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CANADA'S EXTRACTIVE INDUSTRY OMBUDSPERSON

**Background and Recommendations for an
Ombudsperson for Canadian Extractive
Companies Operating Abroad**

Brief Submitted to the Government of Canada Roundtables on
Corporate Social Responsibility in the Extractive Sector

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Foreign Policy Practicum**

In this independent study project supervised by law school faculty members, a team of LL.B. candidates completes a comprehensive review of a topic in Canadian foreign policy, with a focus on international legal issues. The finished product is a detailed policy brief, submitted and presented to governmental and non-governmental groups.

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ISSUE

1. What type of Ombudservice is appropriate for the issue of business and human rights for Canadian extractive companies operations abroad?

RECOMMENDATION

2. It is recommended that:
 - a. The government introduce legislation in parliament establishing a public ombudsperson's office for the operations of Canadian extractive corporations with the power to investigate and issue recommendations to Canadian mining corporations.
 - b. The government undertake a restructuring of the OECD National Contact Point with a view to focusing its efforts on dispute resolution.
3. The following sections outline the background to this recommendation, the specific options with respect to how the ombudsperson can be structured, its relationship to a Canadian National Contact Point and the consequences of inaction. Appended are a series of annexes that provide further information and comparative analysis on ombudsperson options and the OECD National Contact Point.

RATIONALE

Background

4. Under Standing Order 108(1), the Standing Committee on Foreign Affairs and International Trade (SCFAIT) (38th Parliament, 1st Session) established a Subcommittee on Human Rights and International Development (the Subcommittee) "to inquire into matters relating to the promotion of respect for international human rights and the achievement of sustainable human development goals."
5. The Subcommittee heard evidence "related to the activities of Canadian mining and other resource companies in developing countries" (see Fourteenth Report). In addition, the committee heard evidence on the activities of one mining company in particular, TVI Pacific Inc. in the Philippines.
6. The SCFAIT, in adopting the third report of the Subcommittee, reported to Parliament how "these hearings have underlined the fact that mining activities in some developing countries have had adverse effects on local communities, especially where regulations governing the mining sector and its impact on economic and social wellbeing of employees and local residents, as well as the environment, are weak or non-existent, or where they are not enforced. To address problems related to corporate activities in developing countries, a number of organizations have developed and implemented voluntary norms for corporate

social responsibility including the *United Nations Global Compact* and the *Organisation for Economic Co-operation and Development (OECD) Guidelines for Multinational Enterprises*, both of which area supported by the Government of Canada.”

7. The Fourteenth Report called for the following action on the part of the Government of Canada (GOC):
 - a. Put in place a process involving relevant industry associations, non-governmental organizations and experts, which will lead to the strengthening of existing programs and policies in this area and, where necessary, to the establishment of new ones.
 - b. Put in place stronger incentives to encourage Canadian mining companies to conduct their activities outside of Canada in a socially and environmentally responsible manner and in conformity with international human rights standards. Measures in this area must include making Canadian government support- such as export and project financing and services offered by Canadian missions abroad – conditional on companies meeting clearly defined corporate social responsibility and human rights standards, particularly through the mechanism of human rights impact assessments;
 - c. Strengthen or develop new mechanisms for monitoring the activities of Canadian mining companies in developing countries and for dealing with complaints alleging socially and environmentally irresponsible conduct and human rights violations. Specifically, the government must clarify, formalize and strengthen the rules and the mandate of the Canadian National Contact Point (NCP) for the OECD Guidelines for Multinational Enterprises, and increase the resources available to the NCP to enable it to respond to complaints promptly, to undertake proper investigations, and to recommend appropriate measures against companies found to be acting in violation of the OECD Guidelines. The government shall develop specific rules for companies operating in conflict zones;
 - d. Establish clear legal norms in Canada to ensure that Canadian companies and residents are held accountable when there is evidence of environmental and/or human rights violations associated with the activities of Canadian mining companies;
 - e. Increase and improve services offered to Canadian mining companies operating in developing countries to ensure they:
 - i. are aware of their obligations under Canadian and international law and the law of the country where they operate, as well as international corporate social responsibility norms and human rights standards;
 - ii. are aware of the local political, social and cultural context in which they intend to operate and;
 - iii. have the capacity to conduct their activities in a socially and environmentally responsible manner, in particular by developing

and promoting a specific toolkit to help Canadian companies evaluate the social, environmental and human rights impacts of their operations.

- f. Make the building of governance capacity in the area of corporate social responsibility a priority in its efforts to promote good governance and private sector development in developing countries, as outlines in the April 2005 International Policy Statement;
 - g. Work with like-minded countries to strengthen the OECD Guidelines for Multinational Enterprises, first, by clearly defining the responsibilities of multinational enterprises with regard to human rights, second, by making compliance with international human rights standards obligatory, and third, by working towards establishing common rules of evidence;
 - h. Work with like-minded countries to integrate and mainstream international human rights standards in the work of international financial institutions (IFIs) such as the World Bank and the International Monetary Fund – as outlined for example, in the final report of the Extractive Industries Review (December 2003) – to ensure that projects and investments funded by IFIs conform to international human rights standards.
8. The SCFAIT, in relation to the inquiry into the activities of TVI in the Philippines called on the government to:
- a. Conduct an investigation of any impact of TVI Pacific’s Canatuan mining project in Mindanao on the indigenous rights and the human rights of people in the area and on the environment, and table a report on this investigation in Parliament within 90 days;
 - b. Ensure that it does not promote TVI Pacific Inc. pending the outcome of this investigation.
9. Pursuant to Order 109, SCFAIT requested a comprehensive government response to the report.
10. On October 17, 2005, the Government of Canada issued its response: *Government Response To The Fourteenth Report Of The Standing Committee On Foreign Affairs And International Trade* (October 17, 2005). In the report, the GOC underscored the following “practical policy challenges in translating many of the Committee’s recommendations in to practice:
- a. The international CSR architecture is still underdeveloped—there is a proliferation of codes and standards and no agreement on how to define CSR or an accepted methodology with which to measure CSR performance.
 - b. There is no consensus with respect to the appropriate boundaries between governments, companies and other stakeholders. For companies operating in weak states with little or no capacity to enforce their laws and little in the way of accountability or transparency, a blurring of lines between

public and private responsibilities can result. Not only can this perpetuate weak governance, but it can also result in misdirected grievances.

- c. There is a need to reconcile the call for global business standards and accountability mechanisms with the primary responsibility of host governments to ensure that companies act in compliance with domestic and international law. The difficulties that face the international community in addressing acts that take place within the jurisdiction of foreign states point to the need for long-term effort in two areas: strengthening host state capacity to regulate the activities that take place within their borders, and identifying how multilateral mechanisms can be strengthened or developed to address the most egregious corporate behaviour.
- d. Finally, while the Government of Canada can influence companies that are headquartered in Canada and where officers are subject to domestic law, it has few mechanisms at its disposal with which to influence companies that are headquartered abroad and managed by non-residents but incorporated in Canada or listed on a Canadian stock exchange.”

11. Included in the GOC response to the Fourteenth Report of the SCFAIT was a commitment to undertake certain six measures in order to “lay the foundations to respond to the above challenges over the long term” while other steps are intended to “strengthen existing efforts to ensure that companies have the necessary knowledge, support and incentives to conduct activities abroad in a socially and environmentally responsible manner”. The GOC created and implemented the *National Roundtables on Corporate Social Responsibility (CSR) and the Extractive Industry in Developing Countries* in order to examine the issues raised in the Fourteenth Report from the SCFAIT.
12. The National Roundtables on CSR and the Extractive Industry in Developing Countries (the Roundtables) are being held in Vancouver, Toronto, Calgary and Montreal between June and November 2006. The Roundtables were guided by five themes: CSR Standards and Best Practices; Incentives for Implementation; Assistance to Companies; CSR Monitoring and Dispute Resolution Mechanisms; and Resource Governance Capacity Building.
13. The mandate of the Roundtables is to assist the GOC in drafting a report for Parliament that will provide “recommendations for government, NGOs, labour organizations, business and industry associations on ways to strengthen approaches to managing the external impacts of international business activities to benefit both businesses and the communities within which they work.”(See Department of Foreign Affairs and International Trade, *Mining in Developing Countries – Corporate Social Responsibility: The Government’s Response to the Report of Standing Committee on Foreign Affairs and International Trade* (October 17 2005)).

14. At the Roundtables, participants expressed support for the development of a dispute resolution mechanism in Canada. A dispute resolution mechanism would address disputes occurring in other jurisdictions and provide for a compliance management instrument.

OPTIONS

15. With a view to assisting decision makers undertaking the task of devising an appropriate dispute resolution mechanism for the Canadian extractive industries, this section provides examples of selected Ombuds models. The models are discussed with reference to their methods of governance, mandated functions, and operational procedures.
16. There are three broad issues to consider with respect to governance. These are authority, accountability and funding. Authority refers to where an ombudsperson's office derives its powers to act, investigate or pursue remedial actions. Accountability refers to the body to which the ombudsperson reports. Finally, funding refers to the source of funds which finances the ombudsperson's office.
17. Ombudspersons may have a number of different functions, the most important of which is usually a complaints mechanism. Offices may have powers to investigate complaints, conduct or facilitate mediations and negotiations, make recommendations, and impose penalties. The functions to be performed by the ombudsperson are set out in the terms of reference, statute, or directives establishing the office.
18. Operational issues include staffing and resources, how the office ensures transparency, whether the ombudsperson has the power to establish its own rules and procedures, time limits for the submission of a complaint, rules of evidence and the scope of their work. It should be noted that this was the most difficult information to collect with respect to industry ombudsperson, as such data is not normally contained on the web sites or publications of the respective industry ombuds offices.
19. It is intended that the discussion of these different systems be used as a reference point to identify the features of each system that will be most useful and appropriate in a Canadian Ombuds model in the context of the extractive industries. This section also considers the relationship between the ombudservice adopted and the Canadian National Contact Point for the OECD Guidelines.

