



# Donors Committee

For consideration

MIF/GN-78-2  
13 November 2002  
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**To:** The Donors Committee  
**From:** The Secretary  
**Subject:** Evaluation of MIF projects: Alternative dispute resolution (MARC)

**Inquiries to:** Mr. Bernardo Guillamon (extension 1583)

**Remarks:** The attached report is one of the evaluations of the first “Groups” of MIF projects—Alternative dispute resolution (document MIF/GN-78-2), Micro-finance (document MIF/GN-78-3), Financial reform and capital markets (document MIF/GN-78-4). The summary report (document MIF/GN-78-1) brings together the initial findings from each report on the evaluations and attempts to derive general lessons and conclusions. Together, the work advanced this year in the evaluation account for approximately one third of the total universe of MIF projects which are to be evaluated by OVE during 2002-2003.

Although transmitted separately, the reports (MIF/GN-78-2, MIF/GN-78-3, MIF/GN-78-4) should be read as a single work, with the summary report (MIF/GN-78-1) providing an integrating overview of the three detailed “Groups” evaluation reports.

This translation is being distributed on 9 December 2002.

**Reference:** MIF/GN-78(2/02), MIF/GN-78-1(11/02), MIF/GN-78-2 (11/02), MIF/GN-78-3 (11/02), MIF/GN-78-4(11/02)

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**MIF/GN-78-2**

***Evaluation of MIF Projects:  
Alternative Commercial  
Dispute Resolution Methods***

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***Office of Evaluation and Oversight, OVE***

Inter-American Development Bank  
Washington D.C.  
November 2002

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## ABBREVIATIONS

ADR	alternative dispute resolution
APENAC	Asociación Peruana de Negociación, Arbitraje y Conciliación [Peruvian Association for Negotiation, Arbitration and Conciliation]
AMC	arbitration and mediation center
CCB	Cámara de Comercio de Bogotá [Chamber of Commerce of Bogota]
IACAC	Inter-American Commercial Arbitration Commission
CONAMED	Comisión Nacional de Arbitraje Médico [National Medical Arbitration Commission, Mexico]
CONSUCODE	Consejo Superior de Contrataciones y Adquisiciones del Estado [Senior Government Contracting and Procurement Council, Peru]
IFES	International Foundation for Elections Systems
INDECOPI	Instituto Nacional de Defensa de la Competencia y Protección de la Propiedad Intelectual [National Administration for the Protection of Competition and Intellectual Property Rights, Peru]
IPRECOM	Instituto Peruano de Resolución de Conflictos, Negociación y Mediación [Peruvian Conflict Resolution, Negotiation and Mediation Institute]
ITAM	Instituto Tecnológico Autónomo de Mexico [Autonomous Technology Institute of Mexico]
MPPMR	MIF Project Performance Monitoring Report
NAFTA	North American Free Trade Agreement
SME	small and medium-sized enterprise
SEPS	Servicio de Provisión de Salud [Health Care Delivery Service, Peru]
USAID	United States Agency for International Development

## EXECUTIVE SUMMARY

The purpose of this evaluation is to examine the results obtained in the portfolio of alternative commercial dispute resolution (ADR) projects of the Multilateral Investment Fund (MIF). As conceived by the MIF, ADR projects are intended to promote the use of arbitration and mediation as alternative mechanisms for settling disputes (mainly disputes of a commercial nature).

Toward the end of the 1980s, the judicial branches in the countries of the region were in an alarming state. On the one hand, the administration of justice suffered greatly from problems of congestion, lengthy delays and lack of access to courts. On the other, lack of independence and corruption undermined the credibility and image of the judicial branch in the eyes of society. Given this situation, the private sector suffered from constraints on its access to efficient, transparent, independent and predictable justice, which increased its transaction costs and discouraged business.

The ADR portfolio was established to mitigate the shortfall in justice services and to improve the conditions for private sector development. The strategy consisted of setting up arbitration and mediation centers to offer entrepreneurs an alternative for the settlement of their commercial disputes.

The ADR projects were born almost at the same time as the Bank's justice sector reform projects, reflecting one of the priorities of the Eighth Replenishment of Resources of 1994. The MIF's first ADR operation was approved in Peru in 1995 when the Eighth Replenishment was authorizing operations for judicial reform (prior to that time, the first loan of this kind had been one to Costa Rica in 1995).

After the experience in Peru, the MIF approved an operation to consolidate and expand the Arbitration and Mediation Center of the Chamber of Commerce of Bogota (Colombia). This operation was a turning point for the portfolio since the Colombian project was taken by the MIF as a model for its future operations. It was followed by 16 more operations that, with nuances, replicated the Colombian experience.

Since the MIF had no experience with or staff specializing in ADR, it used the services of the personnel of the Chamber of Commerce of Bogota to carry out the new projects. They participated as consultants in nearly all of the later projects, in some cases in conjunction with services provided by institutions such as Fundación Libra (Argentina) or Conflict Management International (Harvard University).

In this context, the ADR portfolio grew dynamically. With an initial goal of six or seven projects, 18 operations were approved between 1994 and 2000. Despite not having its own specialists in arbitration and mediation and despite serious shortcomings in portfolio management, the MIF was able to extend its ADR model to almost all the countries of the region.

In 2002, half of the portfolio was still in execution, although no new projects had been approved since 2000 when the MIF ended its work in the field of ADR. There is no special

follow-up on these projects today, mainly because no staff at MIF Headquarters are assigned to this portfolio.

The analysis of the 18 projects, eight of which were visited for the purposes of this evaluation, detected the following problems:

- The projects were replicated in other countries without heeding specific national characteristics. No prior studies or diagnostic analyses were carried out which, in some cases, led to mistakes and to neglect of the specific problems in each country.
- There were inefficiencies in portfolio management, with the same products being financed repeatedly. Software for tracking cases is a good example. Rather than financing the software once and then adapting it to the needs of each center, the development of new software was included in almost all of the projects. The same was true of training models, virtual libraries and codes of ethics.
- There was no process of institutional internalization and learning. The achievements of the projects were not compiled and lessons were not learned from the problems facing ADR. After nearly 18 projects and more than US\$14 million, the Bank/MIF does not know much more today than it did when it launched the portfolio. The absence of manuals or guides for defining and implementing projects meant, that with the departure of the staff that were originally in charge of the projects, no institutional memory has remained.
- Although there are mechanisms for project monitoring, there is no process for capturing the results and lessons learned. There was no systematic evaluation to learn more about ADR and improve the design of new projects. In this regard, only a very few results were obtained from mid-term and final evaluations, although nearly US\$400,000 was spent on them.

However, despite the problems described above, this report concludes that the ADR portfolio had very positive results. The following achievements were identified:

- The projects had excellent results in a number of countries, particularly Peru, Colombia, Chile and Brazil. The projects not only achieved their goals, but in some cases they created an irreversible trend toward the use of ADR. In Peru, for example, there are more than 500 mediation centers that processed more than 30,000 cases in the last three years. In Brazil, the project has exceeded its goals for the number of centers affiliated with the national network and more than 6,000 negotiations have already taken place. In Colombia, the Chamber of Commerce of Bogota continues to grow and has expanded its work in the country and internationally. In the last two years, it has provided training for more than 400 people from abroad.
- ADR is being used for commercial purposes. Today, the arbitration and mediation center model promoted by the MIF is known throughout the region.

- The model for commercial arbitration was also perfected. From the Colombian project onward, successive operations improved on and fine-tuned the original model.
- Legislation on arbitration and mediation was modernized and harmonized in almost all the countries in the region and today they have up-to-date laws that reflect international norms.
- Specialized human resources were trained in almost all the countries in the region. Today, qualified arbitrators and mediators are available, which was not the case at the beginning of the 1990s.
- There were also some unexpected achievements:
  - The projects in Peru, Colombia and Brazil were extremely successful in school, community and labor mediation, areas with high social content.
  - An inter-American commercial arbitration commission (IACAC) was created. Whenever the MIF financed a new arbitration and mediation center, it subsequently joined the inter-American commission, consolidating a system that had been created earlier but was virtually inactive.

Although the MIF financed projects in almost all the countries of the region and officially the portfolio has been ‘closed’, this does not mean that the possibilities of ADR have been exhausted. There are many lines of action that could be explored to magnify the impact of the investments made so far. This report has identified the following areas:

- *Microenterprise and small and medium-sized businesses:* The projects did not place sufficient emphasis on using ADR for the specific needs of microenterprise and small and medium-sized businesses. This is a field with very great potential, since these enterprises face major hurdles in gaining access to traditional justice services.
- *Regional integration:* The potential of ADR could be tapped for the resolution of disputes under regional integration agreements. In the case of NAFTA or MERCOSUR, for example, conflict resolution could be used in the most disputed areas, such as energy, telecommunications, agriculture, etc. The experience gained by chambers of commerce in alternative dispute settlement could also be drawn on for the purpose of creating regional development poles.
- *Consumer protection:* Following up on the positive experience in Peru, ADR could be extended to deal with consumer complaints.
- *Labor disputes:* Brazil’s experience in this field warrants study to examine the possibility of extending it to other countries.
- *Traffic accidents,* whose settlement is a key for building an effective insurance system in the region. ADR could play an important role as an efficient mechanism for settling disputes of this kind.

- *Small-claims courts:* This is a key area for improving access to justice. The MIF's experience in ADR could be very useful in responding to the needs of citizens and the private sector (particularly small businesses).
- *Government procurement:* ADR could potentially be a very useful tool for settling disputes over government procurement. In Peru, there are more than 850,000 contracts between the private sector and the government, worth approximately US\$4 billion.
- *Health services:* The successful experience of CONAMED in Mexico and the budding SEPS in Peru (the latter financed by the MIF) suggest that ADR could be used to settle disputes over health care services.

In short, the results of the MIF's ADR portfolio have been very positive. Its intervention in the market was a key contribution to promoting the use of ADR for the resolution of commercial disputes. It has had a strong impact on the change in the region's legal culture and on universalizing the use of ADR. Since more than half of the portfolio is still in execution, there are many opportunities to learn from these projects and to magnify their impact by extending the use of ADR to areas that have not yet been explored by the MIF.

## I. SECTOR CONTEXT OF THE PROJECTS

- 1.1 The objective of this chapter is to examine the sector context of the group of alternative dispute resolution (ADR) projects. The following sections will look at aspects such as the macroeconomic context in which the projects were devised and implemented, the relevance of ADR in that context, the structural features of the sector, market imperfections and, last, the make-up of the system's clients or users. Annex I gives further information on the sector context.
- 1.2 In 1994, the MIF began to finance ADR projects that promoted the establishment and strengthening of arbitration and mediation centers in 18 Latin American countries. Given the problems facing the region's judiciaries, it was hoped that the centers could offer a conflict resolution service to the private sector that would be reliable and effective.

**Table 1.1: MIF portfolio of ADR projects**

Country	Project name	Year	US\$
Argentina	National network of commercial mediation and arbitration centers	2000	1,000,000
Bolivia	Commercial conciliation and arbitration	2000	300,000
Brazil	Alternative dispute resolution	1999	1,500,000
Chile	Alternative dispute resolution	1999	650,000
Costa Rica	Alternative dispute resolution systems	1996	374,000
Colombia	Mediation and arbitration program	1995	1,200,000
Ecuador	Mediation and arbitration center	1996	720,000
El Salvador	Modernization of commercial legislation	1996	662,000
Guatemala	Commercial mediation and arbitration center	1998	450,000
Honduras	Mediation and arbitration center	1996	500,000
Mexico	Alternative dispute resolution	2000	1,352,000
Nicaragua	Alternative dispute resolution	1999	1,200,000
Panama	Mediation and arbitration center	1996	270,000
Paraguay	Alternative dispute resolution	1999	503,000
Peru	Alternative dispute resolution systems	1995	1,470,000
Trinidad and Tobago	Strengthening of alternative dispute resolution	2000	385,000
Uruguay	Conciliation and arbitration center	1995	835,000
Venezuela	Alternative dispute resolution	1999	729,000
		<b>Total</b>	<b>14,100,000</b>

### A. Macroeconomic context and its linkage to mediation and arbitration

- 1.3 The Bank's first alternative dispute resolution project was approved in January 1995, at a time when many Latin American and Caribbean countries had made good progress in their economic reforms. The reforms called for a substantial change in the growth model that had been followed for decades in the region. At the end of the 1980s, many of the countries began to implement policies based on a free market, economic openness and a limited role for government in economic matters.

- 1.4 Based on the results of those reforms, the region and the international lending agencies reached agreement on what needed to be done to achieve macroeconomic stability and create higher growth. This agreement, which came to be known as the Washington Consensus,<sup>1</sup> became the standard recipe to be followed by the region's economic policy makers.<sup>2</sup>
- 1.5 After implementing this first series of market-oriented reforms, the countries began to look at a new reform program. This time the debate centered on identifying the reforms needed to capture the benefits of the first round of reforms. This new vision postulated that institutional weaknesses in the Latin American countries were an insurmountable bottleneck to achieving the desired changes.
- 1.6 People began to talk about the "second generation of reforms"<sup>3</sup> and attempted to identify a new program of reforms to redefine the way in which governments deliver public goods and services.<sup>4</sup> In this context, the MIF launched a new product line in 1995 intended to improve the conditions for private sector development. Through its alternative dispute resolution projects, the MIF worked to provide a framework that entrepreneurs could use to settle their disputes.

## **B. The importance of mediation and arbitration**

- 1.7 The relevance of ADR projects is closely linked to the crisis in the region's judiciaries. The judicial branches are institutions that form part of the framework of the State and, as such, they have suffered from all the negative consequences of the multiple crises in the region over the last two decades. They have been affected by budget cutbacks made necessary by recurrent fiscal problems, the lack of a professional public service, and corruption. The judiciaries of Latin America and the Caribbean also suffered greatly as a result of the spread of military governments and the frequent interruptions in democracy that have occurred since the mid-1950s. Annex II gives more details on the basic concepts of ADR.
- 1.8 The absence of an effective judicial service has a host of negative consequences. On the one hand, it poses an obstacle to private sector development. Given the absence of reliable and effective mechanisms for conflict resolution, entrepreneurs have negative

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<sup>1</sup> Williamson, John. 1990. "What Washington means by Policy Reform." In John Williamson, editor, *Latin American Adjustment: How Much Has Happened?* Washington DC, Institute for International Economics.

<sup>2</sup> The Washington Consensus can be summarized in the following 10 proposals: fiscal discipline, redirecting public spending, tax reform, liberalization of interest rates, openness to trade, openness to flows of foreign direct investment, privatization, economic deregulation and property rights.

