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Code of Codes: Compliance Oversight

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Table of Contents

1	<i>Introduction</i>	2
2	<i>Content of the Codes</i>	3
2.1	Functional Role of the Code of Codes	3
2.2	Industry Adherence to the Code of Codes	4
2.3	Compliance Mechanisms and the IBRD Precedents: Towards Transparency and Accountability in International Financial Institutions	4
2.4	The Ombudsman Proposal: A Commentary.	5
3	<i>Conclusion</i>	8

I Introduction

This paper takes on the task of analyzing and evaluating the prospects of establishing a complaints mechanism for the mining industry in the form of an ombudsman. Its point of departure is two-fold: i) the codes identified to be included in the core list of codes, providing a benchmark against which industry performance may be measured, and; ii) the potential creation of an ombudsman for the mining industry, providing an independent forum for amplifying voices of mining affected persons and communities. This paper will explore the meaning of codes as guidance, standard, and basis for complaints. Next it will look at the IBRD precedents with its Inspection Panel and its Ombudsman. This piece will conclude with comments on the proposal regarding the establishment of an ombudsman for the mining industry.

2 Content of the Codes

The precedent provided by the World Commission on Dams has been recognized as an inclusive, participatory process that culminated in a report structured upon a rights approach. According to the WCD recommendations, a rights approach would identify legitimate stakeholders and would bring them to the dialogue table. This approach has procedural advantages, in that it enables the conditions for dialogue, and substantive returns, in that it identifies rights, some of which may not be compromised while others are subject to accommodation or compensation.

The WCD precedent could shed light on the prospective role of the Code of Codes, as its rights approach provides an easily accessible framework for analysis and action. In fact, it would not make best use of available resources to engage in a discussion over the nature of obligation contained in codes. Rather, a rights approach places the focus on process and outcomes, thereby enabling spaces for conflict prevention and resolution. Furthermore, the content of the codes acquires meaning through a complaints mechanism that investigates compliance and looks for mutually acceptable solutions.

2.1 Functional Role of the Code of Codes

From this angle, the Code of Codes may be designed to perform a functional role in several planes: it provides guidance to industry, it provides minimum management and performance standards, and it provides a basis for complaints by affected persons and communities.

Guidance to Industry: The Code of Codes provides guidance to industry in directing its efforts towards sustainable development. The meaning of sustainable development, let alone the challenges of its implementation, is often subject to diverging interpretation. In this regard, codes offer industry direction in recognizing relevant social issues and in identifying internationally recognized rights. This is a crucial first step in the transition towards sustainability.

Minimum Management and Performance Standards: The Code of Codes would identify material standards again in several planes: it would refer to existing customary international legal norms and it would build upon voluntary initiatives developed by inter-governmental and industry organizations. These standards would supply benchmarks against which actual ground performance could be assessed. The importance of these standards is not to be underestimated, as there may be a lack of domestic standards and as these standards represent international consensus.

Basis for Complaints: The basis of complaints will usually be that fundamental rights affected persons or communities have been compromised by industry activities. The Code of Codes would provide claimants with international authorities, voluntary initiatives and hard and soft law instruments, to support and structure their claims.

2.2 Industry Adherence to the Code of Codes

By signing on to the Code of Codes, companies signal their commitment to work towards sustainable development, their assurance to cooperate in the resolution of claims based on the Code of Codes, and the expression of adherence to codes as minimum management and performance standards.

Expression of commitment to sustainable development. This commitment should be followed by concrete action towards implementation of a complaints mechanism, including adequate funding, cooperation, engagement, access to information, and other forms of spaces for public participation. This commitment would be instrumental in driving the self-regulatory process.

Expression of adherence to codes as minimum management and performance standards. These standards provide a yardstick not only for assessment of ground performance, but also for measuring progress towards incremental, continuing improvement.

Expression of intent to cooperate in the investigation and resolution of claims based on the Code of Codes. Cooperation is critical for the success of the ombudsman as a complaints mechanism and will serve as a litmus test for evaluating industry's adherence to the standards contained in the Code of Codes.

2.3 Compliance Mechanisms and the IBRD Precedents: Towards Transparency and Accountability in International Financial Institutions

- Driver of Compliance Mechanism
 - for the IBRD: replenishment
 - for Part I countries: NGO int'l pressure
 - for Part II countries: encroachment on sovereignty
 - for Business: project finance

- WBIP: the Legacy of Narmada
 - Focus: compliance
 - IP reviews
 - IP board polarization
 - Revision of operating procedures
 - Results on the ground?