Public Sector Ombudsperson

20. The first public sector Ombudsperson was established in Sweden in 1809, and provides the model for public sector Ombudsperson. A public sector Ombudsperson is “a public official appointed by the legislature to receive and investigate complaints against administrative acts of government.”¹ The following analysis draws upon the more traditional versions of the public sector Ombudsperson, as well as some modern variations. The Norwegian Sivilombudsman, the Swedish Justitieombudsman, and the UK Parliamentary and Health Service Ombudsman are considered, as is the Canadian Privacy Commissioner. This latter ombudservice represents a modification of the traditional model as it is established and funded by the government, yet has jurisdiction over both the public and private sector.

Governance

21. Public ombudsmen derive power from government. The role of ombudsperson, and their attendant powers and responsibilities, may be constitutionally entrenched, as in the case of Sweden. A general statute, such as an Ombudsman Act, may establish a general parliamentary ombudsperson. Ombudspersons mandated to deal with a specific sector or programs may be enabled pursuant to a specific statute. For example, the general purpose of the Act may be children’s rights, and an ombudservice will be vested with power in a provision within that Act.
22. Public ombudsmen are independent, but may be accountable in some respects to the public body responsible for their creation. In most models, the ombuds office is accountable insofar as they must make a report to parliament at specified intervals, and provide transparent budgetary reports. Often, these offices are at arm’s length from the government, and are accountable internally for day-to-day operational and organizational issues, although the ombudsperson may be appointed by the legislature.
23. Public ombudsmen receive funding through government. In some systems, the budget of the ombuds office is allocated directly by the legislative body, and not by a department or ministry of finance. This ensures that independence is maintained, as the ombuds office will not rely on funds to be provided by the governmental financial departments which they have the jurisdiction to oversee. This avoids the appearance of a conflict of interest. In other systems, where an ombudsperson has no mandate to oversee such departments, the budget may be allocated directly by a financial department.

Functions

¹ Public Sector Ombudsman, online: United States Ombudsman Association <http://www.usombudsman.org/en/references/public_sector.cfm>.

24. Public ombudspersons may engage in various functions, which will be circumscribed by the legislation or constitutional provisions that enable them. For example, the Swedish parliamentary ombudsperson have an expansive list of functions, which may include investigating complaints and inspecting departments, reporting and adjudication of disputes, referring complaints to other departments, engaging in mediations and litigation (acting as a prosecutor), imposing penalties, such as fines, and remedying deficiencies in legislation. Other ombuds offices are much more restricted in the ambit of their powers. The Norwegian Parliamentary Ombudsman, for instance, is entitled only to receive and review complaints, launch investigations, and report their findings. The office can only 'name and shame' the subjects of complaints, and has no authority to impose remedial measures.

Operations

25. The operational procedures of public ombudspersons differ widely. For example, Sweden's ombuds office is structured into four departments, each covering different areas of government actions. There is no limits placed on who can complain to the office, with all complaints being processed regardless of age, citizenship or place of residence. All complaints must relate to an incident which occurred no later the two years prior. The office is able to investigate all government agencies, officials employed by the state, and those parties entrusted with public authority excluding all members of the legislature.

26. In contrast, an elected member of the legislature, who is appointed to act as the ombudsperson during their term, heads the Norwegian office. The department is divided into five divisions, each with a specific focus. Any concerned party regardless of citizenship can submit complaints. The office is only able to investigate specific institutions, and only with regard to issues that have not been settled previously by the legislative body.

Recommendations

27. The expansive powers of the Swedish system allow the ombuds office to have real and tangible effects. The system implemented for the extractive industries should adopt this approach, and give the ombudservice legislative authority to participate in all relevant functions, including the imposition of penalties.

28. Alternatively, the more mild approach of the Norwegian Ombudsman model may provide a more palatable matrix for situations of conflict. The most effective tool at the disposal of this ombudsperson is the 'naming and shaming' of those acting unfairly or improperly. This reporting and disclosure of offenders should be included in any model for the extractive industries, as it will act as a deterrent for corporations to act improperly, lest it risk embarrassing its shareholders, and ruining its reputation.

Industry Ombudsperson

29. Industry Ombuds offices are characterized by corporations and or business associations coming together to “draft rules governing the powers and functions of the ombudsperson that are mutually agreed upon.”² This analysis of the structure of these Ombuds offices covers five different industry initiatives. It offers an illustration of the various approaches these offices have taken to governance, functions, and operations. The following analysis is based on reviews of the General Insurance Ombudsman of Canada, the New Zealand Insurance and Savings Ombudsman Scheme, the Insurance Ombudsman of Ireland, the Ombudsman for Banking Service and Investments in Canada (OBSI) and Australia’s Banking Ombudsman.

Governance

30. All industry ombuds offices reviewed here are incorporated under the business laws of their respective countries. Some specify that these are not-for-profit organizations and thus are incorporated under the relevant statutes.³ This means that the ombudsperson function is essentially a form of private authority. Thus it derives its power from agreements between private individuals or corporations. This is in contrast to the traditional public ombudsperson that is created by statute of parliament or the legislature. This could be seen as a weakness because private actors can withdraw from participation in the scheme and thus it would not be applicable to them.

31. Industry ombudsmen are generally accountable to a board of directors. These boards include industry representatives and independent persons. Boards may be equally comprised of industry and independent observers⁴, yet often independent directors are more numerous than industry representatives.⁵ In no cases studied were independent directors outnumbered by industry directors. However, because the shareholders of the corporation (ombudsperson’s office) appoint the directors, it may be difficult to view independent directors as truly independent when they owe their appointment to the corporations that set up the ombudsperson’s office. The General Insurance Ombudservice addresses this issue by creating a set of criteria to be eligible for appointment as an independent member.

32. The boards do not generally hear appeals on recommendations of the ombudsperson, although the Canadian OBSI allows the chair of the board to

² Linda C. Reif, *The Ombudsman, Good Governance and the International Human Rights System* (Boston: Martinus Nijhoff Publishers, 2000) at 46.

³ Canadian Bankers Association, “OBSI Canada” online:
<<http://www.cba.ca/en/ViewDocument.asp?fl=176&sl=178&tl=&docid=262>>

⁴ E.g., Australian Banking Ombudsman

⁵ Australia Banking Ombudsman, “Banking and Financial Service Ombudsman” online:
<<http://www.abio.org.au/ABIOWeb/abioweb site.nsf>>

consider any concerns about “the complaint-handling process or the conduct of an employee or officer of the OBSI.”⁶ Similarly, the board of the Australian Banking Ombudsman not only appoints the Ombudsperson but also approves their budget, assists in the development of policies for the scheme, and manages the process for making changes to the terms of reference. These illustrations raise questions about the independence of the ombudsperson from the board.

33. Industry ombudsmen are almost exclusively funded by the organizations that establish the system. When funded by industry, an ombudsperson office generally has two sources of funds – regular contributions of member corporations and fees assessed based on the number of cases that implicate a corporation. The Australian Banking Ombudsman uses both these types of financing. The fact that these organizations are funded by industry can also raise the issue of independence of the organization.

Functions

34. There are 4 functions that industry ombudspersons perform, though not all are empowered to do so – conflict resolution, investigation, issuing recommendations, and reporting. The scope of an ombudsperson’s functions will depend on the board of directors and the terms of reference to which they are required to adhere.
35. The resolution of conflicts is the dominant theme among industry ombuds offices. Every office reviewed carried out dispute resolution functions. They did so in a variety of ways. Some referred cases to other dispute resolution mechanisms in the industry; others, such as the New Zealand Insurance and Savings Ombudsman, conducted mediation internally. The Canadian Life and Health Insurance Ombudservice maintained informal and formal complaint resolution systems. The informal system simply involved counsellors calling the insurance provider and attempting to resolve the situation. The formal process involves Ombudservice officers actively assisting the customer and insurance provider in achieving a resolution.
36. In two ombuds offices the dispute resolution process is closely linked to the investigation function of the ombudsperson. In the Canadian OBSI the Ombudsman’s office engages in dispute resolution processes while it investigates a complaint. In the case of the Australian Banking Ombudsman, investigation is the third step in the dispute resolution process the Ombudsman follows. The biggest problem with this approach arises when the two functions are carried out simultaneously. Dispute resolution attempts to focus on resolving a dispute while an investigation attempts to determine fact and distinguish right from wrong. If these two processes are being carried out simultaneously conflicts can arise between them. For example, what does an ombudsperson do with information that is confidentially disclosed to them during the course of a mediation? Is it fair to then put this information in an investigation report or to use it in a finding or

⁶ *Ibid*, Paragraph 12(a)

recommendation that the ombudsperson then issues when a settlement is not reached?

37. All the ombuds offices reviewed had the power to make recommendations and/or award a remedy. The award of financial compensation is capped in most ombuds offices to between approximately \$100000 and \$350000. All ombuds offices state that their finding is binding and must be accepted by the parties. However, it is not clear how this could be enforced against a financial institution where that institution does not choose to accept or agree with the finding. The final function performed by most ombuds offices is reporting. However this will be dealt with below in respect of transparency.