<sup>3</sup> Naim, Moises, 1994. "Latin America: The Second Stage of Reforms." *Journal of Democracy*. October 1994, pages 33-48.

<sup>4</sup> While the first generation reforms had the objectives of changing macroeconomic rules, reducing the size of government and dismantling institutions for protectionism and statism, the second generation focused on creating and rehabilitating institutions, boosting the competitiveness of the private sector, creating economic institutions and conducting a sweeping reform of the way in which governments deliver public services.

incentives for undertaking new projects or making new investments.<sup>5</sup> On the other, the defects of the justice system act as a barrier to the entry of foreign capital. Legal stability and the reliability of the justice system are key factors in attracting foreign investment. Last, an inefficient or corrupt judicial branch imposes unwanted transaction costs.

1.9 In this context, the MIF’s ADR projects were designed to be a tool to fill the void caused by the crisis in the judicial branches. To illustrate the relevance of the projects in the regional context, four aspects of the crisis in justice are examined below—lack of confidence, lack of independence, court congestion and judicial delays.

### 1. Lack of confidence in the judicial branch

1.10 All the measurements from the mid-1990s, when the MIF launched its group of ADR projects, up to the end of the decade point to a low level of confidence in public justice services. Disturbing figures were given in a World Bank study conducted at the start of the 1990s that surveyed a total of 3,600 businessmen from 69 countries. More than 70 percent of the Latin American and Caribbean entrepreneurs surveyed believed that the judicial branch was an obstacle to doing business.<sup>6</sup> In Peru, for example, over 90 percent of the public distrusted the country’s magistrates and the figure for Argentina was similar, at 87 percent. A comparative study of 12 countries in the region in 1996 indicated that the only country where confidence in the judicial branch was above 50 percent was Uruguay.<sup>7</sup>

**Graphs 1.1 and 1.2: Image of justice in Latin America**

Levels of confidence in the administration of justice		
Score	Country	Points
1	Israel	8.71
5	Denmark	8.26
10	Switzerland	7.98
23	<b>Chile</b>	6.03
35	Turkey	3.86
42	<b>Colombia</b>	2.44
43	<b>Argentina</b>	1.98
44	<b>Mexico</b>	1.51
46	<b>Venezuela</b>	0.84

Source: The World Competitiveness Yearbook, 1996

Inappropriate practices (bribery and corruption)		
Score	Country	Points
1	Denmark	9.55
5	Norway	9.13
10	Sweden	8.75
20	<b>Chile</b>	6.81
37	<b>Brazil</b>	2.76
38	<b>Colombia</b>	2.44
39	<b>Argentina</b>	2.38
44	<b>Mexico</b>	1.51
45	<b>Venezuela</b>	1

Source: The World Competitiveness Yearbook, 1996

<sup>5</sup> A study conducted in Peru by Instituto Apoyo concluded that the majority of small businesses and microenterprises only carry on business with agents whom they ‘know’ and in whose economical solvency and commercial conduct they have confidence. This seriously limits the number of transactions they enter into.

<sup>6</sup> World Development Report: The State in a Changing World. 1992, New York, Oxford University Press.

<sup>7</sup> Martinez, Nestor Humberto (1996). “Judicial Councils in Latin America.” In *Lessons Learned*, edited by Crohn and Davis. Williamsburg, Virginia, National Center for State Courts.

## 2. Lack of judicial independence

- 1.11 The lack of independence of the judiciaries in Latin America and the Caribbean is recognized as one of the main problems affecting the region's democracies.<sup>8</sup> The phenomenon takes different forms, including the way in which one branch of government influences another and the way in which political parties, business groups, unions, the military, and other power groups interfere.
- 1.12 The countries of Latin America and the Caribbean have not performed well when compared with others. Only Uruguay and Costa Rica ranked among the top 30 countries in the "Global Competitiveness Report" (Harvard University).

**Table 1.2: World ranking of judicial independence**

The judiciary in the country is independent and not subject to interference by the government and/or parties to disputes

#	Country	Score	#	Country	Score
1	Germany	6.7	52	El Salvador	3.5
10	New Zealand	6.4	53	Mexico	3.5
20	France	5.7	54	Colombia	3.3
26	Uruguay	5.3	55	Latvia	3.3
27	Egypt	5.2	56	Nigeria	3.3
28	Costa Rica	5.1	59	Panama	3.1
29	Estonia	5.1	60	Bangladesh	3.0
30	Mauritius	5.1	62	Russia	2.9
31	Portugal	5.1	63	Indonesia	2.8
32	Jamaica	5.0	65	Argentina	2.7
37	Italy	4.5	66	Zimbabwe	2.6
38	Slovenia	4.4	67	Paraguay	2.3
39	Chile	4.3	68	Ukraine	2.3
40	Taiwan	4.2	69	Guatemala	2.2
41	Trinidad and Tobago	4.2	70	Nicaragua	2.2
42	Brazil	4.1	71	Ecuador	2.1
43	Sri Lanka	4.1	72	Honduras	2.1
49	Vietnam	3.7	73	Bolivia	2.0
50	Dominican Republic	3.6	74	Peru	2.0
51	Malaysia	3.6	75	Venezuela	1.7

CID - Global Competitiveness Report 2001-20002 Harvard University

## 3. Court congestion

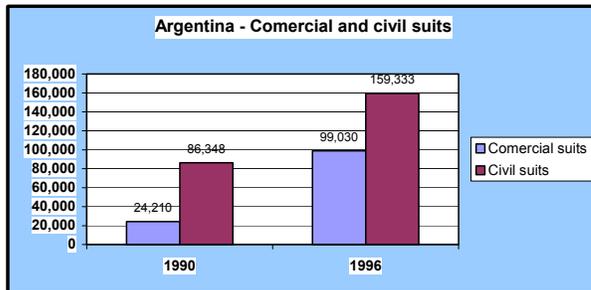
- 1.13 Levels of court congestion in the region are distressing. Congestion is taken to mean the excessive number of cases that judges are required to process.<sup>9</sup> The large number of cases makes it impossible for judges to deal with each case thoroughly. The

<sup>8</sup> There is abundant literature on this topic, which has been approached from the standpoints of law and political science. Sources that may be consulted for a discussion of this subject include: Linz and Stepan (2000); Mendez, O'Donnell and Pinheiro (2001); and USAID/IFES (2002).

<sup>9</sup> This phenomenon is measured by an index that reflects the ratio between the number of cases entering the system and the number exiting it.

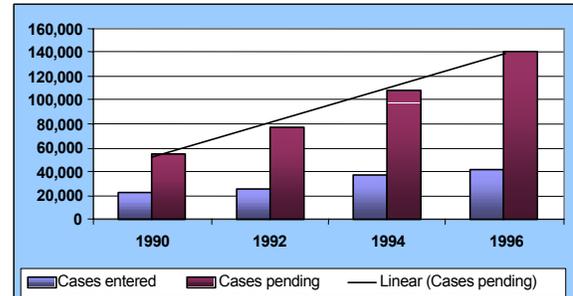
following graphs<sup>10</sup> illustrate the seriousness of this problem in Argentina<sup>11</sup> and Ecuador.

**Graph 1.3: Argentina – Commercial and civil suits**



Source: Dakolias (1999)

**Graph 1.4: Ecuador 1990 - 1996**

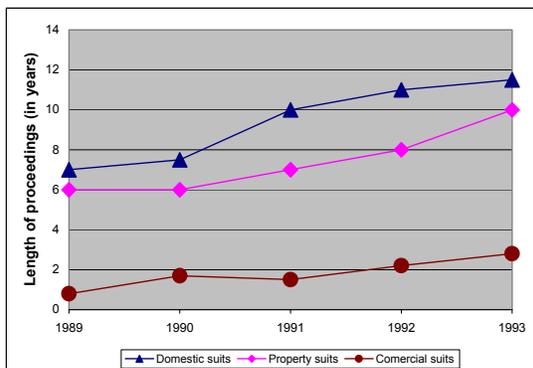


Source: Dakolias (1999)

#### 4. Justice delayed

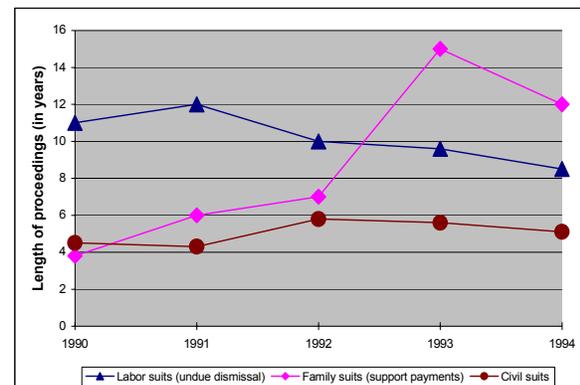
1.14 The problems with congestion and productivity also lead to the phenomenon of justice delayed, i.e. that cases are not settled within the time limits established in trial law. Although the figures vary from country to country, the average time taken to resolve a civil or commercial case is between five and seven years. Examples of delays in Argentina and Ecuador in the 1990s are given below.

**Graph 1.5: Argentina – Delays in civil suits**



Source: Buscaglia and Dakolias (1996)

**Graph 1.6: Ecuador –Delays in civil and labor suits**



Source: Buscaglia and Dakolias (1996)

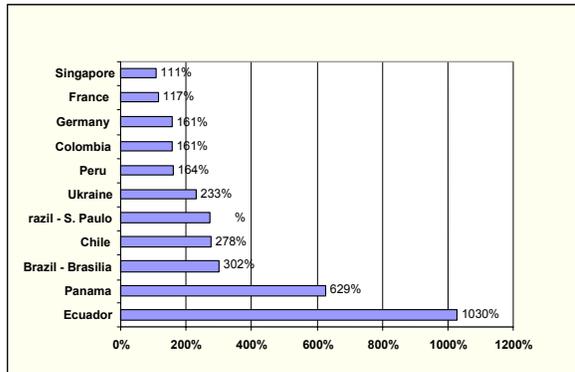
1.15 The examples of Argentina and Ecuador point to the serious problems affecting justice systems in Latin America in the 1990s. Both the degree of congestion and the number

<sup>10</sup> Figures cited by María Dakolias in “Court Performance Around the World. A Comparative Perspective.” World Bank Paper No. 430, Washington DC, 1999, The World Bank.

<sup>11</sup> In Argentina, the number of commercial suits in the city of Buenos Aires rose from 24,210 in 1990 to 99,030 in 1996. The situation with civil suits was equally troubling, rising from 86,348 to 159,333 over the same period. Figures cited by Gladys Stella Alvarez in “Los Métodos Alternos de Resolución de Conflictos en Procedimientos Judiciales: La Experiencia Argentina.” in Reforma Judicial en América Latina, Alfredo Fuentes, editor, Santafé de Bogotá, 1999, Corporación Excelencia en la Justicia.

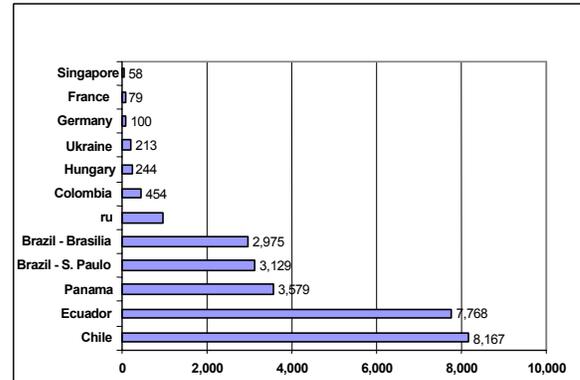
of outstanding cases rose to disturbing levels. As is shown in the following graphs, the situation in Latin America compares unfavorably with the situation in other parts of the world.

**Graph 1.7: Congestion rate 1995 – 1996**



Source: Dakolias (1999)

**Graph 1.8: Cases pending per magistrate**



Source: Dakolias (1999)

1.16 In short, as the statistics show, the relevance of alternative dispute resolution mechanisms is related to the high levels of inefficiency in the region’s justice systems, which are chiefly visible in severe problems of congestion and delay. One of the objectives of establishing arbitration and mediation centers was to create a private space where individuals could settle their disputes, filling the void left by public justice services.

**C. Structural characteristics of the justice sector**

1.17 Alternative dispute resolution (ADR) methods are tools whose purpose is, precisely, to resolve conflicts. They are called “alternative” because they are an alternative to the public system of justice. Although the courts are the only bodies empowered to provide public justice services, over which they exercise an absolute monopoly, there are other mechanisms for dispute settlement that can be used by private parties or between them and the government. These mechanisms are known as ADR and although they are not administered by the State, they are fully legitimate and recognized by the legal system.

1.18 ADR mechanisms are dynamic tools for conflict resolution. Generally speaking, they are short processes with clear and simple rules (particularly when compared to cases in the public system). The use of alternative mechanisms is very widespread in the United States, which is a country that Latin America often takes as its reference point. From the early 1980s to the present, the United States Department of Justice, together with the Information Agency (USIA) and the State Department, have been organizing

programs for Latin American magistrates, lawyers and public policy makers to familiarize them with American judicial policies.<sup>12</sup>

- 1.19 It is generally argued that these mechanisms contribute significantly to streamlining and lowering the cost of conflict resolution and they are presented as one way of overcoming the problems posed by public justice systems. Since they require less time and money and are guided by a more cooperative spirit between the parties, the use of ADR in Latin America and the Caribbean has been discussed in recent years, locally and at international conferences and seminars on the subject.<sup>13</sup>
- 1.20 However, despite the merits of its well-publicized advantages, the legal tradition in the Latin American countries has not welcomed ADR with the same euphoria as experts in the field. The legal tradition in the region is based on Roman or civil law (except for the English-speaking Caribbean countries) and they therefore have a more confrontational concept of justice. They are not as interested in speeding up the dynamics of the process as in prioritizing its formal aspects. For example, it is difficult for them to accept that a dispute can be settled by someone who is not a judge (as occurs in arbitration). This legal culture, based on litigation, written proceedings and legal formalities, is the product of a judicial legacy that needs to be modernized.

#### **D. Analysis of the main challenges**

- 1.21 The establishment of arbitration and mediation centers was intended to create a private space where individuals could settle their disputes, thus filling the void left by public justice services. At the same time, it was expected that more extensive use of arbitration and mediation would remove a large number of cases from the courts and would therefore help to clear up the backlog. These changes were also expected to improve access to justice, as a result of the availability of new mechanisms for dispute settlement and decongestion of the courts.
- 1.22 The lack of independence of the judiciary, compounded by the perception that it was corrupt and inefficient, obviously led to great mistrust of the judiciary by society. Public justice, in its ideal form—-independent, efficient, timely and accessible—has been and continues to be absent from the market. The goal is not to have “perfect” justice, but at least to have a judicial service of acceptable quality.
- 1.23 Given the context, alternative dispute resolution methods were absent from the market during the 1990s. Although arbitration and mediation have a long history, they were only used in very limited environments, for example chambers of commerce and of shipping associations.