- IF Ombudsman: the Legacy of the BioBio
 - Participatory Setup: Guidelines and Nomination
 - Focus: advisory, compliance, and ombudsman

The IFC Ombudsman Conflict of interests: Advisory, Compliance, and Ombudsman Roles

According to its operational guidelines, the Ombudsman should perform an advisory role, a compliance role, and an Ombudsman Role. This institutional scheme does not

appropriately provide for an independent, impartial mechanism to voice the concerns of affected people, as the three functions can not possibly be exercised by a single person or organ because they bring about insurmountable conflicts of interest. The following examples will suffice to illustrate the point:

1. The advisory role requires close involvement of the Ombudsman with Management in the early stages of the project cycle. In turn, the ombudsman role demands further distance from management to assure proper representation of affected people. Finally, the compliance role exacts absolute impartiality and distance from management, in order to assure independent oversight.
2. The different roles are contradictory in nature, because the more the Ombudsman advances in one role, the more it precludes a *bona fide* performance of the others. The more the Ombudsman provides policy advice to management, the less it will have the independence to defend the rights of affected people at the negotiations table. In the same way, the more the ombudsman becomes involved in defending the rights of affected people, the less it will have the impartiality required to conduct compliance audits.

2.4 The Ombudsman Proposal: A Commentary.

2.4.1 Definition of Roles: Compliance Audits and/or Ombudsman?

The definition of roles for the complaints mechanism is critical clarifying process and outcomes. Although compliance audits and the ombudsman function raise different sets of issues, they could nevertheless be combined into a single office, provided that there is clear identification on the roles. In this regard, the main objective of the ombudsman is to ensure that the rights of affected persons and communities are not compromised in any way. In its turn, compliance audits require a set of clearly defined applicable standards against which industry performance may be assessed. The code of codes is a first step both towards identifying the rights of potential users and towards defining the sources of authority and standards that would enable such audits.

It is submitted here that compliance audits serve an instrumental role, while the principal objective of the complaints mechanism is to serve as an ombudsman. Non-compliance by industry of the Code of Codes is likely to give rise to complaints, which will prompt an investigation as to the sources of compliance with a view to resolving conflict. In this process, it is important to determine whether industry has complied with applicable guidelines, in spite of existing ambiguities and differing interpretations. However, it is even more important for the ombudsman to find common grounds for dialogue and conflict prevention and resolution.

The two models examined above, ie the IBRD/IDA Inspection Panel and the IFC/MIGA Ombudsman, combine to some extent these two functions. In the case of the Inspection Panel, its exclusive focus on compliance prevents its utilization as a means for effectuating changes at ground level. For the IFC Ombudsman, the confusion on roles and ensuing conflict of interests represent a serious flaw in its design as a complaints mechanism. The ombudsman for the mining industry should look into non-compliance in her efforts to

identify and eliminate sources of dialogue stress, but should always remain focused on achieving solutions that will safeguard the rights of affected persons and communities.

2.4.2 Definition Of Goals And Purpose: Trust, Transparency, Effectiveness

Trust: Perhaps one of the biggest challenges of a complaints mechanism resides in obtaining the trust of potential users. Without the trust from affected persons and communities, the mechanism would remain an interesting idea on paper. Trust must be gained and not assumed, and this requires the appointment of the right person to the job, an outreach program, the active participation of claimants throughout the process, and above all, the delivery of changes at ground level.

In regards to fostering trust from users, it is particularly important that the complainant know clearly what outcome the process will provide. To this effect, operating guidelines should strike a balance between flexibility and predictability, the former to enable creative and effective solutions on the ground and the latter to avoid arbitrary decisions over the process or over its outcome.

Transparency and Access to Information: The disclosure of information is essential to the transparency of the Ombudsman process. Therefore, in no circumstance should the product of the Ombudsman process be kept confidential; on the contrary, information technology provides powerful opportunities for enhanced dialogue at the global level allowing communities to share their experiences with projects. Moreover, secret agreements do not provide a basis for their public scrutiny or for further supervision, monitoring, and review. In addition, secret arrangements would not avoid new claims against the same project from other affected groups or NGOs. The contribution of the Ombudsman for accountability and transparency in the mining industry will only materialize through open, participatory schemes based on the free flow of timely and relevant information.

Effectiveness: The purpose of the Ombudsman is to assure protection to the legal environmental and social rights of persons, communities, and NGOs affected by mining projects. That is, the goal of an Ombudsman is not to reach friendly (all-happy/sad) solutions at any cost. Recognizing that bringing the parties to a dialogue will foster an enabling atmosphere for implementing adequate environmental and social safeguards, it should be clear that the success of the Ombudsman is not measured in terms of meetings or settlements, but through actual, concrete respect for the rights of the people and of the environment on the ground.