Operations

38. Transparency is ensured in a variety of ways. The most common is the preparation of an annual report for the board of directors.⁷ However, the guidance provided with respect to these reports varies between the different ombudsmen. Some give no guidance with respect to the report, other set out specific information such as statistics, case studies, the number of complaints and other specific information in the ombudsperson's terms of reference. One other approach to ensuring transparency includes requiring the ombudsperson to promote the scheme to the public.⁸
39. Obtaining information on staffing and resources of industry ombuds offices was very difficult. No offices published this information. Only the Australian Banking Ombudsman states that the ombudsperson is not required to follow the rules of evidence. Likewise, only one ombudsperson published information with respect to its power to establish its own rules and procedures.⁹ Information with respect to time limits was available from the Canadian Ombudsman for Banking Service and Investments, which requires that a complaint be made within 180 days of the date that the financial service provider informed the complainant in writing of the existence of the OBSI.

Recommendations

40. Governance Recommendations based on analysis of industry ombudsperson

⁷ Australian Banking Ombudsman, Canadian Ombudsman for Banking Service and Investments, General Insurance Ombudsman, Canadian Life and Health Insurance Ombudservice all have to issue reports to the board of directors.

⁸ Canadian Bankers Association, "OBSI Canada" online:
<<http://www.cba.ca/en/ViewDocument.asp?fl=176&sl=178&tl=&docid=262>>

⁹ Ibid.

- a. If considering an industry ombudsperson to address the human rights and environmental impacts of Canadian extractive companies the following considerations should be built into the governance structure.
 - i. A mechanism for ensuring that the board of directors does not have the power to interfere with the independent functioning of the ombudsperson. This could be done through careful considerations of the powers of the board to set rules and procedures.
 - ii. Independent directors of the Ombudsperson's office are essential, and to ensure that they are truly independent criteria for their appointment should be well developed.
 - iii. Industry funding could create a concern regarding independence but if the above points are addressed they might act as countervailing forces in the weight of financial influence from industry.

41. Recommendations with respect to Functions

- a. If considering an industry ombudsperson to address the human rights and environmental impacts of Canadian extractive companies the following issues should be addressed with respect to the functions they perform.
 - i. How will the mediation and investigation roles be separated?
 - ii. Will the focus be on mediation or investigation?

42. Recommendations with respect to Operations

- a. If considering an industry ombudsperson to address the human rights and environmental impacts of Canadian extractive companies the following operations issues need to be addressed.
 - i. Timing of complaints
 - ii. Sufficient transparency
 - iii. Staffing and resources

Corporate Ombudservices

43. The corporate ombudservices tend towards two purposes. The first purpose is that of precaution or risk-management. The second purpose, conflict resolution, is aimed at maintaining customer satisfaction. Furthermore, the corporate systems address issues that directly affect consumers, employees or suppliers and less frequently do they address concerns of third parties.

Governance

44. Since most corporate ombudservices are internal, they report to senior management or the board of directors. In some instances, it is unclear to what extent disclosure requirements are required for the board or senior management

and if this information is available to third parties. In some instances, the ombudservice reports to an audit committee and a report is contained in materials sent to shareholders.

45. Furthermore, funding structures are not clear. Of particular concern is where an ombudservice is operating in many countries. Funding structures and accountability mechanisms are important considerations in order to ensure that the system is properly resourced in each region where the corporation has its operations.
46. Often, the functions executed by the ombudservice staff or ombudsperson only include investigation into a complaint. In other words, this individual may complete an investigation but will report his or her findings to a senior executive who will then determine the correct course of action for the resolution of the complaint.

Operations

47. There is limited information available regarding transparency mechanisms of the corporate ombudservices. Transparency concerns arise where employees are utilizing the system both in terms of confidentiality but also due process. Since some systems permit employees to report transgressions of the corporation, these operations would require adequate a form of whistleblower protection.

Recommendations:

48. The corporate ombudservices raise the important issue of suppliers and accountability. It is important to recall that transgressions that directly or indirectly affect third parties may originate with the supplier or be caused by a supplier. For a corporation that wishes to meet certain social and environmental standards, it is incumbent upon them to require suppliers to meet the same standards. Any ombudservice should require the inclusion of suppliers, both as subject of complaints and as potential complainants.
49. Where an international corporate ombudservice permits an employee to report a transgression, one must address the implications of limited or varying whistleblower protections present in each country.

International Development Ombudsperson

50. The international development ombuds models are oversight mechanisms created to monitor the projects funded by development financial institutions, such as the Asian Development Bank and the World Bank's International Finance Corporation (IFC) and Multilateral Investment Guarantee Fund. These systems are implicated where funds from the institutions finance private sector projects in

developing nations. The ombuds role is to ensure that institutional guidelines relating to environmental and social responsibility are being respected.

Governance

51. The president of the institution establishes the ombuds role in these institutions. The authority of the ombudsperson is generated by Terms of Reference (TOR) and Operational Guidelines, which define the ambit of the offices powers and responsibilities. In the case of the Compliance Advisor Ombudsman (IFC/MIGA), the office's operational guidelines were a product of consultation with NGO's in developing countries, industry representatives, managers within the IFC and MIGA, and the public.
52. Ombudsmen in these roles are accountable to the president of the institution. They are independent of the departments and projects which they monitor, and of the communities that may be affected by development projects. These offices may also be publicly accountable, depending on the disclosure policies of the organizations to which they are attached.
53. Ombudspersons attached to development financial institutions are funded directly by the office of the president.

Functions

54. The ombudservices of institutions such as the Asian Development Bank and the IFC/MIGA include focus on finding solutions and the resolution of disputes, as opposed to a determination of fault. In both cases, there is a formally structured complaints mechanism. Upon receipt of a complaint, the ombuds office is empowered to launch an investigation. This can include meetings with parties, public consultations, site visits, and general research and analysis. Ombudspersons may then facilitate mediation or conciliation activities, or organize a public consultation process. The ombudsperson then reports to the president of the organization, and releases the information to the public. The ombuds offices may also have a research branch that can offer advisory opinions of issues generally, and a compliance branch that can perform audits of projects complained against on a periodic basis. However, the compliance function of the Asian Development Bank is limited to departments of the institution responsible for implementing the project only. The ombudsperson in this context does not have the authority to adjudicate the compliance of private companies that may be partnered to the bank on a specific project.

Operations

55. Ombudsmen under this model are bound by the relevant operational guidelines and terms of reference. However, these are reviewed and revised on a periodic

basis. There may also be an internal reporting function which reviews the impacts and effectiveness of the ombudsperson.

56. The operational guidelines set out all the relevant procedural formalities, such as the grounds for submitting complaints, timelines for decisions, and the extent of powers and responsibilities. The guidelines also include the principles and considerations the ombudsperson must take into account when adjudicating a complaint and deciding on a course of action.
57. Given that the institutions may be involved in projects in diverse regions, the ombuds offices have also adopted operational policies to improve accessibility to the system for those persons or individuals who may be affected. These include the use of translators and local representatives, and the publication of materials relating to the ombuds office in relevant languages, and a guarantee of confidentiality.

Recommendations

58. The CAO (IFC/MIGA) example should be closely followed in any Canadian extractive industry ombudservice, particularly with relation to operational issues on accessibility.
59. A Canadian system should also have a compliance function to monitor corporations complained against to ensure that resolutions reached are being respected.

Non-Governmental Organization Ombudsperson

60. There are very limited instances of ombudsperson systems set up by NGOs. However, one example, the Oxfam Australia Mining Ombudsman (AMO), deals specifically with the extractive industries. The organization sees the ombudservice it has created is an interim measure to address concerns while it lobbies the Australian Government for an arm's length body statutorily enabled to monitor and police the Australian mining community's actions overseas.

Governance

61. The AMO derives its authority from the terms of reference established by Oxfam Australia. It has no legal basis or power. The office of the ombudsperson differs here as the focus is on advocacy and promoting dialogue and consultation between communities and industry, not on adjudicating complaints per se.
62. The AMO is accountable to the Board of Directors of Oxfam Australia and the public through required annual reports.
63. At present, the AMO is funded by the budget of Oxfam Australia.

Functions

64. The AMO has two major functions; facilitating dispute resolution, and advocacy. To fulfill the advocacy function, activities include providing technical assistance to groups affected, creating standard setting instruments for industry regarding human rights and business practices, and lobbying government to legislate binding extraterritorial controls to force compliance of industry with those standards.
65. The dispute resolution function is centered on helping the parties involved negotiate a solution to problems jointly, not pronouncing on fault. Complaints are vetted to ensure they are credible, and then site visits, public meetings and consultations, and mediations may be conducted.
66. The AMO reports their findings and the resolutions found, or lack there of, to the public. This is the only tool available to the AMO to encourage the mining industry's compliance with human rights and environmental norms.

Recommendations

67. The NGO model has serious deficiencies relating to enforcement. If the NGO model is to be adopted, it should be attached to a Canadian NGO created pursuant to legislation, to ensure that the organization has credibility.
68. The AMO sees itself as an interim measure, and have established principles and characteristics that should form the basis of a national dispute resolution mechanism for the mining industry. These principles should be closely followed in a Canadian system. They include standards, independence, funding, enforcement, accessibility, and accountability. In accordance with these policies, which are aligned with practical recommendations on the AMO website,¹⁰ a Canadian ombudservice should:
 - a. Hold Canadian companies operating overseas to the same standards regarding human rights that are expected on Canadian soil.
 - b. Be linked to legislation regarding enforcing norms and standards extra-territorially.
 - c. Be linked to legislation creating penalties for corporations and allowing the piercing of the corporate veil to sanction officers and directors directly.
 - d. Be independent and impartial in operational activities and budget allocation.
 - e. Be subject to a periodic independent verification process to ensure the ombudsperson system is not bowing to industry pressures.
 - f. Be funded by both government and industry, with some sort of aggregated system to require higher contributions from corporations who proportionally accrue a higher number of complaints.