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<sup>12</sup> As part of these visits and exchanges, many officials came in contact with the use of ADR in American courts. In some cases, these officials returned to their countries with a positive view and attempted to replicate the American experience. This is the case of Dr. Elena Highton and Dr. Gladys Alvarez, two Argentine experts, who are considered pioneers in their country in the use of alternative dispute resolution methods.

<sup>13</sup> See “Justicia y Desarrollo en América Latina y el Caribe,” IDB (1993); “Judicial Reform in Latin America and the Caribbean: Proceedings of a World Bank Conference,” World Bank Technical Paper, No 280, by Malcolm Rowat (Editor), Waleed H. Malik (Editor), Maria Dakolias (Editor).

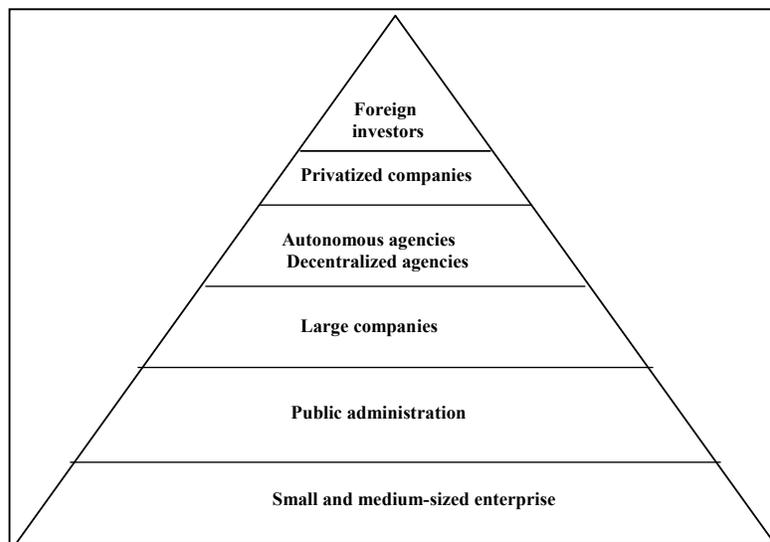
1.24 The ADR projects faced multiple challenges. First, the MIF had to design a model for introducing the new mechanisms for settling commercial disputes and a methodology for putting it into practice. Second, it had to overcome the resistance by lawyers, the judicial branch and governments, in general, to a change in culture that involved the use of a new legal practice. Third, it had to convince entrepreneurs of the merits of using it and find a way of involving them in the projects.

**E. Market segmentation**

1.25 In studying market segmentation, a distinction should be drawn between the two different alternative dispute resolution methods introduced through MIF projects, namely arbitration and mediation.

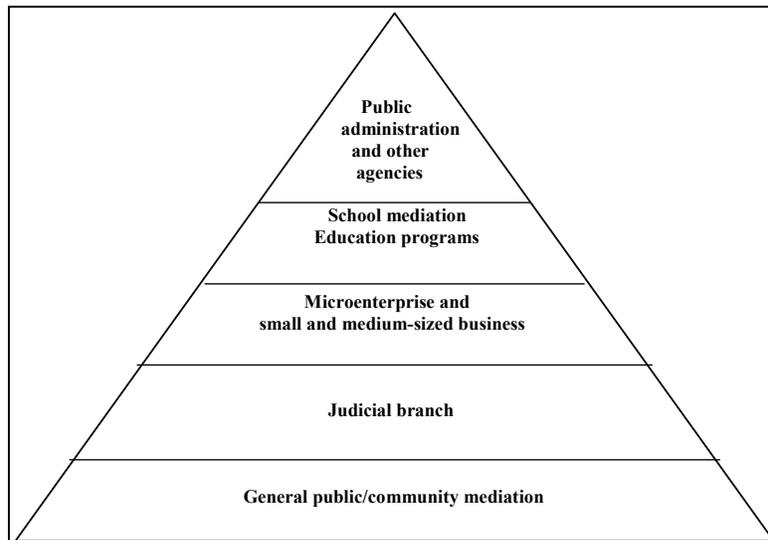
1.26 In the case of **arbitration**, the clients are generally entrepreneurs heading medium-sized and large companies, although the specific segment of the business sector that uses arbitration centers varies significantly from country to country and largely depends on the original project goals.

**Graph 1.9: Size and segmentation of the market for arbitration**



1.27 As for **mediation**, the clients vary considerably from country to country. The universe of potential users is much larger than for arbitration, since mediation can be used by the private sector and by the general public. Aside from the mediation services offered by chambers of commerce, work can be done with children in schools, in communities and in court houses. Mediation can also be used in specific thematic areas, such as the protection of consumer rights, conflicts arising from medical services, and small-claims courts.

**Graph 1.10: Size and segmentation of the market for mediation**



## II. STRATEGIC OBJECTIVES OF THE MIF

### A. The Bank's sector policies and strategies

- 2.1 To study the relationship between the MIF's alternative dispute resolution (ADR) projects and the other activities of the Bank Group, it is first necessary to identify their place in the thematic classification of activities used by the Bank.
- 2.2 Alternative dispute settlement mechanisms form part of the set of tools used by the Bank to reform justice systems in the region and, as such, they fit into the objective of modernization and reform of the State. The MIF projects are also explicitly connected to the justice sector when their objectives include "*helping to clear up the backlog in the courts*".
- 2.3 The two main documents that guide the Bank's actions in the justice sector are the Eighth General Increase in Resources of 1994 and the Frame of Reference for Bank Action in Programs for Modernization of the State and Strengthening of Civil Society of 1996.<sup>14</sup> Annex III gives more details on the Bank and its actions in the justice sector.
- 2.4 It was not until the start of the 1990s that the Bank began to be involved in the justice sector. In 1993, it organized a conference on "Justice in Latin America and the Caribbean in the 1990s: Challenges and Opportunities" that drew participants from around region. This interest in the judicial sector was reflected in the Eighth Replenishment of 1994, which included the justice sector in Bank operations.
- 2.5 With the approval of the first judicial reform project (for Costa Rica in 1995), the Bank began to operate in the field of modernization and reform of the justice sector. To date, it has approved 20 loans and more than 70 technical-cooperation projects, for close to US\$500 million.

### B. Strategic objectives of the MIF and their evolution

- 2.6 This section will examine the references to ADR projects in the MIF's internal documents and the legal framework in which the projects were carried out. Annex IV gives more information in this regard.
- 2.7 The **Agreement Establishing the MIF** does not make specific mention of alternative dispute resolution projects. Instead, it outlines the Fund's general objectives, making mention of financing for activities to improve the legal climate for investors.
- 2.8 Within this framework, the MIF undertook its first operation in alternative dispute settlement mechanisms in 1994 in Peru. Its interest in alternative methods was reflected in the Guidelines for Project Preparation for Technical-Cooperation

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<sup>14</sup> The Agreement Establishing the Bank of 1959 makes no reference to the justice sector.

Facility I,<sup>15</sup> which mention the creation of arbitration and mediation centers as one of the facility's priority activities.

- 2.9 Eight operations were approved between the time the MIF was established and 1996, meeting the original goal of financing a small group of projects. The MIF's **Task Force Report**, also known as the **Perry Report**, came out in August 1996, reviewing the Fund's activities and making a series of recommendations to optimize their impact. The Perry Report suggested changes in operating priorities and recommended that some of the groups of projects that had been financed should cease to be priorities. Specifically, it recommended that the arbitration and mediation be eliminated.
- 2.10 It is clear that the Fund did not follow that recommendation, since it approved 14 new alternative dispute settlement operations after the report. It was felt that a narrow interpretation of its founding objectives would take away the flexibility the Fund needed to finance innovative pilot projects, such as mediation and arbitration centers.
- 2.11 The MIF's **Working Group Report** for 2000 devotes very little space to alternative dispute resolution projects,<sup>16</sup> but notes that they have had a strong impact on the creation and strengthening of ADR in the region. As a factor in their success, it highlights the commitment and enthusiasm of the executing agencies. To cover all bases, it stresses that supervision and control during project execution could be improved and adds that cooperation between MIF experts, the IDB and the executing agencies could help to improve performance and make the necessary adjustments. Last, the report points out that in all cases, the execution periods were longer than originally planned.
- 2.12 Generally speaking, ADR projects have not received much attention in the different MIF documents. Nonetheless, sufficient interest and financing existed to carry out operations in almost every Latin American country.

### C. Analysis of the strategic aims of the projects

- 2.13 This section looks at the strategic intentions announced in alternative dispute settlement projects, with a more detailed analysis presented in Annex V. By identifying the objectives established for each project and then comparing them with the activities planned, it becomes possible to determine the rationale of the operations.
- 2.14 A review of the MIF projects indicates that although their announced intentions are not uniform, most of them identify the promotion, consolidation, dissemination and/or development of alternative dispute settlement mechanisms as their main and principal objective.
- 2.15 However, there are some variations from project to project. The different types are listed below, arranged in declining order of frequency:

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<sup>15</sup> Guidelines for Project Preparation (Draft), MIF, September 1995.

<sup>16</sup> The projects in Peru, Colombia, Uruguay, Costa Rica, Honduras, Panama and Ecuador were reviewed for the report.

1. ***Develop, disseminate, promote, strengthen or consolidate alternative dispute resolution mechanisms.*** This kind of general objective is probably the most moderate and least ambitious. It is typical of projects that simultaneously include arbitration and mediation components.
2. ***Facilitate the settlement of commercial disputes through the development of alternative dispute resolution mechanisms.*** This statement appears principally in projects that focus exclusively the resolution of commercial disputes.
3. ***Help clear up the backlog in the ordinary justice system.*** This objective appears in a number of projects, including the oldest and the newest.
4. ***Improve the climate for commercial relations and investment.*** The starting point for these projects is that the absence of reliable mechanisms for the settlement of disputes is an obstacle to the development of commerce and private investment.
5. ***Support the settlement of property disputes.*** The only case in which property disputes was the objective was in Nicaragua.
6. ***Support the resolution of labor disputes.*** This was the intent of the Brazilian project, which promoted the use of mediation for the solution of labor disputes, in an attempt to reduce the role played by government in settling conflicts between employers and employees.

2.16 In some cases, the ‘premises’ described above are the sole objective of the projects, but in many others, they are combined into a set of project objectives.

#### **D. Evolution of the types of intervention**

2.17 The MIF’s portfolio of ADR projects has been very uniform and it is not possible to detect different types of interventions with respect to the instruments and mechanisms used to implement the changes. However, some variations can be detected in the different types of arbitration or mediation sought by the projects.

2.18 The first ADR project financed by the MIF was for Peru. It was approved in December 1994. Although it had arbitration components, it focused on the promotion of mediation.<sup>17</sup> The second project, approved by the MIF in 1995, was for Colombia. That operation was a turning point since its format was replicated in most of the subsequent projects.

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<sup>17</sup> The activities included school mediation programs, mediation to protect consumer rights through the National Administration for the Protection of Competition and Intellectual Property Rights, community mediation in marginal barrios of Lima, strengthening the mediation service of the Lima Chamber of Commerce, activities with the provincial colleges of attorneys and the establishment of mediation centers in the interior. It also included training for public servants, judicial officials, entrepreneurs and private sector representatives.

- 2.19 There are two reasons for this change. First, greater attention began to be paid to the MIF's mandate, which established that its operations should contribute directly to private sector development. As a result, activities such as school and community mediation were left to one side. But the most important reason for the change in the model was having found a success story in Colombia. When the MIF contacted the Arbitration and Mediation Center of the Chamber of Commerce of Bogota, it was already operating and had its own dynamics which, although not fully fledged, already pointed to success. The MIF decided to support the center and draw on its experience and organizational and operational model, replicating it in other countries. The importance of having a successful model that originated in Latin America should be stressed, since this was very influential when it came time to duplicate the experience in the other countries of the region.
- 2.20 Subsequent to the Colombian experience, the MIF adopted a model for its future projects that basically consisted of establishing an arbitration and mediation center that would operate inside a chamber of commerce that acted as the project's executing agency. The 'Colombian model' was reproduced with minor changes in most of the countries of the region.
- 2.21 These minor variations generated 'subtypes'. The first consisted of using ADR to settle disputes over property. The second consisted of using ADR to settle labor disputes. The objective of these operations was to introduce new ways of resolving conflicts between employees and employers. The third involved projects to establish national networks of centers under the auspices of the chamber of commerce. The projects were not limited to establishing or strengthen a single center, but were intended to propagate the centers throughout the country by providing the necessary know-how. Lastly, the fourth subtype consisted of financing the creation of arbitration and mediation centers in conjunction with reformulating the country's commercial legislation.

### III. PROJECT EVALUATION

3.1 This chapter presents the results of the evaluation of the ADR projects approved by the MIF between 1994 and 2001. It looks first at the overall performance of the portfolio in terms of time lines and then analyzes the individual projects. The evaluation methodology was developed by OVE for this specific purpose and involves rating the projects in seven main areas: relevance, effectiveness, efficiency, innovation, sustainability, additionality and evaluation. These areas were looked at in the different stages of the projects, i.e. when they were being designed (ex ante), during execution and close to or after completion (ex post). The main aspects examined in each stage are shown in Table 3.1.

**Table 3.1: Dimensions evaluated**

Dimensions	Project stage		
	A. Ex ante	B. Execution	C. Ex post
1. RELEVANCE	1.A. Analysis of needs	1.B. Demand for services	1.C. Market creation
2. EFFECTIVENESS	2.A. Risk prevention	2.B. Contingency management	2.C. Project outcomes
3. EFFICIENCY	3.A. Allocation of resources	3.B. Administrative management	3.C. Productivity
4. INNOVATION	4.A Product innovation	4.B. Process innovation	4.C. Demonstration effect
5. SUSTAINABILITY	5.A Analysis of partners	5.B. Monitoring of partners	5.C. Institutionalization
6. ADDITIONALITY	6.A. MIF value added	6.B. Synergy between projects	6.C. Catalytic effect
7. EVALUATION	7.A. Evaluability	7.B. Monitoring	7.C. Impact evaluation

3.2 Using this methodology, the team evaluated the 18 projects approved by the MIF over the period, for a total of US\$14.1 million. Eight of these projects (44 percent of the total), particularly those that had been completed or were nearing completion, were visited directly and the other 10 (56 percent of the total) were evaluated based on documents available in the IDB (MPPMR, progress reports and evaluations) and information obtained through surveys sent to the executing agencies and telephone interviews and contacts with IDB and MIF staff. In-depth case studies were prepared for the eight projects visited (a sample of one study is included in Appendix 1) and for the others, a shorter analytical review was prepared known as an “evaluation fiche” (a sample of a fiche is included in Appendix 2), where both types of documents contain a detailed analysis, based on the evaluation matrix.

