION BY THE BOARD OF EXECUTIVE DIRECTORS REGARDING THE COMPLIANCE REVIEW REPORT FOR CASE PN-MICI002-2011, *supra* note 129, at 1.

136. *Id.*

137. *Processing of the Active Requests Received Under the 2010 Policy*, INTER-AM. DEV. BANK, <https://web.archive.org/web/20160805155518/http://www.iadb.org/en/mici/processing-of-the-active-requests-received-under-the-2010-policy,8171.html> [<https://perma.cc/WL6K-2836>] (last visited May 11, 2017) (archived by Internet Archive Wayback Machine August 5, 2016).

138. FINAL DECISION BY THE BOARD OF EXECUTIVE DIRECTORS REGARDING THE COMPLIANCE REVIEW REPORT FOR CASE PN-MICI002-2011, *supra* note 129. This request was originally submitted on October 10, 2011, and resulted in a final Board decision on August 4, 2015. PANAMA - PANAMA CANAL EXPANSION PROGRAM, *supra* note 133. This request was originally submitted on December 26, 2012 and resulted in a final Board Decision on September 14, 2016. *Mexico - Mareña Renovables Wind Project ME-MICI002-2012*, INTER-AM. DEV. BANK, <http://www.iadb.org/en/mici/complaint-detail,1804.html?ID=ME-MICI002-2012> [<https://perma.cc/3U9Z-6GKV>] (last visited Apr. 29, 2017).

139. *Transferencia de Solicitud [Request to Transfer]*, INTER-AM. DEV. BANK (Aug. 10, 2015), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=39792214> [<https://perma.cc/CV7Y-D3Z9>].

140. This request was originally submitted on August 12, 2011. Letter from Gloria Cecilia Molina V., Spokesperson, Comunidades Unidas, to Victoria Márquez-Mees, Executive Secretary, Independent Consultation and Investigation Mechanism, INTER-AM. DEV. BANK (Aug. 12, 2011), <http://idbdocs.iadb.org/wsdocs/getdocument.aspx?docnum=37327027> [<https://perma.cc/AM5J-6HF5>].

141. This request was originally submitted on March 27, 2014, and the requester opted not to engage in the Consultation Phase. *Bolivia - La Paz Storm Drainage Program II*, *supra* note 130. Under the 2010 Policy, the request was transferred to the separate eligibility determination process for the Compliance Review Phase. *Id.* There have been no updates to the public registry for this request since December 6, 2016. *Id.*

Phase and proceed directly to the Compliance Review Phase; and the creation of a new position, the investigative team leader.<sup>142</sup> It is difficult to determine how the newly imposed deadlines will impact the time for resolutions, because although the new deadlines have been in place since the policy went into effect, MICI only finished the process of hiring the full staff necessary for MICI's new structure under the 2014 Policy in January 2016.<sup>143</sup> Under the 2010 Policy, requests could move into the Compliance Review Phase regardless of the outcome of the Consultation Phase.<sup>144</sup> Because the 2014 Policy prohibits a Compliance Review Phase when the Consultation Phase results in an agreement, this deprives the IDB and external observers of feedback and information about potentially noncompliant activity.<sup>145</sup> This will further constrict opportunities for feedback and information that are already limited given both the low number of cases that have successfully proceeded through MICI's entire process and the IDB's failure to track requests transferred to other IDB entities.<sup>146</sup> The discussion below focuses on how to remedy the inefficiencies in the MICI process.

## II. ANALYSIS

The creation of internal accountability mechanisms over the past twenty-three years marks an important new period for international development institutions, reflecting institutions' willingness to listen to the voices of people impacted by institutional activities.<sup>147</sup> As the system of internal accountability mechanisms evolves, international development institutions have ongoing opportunities to increase the efficiency and effectiveness of their own mechanisms.<sup>148</sup> While the changes the Board made to MICI represent important strides toward increased effectiveness, MICI, like all international accountability mechanisms, still faces inefficiencies.<sup>149</sup> These inefficiencies include the large number of requests transferred and then never tracked, the small number of requests that move forward to a binding resolution in the Consultation Phase, and the extremely small number of requests where

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142. MICI 2014 ANNUAL REPORT, *supra* note 23, at 8.