¹⁰ http://www.oxfam.org.au/campaigns/mining/ombudsman/complaints_mechanism.html

- g. Be accessible in any language and free of costs for complainants.
- h. Provide free legal and technical assistance to communities to be sure that they understand their rights
- i. Report findings to the Australian stock exchange and fully disclose findings to the public.

Ombudservices and OECD National Contact Points

69. If an extractive industry ombudsperson were to be created, the issue of how the ombudsperson and the Canadian National Contact Point (NCP) would relate to each other arises. There are three possible approaches to dealing with this relationship. First the status quo could remain – *i.e.* the two functions would be entirely separate. Second, the NCP could be closed in light of the creation of an ombudsperson’s office. This would be possible, as Canada has never passed implementing legislation for the OECD Council Decision that requires countries to set up NCPs, and thus has no treaty obligations with respect to the NCP. However, the problem with this approach is that many other industries would be unable to access an industry specific ombuds office. A third option would be to relate the ombuds office in some manner to the Canadian NCP.
70. The third option is probably the most viable. Perhaps the most sensible relationship between the two bodies would be one that allows the NCP to focus on dispute resolution and the ombuds office to focus on fact finding. This would allow the NCP to work from a clear report on the facts of a situation and assist it in focusing on real problems rather than perceptions of what the parties think the problem is.
71. However, to be useful this option requires that the NCP's functions, resources and rules be reconsidered. This is important as there has been widespread dissatisfaction with its performance until now. The final appendix to this proposal discusses the NCPs current procedures, and makes recommendations on how to begin this reconsideration of the NCP.

CONSTITUTIONAL AND CHARTER CONSIDERATIONS

72. The creation of an Ombudsperson by the Federal Government does not create a problem under the *Canadian Charter of Human Rights and Freedoms*. So long as the ombuds office focuses exclusively on international performance of companies, there should be no federalism issue. International trade and affairs are federal powers.

APPENDIX 1 - SUMMARY OF GOVERNANCE FUNCTIONS OF OMBUDS OFFICES¹¹

| Ombudsperson | Authority | | | Accountability | | | | Funding | | |
|---|---|-------------------|--------------|--------------------|--|---|----------------------------|----------|--|---------|
| | Statute | Private Agreement | Policy of IO | Board of Directors | Parliament | Executive | International Organization | Industry | Public | Private |
| PUBLIC SECTOR OMBUDSPERSON | | | | | | | | | | |
| UK Parliamentary and Health Service Ombudsman | Parliamentary Commissioner Act 1967 and the Health Service Commissioners Act 1993 | | | | Reports directly to Parliament Appears before Public Administration Select Committee – Parliament’s principal liaison mechanism with ombudsperson | Cabinet Office is principal point of contact with government and plays a liaison role | | | Funded by government Produces Resource Accounts under agreement with the Treasury | |
| Privacy Commissioner (Canada) | <i>PIPEDA</i> and <i>Privacy Act</i> | | | | Commissioner is an officer of Parliament and reports directly to the House of Commons and Senate | | | | Government | |
| Swedish Justitieombudsman (JO) | Entrenched in the Swedish Constitution since 1809 | | | | Reporting and Appointment to the Riksdag – Swedish Parliament | | | | The Riksdag – The Swedish Parliament | |
| Norwegian Sivilombudsman | Entrenched in the Norwegian Constitution | | | | Reporting and Appointment to the Storting | | | | The Storting – The Norwegian | |

¹¹ This table should be read with the summaries provided in Of each *ombuds offices*. It is designed as a quick reference tool but there is further information contained in the paper that is important to understanding the scope of the powers each ombudsman office is given.

| Ombudsperson | Authority | | | Accountability | | | | Funding | | |
|---|----------------------------------|---|--------------|---|------------------------|-----------|----------------------------|--|------------|---------|
| | Statute | Private Agreement | Policy of IO | Board of Directors | Parliament | Executive | International Organization | Industry | Public | Private |
| | and defined in the Ombudsman Act | | | | – Norwegian Parliament | | | | Parliament | |
| INDUSTRY OMBUDSPERSON | | | | | | | | | | |
| Ombudsman for Banking Service and Investments | | Incorporated under CBCA, not for profit status | | Board of Directors – 6 independent and 3 industry | | | | Member companies and associations pay. | | |
| Australia's Banking Ombudsman | | Incorporated | | Board of Directors – 3 independent directors and 3 industry | | | | Members pay a fee, and can be assessed an annual fee in addition based on the number of cases that implicated them | | |
| Canada OBSI | | Incorporated under CBCA | | Board made up of 7 Independent Directors and 3 FSI | | | | Member Financial Services Institutions (FSIs) fund the OBSI | | |
| General Insurance Ombudservice | | Incorporated as a non-profit corporation. | | 2 industry experts and 5 independent directors. | | | | Member companies must pay levies to the GIO. | | |
| Canadian Life and Health Insurance Ombudservice | | Incorporated as a federal non-profit corporation. | | 2 industry directors and 5 independent directors. | | | | Member companies must pay levies to CLHIO. | | |

| Ombudsperson | Authority | | | Accountability | | | | Funding | | |
|---|-----------|---|-----------------------------------|--|------------|---|----------------------------|--|--------|---|
| | Statute | Private Agreement | Policy of IO | Board of Directors | Parliament | Executive | International Organization | Industry | Public | Private |
| New Zealand Insurance and Savings Ombudsman Scheme | | Incorporated as a non-profit corporation under the law of NZ. | | 8 industry directors. The ISO Commission is comprised of 2 industry directors, 2 consumer representatives (appointed by the Minister of Consumer Affairs) a secretary and a independent chair. | | | | Member companies must pay levies to the ombudsperson office. | | |
| CORPORATE OMBUDS OFFICES | | | | | | | | | | |
| Nestle World Health Organization (WHO) Code Ombudsman | | Not an independent entity | | | | The ombudsmen report the Executive Committee at the headquarters in Switzerland | | | | Not clear if the ombudsmen are funded by each Nestle country office or by headquarters. |
| Royal Bank of Canada Ombudsman | | Not an independent entity, it is empowered by the Board of Directors. | | Ombudsperson is accountable to the RBC Board of Directors. | | | | | | The office is funded by RBC. |
| INTERNATIONAL ORGANIZATION OMBUDSPERSON | | | | | | | | | | |
| Compliance Advisor Ombudsman (IFC/MIGA) | | | Guidelines and Terms of Reference | | | | President of World Bank | | | Office of President of World Bank |

| Ombudsperson | Authority | | | Accountability | | | | Funding | | |
|---|-----------|-------------------|--|--|------------|-----------|--|----------|--------|--|
| | Statute | Private Agreement | Policy of IO | Board of Directors | Parliament | Executive | International Organization | Industry | Public | Private |
| | | | (Developed through Industry, NGO, IFC/MIGA, and Public consultation) | | | | | | | |
| Asian Development Bank- Special Project Co-ordinator (SPF)/ Compliance Review Board (CRB) | | | Terms of Reference | | | | SPF- President of the Asian Development Bank CRB- Board Compliance Review Committee | | | President of Asian Development Bank |
| NGO OMBUDSPERSON | | | | | | | | | | |
| Oxfam Australia Mining Ombudsman | | | Created by Oxfam Australia | Accountable to Oxfam Australia Board through Annual Report | | | | | | Oxfam Australia (Donations, grants, fundraising) |

APPENDIX 2 - SUMMARY OF FUNCTIONS OF *OMBUDS OFFICES*

| Ombudsperson | Receive Complaints | Investigate Complaints | Combined Investigation/Mediation | Mediate/Dispute Resolution | Make Recommendations | Written Procedures |
|---|---|--|--|--|--|---------------------------|
| PUBLIC OMBUDSPERSON | | | | | | |
| UK Parliamentary and Health Service Ombudsman | Before making a complaint to ombudsperson, should first complain to the organisation, then can ask your MP to send complaint to ombudsperson. | Investigators can look at organisations' files and interview their staff about a case in detail Listen to both sides of the argument | Not formally mediation, but do try to resolve a complaint in a non-adversarial way | | If find something has gone wrong, get organisation to provide an explanation and acknowledgment of what went wrong and take action to put the matter right (including an apology) If find serious faults, can make recommendations about: <ul style="list-style-type: none"> - changes in the way the organisation works so it does not happen again - lessons to be learnt - payment for financial loss, or worry/inconvenience caused No formal power to enforce recommendations, but almost always followed | |
| Privacy Commissioner (Canada) | May receive complaints from anyone | Investigates complaints with respect to federal public sector and private sector Can also initiate and conduct audits. Can publicly disclose information related to the personal information management practices of an organisation | Uses mediation and conciliation if appropriate | Prefers to resolve disputes through negotiation and persuasion | Makes findings and non-binding recommendations | |