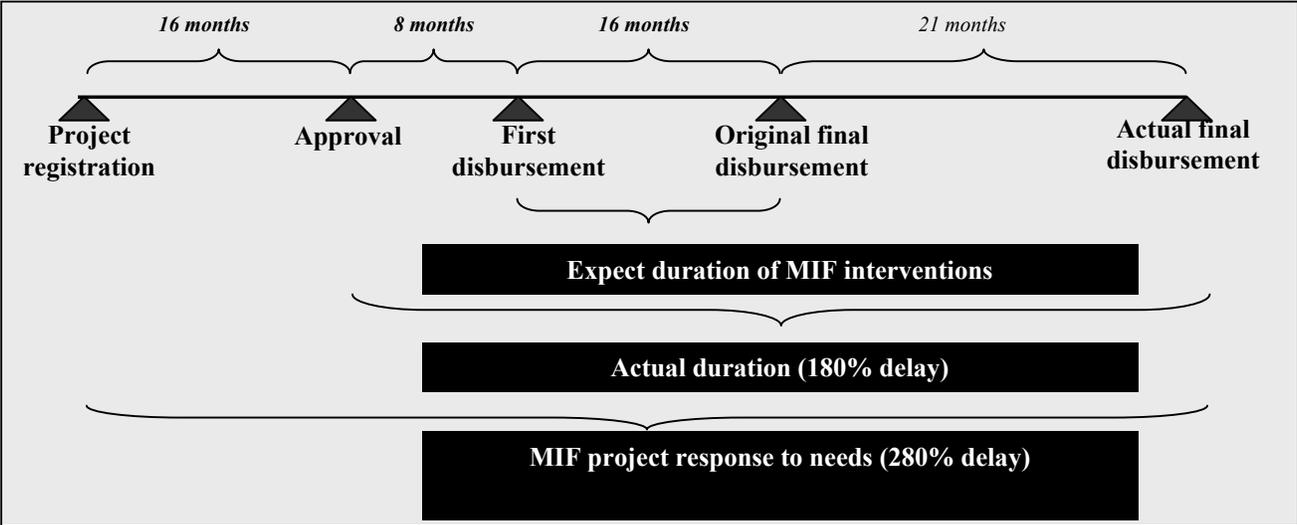
#### A. Analysis of the overall performance of the ADR portfolio

3.3 The ADR portfolio is composed of 18 projects. Eight of them have already been completed, while the others are still being executed. They have been divided into “mature” and “early” projects. These two categories account for more than 50 percent

of the ADR portfolio, in other words, the number of projects still in execution is quite high.

3.4 The ADR projects took longer to prepare (an average of 16 months) than other groups of projects. If the original execution periods are considered, the average for ADR projects is 21 months. However, if we look at the actual time between project approval and completion, the 45 months required for ADR projects is much longer than for other Facility I projects. Their average execution time is also longer (with the average for the universe of Facility I projects being 18 months). This suggests that ADR projects are complex and tend to encounter difficulties in execution.

**Table 3.2: Completed projects**



3.5 The portfolio of projects still in execution presents some differences compared to the projects that have been completed. For on-going projects, the original execution period is 42 months. In other words, the difficulties in executing the first generation of ADR projects have been recognized, and is attributable to the fact that the execution periods established for the first set of projects were too short and therefore unrealistic.

**Table 3.3: Projects in execution**

<b>Mature</b>							
<b>Country</b>	<b>MIF/AT No.</b>	<b>Project name</b>	<b>Date of approval</b>	<b>Execution in months</b>	<b>Amount approved</b>	<b>Amount cancelled</b>	<b>% disbursed</b>
BR	MIF/AT-235	Mediation and arbitration center	2/3/99	54	1,599,400	0	38
CH	MIF/AT-232	Commercial Arbitration	2/3/99	56	650,000	3,000	66
VE	MIF/AT-262	Commercial mediation and arbitration	7/21/99	42	729,170	0	66
NI	MIF/AT-286	Support for property disputes	9/22/99	42	982,456	0	66
ME	MIF/AT-341	Support for commercial disputes	7/26/00	42	1,352,500	594,675	59
<b>Early</b>							
AR	MIF/AT-322	National mediation and arbitration	4/26/00	42	1,000,000	10,000	18
AR	MIF/AT-434	Private job placement services	9/19/01	42	1,730,000	0	5
BO	MIF/AT-364	Commercial arbitration	10/20/00	42	300,000	0	20
ES	MIF/AT-95	Commercial law and dispute resolution	10/30/96	69	662,000	0	19
TT	MIF/AT-317	Alternative dispute resolution system	3/17/00	36	383,500		21

## **B. Analysis of the seven dimensions in the evaluation matrix**

3.6 This section will measure the seven dimensions defined in the evaluation matrix: relevance, effectiveness, efficiency, innovation, sustainability, additionality and evaluation. The sources of information used to analyze each of these dimensions were:

- a. *Surveys of executing agencies:* A survey was sent to each of the executing agencies to obtain information on different aspects of execution.
- b. *Tabulated data:* A fiche was prepared for each project, compiling specific data on general project performance. The length and complexity of the fiches varied significantly in cases in which field visits were paid.
- c. *Monitoring and evaluation materials:* They include the semiannual reports prepared by the executing agencies, the MPPMRs prepared by the MIF specialist at the Country Office and the mid-term and final evaluations.
- d. *Other sources:* They include the material collected from interviews held in Washington and in the countries, publications, seminars and congresses.

### **1. Relevance**

3.7 This section determines whether the ADR projects were relevant or not in the context of private sector development. It should be recalled here that the strategic intentions announced in the project documents were, generally speaking, to facilitate the resolution of commercial disputes through the use of ADR, with a view to improving the climate for business relations and investment and helping to clear up the backlog in the ordinary justice system. Annex VI presents some analytical indicators that may be useful in determining the relevance of ADR.

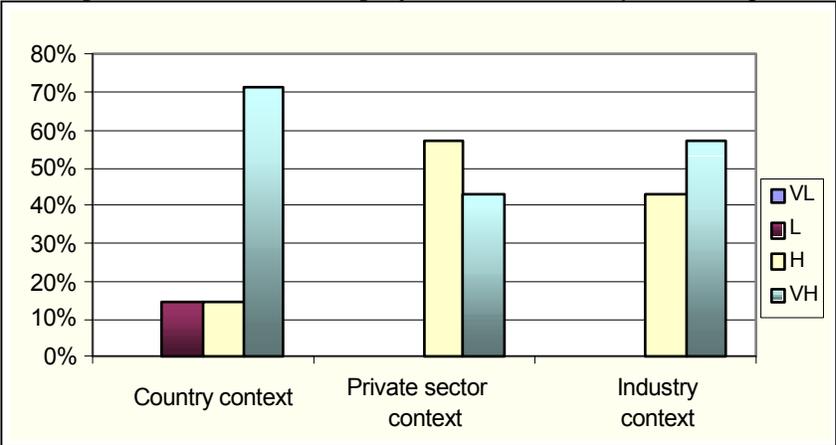
3.8 If we take the information on the situation of the judicial branches in Latin America presented in Chapter I as the reference point, it can quickly be seen that the MIF's intervention with ADR projects was intended to address a crucial area for private sector development in Latin America. Regardless of whether the tool used was the

best one available, the decision to get involved in this market was undoubtedly a good one. The absence of an efficient, independent, accessible and transparent judicial branch was a fundamental obstacle for private sector development and higher investment.

3.9 It is not difficult to deduce that in the few countries where the judicial branch operated suitably, the relevance of the MIF intervention with its ADR projects is significantly less. This is true in Uruguay, which performs well in international rankings in the justice sector. Taken together with Costa Rica, these are the two Latin American countries with the best judicial performance.

3.10 Graph 3.2 provides information from the case studies. It shows the high relevance of ADR projects in reference to the context in the countries and the context in the private sector and industry. The column showing a low level of country relevance corresponds to the project in Uruguay.

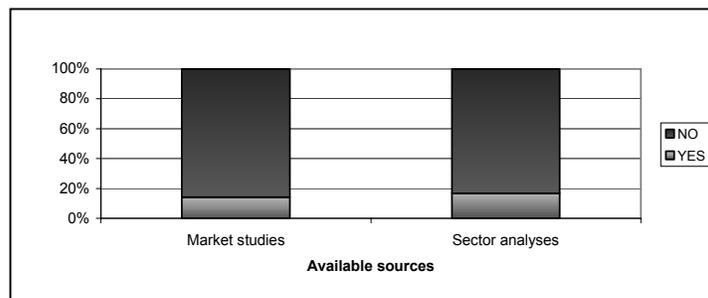
**Graph 3.1: Relevance of the projects at the time they were designed**



3.11 Although the relevance of the MIF’s interventions was generally high, in many cases not all the conditions necessary to launch ADR projects were present. The use of alternative dispute resolution methods such as arbitration and mediation is only legally valid in countries where the legal framework recognizes them. In the cases of Honduras and El Salvador, operations were approved despite the absence of the necessary minimum legal framework. This meant that execution times were drawn out unreasonably, as the projects awaited passage of the new legislation by congress. Interventions of this kind, where not all the conditions necessary for project approval are present, are always risky, since if the legal framework for ADR is not approved, the projects are truncated.

3.12 Another important aspect is the level of knowledge of the market that exists at the time operations are designed. No studies were conducted to learn more about the situation, characteristics or size of the market for alternative dispute resolution mechanisms in the region as a whole. The ADR portfolio was launched without adequate information on the market it was intended to influence.

**Graph 3.2: Information on the needs of beneficiary clients available when the projects were designed**



- 3.13 The situation is much the same with respect to ADR operations in each of the countries. In virtually every case, operations were designed without conducting market studies or sector analyses. This is a serious failing, since it can lead to errors or missed opportunities. For example, in most countries, associations of SMEs were overlooked as a possible segment for work with arbitration or mediation. In the design stage, the stakeholders were not analyzed nor were the different players who should or could potentially be involved in the ADR market consulted. The MIF teams that designed the operations always dealt directly and exclusively with the chambers of commerce.
- 3.14 One of the crucial aspects for the success of projects is finding suitable partners for their execution and working closely with key players in industry and with leaders and agents for change. The ADR projects were unusual in this aspect since, in almost all the countries, they worked with exactly the same institution: the local chamber of commerce. In 1994, MIF staff came in contact with the Chamber of Commerce of Bogota's experience in arbitration and mediation through a Bank official who had been employed by that institution. Since its arbitration and mediation center worked very well, the MIF decided to support it financially and to replicate the model in other countries in the region. This explains why all the projects after Colombia (1995) worked inevitably with the chamber of commerce of the respective country.<sup>18</sup>
- 3.15 The results of this practice of working exclusively with chambers of commerce were uneven. In some cases it was one of the keys to the success of the projects, while in others it was one of the reasons for their failure. In the case of Chile, working with the Santiago Chamber of Commerce was a great success. It has a long history and excellent relations with the private sector and with the most prominent figures in the country's public sector. Its financial solvency and institutional prestige make it a key player in the private sector. The experience with the Confederation of Commercial Associations of Brazil, which played a key role in the success of the project in that country, was similar.
- 3.16 In the case of Mexico, the executing agency was the Instituto Tecnológico Autónomo de Mexico (ITAM), but the Chamber of Commerce of Mexico City received financing

<sup>18</sup> The only exception is the project to settle property disputes in Nicaragua where, owing to its specific nature, the work was done with the Supreme Court.

to consolidate the activities of its arbitration center. However, a visit paid to the center when this evaluation was being prepared found that although it is interested in ADR and is carrying out different dissemination activities, the results so far have been meager.

## **2. Effectiveness**

- 3.17 The effectiveness of the MIF projects is measured in terms of whether they achieve the proposed objectives. In this section, effectiveness will be examined from three angles: risk prevention, contingency management and project results.
- 3.18 Risk prevention in ADR projects has not been good. In general, the risks were identified as resistance to a change in culture and the lack of specialized human resources. But those risks were simply the purpose of the projects and therefore it was wrong to classify them as risks. What the projects were attempting to do was precisely to disseminate a new culture of conflict resolution and to do so, it is necessary, among other things, to overcome resistance to change and train professionals.
- 3.19 Furthermore, many of the projects ignored the risks inherent in their execution plans. In the cases of Argentina, Peru, Brazil, Colombia and Mexico, the projects required close coordination, owing to the host of actors and activities included in the execution stage.

### **Box 3.1: Colombia: A model for all of Latin America**

The case of the Mediation and Arbitration Center of the Chamber of Commerce of Bogota (CCB) is one of the most successful projects in the ADR portfolio and it served as a model for other similar projects. The MIF's support consolidated the operation of the center and transmitted its experience to 70 more centers elsewhere in the country (today more than 150 centers are operating). It also contributed to the design of models for institutional strengthening, training for arbitrators, mediators and multipliers, and the dissemination of strategies and training on the national and international levels. It led to the development of systems for tracking cases and incorporated the latest technology in the day-to-day operations of the center's many offices. With regard to the volume of operations, the center grew from an average of 30 cases a year in 1991 to 371 cases in 2000-2001, representing claims of Col\$3.2 billion.

The center has designed projects with a deep social impact. Its activities in poor communities and schools are very successful. In just over two years, the community mediation centers in Engativá and Cazucá have handled more than 3,500 cases. With MIF financing, the CCB designed the Ariadna program for schools which is being applied in 48 educational institutions. The object is to help solve conflicts in schools and create a culture of co-existence for Colombian children. The Ariadna program currently has the potential to cover 23,864 children and teenagers.

The success of the center can be seen in its market creation. In less than five years, it has been able to increase its income by 1,000%. In 1997, the center earned Col\$100,000, while in 2001 it brought in Col\$1.026 billion, with Col\$113 million coming from international projects, Col\$350 million from income from training activities and the remaining Col\$525 million from fees for arbitration and mediation services.