143. *Appointment of Coordinators for the Consultation Phase and the Compliance Review Phase*, INTER-AM. DEV. BANK, <http://www.iadb.org/en/mici/appointment-of-coordinators-for-the-consultation-phase-and-the-compliance-review-phase,19789.html> [https://perma.cc/92SH-A6JH] (last visited Apr. 29, 2017).

144. POLICY ESTABLISHING THE INDEPENDENT INVESTIGATION AND CONSULTATION MECHANISM, *supra* note 51, at 9.

145. *See* 2015 IDB MICI POLICY, *supra* note 17, at 17.

146. MICI 2014 ANNUAL REPORT, *supra* note 23, at 2.

147. *See* Nanwani, *supra* note 19, at 243.

148. *See id.* at 250.

149. *See id.*; discussion *supra* Sections I.C.1–3.

MICI actually investigates potential noncompliant activity.<sup>150</sup> Thus, the IDB Board should first establish a system to track all requests submitted to MICI, even if the request is transferred to another IDB entity. And second, the Board should revise MICI's 2014 Policy so that MICI may impose binding obligations on relevant parties for both phases, as well as ensure that Compliance Review Phase investigations into whether the IDB violated its internal policies occur regardless of the outcome of the Consultation Phase. The IDB has the opportunity to help not only individuals who may be impacted by IDB-financed projects, but to improve the quality of all IDB-financed projects by ensuring that projects move forward in full compliance with the operational policies.<sup>151</sup>

#### A. *Track All Requests Submitted to MICI*

The IDB currently does not track any of the forty percent of all requests that MICI transfers to other IDB entities.<sup>152</sup> Since no other IDB entity has a public registry like MICI's, transferred requests cannot be tracked by outside observers.<sup>153</sup> However, it is important for outside observers to track the outcome of complaints, because civil society engagement is essential to the evolution of accountability systems for international development institutions.<sup>154</sup> Additionally, requesters have complained to the IDB that the entity to which the request was transferred failed to communicate with them regarding the status of their request.<sup>155</sup> When an IDB entity fails to respond to a request, this reflects poorly on the IDB as a whole and indicates that the IDB does not take allegations seriously.<sup>156</sup>

The IDB can resolve these failings by posting outcomes of requests that are transferred to other entities on MICI's public registry site.<sup>157</sup> Under this system, entities would communicate the outcome of transferred requests to MICI, which would then update its public registry with any new information. Ensuring a consistent and uniform system of tracking transferred requests across all IDB entities will also resolve issues with requesters who have not received responses from the units to

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150. See discussion *supra* Sections I.C.1–3.

151. OVE Evaluation of MICI, *supra* note 25, at ii.

152. See discussion *supra* Section I.C.1.

153. *How To Report Fraud and Corruption?*, INTER-AM. DEV. BANK, <http://www.iadb.org/en/topics/transparency/integrity-at-the-idb-group/how-to-report-fraud-and-corruption,2872.html> [<https://perma.cc/D26L-DN78>] (last visited Apr. 29, 2017). However, the IDB does post information about specific projects on its website. *Explore and Download Data*, INTER-AM. DEV. BANK, <https://data.iadb.org> [<https://perma.cc/9S5D-NFW4>] (last visited Apr. 29, 2017).