| Ombudsperson | Receive Complaints | Investigate Complaints | Combined Investigation/Mediation | Mediate/Dispute Resolution | Make Recommendations | Written Procedures |
|--|---|---|--|---|--|--|
| Swedish Justitieombudsman (JO) | Receive and review complaints | Investigate all complaints as well as able to initiate own investigation | None | Able to initiate prosecutions | Able to make adjudications and refine legislation | Annual Reports of actions taken |
| Norwegian Sivilombudsman | Receive and review complaints | Investigate all complaints as well as able to initiate own investigation | None | None | Issues non binding opinions to parliament | Annual Reports surveying proceedings and actions taken in year |
| INDUSTRY OMBUDSPERSON | | | | | | |
| Ombudsman for Banking Service and Investments | Yes they can receive complaints | Procedures for the investigation of complaints are laid out in the terms of reference | During an investigation the Ombudsperson also engages in mediation and dispute resolution | | Power to make recommendations exists "to the extent appropriate" | Procedures are laid out in the terms of reference. |
| Australia's Banking Ombudsman | Yes they can receive complaints from individuals and small businesses, there are restrictions on wealthy individuals who complain | The procedures are laid down in the terms of reference but the ombudsperson also creates its own procedures known as the Guidelines to the Terms of Reference | Dispute resolution is the overarching goal of the scheme. Investigations are carried out after the ombudsperson encourages the parties to resolve the issue themselves. It is used to help make recommendations, or in dispute resolution. | | After an investigation the ombudsperson has discretion as to whether a recommendation should be published or whether dispute resolution is appropriate | The Ombudsperson has very extensive written procedures. |
| General Insurance Ombudservice | The customer service officers receive the complaints. | The customer service officers investigate the complaints. | No | The case is referred to a registered mediator | The mediator in consultation with the mediator can make a non-binding recommendation. | Yes |
| Canadian Life and Health Insurance Ombudservice | The complaint officer receives the complaint. | The office will request any additional information from both parties and investigate the complaint. | There is an informal process undertaken by the complaints officer. | The formal mediation process is undertaken by a separate "Ombudservice Officer" | A senior adjudicative officer can make a non-binding recommendation for the parties' consideration. The recommendation is non-binding but if a company refuses to take the recommended action, their name will be made public. | Yes |
| New Zealand Insurance and Savings Ombudsman Scheme | The ombudsperson case managers receive the complaint | The case managers investigate the complaint | The case managers in consultation with the ombudsperson will assist the parties in resolving the dispute. | | At the request of one party, the Ombudsperson will provide a written recommendation. The parties have one month | Yes |

| Ombudsperson | Receive Complaints | Investigate Complaints | Combined Investigation/Mediation | Mediate/Dispute Resolution | Make Recommendations | Written Procedures |
|---|--|--|---|---|---|--------------------|
| | | | | | to respond to the recommendation with their comments. | |
| CORPORATE OMBUDSPERSON | | | | | | |
| Nestle WHO Ombudsman System | The country ombudsperson receives the complaint. | Unclear whether the country ombudsperson may investigate the complaint. | Yes | It appears that the Senior Executive must be consulted in the mediation of a dispute. | No | No |
| Royal Bank of Canada (RBC) Financial Group | The ombudsperson receives the complaint. | Office decides to do a complete case assessment it will do preliminary investigations and assist RBC and the client to arrive at a resolution. | Yes but may refer the case to an external mediator. | The case can be referred to an external mediator. | Recommendations are not binding. | Yes |
| INTERNATIONAL ORGANIZATION OMBUDSPERSON | | | | | | |
| Compliance Advisor Ombudsman (IFC/MIGA) | Yes- from individuals, NGOs, local representatives. | Site visits, desk research, interviews | Yes | Yes. | Yes. | Extensive |
| Asian Development Bank- Special Project Co-ordinator (SPF)/ Compliance Review Board (CRB) | Yes- two or more people from borrowing country or adjacent country, local representative, non-local representative where local representative can not be found | Site visits, desk research, interviews | Yes. | Yes. | Yes. | Extensive |
| NGO OMBUDSPERSON | | | | | | |
| Oxfam Australia Mining Ombudsman | Yes from individuals, NGOs, local representatives. | Site visits, desk research, interviews | Yes | Yes. | Yes. | Extensive |

APPENDIX 3 - SUMMARY OF OPERATIONAL ISSUES IN OMBUDS OFFICES

| Ombudsperson Office | Staffing / Resources | Time limits on complaints | Rules of Evidence | Transparency Measures | Power to establish procedures | Scope of Work |
|--|--|---|--|--|---|--|
| PUBLIC OMBUDSPERSON | | | | | | |
| Parliamentary and Health Service Ombudsman | Staff are Crown Servants, but not part of the Home Civil Service | Parliamentary - normally must complain within twelve months of knowing you had a reason to complain NHS – 3 stages – time limits at each stage: complaints advised to complain ‘as soon as possible’ | n/a | Publishes annual reports on its operations. | Most of its procedures are laid out in its governing statutes, but it has set up some policies regarding issues such as conflicts of interests. | Carry out independent investigations into complaints about unfair or improper actions or poor service by UK government departments and their agencies, and the NHS in England Can look at limited range of issues (mostly procedural type problems) |
| Privacy Commissioner (Canada) | Two assistant privacy commissioners External Advisory Committee | No | Has the power to summon witnesses, administer oaths, and compel the production of evidence | Publishes annual reports as well as select case summaries. | No | Enacted in stages, but now covers: retail sector, publishing and insurance companies, the service industry, manufacturers and other organizations, such as those in the health sector Commissioner does not have power to order an organisation to cease or change a practice or to make an order for damages |
| Swedish Justitieombudsman (JO) | 53 staff – 4 Ombudsmen with 10 person per investigative divisions | Complaints must be failed within 2 years of the incident to be considered by the office. | No special rules stated | Annual reporting to Riskdag on investigations and general operations | Investigations are directed internally, the office considers its direction independent from that of other departmental | Covers all government departments, government officials, and persons with |

| Ombudsperson Office | Staffing / Resources | Time limits on complaints | Rules of Evidence | Transparency Measures | Power to establish procedures | Scope of Work |
|---|---|--|--|---|--|--|
| | | | | | interferences. | public authority – excluding the members of the Riksdag |
| Norwegian Sivilombudsman | 25 staff | Complaints must be filed within 1 year of the incident to be considered by the office. | No special rules stated | Annual Reporting to Storting on actions undertaken and general operations | None stated | |
| INDUSTRY OMBUDSPERSON | | | | | | |
| Ombudsman for Banking Service and Investments | Not Available | Not Available | Not Available | Under the terms of reference the Ombudsperson issues an annual report including statistics and case studies | None stated | Banking Industry in Canada, but limited to members of the corporation. |
| Australia’s Banking Ombudsman | Not Available | No Time limit, but there are limits on who can complain such as wealthy individuals. | The rules of evidence do not apply according to the terms of reference | The ombudsperson is required to promote the scheme to ensure transparency | Has the power to establish procedures – “Guidelines to the Terms of Reference | Ombudsperson’s work covers member companies |
| General Insurance Ombudservice | Executive Director and Customer Service Officers. The Executive Director does not investigate complaints. | N/A | N/A | Annual Report submitted to the Members and Board of Directors. | The Board of Directors has the power to adopt and oversee procedures to “ensure compliance with the established services standards of accessibility, timeliness, courtesy, clarity, accuracy, consistency, expertise and knowledge, fairness and impartiality, confidentiality, objectivity and independence, and update standards from time to time.” | Complaints must concern a member company in the home, automobile and business insurance industry. Deals with complaints that address claims, interpretation of policy coverage, policy processing and handling. The Board can take appropriate action in relation to systemic industry problems. |
| Canadian Life and Health Insurance Ombudservice | Counsellors are responsible for receiving and addressing consumer complaints. | N/A | N/A | CLHIO has a set of standards for which its officers and services are required to follow. Transparency is ensured through an annual report to the Board of Directors and | The Board of Directors sets the criteria that must be followed by the ombuds office in executing its procedures. | The complaints must concern a member company in the health and life insurance industry. |

| Ombudsperson Office | Staffing / Resources | Time limits on complaints | Rules of Evidence | Transparency Measures | Power to establish procedures | Scope of Work |
|--|--|---|-------------------|--|---|--|
| | | | | members. | | |
| New Zealand Insurance and Savings Ombudsman Scheme | Ombudsperson | Within six years after the company's indication to the complainant that the issue cannot be resolved by their formal complaint mechanism. | N/A | The ISO decision cannot be appealed or reviewed by "any other person, court, tribunal, statutory complaints authority or any other body" The company and the complainant must disclose all relevant information related to the complaint. Prior to engaging the ombudsperson, the complainant and company must meet disclosure requirements via the formal complaints mechanisms. | The Board determines rules and terms of reference. The ombudsperson can determine what procedures it will follow. | Complaints must concern a member company and be about house, contents, vehicle, travel, health, income protection, life insurance and personal superannuation. Complaints cannot exceed NZ150,000. |
| Nestle WHO Ombudsman System | In each country where <i>Nestle</i> operates, there is a country ombudsperson. | N/A | N/A | The WHO Code Ombudsperson System is one of six internal mechanisms aimed at ensuring compliance with the WHO Code. There is no mechanism in place for the work of the ombudsmen to be directly reviewed by a third party. | N/A | Complaints must relate to the WHO Code or the Nestle Instructions. |
| Royal Bank of Canada (RBC) Financial Group Ombudsman | The RBC Financial Group Ombudsman Office is funded by the <i>Royal Bank of Canada</i> . The Office of the Ombudsman is staffed and resourced by RBC. The office is made up of dispute resolution specialists | N/A | N/A | The Ombudsperson is accountable to the RBC Board of Directors. The Office issues an annual report that provides the Board of Directors and shareholders with statistics and analyses of what kinds of complaints and actions are taken. These reports are made public and published on its website | Unclear whether the Board determines the procedure or if the office creates and follows its own procedures. | Office of the Ombudsman is empowered to review the compliance by the RBC Financial Group and member companies with proper business procedures. |
| INTERNATIONAL ORGANIZATION OMBUDSPERSON | | | | | | |

| Ombudsperson Office | Staffing / Resources | Time limits on complaints | Rules of Evidence | Transparency Measures | Power to establish procedures | Scope of Work |
|--|--|----------------------------------|--------------------------|--|--|--|
| Compliance Advisor Ombudsman (IFC/MIGA) | Ombudsperson appointed for 3-5 years by World Bank President. Compliance and advisory staff recruited, and employed separately from IFC/MIGA | | | Self-Reporting Annual Reports Disclosure to public | Guidelines and Terms of Reference created internally and endorsed by World Bank President. | Complaints must relate to IFC/MIGA funded projects |
| Asian Development Bank-Special Project Co-ordinator (SPF)/ Compliance Review Board (CRB) | SPF- Appointed by President for 3 years. May not have worked for any ADB project implementation department in past 5 years | | | Annual Report | Terms of Reference reviewable by Board Compliance Review Committee | Complaints must relate to projects funded by ADB. Compliance reports can only be conducted with regard to ADB departments. |
| NGO OMBUDSPERSON | | | | | | |
| Oxfam Australia Mining Ombudsman | Ombudsperson appointed by Oxfam Australia's board of directors. | | | Annual Reports | Yes. | Complaints must relate to the mining activities of Australian companies only. |

APPENDIX 4 – SUMMARIES OF OMBUDS OFFICES

PUBLIC OMBUDSPERSON

Swedish Justitieombudsman – Parliamentary Ombudsman

Governance

From where does it derive its authority (powers)?