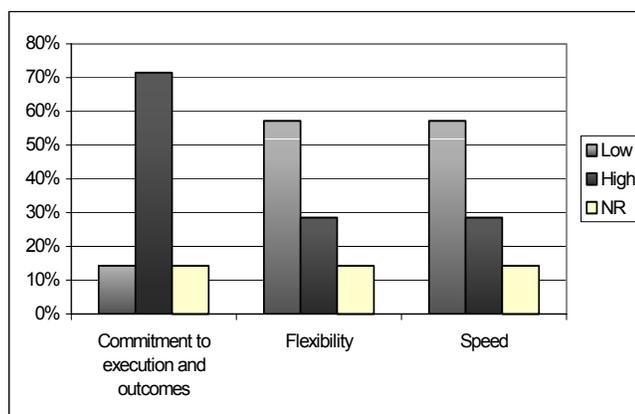
Most importantly, the CCB experience served to consolidate the use of ADR in Colombia and in other Latin American countries. Thanks to MIF financing, the CCB's operating model has been replicated throughout the region. Center directors and officials have provided technical assistance to develop arbitration and mediation centers in nearly all the countries of the region. The CCB has become a lead institution on the national, regional and international levels in the settlement of commercial disputes and currently acts as Directorate General of the Inter-American Commercial Arbitration Commission.

- 3.20 In Colombia, the Arbitration and Mediation Center (AMC) of the Chamber of Commerce of Bogota served as coordinator of institutional strengthening, training and dissemination services for a group of more than 70 centers in the country's interior. In Peru, the executing agency (APENAC) was called on to coordinate a host of activities in Lima and in the interior, including pilot centers for dispute settlement in marginal communities, pilot centers in the courts in Lima and the interior, violence reduction programs in schools, training and dissemination programs throughout the country, publications, pilot experiences at judicial headquarters, etc. In Argentina, the Argentine Chamber of Commerce was called upon to establish a network of at least 32 AMCs country wide, provide them with human resource training, transfer know-how for their institutional management and disseminate the program nationally to ensure sustainable demand for mediation and arbitration services.
- 3.21 The complexity of the institutional arrangements in the execution stage is never included among the risks identified by the projects. In practice, it has caused delays, since the capacity of the executing agencies to coordinate and carry out all the activities on time and as planned becomes saturated. To forestall these problems, more decentralized execution plans could have been designed, which would ease the burden on the central executing agency and ensure that other AMCs participate in activities, thereby contributing to their institutional learning. In Colombia, for example, several AMCs in the interior complained of the excessive concentration of functions in the Bogota Chamber of Commerce, not just because this delayed execution, but because the activities were overly oriented to the situation in the capital and failed to consider the problems of other regions.
- 3.22 Another risk that was not taken into account was the institutional weakness of the executing agencies and the beneficiaries. In many cases, the chambers of commerce had no experience in the administration or execution of projects with international agencies and did not have suitable staff for carrying them out. In Mexico, for example, there were serious problems with the project beneficiaries. The executing agency (ITAM) is doing excellent work, but just two of the seven AMCs that were originally selected to receive MIF financing are still participating in the project.
- 3.23 In some cases, the institutional weakness lies in the fact that the executing agency or the beneficiaries had very little experience at the time they joined the MIF project. Looking again at the case in Mexico, one of the arbitration and mediation centers was established at the same time as the technical-cooperation project was approved. The institution was withdrawn from the project shortly after execution began. In Peru, the executing agency (APENAC) was established specially to execute the MIF project. In this case, there was a happy ending, since APENAC worked extremely well and there were no major problems in execution. The problem was not the lack of experience of executing agencies, but that their institutional capacity was not properly analyzed with a view to providing them with the necessary support.
- 3.24 One element that was not often foreseen in the design was the potential opposition to change by attorneys and magistrates. In some projects, attorneys reacted negatively, since they believed that the projects would shrink their market and they would lose

income. In other cases, magistrates saw the projects as promoters of a kind of private justice that undermined their importance and functions. This opposition can be contained by establishing institutional partnerships with the judicial branch and the colleges of attorneys. More work can also be done with law faculties, in training and teaching and in extension activities through their legal consulting services.

- 3.25 The data tabulated and the surveys of executing agencies indicate that external events do not generally have a strong influence on project execution. However, in Honduras and El Salvador, the Congress was slow to pass the necessary legislative amendments, causing lengthy delays. In El Salvador, the delays are on the verge of shipwrecking the project. The situation in Argentina is special. The severe economic crisis afflicting the country has also been felt in project execution, particularly the willingness of the AMCs to provide counterpart resources. The instability in Venezuela in the last two years has been an obstacle to holding conferences with international panelists.
- 3.26 The MIF's response to needs to adapt the project can be analyzed by looking at different variables. One is the commitment to project execution and outcomes. The role of the Country Offices has been very positive in this regard, since they demonstrated interest in execution and the achievement of the objectives. The other two variables are speed and flexibility. In the interviews with the executing agencies, problems in terms of the speed of responses to requests made to the Country Office were frequently mentioned. The executing agencies also reported lack of flexibility when it came to making changes in activities or the project's budget.
- 3.27 The problems with speed and flexibility can be explained in two different ways (which are not necessarily incompatible). First, the MIF used a similar model for all its ADR projects. In nearly all the countries, the model was based on the experience of the Chamber of Commerce of Bogota. And over time and with the approval of new ADR operations, the model became even more highly consolidated. The meant that in many cases the execution scheme became rigid and proposals for changes in the original model were often not looked upon favorably by the Bank's Country Offices. Second, in nearly all cases, the staff assigned to MIF projects in the Country Offices had no prior knowledge of how the AMCs operated and were not experts in ADR. As a result, the general tendency was to refrain from making changes in the model out of the fear of making mistakes. The resistance to approving changes in the projects became stronger when there were no longer any officials at Bank Headquarters with experience in ADR.

**Graph 3.3: Bank/MIF response to needs for adaptation**



**Box 3.2: El Salvador: Absence of a legal framework for arbitration. A project doomed in advance?**

Project ATN/MT-5391-ES was approved in October 1996 despite the fact that local legislation did not give adequate recognition to arbitration. To surmount that obstacle, the project included a component to draft an arbitration law and financed the creation of a drafting committee. This meant that until the new legislation was passed, the Chamber of Commerce of El Salvador was unable to start up its arbitration center.

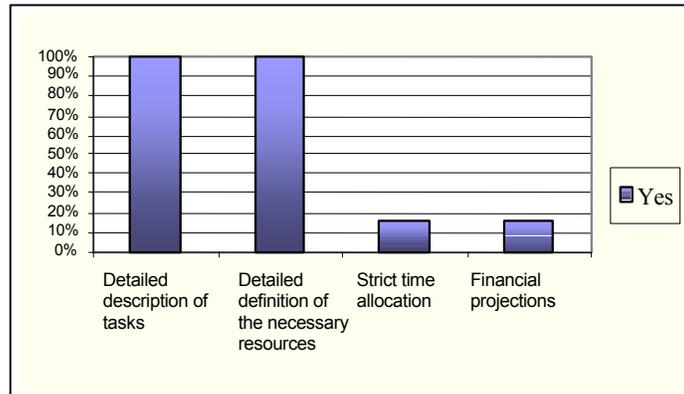
Passage of a law is always subject to political contingencies and the new legislation was not passed until June 2002. In the almost seven years since the MIF technical-cooperation project was approved, just 19 percent of the funds were disbursed. The successive extensions in the execution period and the impossibility of complying even modestly with the project objectives within a reasonable period have led the Country Office to consider canceling the operation.

- 3.28 The projects in the ADR portfolio were highly effective in obtaining the expected **outputs**. Although some operations were changed during execution, generally speaking, all the outputs envisaged in the designs were obtained. According to the data tabulated, all the completed projects that were visited for the purposes of this evaluation obtained very high scores in that regard.
- 3.29 However, the score is not as high when it comes to measuring the desired **impact**. In many cases, the projects did not have the expected results, despite the fact that all the tasks were performed. For example, in the case of Uruguay, all the activities were carried out, but the project did not generate demand for ADR services. The situation in Nicaragua and Mexico is similar, since despite the progress in project execution, the outcomes in terms of impact have been much lower than expected. In Mexico, for example, both CANACO and the AMC had very few cases in 2001.

**3. Efficiency**

- 3.30 This section looks at efficiency levels in ADR projects, stressing the use of financial resources and time management. It examines the planning of activities, allocation of resources, administrative management in the execution stage and productivity.
- 3.31 The planning of activities was adequate in almost all the ADR operations. The project documents contain detailed descriptions of the tasks to be carried out in the execution stage and provide information on each component and its respective outputs.
- 3.32 However, the projects were not efficient in determining time lines. In many cases there was not only a failure to prepare a detailed determination of the times required for each of the components but, even more importantly, no strategy was designed for project execution. In other words, no sequence of execution was determined for the different components that gave priority to the ones that should have been executed first, owing to their nature or importance.

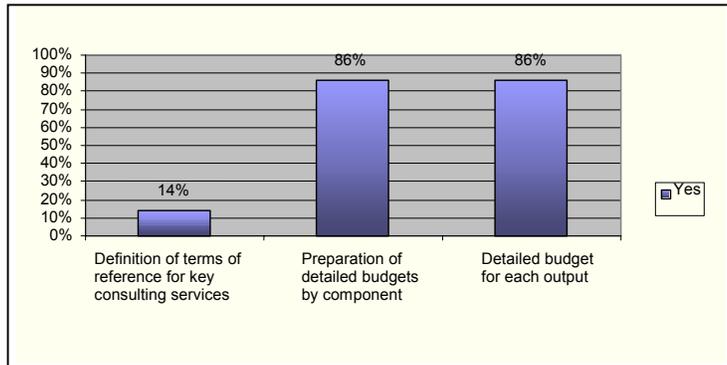
**Graph 3.4: Planning of activities**



3.33 One of the weak points in efficiency was the failure to define key consulting services in advance of project execution. This failure led to delays in the initial stages of execution. Since all the ADR projects are virtually identical, all require the same kinds of consulting services, and there are many consultants who have provided the same services for different projects, it would have been very easy to define the basic consulting services for all the projects in advance.

3.34 The definition of budgets and the definition of key consulting services are both important factors for the initial stages of the projects, particularly in cases where the executing agency has no previous experience in projects of this kind.

**Graph 3.5: Planning and ex ante allocation of key resources**



3.35 According to the data tabulated, with the sole exception of Nicaragua, none of the executing agencies had previous experience in executing or managing projects with international agencies. To mitigate the potential impact of this lack of experience on the pace of project execution, training could have been provided for the executing agencies in the administrative procedures most frequently used in the Bank/MIF, such as procurement, consulting services, disbursements and contracting. In virtually all the cases studied, no training of any kind was provided for the executing agencies.

3.36 This lack of information and training is linked to the delays in execution. In the survey of executing agencies, contracting of consulting services and the contracting process were mentioned on repeated occasions as elements that were obstacles or that caused significant delays.

3.37 The “efficiency” dimension should be examined from the standpoint of overall management of the ADR portfolio. As explained earlier, the projects are all virtually identical, with just minor differences to satisfy the conditions in each country.

However the format of the components is similar in all cases. Also, the consulting services and outputs required in each project are generally similar.

- 3.38 It follows that outputs and consulting services are repeated from project to project. Software for case management in the AMCs is a good example of this repetition. Resources were not used efficiently, since the MIF financed development of the same software in many different projects. In other words, the MIF agreed to finance software in each project that needed it. Instead of paying for the software once and then distributing it free-of-charge to every project, it repeated the same cost a number of times.
- 3.39 The first project that financed software for case management in the AMCs was in Colombia. Then, the same project was financed in Uruguay. Uruguay's Chamber of Commerce used the funds for this item to buy the software that had been designed for the Chamber of Commerce of Bogota. There was an unsuccessful attempt to get Bogota to give the software free of charge to its counterpart in Uruguay, since it had been financed with MIF funds. Subsequently, the same thing happened with the Chamber of Commerce in Chile, which received financing to develop the same product. And the story repeated itself in the cases of Venezuela, Brazil, Nicaragua, Trinidad and Tobago, Panama and Argentina.
- 3.40 A similar problem was encountered in the development of virtual libraries. Internet sites that made an array of information, publications, studies, etc., on alternative dispute settlement mechanisms available to the public and promoted their use were developed in several countries. But once a library had been financed in one country, it was not taken advantage of in the others.<sup>19</sup>
- 3.41 What happened with the software also happened in other areas. For example, in Colombia, excellent training models were developed that produced optimum results nationally. The opportunity of taking this model and using it in the ADR portfolio was missed. Since the MIF had paid for the materials, it had the possibility and right to apply them in other cases. However, the practice of having each project design and pay for its own products was maintained.
- 3.42 One area where severe failings in efficiency were detected was in the mid-term and final evaluations.<sup>20</sup> First of all, no criteria could be found for determining which projects would include a mid-term and/or final evaluation.
- 3.43 Second, the differences in determining how much money would be spent on evaluation activities are disconcerting. At the upper end, we have Argentina with US\$60,000, followed by Uruguay and Mexico with US\$40,000, while at the lower end we have Bolivia with just US\$8,000. There are also differences in the number of evaluations to be performed. In some cases, both mid-term and final evaluations are

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<sup>19</sup> The Bolivian project also included the creation of a virtual library.

<sup>20</sup> Of the 18 projects analyzed, 11 provide for a mid-term evaluation and 10 include a final evaluation in the budget.

included, while others include just the final or just the mid-term evaluation or neither of the two.

- 3.44 A serious problem was also detected with information management. It was very difficult to obtain the mid-term and the final evaluation reports. In almost every case, the Country Offices said they had been remitted to the MIF in Washington, but despite consultation with staff at Headquarters, it was impossible to locate the reports and there is no record of their having been received (except in the case of Guatemala, where the final report had been remitted to the person in charge of programming new projects). The Country Offices, for their part, destroy all the information after a given time, and therefore it was impossible to obtain some of the evaluations, except where the consultant or project director had kept them in their personal files (Peru and Colombia).
- 3.45 The unavailability of the final reports is a symptom of various problems. On the one hand, the opportunity of studying the projects and learning from their successes and failures is lost. On the other, it points to problems in portfolio management. Last, the absence of a mechanism for compiling the evaluations is an inefficient use of the funds earmarked for measuring the impact of projects. The total aggregate investment in evaluation reports is about US\$384,000.
- 3.46 As for efficiency in the use of time, problems were detected with execution periods. There was a significant gap between the planned and real execution periods. By way of example, the Uruguayan program was designed to be implemented in 24 months, but ended up taking five years to carry out all the activities. The case of Honduras was similar, with a difference of almost three years in the period originally planned for the last disbursement. Last, in the case of El Salvador, the operation was approved in October 1996 but was only declared eligible in May 1999 and, as of August 2002, less than 20 percent of the funds had been disbursed.
- 3.47 Many of the aspects analyzed in this and other sections serve to explain the problems with efficiency in time management. The failure to define key consulting services prior to the start of execution, lack of knowledge of the market and the scant experience of the executing agencies are some of the main causes of the delays. The lack of specialized staff at Headquarters and in the Country Offices also contributed to them.