154. See Nanwani, *supra* note 19, at 243.

155. OVE EVALUATION OF MICI, *supra* note 25, at 17.

156. *Id.*

157. See *Chronological Registry*, *supra* note 62.

which their request was transferred.<sup>158</sup> In the event that MICI does not receive an update on the status of a request within a certain time frame, MICI may follow up with the entity to request additional information. Further, with public disclosure of request outcomes, civil society, which relies heavily on publicly disclosed information, will be able to more effectively evaluate and provide feedback to the IDB overall.<sup>159</sup>

Although it may seem this proposal would impose an additional financial burden on the IDB, since MICI has already established a public registry page<sup>160</sup> the IDB would not need to create an entirely new tracking and disclosure system. Reliance on existing structures within the IDB will mitigate any additional costs from this recommended system. By tracking the outcome of all requests submitted to MICI, the IDB can increase transparency and improve outcomes for requesters.

### B. *Revisions to MICI's 2014 Policy*

#### 1. The Ability to Impose Binding Obligations on Parties in Both the Consultation and Compliance Review Phases

Currently, parties other than the requester have limited incentives to engage in good faith negotiations beyond good will and a concern over public image.<sup>161</sup> Parties that benefit from IDB financing may refuse to engage in the Consultation Phase process entirely, fail to meet terms for negotiations upon which they agree at the beginning of the Consultation Phase, or withdraw at any time during consultation.<sup>162</sup> Seven requests submitted to MICI were left unresolved because an essential party either refused to participate, failed to meet the terms for negotiations, or withdrew during the process.<sup>163</sup>

To promote stakeholder investment in the Consultation Phase process, the Board should grant MICI authority to impose binding obligations on relevant parties for both phases. Past requests may have ultimately been successful if MICI had been able to exert pressure on parties to engage in the process. For example, the IDB could include a clause in loan or grant agreements that parties must engage in the Consultation Phase if in its initial eligibility investigation MICI deems the request eligible for the Consultation Phase. This clause should not require that disbursements be halted, because although that would be the strongest form of leverage to

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158. See OVE EVALUATION OF MICI, *supra* note 25, at 17.

159. See BENNEKER, *supra* note 18, at 13, 123.

160. See *Chronological Registry*, *supra* note 62.

161. See 2015 IDB MICI POLICY, *supra* note 17, at 10.

162. See *id.*

163. See discussion *supra* Section I.C.2.

ensure participation in negotiations, it may also interfere with projects that have an overall beneficial impact on a community.

MICI could alternatively impose penalties in the form of increased scrutiny for future financing if a participant fails to complete the Consultation Phase. Requesters already have an incentive to engage in the process, often because it is the optimal method to mitigate negative impacts to a requester's health and welfare.<sup>164</sup> Imposition of penalties for failure to engage would help put both parties on equal terms going into the negotiations by ensuring that both have a stake in a fair resolution.

Both the Panama Canal Project and the São José dos Campos Urban Restructuring Project faced delays from uncooperative parties.<sup>165</sup> For the Panama Canal Project, the Board ultimately found that the IDB failed to comply with its internal policies in assessing the seismic risks, but the IDB made this determination after the project had ended.<sup>166</sup> If major actors had engaged in the process, project implementers could possibly have taken steps to mitigate or alleviate these risks. For the São José dos Campos Urban Restructuring Project, requesters waited more than four years to enter into the Consultation Phase, only to have it fail when the requesters withdrew because an essential party refused to comply with the terms agreed upon at the beginning of the Consultation Phase.<sup>167</sup> If all major actors had been fully engaged in the project, city residents and the project implementers may have been able to come to a cooperative resolution.

Some may argue that cooperative problem solving rests on good relationships, and it is therefore important for parties to engage in the process willingly.<sup>168</sup> However, studies have shown that court-ordered mediation not only had similar success rates to voluntary mediation, but also higher rates of utilization.<sup>169</sup> With the current extremely low rate of participation,<sup>170</sup> the burden of mandatory mediation outweighs the risks that it would impact party relationships.

Further, some government officials and executing agency personnel that have engaged in the MICI process believed that MICI paid too much attention to requesters and failed to give the governments' perspectives sufficient weight.<sup>171</sup> However, these claims should be discounted as,

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164. See Nanwani, *supra* note 19, at 242–43.