The Swedish Justitieombudsman or Parliamentary Ombudsman (JO) has derived its authority from the Swedish Constitution since 1809. The provisions are contained in Chapter 12 articles 6 and 8¹² which entrench the office and its abilities into the constitution.

To whom is the Ombudsperson accountable?

The Swedish JO is appointed under Chapter 3 provisions 3.8.1-3.8.5 of the Riksdag Act.¹³ The office is considered independent and internally accountable, with its own internal structures for administration, hiring and mandate direction. The Riksdag is responsible for the appointment of the Ombudsperson¹⁴ who must submit a report¹⁵ on a yearly basis. In this manner, the reporting requirements serve as an accountability mechanism between the Ombudsperson and the Parliament of Sweden.

How is the office funded?

The Riksdag, in order to avoid a conflict of interest with the Ministry of Finance and Parliament, allocates the annual budget for the Swedish JO. The separation between the Ombudsperson and the Ministry of Finance is intended to enhance the independence of the office.

Functions

What function is the Ombudsperson's Office tasked with carrying out?

The Swedish JO is tasked with the following responsibilities:¹⁶

- *Investigation and inspections*
- *Reporting and adjudication*
- *Referral of complaints to other departments*
- *Dispute resolution and litigation; acting as a prosecutor*
- *Placement of penalties; including fines*

¹² Riksdag, "Laws – The Constitution – Chapter 12 Parliamentary Control," online: Riksdag <http://www.riksdagen.se/templates/R_PageExtended_6329.aspx>

¹³ Riksdag, "Laws – The Constitution – Chapter 3 Introduction to Business," online: Riksdag <http://www.riksdagen.se/templates/R_PageExtended_6420.aspx>

¹⁴ Riksdag, "Laws – The Constitution – Chapter 12 Parliamentary Control – article 6," online: Riksdag <http://www.riksdagen.se/templates/R_PageExtended_6329.aspx>

¹⁵ Riksdag, "Laws – The Constitution – Chapter 3 Introduction to Business – article 8," online: Riksdag <http://www.riksdagen.se/templates/R_PageExtended_6420.aspx>

¹⁶ Riksdag, "Parliamentary Ombudsman – Powers and Sanctions," online: Riksdag <http://www.jo.se/Page.aspx?MenuId=23&MainmenuId=12&ObjectClass=DynamX_Documents&Language=en>

- *Remedy deficiencies in legislation*

The legislation defines the role of the Ombudsperson as both a reporting agent and a prosecutor with powers similar in kind to the Swedish Chancellor of Justice. The Chancellor operates in much the same way as the Canadian Attorney General.

How do the functions relate to each other? Are there conflicts between them?

The office is responsible for all aspects of case management. Investigations are initiated either through receipt of a complaint or by an independent investigation conducted by the office. All functions work in a complimentary process and no conflicts were noted.

Operational Issues

How does the Ombudsperson's Office ensure transparency?

The office is structured into four departments where each one is responsible for an area of the government. The JO has a staff of approximately fifty persons, with ten persons in each "Ombudservice" group, administrative staff and the four Ombudsmen. There are no limits placed on who can complain to the office, all complaints are processed regardless of age, citizenship or place of residence. On average, the office receives 5,000 complaints yearly. All complaints must relate to an incident which occurred no later the two years prior.

The Office has the authority to investigate all government agencies, officials employed by the state, and those parties entrusted with public authority (excluding members of the Riksdag). These complaints are processed and investigated and where fault is found, adjudication can commence. Approximately 60% of all complaints received are investigated with 25% resulting in 'minor inquiry' while 35% result in more exhaustive investigations.¹⁷

Norwegian Sivilombudsman – Parliamentary Ombudsman

Governance

From where does it derive its authority (powers)?

The Norwegian Parliamentary Ombudsman derives its authority through article 75 of the *Norwegian Constitution*¹⁸. Article 75 of the *Norwegian Constitution* creates a civilian office responsible for monitoring the actions of the government. This constitutional provision is further defined in the *1980 Ombudsman Act*, which lays out the framework for the operation of the Office.

¹⁷ Riksdag, "Parliamentary Ombudsman – Dealing with Complainants," online: Riksdag <http://www.jo.se/Page.aspx?MenuId=40&MainmenuId=12&ObjectClass=DynamX_Documents&Language=en>

¹⁸ Storting, "Parliamentary Ombudsman," online: <<http://www.sivilombudsmannen.no/eng/statisk/som.html>>

The Office is constitutionally entrenched, thus ensuring its importance within the Norwegian government. In contrast to the Swedish model, the Constitution merely calls for the existence of such an office and does not specify its role or responsibilities. The roles and responsibility of the Ombudsperson can be found in the *Ombudsman Act*.

To whom is the Ombudsperson accountable?

The Sivilombudsman is accountable to the Norwegian Parliament, the Storting. The office is required to produce a yearly report tabling a survey of proceedings conducted throughout the year as well as any suggested legislative changes. The Storting is also responsible for the appointment of Ombudsmen as well as financing the office. The office maintains that it is politically neutral and independent. It is detached from the general ministries, which it monitors, and has no authority over the members of the Storting.

How is the office funded?

The Norwegian Parliamentary Ombudsman is funded through the Storting. The Ombudsperson is an elected member of the Storting and his salary and benefits are aligned with that position.¹⁹ The office is funded through the Storting in the same manner as other departments. The Ombudsperson's office is not responsible for reviewing the finances of the government reducing a potential conflict of interest.

Functions

What function is the Ombudsperson's Office tasked with carrying out?

The Sivilombudsman has the ability to receive and review complaints as well as launch independent investigations into government operations over which it has authority. Once the complaint has been reviewed and a finding made, the Ombudsperson issues its opinion to the public. This opinion is not legally binding and acts as a notice or recommendation to the Storting.

The scope of the Sivilombudsman extends to all persons working in the public service but its jurisdiction is limited. Section 4 of the *Ombudsman Act* details the jurisdictional limits thereby reducing the function of the office to a reviewing function. It may only review issues that the Storting or the King have not yet ruled upon.

How do the functions relate to each other? Are there conflicts between them?

There does not seem to be any evidence of a conflict between the two powers. The office is designed to both receive complaints and issue independent opinions, both of which are reported in the annual report.

Operational Issues

How does the Ombudsperson's Office ensure transparency?

¹⁹ Odin Archive, "Storting's Ombudsman for Public Administration" online: <<http://www.sivilombudsmannen.no/eng/statisk/som.html>>

An elected member from the Storting who is appointed by that body to act as the Ombudsperson throughout their term in office is responsible for the office. Under their direction, the staff of 25 is divided into five divisions, each with a specific focus. On average, the office annually deals with 2,300 complaints, each of which can be submitted by a concerned party regardless of citizenship.

What are the parties' obligations with respect to disclosure of information?

Not Available

Privacy Commissioner of Canada

The mandate of the Privacy Commissioner is to oversee the application of the *Privacy Act*²⁰ and the *Personal Information and Protection and Electronic Documents Act (PIPEDA)*.²¹ It works within that context to protect and promote the privacy rights of Canadians.

Governance

From where does it derive its authority (powers)?

The *Privacy Act* established and set out the powers of the Office of the Privacy Commissioner. Its powers were extended through the *Personal Information and Protection and Electronic Documents Act (PIPEDA)*. The Commissioner is independent of any other part of government. Enacted in stages, the Act now covers the retail sector, publishing and insurance companies, the service industry, manufacturers and other organizations, such as those in the health sector.

To whom is the Ombudsperson accountable?

The Commissioner is an Officer of Parliament and reports directly to the House of Commons and the Senate. Within three months of the end of each financial year, the Commissioner submits a report to Parliament on the activities of the Office during that year. The Commissioner may also make special reports to Parliament on any matter within the scope of the powers, duties and functions of the Commissioner if in her opinion the matter is sufficiently urgent.

Periodic reviews of *PIPEDA* are conducted by Parliament, and the Privacy Commissioner is audited by the Office of the Auditor General.

How is the office funded?

The Privacy Commissioner is funded by Government of Canada.

Functions

What function is the Ombudsperson's Office tasked with carrying out?

²⁰ R.S., 1985, c. P-21.

²¹ 2000, c.5.