### **Box 3.3: Uruguay. Scant relevance of ADR and lack of knowledge of the market**

Project ATN/MT-5061-UR financed the start up of the Arbitration and Mediation Center of the Uruguayan Chamber of Commerce and a series of publicity and training activities. The main objective was to improve the climate for business relations in Uruguay and the region through the use of ADR. No sector or market studies to identify private sector problems or the different uses that could be made of ADR based on the judicial and political context in the country were carried out during the design stage, nor were there studies conducted of the impact of MERCOSUR on trade relations and the demand for justice services.

However, the project affirmed that "...the increase in trade flows, coupled with the adoption of new commercial instruments and modalities ... has led to an increase in the number of commercial disputes" and added that "the legal system on the regional level is unable to cover the increase in demand owing to a number of institutional deficiencies... This has led to the erosion of legal protection in the region." Later, the project document states that despite the growing number of commercial disputes of increasing complexity and the difficulties encountered by the justice system in serving this demand, no alternative dispute settlement mechanisms have been established. Many of these affirmations are partly or totally incorrect and are not backed by empirical information. Furthermore, the project failed to realize that Uruguay is one of the few countries in Latin America with an efficient judicial branch, with high levels of public approval. Since the justice system is reliable and efficient, there are no incentives to have recourse to arbitration and mediation centers. This meant that after the end of the project, there was almost no demand for ADR services and that the Board of Trade's International Arbitration and Mediation Center is virtually inactive.

## **4. Innovation**

- 3.48 This section examines the level of innovation in the MIF projects. At the start of the 1990s, the use of alternative dispute settlement methods was practically unknown in Latin America. Except for a few countries where arbitration was carried out on a very small scale, these methods were a highly unusual practice. When the MIF launched its portfolio of ADR projects in 1995 with the approval of the Peruvian project, it took a risk in wagering on an area that did not appear on the agenda of any international organization and was not included in the judicial reform plans of the countries of the region.
- 3.49 In this context, the level of product innovation was clearly very high. The MIF offered nonreimbursable financing for an area that was virtually unknown, not just to the public in general but to the judicial community as well. The Peruvian project was a pioneer in the MIF's ADR portfolio.
- 3.50 In addition to being an innovative product per se, as the portfolio of ADR products grew, innovative elements were incorporated as a consequence of adapting the projects to each of the countries. The emphasis on mediation in Peru is linked to the high levels of social violence and conflict in the country in the previous decade. In Nicaragua, the arbitration and mediation centers are being used to resolve property conflicts that were created by the expropriations that took place under the Sandinista government.
- 3.51 The ADR projects introduced innovations linked to the new processes of regional integration since the end of the 1980s. In Uruguay, for example, the intention was to use ADR (unfortunately without success) to improve the framework for trade and investment in the MERCOSUR countries. Something similar happened in Trinidad

and Tobago, where the project objectives included contributing to the use of arbitration and mediation in the Caribbean, on the subregional level.

- 3.52 There were also thematic innovations in projects that included unusual areas for arbitration and mediation. For example, the projects in Peru and Colombia included school and community mediation. The projects in Brazil and Peru included labor mediation. Others included the use of mediation for the protection of consumer rights and the use of mediation in the courts. There were also product innovations in projects that included the use of technology for case management, transparent fee systems available over the Internet, the creation of virtual libraries and publication of a collection of arbitration rulings.
- 3.53 The projects also involved innovations in execution. In the case of Colombia, the Chamber of Commerce of Bogota was in charge of coordinating activities on the national level with more than 70 centers. In the case of Brazil, a model was used in which the executing agency transfers a franchise for the operation of AMCs to interested parties throughout the country. The case in Argentina is similar. The Argentine Chamber of Commerce transfers know-how to centers in the interior and also has the objective of establishing a national network of arbitration and mediation centers. Last, in Mexico the ITAM was engaged to act as coordinator of a project that involved seven AMCs in different parts of the country.
- 3.54 However, the rigid application of the Colombian model, coupled with the absence of market or sector studies in the project design stage, meant that sometimes opportunities to be even more innovative were lost. Interesting opportunities were missed with regard to target groups. For example, in most cases, the possibility of working with small and medium-sized enterprises (SMEs) was overlooked. This is a segment that encounters great difficulties in gaining access to legal services and which could have benefited from the MIF projects. Also, broadening the spectrum of users (and potentially the demand for services) could have increased the possibilities of making the AMCs financially sustainable.

### Box 3.4: Success in Peru. The other path?

When the MIF launched its ADR portfolio in 1994 with approval of a project to promote alternative dispute resolution mechanisms in Peru, the country's experience in arbitration and mediation was in its infancy. There were only two arbitration centers and some isolated experiences in mediation. The MIF project covered a very broad spectrum of activities, but focused mainly on mediation, supporting training for representatives of the judicial branch, the private sector and the civil service. It also financed pilot projects for school, community and court mediation, protection of consumer rights, training for multipliers, institutional strengthening of the Arbitration Center of the Chamber of Commerce of Lima and different dissemination activities.

If the current state of ADR in Peru is compared with the picture in 1994, the results are amazing. Thanks to the MIF's intervention, the use of ADR has spread dramatically in Lima and in the interior. According to data for 2002 from the country's Ministry of Justice, 500 private conciliation centers are operating around the country and there are 11,857 trained conciliators. The Ministry of Justice has 31 centers of its own.

The impact of the project is clear from the volume of cases processed in the conciliation centers. From 1999 to 2002, 31,203 conciliation cases were instituted country wide, and 27,195 of them concluded satisfactorily. The Arbitration Center of the Chamber of Commerce of Lima went from two cases in 1993 to an average of 182 in 2000. The average duration of arbitration cases is five months and 20 days, which is far below the average of three years and 10 months in cases heard by the judicial branch. Use of ADR for consumer protection was equally successful. Over the period 1999-2001, INDECOPI processed 10,806 cases and 71 percent of them were successfully settled through the use of conciliation. Last, conciliation in schools, in courts and in marginal communities was equally successful.

Based on the results obtained with the MIF project, the executing agency (APENAC) signed agreements and executed projects with USAID, the Tinker Foundation, CMG of Harvard University and different public agencies. Some of the people who participated directly in project execution went on to found new organizations to promote ADR in Peru (IPRECOM and MARC/Peru).

Although almost none of the activities financed under the MIF project survived the passage of time, there is no doubt that the operation was a great success, since it helped to irreversibly introduce the use of ADR. Furthermore, leadership in the promotion of conciliation is carried out today under private initiative. The project also paved the way for use of conciliation in areas with high social content, such as conflict resolution in schools and communities.

- 3.55 The tendency to always use the same model meant that working methods which could have helped to increase project impact were excluded. In Uruguay, for example, more work could have been done with the government. Although the MIF projects in this field tried to avoid working with the public sector, in Uruguay's case this could have been an option, considering the prestige enjoyed by the judicial branch. In other countries, partnerships could have been developed with public universities to broaden the field for dissemination and training. In Argentina, more stress could also have been placed on the academic world and greater use of ADR could have been promoted in the interior, where there are areas that are completely unfamiliar with the practice.

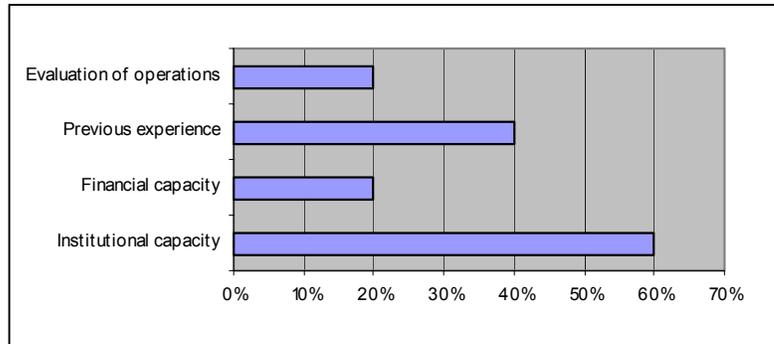
## 5. Sustainability

- 3.56 One of the MIF's key concerns is to ensure that its projects become self-sustaining and that activities are maintained and grow after its projects are completed. Sustainability has been one of the core issues in ADR projects.
- 3.57 The first aspect of sustainability of interest here is an analysis of the capacity of the executing agencies. As was explained earlier, after the Colombian project, a decision

was made to work exclusively with the chambers of commerce of each of the countries. This excluded the possibility of working with other institutions that could also have been trained to execute the projects. But the MIF clearly felt comfortable with the chambers of commerce, finding them to be reliable partners, relatively efficient and, in general, with long institutional histories and solid financial backing. Even more importantly, the chambers of commerce are institutions that can reach the private sector, particularly medium-sized and large entrepreneurs.

3.58 In this context, the MIF failed to conduct in-depth studies of the financial solvency or institutional capacity of the chambers of commerce, since the decision to work with them had already been made beforehand. Graph 3.6 indicates that levels of analysis were generally low. But it should be noted

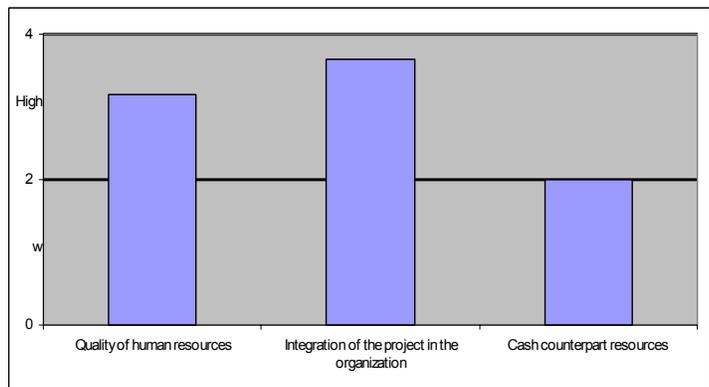
**Graph 3.6: Frequency with which executing agencies were analyzed in advance**



that there is no institutional uniformity among the chambers of commerce of the different countries. The Chamber of Commerce of Chile, for example, is a powerful institution with large financial resources, while the Chamber of Commerce of Uruguay or the Chamber of Commerce of Valparaíso are institutions with much less financial backing, although they have long institutional histories. The Chamber of Commerce of Bogota, on the other hand, is one of the private institutions with the greatest weight in public life in Colombia. However, in other countries, the chambers of commerce do not have the same influence on political life. This leads to the conclusion that working with institutions that have the same name and theoretically the same functions does not mean that their institutional nature is identical.

3.59 Another relevant aspect of sustainability lies in the capacity demonstrated by the executing agencies to push forward with project execution. The chambers of commerce have performed excellently in this regard. With few exceptions, the human resources involved are of high caliber, with professionals from such fields as law, psychology, accounting, pedagogy, business administration and education sciences.

**Graph 3.7: Level of commitment by the executing agencies**



### **Box 3.5: First positive signs in Brazil: Success Brazilian style?**

The MIF's strategy for disseminating ADR in Brazil presented some differences with other projects. Instead of financing the creation or consolidation of a given institution, it worked on the macro level by creating a national network of arbitration and mediation centers. The role of the executing agency, the Confederation of Commercial Associations of Brazil, was to develop and promote a franchise for the creation of centers that would join the network once they were operational.

The project was organized into three main components to achieve the above objectives. The first was strengthening the administrative and technical capacity of the AMCs, including market studies, research on entities already operating in the area, construction of a model for AMC costs and operations for a kind of franchise. The second main component was training on the national level for a network of specialists (existing and potential arbitrators and mediators). The third component was to consolidate a change in the culture of litigation through mediation and arbitration in order to generate higher demand for the network of AMCs that was being mounted, which included the development of a marketing plan, information packages on services, promotional visits to different regions, and a virtual library to offer general information.

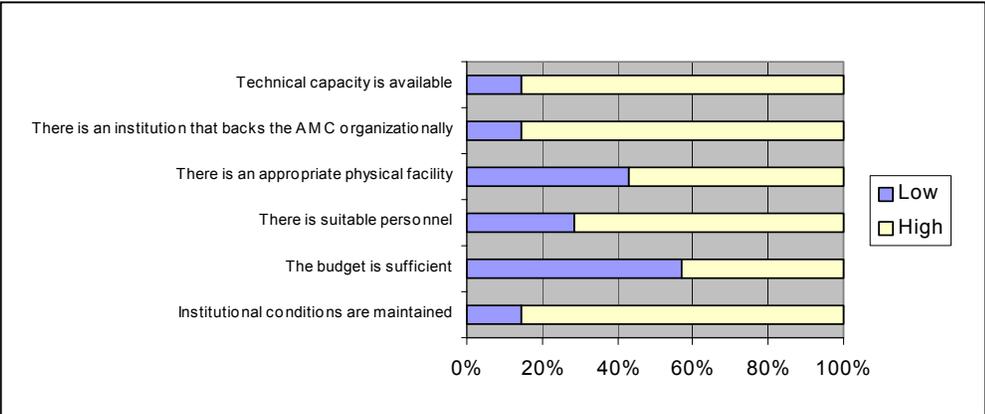
Although the Brazilian project is still in execution, the operation has obtained very satisfactory initial results and, given the size of the Brazilian market, it has the potential to become one of the largest operations in Latin America and the Caribbean. The original goals have already been surpassed and 45 centers are currently associated with the network, which have already processed about 6,000 cases (out of an initial goal of 360). More than 20,000 contracts containing arbitration clauses have been registered. These figures indicate that this is one of the most successful experiences in the region.

- 3.60 The relationship between the executing agencies and the Bank/MIF is generally good. Some executing agencies, as was mentioned earlier, expressed their concern over slowness to respond and in other cases they pointed out the need for more training in the Bank's administrative procedures to improve relations with the Country Office. Also, it was frequently mentioned that it would have been desirable to have more contact with the MIF at the Country Office and in Washington. Some executing agencies said that relations with the Bank/MIF were based on "a great deal of quantitative contact but little qualitative contact", referring to the Bank/MIF concern with performance indicators and not with the quality of the outputs or the learning process in the executing agency.
- 3.61 The final aspect of sustainability of interest here is the "institutionalization" of the project, in other words, whether it is financially and institutionally feasible to operate. The aspect of greatest concern in this regard is undoubtedly finances. Although there is a high level of commitment to the projects by the executing agencies, in many cases, financial sustainability is not assured. Of the projects visited, only Colombia has attained income levels that make the long-term future of the AMC a certainty. Also, although the project in Chile is still being executed, it has already shown signs of being self-sustainable. The project in Uruguay has continued to function, despite the paucity of cases, by holding costs down to the bare minimum. There are serious

doubts that the project in Nicaragua will be sustainable in the long term, since unlike Uruguay, its fixed annual costs are a sizeable US\$340,000.