165. See discussion *supra* Sections I.C.2–3.

166. See discussion *supra* Section I.C.2.

167. See *id.*

168. OVE EVALUATION OF MICI, *supra* note 25, at 4.

169. Bobbi McAdoo, Nancy A. Welsh & Rosselle L. Wissler, *Institutionalization: What Do Empirical Studies Tell Us About Court Mediation?*, DISP. RESOL. MAG., Winter 2003, at 8.

170. See discussion *supra* Section I.C.

171. OVE EVALUATION OF MICI, *supra* note 25, at 23.

understandably, both borrowing entities and IDB staff might be skeptical of MICI's impartiality, given the nature of MICI's role to investigate allegations made by non-institutional actors.<sup>172</sup> Additionally, MICI can mitigate this perspective by taking common sense steps, such as treating all parties fairly throughout the process and avoiding activities that would seem partial to the requesters.<sup>173</sup>

Finally, although the imposition of binding obligations on actors might seem to encourage frivolous requests that interfere with projects, or even provide a means for political opposition groups and protesters to strengthen and legitimize their claims, no international development institution has seen a marked increase in petitions after strengthening its accountability mechanism, but instead there has been a steady increase in all complaints from 1994 through 2013.<sup>174</sup> By ensuring that all parties engage in the Consultation Phase, MICI can increase the rate of successful outcomes for requesters and optimal outcomes for all parties through cooperative problem solving.

## 2. Engagement in Compliance Review Regardless of the Outcome of Consultation

Under the current policy, MICI cannot conduct an investigation into whether IDB officials engaged in noncompliant behavior if requesters are able to successfully address their concerns through the Consultation Phase.<sup>175</sup> However, this discounts the value of conducting compliance reviews for interests other than those of the requester. Compliance review helps the IDB learn from past lessons so that it may refrain from noncompliant behavior in the future and refuse to work with partners that have engaged in noncompliant behavior.<sup>176</sup> Further, compliance review through a transparent mechanism helps civil society hold MICI and the IDB accountable for violations of internal policies.<sup>177</sup> Therefore, MICI's operational structure should be changed so that investigations into whether the IDB violated its internal policies may occur for all requests where the requesters indicate that they want MICI to engage in

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172. *See id.* at 24 (acknowledging that the Bank's staff and borrower representatives mistrust an independent mechanism that may question their judgments).

173. *Id.*

174. BENNEKER, *supra* note 18, at 29–31. Total complaints among all accountability mechanisms have experienced some dramatic increases, but these can be explained by the creation of new accountability mechanisms at various international development institutions. *Id.*

175. *See* 2015 IDB MICI POLICY, *supra* note 17, at 17.

176. BENNEKER, *supra* note 18, at 65.

177. *See* discussion *supra* Section I.A.; KRISTEN LEWIS, THE WORLD BANK, CITIZEN-DRIVEN ACCOUNTABILITY FOR SUSTAINABLE DEVELOPMENT 31–32 (2012), [http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Rio20\\_IAMs\\_Contribution.pdf](http://siteresources.worldbank.org/EXTINSPECTIONPANEL/Resources/Rio20_IAMs_Contribution.pdf) [<https://perma.cc/TP5P-P64Q>].

compliance review.<sup>178</sup>

The Compliance Review Phase serves an important and independent role that should not be restricted based on the outcome of the Consultation Phase. While the Consultation Phase is an important way to remedy specific harms faced by local individuals, the Compliance Review Phase is essential to ensuring that the IDB is transparent when it fails to comply with internal policies, and for learning from previous examples to avoid noncompliant activity in the future.<sup>179</sup> It is particularly imperative that the IDB not restrict the number of requests that enter the Compliance Review Phase since the IDB has so few opportunities to learn from past mistakes: few requests entered the Compliance Review Phase under the previous policy, which allowed for both successful consultation and then compliance review.<sup>180</sup>