As a instrument for conflict resolution, the Ombudsman should not be transformed into yet another institutional tool for “legitimizing” projects that harm people and/or the environment through the conclusion of negotiated settlements. Quite the reverse, the Ombudsman has a duty to represent the affected persons in good faith and with the highest standard of diligence, making sure that, under no circumstance, the rights of affected persons be violated or compromised.

2.4.3 Definition of Locus: Where Should the Ombudsman be Based?

The *locus* of the ombudsman raises concerns on its potential to deliver adequate process and outcomes. Several alternatives exist in the abstract: the ombudsman could lie with national governments, international inter-governmental organizations (IGOs), international non-governmental organizations (NGOs), and international industry organizations. The following lines elaborate on the problems associated with these alternatives:

National Governments: The association of the ombudsman with national governments, in a model paralleling the 2000 OECD Guidelines for Multinational Enterprises, would give grounds to serious problems. First, the ombudsman would be trapped by the political game within the government, and would have to cater to the demands of the elites controlling the structures of the State. Then, the ombudsman would depend on the cooperation of governments, which is doubtful in the light of internal corruption, political feuds, bureaucracy, lack of resources, and other constraining circumstances. In this line of analysis, the cooperation of governments could be elusive to the extent that the ombudsman was seen as an obstacle for the reception of foreign direct investment. Finally, an association with governments would preclude the possibility of an international forum and would derive into a fragmenting approach.

IGOs: The association of the ombudsman with IGOs is problematic on several grounds. First, it remains open to debate which IGO is better suited in terms of resources, mandate, and sphere of competence to host such a complaints mechanism. Then, it is doubtful whether IGOs could resist political pressure from Member governments, as the case of the IBRD Inspection Panel shows. Next, although some institutions could appear interested in expanding their focus to providing a forum for the alternative resolution of international disputes, the creation of a mining ombudsman would lead to pressure from other sectors for similar mechanism, thereby reducing the ombudsman's leverage.

NGOs: The association of the ombudsman with NGOs raises concern over the mechanism's leverage. The ombudsman should maintain an arms-length relationship with industry, as otherwise the mechanism would risk isolation and marginalization. Then again, the internal NGO community dynamics could also mean that an NGO housing the ombudsman could itself suffer from the alienation of its greater constituency.

ICMM: Were the ombudsman to be associated with the industry, its potential for contributing to accountability, transparency, and conflict prevention and resolution could be seriously undermined. The possibility of industry hijacking the ombudsman would curtail trust from affected communities, which is essential for the success of the mechanism.

Who is left? There is the possibility of structuring a new international forum, much like the **MMSD** (hereinafter MMSD II), which could house a complaints mechanism. This alternative requires further institutional analysis and thought, but in structural terms it could be steered by a Board composed by the representatives of major stakeholders. The participation of industry in the Board would ensure that the complaints mechanism retained its necessary influence, in order to access information and produce changes on the ground. The participation of NGOs in the Board would ensure that the ombudsman retained the necessary trust of affected communities and was not hijacked.

The functions of the MMSD II Secretariat would encompass, at least the following:

1. providing support for the multi-stakeholder process that would close the gaps in existing standards for the mining industry,
2. serving as the international forum for the discussion and research towards mining and sustainable development,
3. providing support for the operations of an associated Ombudsman Office.

3 Conclusion

The creation of an ombudsman for the mining industry presents an opportunity for advancing the MMSD agenda towards tangible outcomes that could thrust changes at ground level. An ombudsman would serve the needs of industry for preventing and resolving disputes in an extra-judicial forum, and would serve affected persons and communities by amplifying their voices at the highest levels.

A rights based approach would be easily accessible to all users. Furthering this approach, the creation of an ombudsman for the mining industry would provide voluntary codes of conduct with teeth (although perhaps not very strong teeth). A complaints mechanism whereby affected persons and communities could present their claims and whereby industry could cooperate in the investigation of non-compliance would serve all stakeholders.

The ombudsman's success depends on several key factors, including trust by affected communities and cooperation by industry. It is possible to gain by affected communities and local NGOs trust by appointing the right person, conducting an adequate outreach program, and clarifying process and outcomes. It is not so clear whether industry's cooperation will readily avail, as this element depends on a voluntary commitment to sustainable development. Further inquiry on the dynamics of peer-pressure and of the 'naming and shaming' mechanisms could be warranted.