3.62 Financial sustainability is linked to a project’s capacity to achieve the desired impact and generate adequate demand for ADR services. This is undoubtedly the main bottleneck for arbitration and mediation centers. Other relevant aspects are easier to assure, such as suitable personnel, appropriate premises, and institutional backing.

**Graph 3.8: Institutional feasibility of continuing to provide the services**

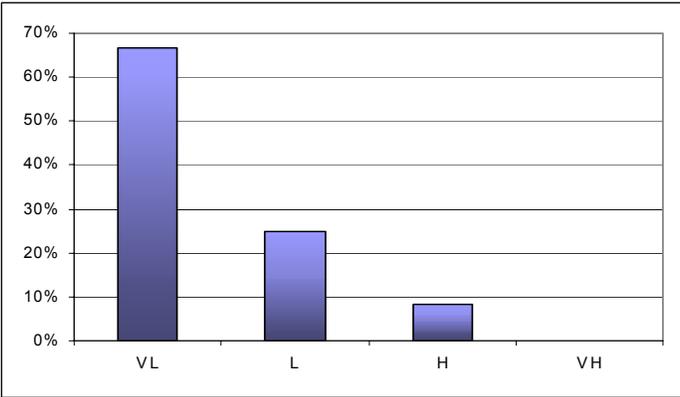


**6. Additionality**

3.63 The additionality dimension is intended to identify whether the ADR projects could only have been carried out thanks to the MIF’s intervention and whether the Fund’s participation allowed conceptual elements different from the original idea to be included.

3.64 The MIF’s interventions have played a key role in promoting the use of ADR in Latin America. Without the MIF’s support it would have been very difficult to reach its present level of development. Today, the use of mediation and arbitration in commercial disputes has grown to a scale that would have been unthinkable only a few years ago. Graph 3.9 shows that in 95 percent of cases, the possibility of obtaining the products without MIF financing is for the most part either very low (65 percent) or low (25 percent).

**Graph 3.9: Probability that the project’s outputs and outcomes would have been obtained without MIF financing**

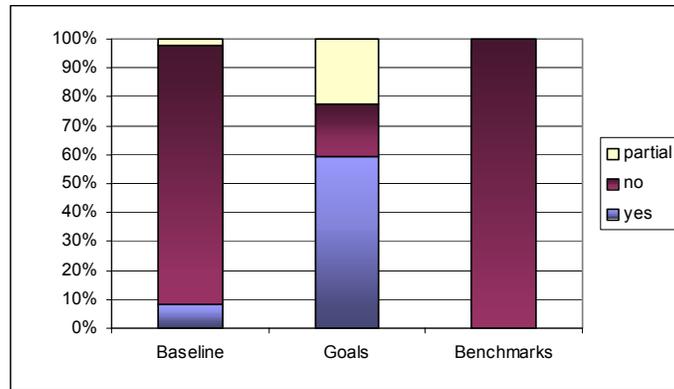


- 3.65 The additionality brought by the MIF to the original idea was very high. In most cases, the countries had no experience with ADR for commercial disputes. In addition to financing, the MIF contributed a defined methodology and its know-how for project execution.
- 3.66 Apart from promoting the use of ADR in the region, there were other unexpected impacts. The MIF financing helped to modernize the region's legislation on arbitration and mediation and make it more homogeneous. It also contributed to the consolidation of the Inter-American Commercial Arbitration Commission (IACAC), since many of the AMCs that received MIF financing went on to become national chapters of the IACAC.
- 3.67 One of the aspects of additionality that calls for evaluation is the synergy between projects. The ADR projects have had virtually no interaction with other Bank projects. Except for Nicaragua, where the project was closely related to operations ATN/SF-4904 and ATN/SF-5307, the other projects did not tap the possible synergies with other Bank Group operations. Some IDB loans for reform of the justice sector contained activities linked to ADR. This was the case in operations in Argentina, Honduras and El Salvador, but there was no contact at all between the projects.
- 3.68 There were other countries that simultaneously executed separate ADR projects and judicial reform projects that did not have ADR components. An attempt could have been made to achieve greater interaction between the two, but that was not the case. The countries in question are Uruguay, Peru, Colombia, Panama and Guatemala.
- 3.69 However, there was good interaction between ADR projects in different countries. As mentioned earlier, many directors and officials from the Bogota Arbitration and Mediation Center participated actively in other ADR projects. For example, two former directors of the center acted as consultants in Uruguay, Guatemala, Brazil and Peru. There was also an extensive exchange of experiences among the projects. In some cases, such as Mexico and Panama, financing was made available to the directors of the AMCs for study visits to the Bogota center.

## **7. Evaluation**

- 3.70 This section will attempt to determine the extent to which the ADR projects were designed so that they could be evaluated. It will also examine systems for monitoring execution and whether provisions were included for impact evaluations.
- 3.71 In general, the projects have numerous output indicators. In most cases the indicators have goals, but in almost all cases they are incomplete (for example they refer to the quantity of a product to be obtained but are silent on the time frame for producing it). Further, it is not common to find baselines and/or benchmarks. As can be seen in Graph 3.10, just 5 percent of the cases analyzed had baselines, while benchmarks were absent in 100 percent of the cases.

**Graph 3.10: Selected indicators for measuring project progress**



- 3.72 The information for measuring project execution is one of the strong points of the ADR projects. In almost every case, the projects have semiannual progress reports and MIF project performance monitoring reports (MPPMRs). The semiannual reports were particularly useful for obtaining information on headway in project execution. Unlike the MPPMRs, the semiannual reports are detailed, extensive and contain interesting information on the details of execution. However, they are only available at the Country Offices, in other words, only the sector specialist has access to them.
- 3.73 The MPPMRs, for their part, contain very little information and any information provided is often insufficient to be of more than limited use. They did not contain any detailed description of the status of the projects. However, a marked effort has been launched in 2002 to improve the quality of those reports.
- 3.74 The analyses contained in the MPPMRs tend to be overly optimistic with respect to progress in execution and the possibility of attaining the objectives. When the information contained in the MPPMRs was crossed with the data compiled during the present evaluation, significant differences were found. A comparison of the “Implementation Progress” (IP) category of the MPPMRs with the “Efficiency” category of the evaluation framework shows that 33 percent of the projects received a higher ranking in the MPPMRs. And when the “Development Objectives” (DO) category was crossed with the “Effectiveness” category, 53 percent of the projects were rated higher in the MPPMRs.
- 3.75 Many difficulties were encountered in obtaining the evaluation reports financed by the projects. Of the three ex post evaluations performed, only the report for Guatemala was available at MIF Headquarters. The others were obtained from the personal files of the project directors (Peru and Colombia) or through the executing agency (Costa

Rica<sup>21</sup>). The only mid-term evaluations that could be obtained were for the projects in Ecuador and Paraguay, in both cases through the Country Office.

- 3.76 The funds set aside for final evaluations totaled approximately US\$384,000. Although the amount is considerable, the impact of this investment has been minimal. The problem is not related to the quality of the reports, but to the fact that it is virtually impossible to obtain copies of them, which is a sign that the MIF was not interested in learning about the results of its projects.

**Table 3.4: Types of Evaluation by project**

Country	Mid-term evaluation	Final evaluation	Funds allocated US\$	Available	Comments
Argentina	Yes	Yes	60,000	No	Not conducted yet.
Brazil	Yes	Yes	30,000	No	Not conducted yet.
Chile	Yes	No	0	No	Not available at COF or MIF.
Uruguay	No	Yes	40,000	No	Not available at COF or MIF.
Bolivia	Yes	Yes	8,000	No	Not conducted yet.
Paraguay	Yes	Yes	25,000	Yes	Mid-term evaluation available at COF.
Panama	No	No	0	-	
Costa Rica	No	No	0	-	Final report prepared by the executing agency, not available at COF or MIF
Honduras	No	No	0	-	PCR available at COF.
Guatemala	Yes	Yes	20,000	Yes	Final evaluation available at COF.
Mexico	Yes	No	40,000	No	Not conducted yet.
Nicaragua	No	Yes	15,000	No	Not conducted yet.
El Salvador	No	No	0	-	
Colombia	Yes	Yes	30,000	No	Not available at COF or MIF.
Peru	No	No	0	No	Final report prepared by the executing agency, not available.
Ecuador	Yes	No	69,300	Yes	Mid-term evaluation available at COF.
Venezuela	Yes	Yes	25,000	No	Not conducted.
Trinidad Tobago	Yes	Yes	22,000	No	Not conducted yet.
<b>TOTAL</b>			<b>384,300</b>		

- 3.77 In four of the projects shown in Table 3.4, a final report will be conducted one year after completion, while in two others, it will be prepared within three months afterward. Although this time frame may appear reasonable, since it is not advisable to measure impact immediately after project completion, what happens is that after a project has been executed the Bank no longer tracks it and does not check to ensure that the evaluations are actually conducted. There are another two operations (Honduras and El Salvador) which establish that RE3/OD2 and DPP/MOS will perform project “supervision”, which is the only evaluation mechanism.

<sup>21</sup> In this case, it was the final report by the executing agency and not an ex post evaluation.

- 3.78 It is necessary to seek alternative mechanisms to ensure that the evaluations are performed and that they are used to good advantage by the Bank/MIF. It is not productive to invest almost US\$400,000 in reports that are not read, discussed, are inaccessible or are not disseminated.
- 3.79 Last, one key for the success of final evaluations should be highlighted. None of the projects under study had impact indicators or at least baselines that could be used as a starting point for measuring the outcomes of the program. Without information of this kind, it is very difficult to quantify program impact. The logical frameworks for the projects do not contain even a minimum effort to determine impact indicators.

## **8. Summary of the project evaluation ratings**

- 3.80 The ratings assigned to the 18 ADR projects for the seven evaluation dimensions over the project life cycle are summarized below. The marking range is the same as OVE uses for all MIF evaluations and ranges from high (4), medium high (3), medium low (2) to low (1). Generally speaking, the ADR projects score about 3 or medium high.
- 3.81 The **relevance** of the projects in the country context was generally high initially, although it declined owing to the failure to do more work on advance studies and identify specific needs during execution and after the end of the projects. With regard to **effectiveness** the main problem was the identification of risks and, consequently, the adoption of measures to mitigate them. The **efficiency** of the individual projects was good but on the level of managing the portfolio as a whole, there were serious problems that could have been addressed through better integration and synergy among systems and services that were common to various projects.
- 3.82 As for the special attributes sought by the MIF, for example **innovation**, the results were excellent. The innovations conceived in the design stage were successfully put into practice during execution. This illustrates the risk shouldered by the MIF and its nature as a “laboratory of ideas”. In general, **sustainability** was very good on the level of the beneficiaries and average on the financial level. Although some projects were not financially self-sustainable with regard to ADR services, many of the chambers of commerce took over their operating costs permanently. In other cases, the projects mounted an active network of ADR in their countries, going beyond the sustainability of the project and the executing agency. The projects performed excellently in the area of **additionality**. The MIF made a very important contribution with respect to the provision of knowledge and know-how and financing, for a catalytic effect. However, there was scant synergy between projects and no interaction with Bank operations under way. Last, the **evaluation** dimension suffers from shortcomings in the area of indicators (particularly the absence of indicators for outcomes) and there is a need for more effective mid-term evaluations to support execution.

## IV. SYNTHESIS OF THE EVALUATION OF THE GROUP OF PROJECTS

### A. Evolution of the portfolio

- 4.1 The ADR portfolio was launched in the mid-1990s, at a time when the justice systems in the region showed signs of severe problems in their operation (congestion, delays, corruption, etc.) and in their role in the political system (lack of independence, instability, etc).<sup>22</sup> This set of problems was taken into account in the diagnostic analysis that served as the basis for the ADR portfolio, and can be summarized as follows: *“The judicial branches in the region are inefficient and do not provide services that are suited to the needs of the private sector”*.
- 4.2 The MIF attempted to approach the problem from the standpoint of the private sector. Its strategy was based on the hypothesis that by creating an alternative justice service, it would be able to fill the void created by the inefficiency of the ordinary courts of law. And to that end, it began to finance operations to propagate alternative dispute resolution methods.
- 4.3 As was explained earlier, the operations were homogeneous and no significant changes were made in the types of intervention. A total of 18 operations were carried out and half of them are still in execution. The initial results are promising, since there are at least eight countries where the projects, with different nuances, had the desired impact.

### B. Analysis of the gap: MIF actions versus the context

- 4.4 As was mentioned at the start of this chapter, the ADR projects were a reaction to problems in the region’s justice systems. Clearly, the absence of reliable and efficient mechanisms for the settlement of commercial disputes was an obstacle to development of the private sector and investment. The MIF determined that the establishment of arbitration and mediation centers was an ideal tool for bridging the gap left by the courts.
- 4.5 The MIF’s response was suited to the private sector context, since it attempted to make up for the absence of mechanisms to settle commercial disputes, which were expected to create an incentive for investment and commercial transactions. In other words, the MIF’s reaction was in line with private sector requirements.
- 4.6 Given the widespread unfamiliarity with ADR in Latin America at the start of the 1990s, the MIF had to create a demand for these services. This was a risky wager, since it involved familiarizing the private and legal sectors with an unknown practice and bringing about an effective change in an old legal culture. It is worth noting that apart from the problems in the justice sector, there were other elements in the legal environment that had a negative impact on private sector development, such as the lack of access to suitable legal advisory services, the complexity of regulations and

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<sup>22</sup> For a more detailed discussion of these problems see Chapter I, Sections B and D.

shortcomings in the field of debt performance. But there can be no doubt that the seriousness of the crisis in the justice sector made the MIF projects a pressing priority.

- 4.7 Returning to the MIF's reaction to the private sector context, it is worth noting that the Colombian model had ideal features for being replicated in other countries. First, the results up to that point had been very good and promised to get even better. And second, it was a Latin American experience. Since the use of foreign practices generally leads to resistance, the propagation of a home-grown model was more desirable. Also, the Colombian case had already generated experience and sufficient human resources to advise other projects in the region.