Although some may argue that elimination of possible future investigation encourages parties to engage more fully in the consultation process—to hopefully avoid a lengthy and time-consuming compliance review process—very few cases under the 2010 Policy actually resulted in a successful resolution in the Consultation Phase.<sup>181</sup> Indeed, it is nearly impossible to lower the present success rate for the Consultation Phase.<sup>182</sup> Further, disconnecting a compliance review from the outcome of the Consultation Phase will create incentives for the IDB project management team to engage more fully in the mediation process. Under the current structure, the Board can require the management team to take remedial action,<sup>183</sup> but IDB project management could preempt potentially disruptive Board action by resolving the imminent injury through a cooperative solution that is best tailored to the project's objectives and the requesters' concerns. Under the proposed framework, the Board may still make compliance findings, but would not need to interfere with ongoing project implementation if parties have already come to an equitable solution through the consultation.

Though it may seem MICI would not have the capacity to handle additional compliance review proceedings, this burden would actually only revert back to practices under the 2010 Policy, which did not prohibit MICI from conducting a compliance review after a successful

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178. The interests of others in conducting a compliance review may conflict with requester control over their own request, a conflict the 2014 Policy resolves on the side of requesters by allowing requesters to opt out of the Compliance Review Phase. *See* 2015 IDB MICI POLICY, *supra* note 17, at 9. This Note does not challenge that determination.

179. *See* Nanwani, *supra* note 19, at 242–43.

180. *See* discussion *supra* Section I.C.3.

181. *See* discussion *supra* Section I.C.2.

182. *See* discussion *supra* Section I.C.2.

183. 2015 IDB MICI POLICY, *supra* note 17, at 20.

Consultation Phase.<sup>184</sup> MICI has therefore already shown that it is capable of conducting these reviews. Overall, the changes to MICI's structure in the 2014 Policy fail to take advantage of the opportunity that the Compliance Review Phase offers for the IDB to learn from past mistakes, be more transparent to outside observers, and increase the effectiveness of its development work.

#### CONCLUSION

MICI is an essential entity to ensure that the IDB conducts its activities in a manner that minimizes negative impacts on vulnerable groups.<sup>185</sup> Because the IDB and other development finance institutions do not face external accountability, effective internal accountability mechanisms are essential.<sup>186</sup> As the largest lender in Latin America and the Caribbean, the IDB has the potential to be an effective tool for countless individuals who may be adversely affected by IDB-financed projects, not only by remedying past, present, and imminent harms, but also by ensuring that the IDB follows its own operational procedures in future projects.<sup>187</sup>

Although the IDB and other regional banks' internal accountability mechanisms reflect the principles established by the first international accountability mechanism—the Inspection Panel of the World Bank—regional banks may also be models for one another, and may even serve as a model for the World Bank.<sup>188</sup> For example, the IDB and the Asian Development Bank both revised their respective accountability mechanisms after other regional development banks incorporated mediation into their accountability mechanisms.<sup>189</sup> Although the World Bank has an accountability mechanism that is substantially similar to MICI's Compliance Review Phase, it does not serve as a facilitator for mediation.<sup>190</sup>

These recommendations alone will not fully address all of the challenges that MICI faces, but if the IDB implements these changes and continually works toward the goals of improved outcomes for requesters and increased transparency within the IDB, then MICI's success could form the foundation for future changes at a global level.

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184. See POLICY ESTABLISHING THE INDEPENDENT CONSULTATION AND INVESTIGATION MECHANISM, *supra* note 51, at 9.

185. See discussion *supra* Section I.B.

186. See discussion *supra* Section I.A.

187. See discussion *supra* Section I.B.

188. See BENNEKER, *supra* note 18, at 11.

189. Nanwani, *supra* note 19, at 242–43.

190. *Id.* at 244–45.