The role of the Privacy Commissioner is to advocate for the privacy rights of Canadians, and to investigate complaints made under s.29 of the *Privacy Act* or s.11 of *PIPEDA*. The Commissioner investigates complaints from individuals with respect to the federal public sector as well as the private sector.

The Commissioner has the power to make findings and non-binding recommendations, as well as to initiate and conduct audits. The Privacy Commissioner has the power to publish information about personal information-handling practices in the public and private sector. The Office also has a research function, and conducts research into privacy issues as required.

If the complainant is not satisfied with the results, he or she can seek judicial review. The Commissioner can also initiate court actions with the consent of the complainant if its recommendations are not being implemented. Its preference is to resolve disputes through negotiation and persuasion. The Commissioner also uses mediation and conciliation where appropriate.

Other Powers

The Commissioner does not have the power to establish its own rules and procedures. The Commissioner has the power to summon witnesses, administer oaths and compel the production of evidence. The Commissioner does not have the power to order an organization to cease or change a practice or release personal information, nor can the Commissioner award damages.

How do the functions relate to each other? Are there conflicts between them?

There does not seem to be any separation between the functions.

Operational Issues

How does the Ombudsperson's Office ensure transparency?

There are two assistant privacy commissioners and an external advisory committee. Section 58(1) of the *Privacy Act* provides for "such officers and employees" as are necessary for the Commissioner to carry out its obligations and employees shall be appointed in accordance with the *Public Service Employment Act*.

What are the parties' obligations with respect to disclosure of information?

The Commissioner ensures transparency through annual and special reports to Parliament. She also publishes select case summaries of her findings. If a summary deals with a subject already on the website, or if it has little educational value, it may not be posted online.

Are there time limits for the submission of a complaint?

There are no time limits on the submission of a complaint.

UK Parliamentary And Health Service Ombudsman

The *UK Parliamentary and Health Service Ombudsman* combines the two statutory roles: Parliamentary Commissioner for Administration (PCA) and Health Service Commissioner for England (HSCE). Its mandate is to carry out independent investigations into complaints about unfair or improper actions or poor service by UK government departments and their agencies, and the NHS. Its goals are to:

- *make our services available to all;*
- *operate open, transparent, fair, customer-focussed processes;*
- *understand complaints and investigate them thoroughly, quickly and impartially, and secure appropriate outcomes; and*
- *share learning to promote improvement in public services*²²

Governance

From where does it derive its authority (and powers)?

The Ombudsperson derives its authority from two statutes: *Parliamentary Commissioner Act 1967* and the *Health Service Commissioners Act 1993*. Its jurisdiction can be updated or amended by way of Orders in Council or other legislative means. The Queen, on the recommendation of the Prime Minister, appoints the Ombudsperson. The Ombudsperson is independent of government and has statutory responsibilities and powers to report directly to Parliament. She holds office during good behaviour and can only be removed if incapacitated or following a resolution of both houses.

The Ombudsperson can carry out independent investigations into complaints about unfair or improper actions or poor service by UK government departments and their agencies, and the NHS in England. There are specified issues and organizations that the Ombudsperson can investigate. For example, the ombudsperson cannot investigate a matter if the complainant intends to take legal action.

To whom is the Ombudsperson accountable?

The Ombudsperson reports directly to Parliament. It appears at least annually before the Public Administration Select Committee, which the Parliament has chosen to be its principal liaison mechanism with the Ombudsperson, to give evidence on the work of the office. The ombudsperson is solely responsible and accountable for the conduct, administration and decisions by the office. Its decisions may also be judicially reviewed. The relationship between the ombudsperson and the government is set out in a statement of responsibilities.

How is the office funded?

This is a non-governmental, public body funded by government.

Functions

²² Governance Statement, online: Parliamentary and Health Service Ombudsman <http://www.ombudsman.org.uk/about_us/governance/governance_statement.html>.

What function is the Ombudsperson’s Office tasked with carrying out?

The Ombudsperson undertakes independent investigations into complaints about government departments, a range of public bodies and the National Health Service. It works to “secure appropriate outcomes” and “share learning to promote improvement in public services”.²³ Its aim is to ensure 100% compliance with recommendations stemming from its investigations. In its latest annual report, it claims that over 99% of its recommendations were complied with.²⁴

The majority of parliamentary recommendations focused on financial compensation for inconvenience or distress, an apology, financial compensation for loss, or an action to remedy. The majority of health recommendations focused on an apology or changes to a policy or procedure; others included procedural review, staff training or some other action to remedy the failure identified.

Other powers

The Ombudsperson has established policies and procedures in the areas of conflicts of interest, access to information, records management, diversity policy, unreasonably persistent complainants, unacceptable behaviour from complainants and complaints about the ombudsperson.

How do the functions relate to each other? Are there conflicts between them?

There are no explicit distinctions between people carrying out various functions, and no apparent conflicts between the functions.

Operational Issues

How is the Ombudsperson office staffed and resourced?

The Ombudsperson may delegate authority to act on her behalf. Staff are employed by the Ombudsperson, and are Crown Servants but are not part of the Home Civil Service.

How does the Ombudsperson’s Office ensure transparency?

The Ombudsperson accounts to Parliament through a statutory Annual Report. It also produces Resource Accounts under arrangements agreed with the Treasury, which are subject to audit by the National Audit Office. Both reports are published and available to the public.

Annual reports to Parliaments cover: the discharge of the Ombudsperson’s functions; standards of service provided to complainants; and, use of public money. From time to time, the ombudsperson reports on individual and/or systemic examples of injustice.

What are the parties’ obligations with respect to disclosure of information?

Not available

²³ Role and Purpose Statement, online: Parliamentary and Health Service Ombudsman <http://www.ombudsman.org.uk/about_us/role_purpose.html>.

²⁴ Parliamentary and Health Service Ombudsman, *Annual Report 2005-06: Making a Difference*, online: <http://www.ombudsman.org.uk/pdfs/ar_06.pdf>.

Are there time limits for the submission of a complaint?

Under the Parliamentary branch of the Ombudsman Office, it is advised that people make their complaint within twelve months of knowing they had a reason to complain.

For the NHS, there are three stages and apparently time limits at each stage, although it is not clear what these time limits are.

INDUSTRY OMBUDSPERSON – BANKING

Ombudsman for Banking Service and Investments (OBSI)

Governance

From where does it derive its authority (and powers)?

The OBSI is a corporation originally incorporated as the Canadian Banking Ombudsman Inc., a not-for-profit corporations under Part II of the Canada Business Corporations Act. The Ombudsperson is appointed by the Board of Directors of the corporation on the recommendation of an independent directors' committee.²⁵ The term of appointment can be up to 5 years and they may be reappointed. Thus the ombudsperson derives its powers from the organizations it seeks to regulate.

The Ombudsperson can be removed by a vote of 75% of the Board of Directors, but this has to include a majority of independent directors.

To whom is the Ombudsperson accountable?

The OBSI states that the “while responsible to the Board, the Ombudsperson does not report to the board and does not solicit advice of directors on specific complaints.”²⁶ The Terms of Reference of the OBSI states that “the Ombudsman shall prepare and provide an annual report as well as other reports containing statistics, case studies of complaints for educational purposes (with all personal identifiers removed), and other information that the Board considers appropriate to the interests of interested parties and the general public.”²⁷

The Board is specifically prohibited from receiving or hearing appeals on recommendations of the Ombudsperson. However, the Chair of the Board may “in a manner that the Chair deems appropriate, consider any concerns about the complaint-handling process or the conduct of an employee or officer of the OBSI;”²⁸

The Board includes 6 independent directors and 3 directors representing industry.

How is the office funded?

Member financial service providers fund the Ombudsman for Banking Service and Investments. There is no cost to clients who use the OBSI's services.²⁹

Functions

What function is the Ombudsperson's Office tasked with carrying out?

²⁵ OBSI : Terms of Reference, Paragraph 3.

²⁶ OBSI: Governance Structure, available online at http://www.obsi.ca/obsi/pages_english/about_us_govern.php3> visited on 26.10.2006.

²⁷ OBSI: Terms of Reference, Paragraph 26 available online at http://www.obsi.ca/obsi/pages_english/about_us_govern.php3>

²⁸ IBID, paragraph 12(a).

²⁹ OBSI: Terms of Reference, available online at http://www.obsi.ca/obsi/pages_english/about_us_terms.php3> vistied on 26.10.2006.

The primary functions or powers of the Ombudsman Office include investigation of complaints, dispute resolution which arise from complaints. It also has various other powers that are marginal to the complaints process.

Investigation

The Ombudsman's powers are set out in article 3 of the Terms of Reference. They include: receiving complaints (3(c)), investigation of complaints subject to section 8 – 13 with the goal of resolving them, to the extent appropriate in each case; making recommendations to FSPs and Complainants to resolve the complaints or reject complaints on their merits; advising the public on complaint procedures (3(f)) and providing general information about an FSP.³⁰

Dispute Resolution

The Ombudsman's Office engages in dispute resolution processes while it investigates a complaint.³¹ The terms of reference of the OBSI refer in several places to dispute resolution. For example the Ombudsman's Office can decide not to investigate a complaint if it is being considered in another proceeding (8(e)), unless the FSP consents to consideration. The Ombudsman is required not to investigate a complaint where they decide there is a more appropriate place to deal with the complaint such as a dispute resolution process.

The dispute resolution process is confidential and will not be disclosed or used in any subsequent legal or other proceedings; nor will the staff of the office be called upon to testify at any subsequent legal or other proceedings.

Other Powers

The ombudsman has various other powers and responsibilities such as to ensure compliance by the OBSI with all applicable legislation. It is also tasked with ensuring that the officers, employees, consultants and independent contractors of OBSI acknowledge their understanding of and compliance with any code of conduct and privacy policies. Finally, it is to report any threat to FSP staff or property, which they become aware of in the course of their duties.