### **C. Analysis of the gap: Consistency of actions**

- 4.8 A comparison between the strategic intent of the projects and the projects that were actually carried out points to some discrepancies. The most important is probably the gap between the people who were supposed to receive the benefits of the projects and those who actually did. The project documents repeat that the creation of arbitration and mediation centers will contribute to private sector development. Although the beneficiaries were the chambers of commerce, the real objective of the projects was to benefit the private sector.
- 4.9 But who was meant by the 'private sector'? Generally speaking, the projects worked with the clients of the national chambers of commerce and therefore mainly focused on large businessmen and entrepreneurs. Emphasis was therefore placed on the biggest players in the private sector, leaving small businesses, which are also part of the private sector, to one side in a number of cases.
- 4.10 Another gap between the intent of the projects and what really happened is linked to the justice sector. The projects were intended to have an impact on the courts, helping to clear up the backlog. This did not happen, even in countries where the projects were very successful. In both Colombia and Peru, where the results of the MIF operations were excellent, there are no signs of decongestion in the courts.
- 4.11 There are two elements that can help to understand this gap. First, almost all the projects ignored the judicial branch. The only exceptions are the projects in Bolivia and Trinidad and Tobago, where systems were design to divert cases from the courts to the arbitration and mediation centers, and in Peru, where pilot projects were carried out for mediation at the courts. Second, the assumption that the simple creation of arbitration and mediation centers could help to clear up the backlog in the courts was either overly ambitious or overly naïve.
- 4.12 In short, although the MIF's actions were consistent, there were aspects in which its strategic intent was not carried through in practice. This gap can be seen clearly in two cases. The first was failure to take a specific approach to smaller businesses as part of the private sector. The second was the lack of action and impact on the backlog in the courts. But the main goal of the projects, the implementation of new systems for the resolution of commercial disputes, was successfully achieved in all cases.

#### **D. The MIF and the Bank**

- 4.13 The following three dimensions were examined to determine the extent to which MIF activities were integrated with those of the Bank: coordination in the programming process, relations during execution and the generation of knowledge of ADR in the Bank.
- 4.14 Coordination between the Bank and the MIF in the programming process was very weak. The interviews suggest that in general there was no continuous contact during the stage of identifying operations that would have helped to coordinate the needs of the area of modernization of the State, for example, with the ADR portfolio. There was scant coordination in the specific area of judicial reform projects, which could have been a natural environment for achieving synergies in sector projects and strategies. The only judicial reform project in which some degree of interaction between the two portfolios was detected was the program to support reform of the justice system in El Salvador.<sup>23</sup>
- 4.15 Another significant area in which common lines of work could have been explored is microenterprise and small and medium-sized business. Lack of access to justice is a very important issue for these businesses and the MIF's experience in the sector could have been capitalized on to develop new projects or to tap economies of scale with projects that had already been implemented.
- 4.16 That being said, Bank staff specializing in projects for judicial reform and/or modernization of the State participated actively in nearly all the projects. The composition of the project teams points to permanent cooperation by DPP/MOS in the initial years and then by SDS/SGC.
- 4.17 Table 4.1 lists the judicial reform projects that have components involving alternative dispute resolution mechanisms. They make no reference to the MIF and did not draw on its experience in ADR projects, which demonstrates the scant interaction between the two portfolios.
- 4.18 There was no integration between Bank and MIF activities during project execution either. The Bank's sector specialists did not participate in project execution or evaluation. This is a problem that affects the MIF and the Bank in general, where a gap has opened up between the design and execution stages. Execution is in the hands of the Country Offices and the team that participated in designing the project is no longer involved.
- 4.19 Last, with regard to the generation of knowledge of ADR projects in the Bank, it should be noted that the MIF has acted as a kind of laboratory of ideas, where

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<sup>23</sup> The legal reform component states that the objectives would be complemented by a MIF operation that would finance "a comprehensive view of the commercial area". Later the document adds that the training program in alternative dispute resolution methods, to which US\$200,000 was allocated, would be complemented by the MIF operation in question.

innovative projects are developed that have not been carried out before. These innovations are risky by nature and are a challenge for the MIF.

- 4.20 But in the event that positive results are obtained, they should be multiplied and extended, not by the MIF but by other institutions. By nature, the Bank would be the institution that could build on the experiences of the MIF. However, Bank staff has not learned or internalized the results of the ADR projects. In other words, they have been an ‘experiment behind closed doors’, with no one looking at the results.
- 4.21 It is necessary to examine why this learning process did not take place and to try to identify where the failures lie. First, it is possible that not even the MIF itself fully understands the results of these projects. Second, it may be that the Bank is not interested in this area, although the interviews with Bank staff and the fact that the Bank has invested more than US\$2.86 million in the last three years would seem to refute this possibility. But it is a fact that there are no mechanisms in the MIF (or in the Bank to some extent) for generating a process of institutional learning. Therefore, despite the investment made, the Bank has been unable to learn from or capitalize on the lessons of ADR projects. ADR programs are very weakly integrated with the line areas of the Bank responsible for microenterprise and small business, social sectors, reform of justice, modernization of the State and violence reduction.

**Table 4.1: ADR components in the Bank’s judicial reform projects**

Country	Year	Description of the ADR component	Amount
Honduras	1996	A broad experimental program in ADR for general purposes. Young law students will be trained and the use of ADR will be promoted in the legal consulting services of the Autonomous University of Honduras.	US\$286,000
Argentina	1997	The intention was to perform an evaluation of the development of mediation as an alternative method for dispute settlement in Argentina. The Argentine government cancelled the loan.	US\$284,000
Nicaragua	2001	The component on centers for assistance, mediation, information and guidance will train community mediators, in cooperation with universities, and promote the use of peaceful conflict resolution methods.	US\$1,600,000
Barbados	2001	The use of ADR will be promoted as a tool for settling disputes and improving access to justice.	US\$750,000
Costa Rica	2001	The use of alternative dispute resolution mechanisms will be promoted through one-stop legal offices (“Casas de Justicia”).	US\$505,000

## **E. Areas of opportunity**

### **1. In ADR projects**

- 4.22 The MIF has financed ADR projects in 18 Latin American and Caribbean countries. This means it has covered 70 percent of the countries of the region, where it has

developed personal and institutional contacts and has trained thousands of people. This is a very solid foundation on which it can continue to build.

- 4.23 The MIF can take advantage of its investments over the last eight years to diversify or specialize ADR projects. As was mentioned in the previous chapter, opportunities exist for closer linkage between arbitration and mediation centers and microenterprises and SMEs, that would make the most of the extensive experience that has been built up in both fields. SMEs have serious problems of access to reliable and efficient justice services and, in many cases, conflict resolution centers need higher demand for their services.
- 4.24 The ADR projects also have unexplored potential in the processes of regional integration. Although no exhaustive studies have been conducted in this field, there are new opportunities for AMCs in MERCOSUR, CARICOM, NAFTA and other regional agreements. Concretely, there are specialized areas in each of the regional agreements that could be dealt with by mediation and arbitration centers, such as agriculture, telecommunications, banking and finance, insurance and others.
- 4.25 The advance of technology is creating a more integrated world, where more and more commercial transactions are being carried out over the Internet. ADR could be an ideal tool for solving conflicts arising from e-commerce. Adaptation of ADR to the specific nature of e-commerce disputes could be explored.
- 4.26 One potential area for diversifying ADR is in the field of consumer protection. The MIF financed a very successful pilot project of this kind in Peru. This experience could be used as a reference for closer linkage between ADR and consumer protection.
- 4.27 The use of ADR for resolving labor disputes has had excellent results in Brazil, under the auspices of the MIF. The experience and lessons learned from this project could be extremely useful for other countries of the region. Closer linkage to judicial reform programs can also be sought, but stressing small-claims courts. The possibility of integrating ADR into a small-claims court system that would provide justice services for microentrepreneurs and small businesspeople could be explored.
- 4.28 It is also viable to develop the use of ADR in public and government services in general. Complaints about public services are generally channeled through the regulatory agencies. Possible synergies with existing ADR projects could be studied in this area, in particular. Mechanisms could also be designed to apply ADR in conflicts between the private sector and government, and even in conflicts within government. One case that could be used as a reference is CONSUCODE in Peru, which uses arbitration to settle conflicts arising from government contracts.
- 4.29 Last, there are interesting experiences with decentralized agencies that are involved in dispute settlement, for example, in the practice of medicine. In Mexico, CONAMED has had very good results and has helped to strike a balance with respect to complaints about medical malpractice. The MIF has financed something similar in Peru, through

the Office of the Superintendent of Health Care Providers. Although it is still in the development stage, a study of this experience could help to build up knowledge in this area, which is still in its very early stages.

## **2. In general aspects**

- 4.30 This section will review several issues linked to organizational and operational aspects in the Bank/MIF.
- 4.31 **Gap between design and execution.** As was mentioned earlier, there is a gap between the design and execution stages that prevents adequate project monitoring. After they are approved, operations become the responsibility of the Country Offices and the team participating in the design stage loses contact with the project. This means that in the vast majority of cases, they never find out what the outcomes of the project were. In other words, the specific lessons that can be drawn from each project are lost.
- 4.32 **Staff specializing in ADR.** The absence of the specialized personnel among the MIF staff that led the ADR initiative had its impact on different aspects. For one, there was heavy dependency on consultants. The lack of specialized staff was also felt in project execution. The early months of execution are always difficult and even more so in cases where the chambers of commerce had no previous experience with ADR. If at least one person were available with in-depth knowledge of the subject, that person could guide the new projects, reducing delays and contributing to the efficient use of time. It should not be forgotten that the Country Offices do not have specialists in every area, which makes it useful to have staff at Headquarters who can monitor projects when necessary.
- 4.33 **Lack of studies.** No specific studies were conducted of ADR. Studies should have been conducted on the linkage between ADR and the justice systems in the region, identifying its characteristics, potential impact and how it could be adapted to the legal realities of the countries, in order to strengthen the projects, since this was an innovative area. It should not be forgotten that ADR began to be known as a result of its theoretically successful use in the United States, a country with a completely different legal tradition from Latin America.
- 4.34 **Exact replication of projects.** As for project design, the tendency to replicate the projects from one country to another meant that the special features of each region and country were ignored. Mexico, a country immersed in a trade integration process with the United States and Canada, can be taken as an example. The project did not include training in key areas of NAFTA investments, such as energy, telecommunications and agriculture. A better response could have been made to specific arbitration and mediation requirements in the Mexican context.
- 4.35 **Lack of project follow-up.** The person in charge of MIF projects at one Country Office noted in the MPPMR that there was a need for more participation by the project team in the initial stages of execution, since they have the specialized knowledge. The specialist asks that “the people who participated in the design stage not disengage

from the project so easily”. He also notes his concern over the fact that there is no one at Headquarters assigned to supervise ADR projects.

- 4.36 **Portfolio management.** Problems of efficiency in portfolio management were detected. In the case of financing for products such as software, training models, codes of ethics, virtual libraries, operating models and others, the same product was financed on repeated occasions. Every time a new project was approved, funds were provided again for products that had already been financed. One typical example is case management software for the AMCs.
- 4.37 **Lack of institutional learning.** Another failing was the inability to generate a process of institutional learning. The MIF’s files and institutional memory do not reflect the knowledge that should have been built up with a portfolio that implemented projects in 18 countries. This lack of learning was not limited to the MIF, but also extended to the Bank. In the MIF’s files there are no materials such as books, videos, consultants’ reports or other reference materials on the arbitration and mediation centers. However, more recently an effort has been made generally in the MIF to reverse this situation. Today, the MIF’s web page contains information and presentations made at the international conference on arbitration and mediation that the Fund organized in 2000 and the MIF project evaluation report for the same year.
- 4.38 **Lack of integration with the Bank.** The ADR portfolio was not integrated with other Bank actions. The group of projects was highly compatible with the Bank’s work in the area of modernization of the State, particularly in the justice sector, and with private sector development programs. Nonetheless, there was no joint, coordinated or complementary planning.
- 4.39 **Lack of awareness of achievements.** As was mentioned earlier, the Bank/MIF does not have detailed knowledge of the impact of its ADR projects. The main achievements are outlined below.
  - a. The projects had excellent results in a number of countries, particularly Peru, Colombia, Chile and Brazil. Not only did the projects achieve their goals, but in some cases the use of ADR became irreversible. In Peru, for example, today there are over 500 mediation centers, which processed more than 30,000 cases in the last three years. In Brazil, the project exceeded the goals for the number of centers affiliated with the national network and more than 6,000 mediations have been reported. In Colombia, the Chamber of Commerce of Bogota continues to grow and has expanded its experience in Colombia and internationally. In the last two years, it has trained more than 400 people from abroad.
  - b. The use of ADR for commercial purposes has become entrenched in Latin America and the Caribbean. Today, the model arbitration and mediation center promoted by the MIF is known throughout the region.

- c. The model for commercial arbitration was also perfected. Ever since the Colombian project, successive operations have improved and fine-tuned the original model.
- d. Legislation on arbitration and mediation was modernized and harmonized in almost all the Latin American countries. Today they have modern laws that reflect international norms.
- e. Specialized human resources were trained in nearly all the countries in the region. Today, well-prepared arbitrators and mediators are available, which was not the case in the early 1990s.
- f. There were also some unexpected achievements:
  - i. The projects in Peru, Colombia and Brazil were very successful in school, community and labor mediation, which are areas with a high social content.
  - ii. An inter-American commercial arbitration network (IACAC) was established. After the MIF had financed the creation of an arbitration and mediation center, it then joined the inter-American network. In this way, a network was consolidated which, although it had been established earlier, was virtually inactive.

4.40 The absence of specific studies, unawareness of achievements and lack of follow-up on project results are problems that have created an institutional void in the MIF with respect to ADR. The MIF failed to internalize the extensive experience and knowledge generated with its interventions. This also meant that it failed to take credit for the success stories.

4.41 However, this problem can be solved satisfactorily. Since half of the ADR portfolio is still in execution, there is a critical mass of projects from which relevant information can be extracted. Activities such as the following could be carried out to create an institutional memory, thereby consolidating the MIF's knowledge of ADR:

- Conduct case studies of the projects with the greatest impact.
- Prepare a manual for the design and implementation of ADR projects, that compiles the methodology developed by the MIF.
- Compile the evaluation reports (mid-term and final) and ensure that the pending evaluations are carried out and are up to suitable quality standards.
- Obtain samples of the products designed thanks to MIF financing, such as training manuals, software, virtual libraries and codes of ethics, and establish a mechanism for referencing and access by interested parties in the region.

- Publish a brief description of ADR projects, containing a summary of the MIF's main accomplishments.