How do the functions relate to each other? Are there conflicts between them?

There appears to be confusion between the dispute resolution and investigation powers. According to the Terms of Reference of the ombudsman's engages in dispute resolution while conducting an investigation. These powers appear to be in conflict. The purpose of an investigation is normally to determine facts and make a finding regarding the validity of a particular complaint. However, dispute resolution usually involves negotiation or mediation of two opposing positions. If an Ombudsman is tasked with determining facts and making a finding, this would appear to be inconsistent with the role as mediator. The terms of reference do not outline any procedures with respect to dispute resolution, thus it is not clear to what extent the ombudsman actually performs this function.

³⁰ *ibid*, article 3 a-g.

³¹ *ibid*, article 3(d).

Operational Issues

How is the Ombudsperson Office staffed and resourced?

Not available

How does the Ombudsperson's Office ensure transparency?

The Ombudsman's Office is required to issue an annual report and other reports that contain "statistics, case studies of complaints for educational purposes...., and other information that the Board considers appropriate ..."³²

What are the parties' obligations with respect to disclosure of information?

FSPs are required to provide "full co-operation and assistance ... in the investigation of the Complaint." The Ombudsperson "shall require an FSP and any Representative of the FSP to provide all non-privileged information relating to the subject matter of the Complaint within a reasonable period of time. If an FSP does not provide information to the Ombudsperson it must demonstrate to the Ombudsperson's "satisfaction that the disclosure of the information would likely place the FSP or its representative in breach of the law or its duty of confidentiality to a third party where consent to disclose has not been obtained, despite its best endeavour to obtain that consent;"³³

Are there time limits for the submission of a complaint?

A complaint needs to be made within 180 days of the date that the FSP has completed its investigation and the FSP has informed the complaint in writing of the existence of the OBSI and of the time limitation.³⁴

Australia's Banking Ombudsperson

Governance

From where does it derive its authority (and powers)?

Member banks created a company called the Banking and Financial Services Ombudsman Limited. It is a self regulatory initiative.

To whom is the Ombudsperson accountable?

"The Scheme is overseen by a Board of Director which has three industry and three public interest representatives, and an independent Chairperson."³⁵ The Board of Directors is elected by member companies and is responsible for appoint the ombudsperson, assisting the ombudsperson in developing the policies of the scheme,

³² Ibid, article 26.

³³ Ibid, article 15b.

³⁴ Ibid, article 8(c).

³⁵ BFSO: Guidelines to the Terms of Reference, p. 3.

considering the budget submitted by the Ombudsperson and managing the process for making changes to the terms of reference.³⁶

How is the office funded?

BFSO is funded by industry. Individuals complaining incur no costs. The annual budget is met by contributions from members of the scheme, who pay a participation fee and an additional amount assessed based on the number and complexity of the disputes considered regarding that member.³⁷

Functions

What function is the Ombudsperson's Office tasked with carrying out?

The aim of the Ombudsperson is to “provide an independent and prompt resolution of the disputes.”³⁸ The Ombudsperson considers complaints and either recommends that they be withdrawn or settled.³⁹ The rules of evidence do not apply to the office of the ombudsperson in the performance of their duties.

The terms of reference establish criteria for making such determinations including the law, applicable industry codes or guidelines, good industry practice and fairness in all the circumstances.⁴⁰ The Ombudsperson is also required to set procedures for the investigation of disputes. Finally, the Ombudsperson has the power to make recommendations that parties are required to accept. However, in a situation where a person accepted the recommendation, but not the financial services provider then the Ombudsperson can make a determination against the FSP.⁴¹ This determination can include a payment, not more than \$250 000, other non-monetary requirements for cases involving privacy, and an order for the provision of information on the subject of the dispute.⁴² The terms of reference also have requirements for the form of determination.

Other Powers

The Ombudsperson does have the power to establish rules and procedures.⁴³ In this regard it has published a document entitled “Guidelines to the Terms of Reference.”⁴⁴

How do the functions relate to each other? Are there conflicts between them?

The functions appear to be organized so that the Ombudsperson begins with dispute resolution and where this fails, they begin an investigation that is followed by a recommendation. This is slightly confusing as dispute resolution may benefit from an impartial fact finding process. Neither the terms of reference nor the guidance documents make it clear whether dispute resolution or investigation is performed first.

³⁶ BFSO: Guidelines to the Terms of Reference, p. 3.

³⁷ Ibid.

³⁸ BFSO: Terms of Reference, p. 3.

³⁹ Ibid Section 7.3, P. 10.

⁴⁰ Ibid Section 7.1, p. 10.

⁴¹ Ibid, Section 7.9 p. 11.

⁴² Ibid, Section 7.10 a-c, p. 12.

⁴³ Ibid, Section 12.6

⁴⁴ BFSO: “Guidelines to the Terms of Reference” 96 pages.

Operational Issues

How is the Ombudsperson office staffed and resourced?

Not available.

How does the Ombudsperson's Office ensure transparency?

Transparency appears to be ensured in two ways. This includes publishing and promoting details about how the scheme works, how a dispute can be lodged; assistance which is available to disputants; and the time frames which are imposed on the procedure.⁴⁵

Are there time limits for the submission of a complaint?

The scheme places a variety of limits on complaints. First, only individuals and small businesses who receive financial services, provided security over financial service and those whose information is the subject of a dispute relating to confidentiality and privacy can pursue a complaint.⁴⁶ Interestingly, the Ombudsperson is entitled not to consider disputes involving wealthy individuals.

⁴⁵ Ibid, Section 11, p. 15.

⁴⁶ Terms of Reference, Section 2.1 a-b, p. 3.

General Insurance OmbudService (Canada)

Governance

From where does it derive its authority (and powers)?

The Governance Insurance OmbudService (GIO) is an independent, non-profit corporation with a Board of Directors. The GIO is made up of federally licensed members from the home, automobile and business insurance industry carrying out the business of general insurance. Membership can be withdrawn or members can voluntarily resign. The scheme does not include brokers.

To whom is the Ombudsperson accountable?

The GIO is governed by a Board of Directors and consists of five independent directors and two industry directors.⁴⁷ The Board of Directors of the Insurance Board of Canada appoints the two industry experts while the independent members must meet certain criteria to be eligible for appointment.⁴⁸ Once eligible for appointment, candidates for the offices of independent director must also “be known and respected regionally and nationally...have a significant background in public and consumer affairs...represent the Canadian public in gender, language, region and minority background”⁴⁹

How is the office funded?

The office is funded through levies applied to each of the member companies.

Functions

What function is the Ombudman tasked with carrying out?

⁴⁷ http://www.gio-scad.org/mandate_role.html The five independent directors are made up of a 3 consultants, a retired justice, and a professor each representing different regions of Canada. The 2 industry directors are the president and CEO of two insurance companies (Peace Hills Insurance Company and Insurance Bureau of Canada).

⁴⁸ http://www.gio-scad.org/bylaws_governance.html criteria that will exclude a person from holding the position of independent director are the following:

- a director, officer or employee of the Insurance Bureau of Canada or any insurer or reinsurer that is a member of GIO, either currently or in the three years before being appointed as an Independent Director
- currently an employee of a federal, provincial or territorial government, a current director, officer or employee of an Crown agency
- a director, officer or employee of a government department or agency that regulates or supervises financial institutions or financial services financial services, currently or in the three years before being appointed as an Independent Director
- a member of the Senate of Canada, member of Parliament or member of a provincial or territorial legislative assembly currently or, in the three years prior to appointment as an Independent Director
- an individual who provides goods or services for a fee to an insurance company or reinsurance company that is a member of GIO
- a person who has a significant interest (as defined by federal legislation) in a class of shares of a insurer or reinsurer that is a member of GIO

⁴⁹ Ibid.

The Ombudservice is tasked with assisting in the resolution of conflicts between insurance customers and their companies but only when complaints cannot be resolved within the company to the satisfaction of the customer.⁵⁰ Complaints that the GIO deals with are: claims, interpretation of policy coverage, policy processing and handling. They do not have the scope to address the following issues: cost of insurance rates, availability of insurance, settlement procedures required by law and matter that have or will be before the courts.⁵¹

The process is divided into two steps. The first step involves the assignment of a CSO who determines how best to address the problem in question. Often the customer is asked to approach the company and use any formal complaint processes available within that company, often they are directed to contact a Complaint Liaison Officer. If the settlement remains unsatisfactory, a customer can then request mediation from the GIO.

Mediation

The customer must submit a written request for mediation to the Consumer Services Officer assigned to the file. The mediator is chosen by the consumer from a list of mediators found at the *ADR Institute of Canada Inc.* or *le Bureau du Quebec*. Mediation sessions are confidential and non-binding. If there is no agreement between the two parties following mediation, the GIO in consultation with the mediator, will provide a non-binding recommendation.

Other Powers

The Board has the authority to adopt and oversee procedures to “ensure compliance with the established service standards of accessibility, timeliness, courtesy, clarity, accuracy, consistency, expertise and knowledge, fairness and impartiality, confidentiality, objectivity and independence, and update standards from time to time”.⁵² The Board also has the authority to take appropriate action in relation to “systemic industry problems”.⁵³

The GIO Customer Service Officers will often respond to situations where the GIO dispute settlement system is not the correct venue and recommend other options for the customer.

How do the functions relate to each other? Are there conflicts between them?

It is not clear that investigations are undertaken by the Customer Services Officers, but it may be assumed that in exercising the power to decide which cases will be referred to mediation, preliminary investigations have occurred. There is a clear division however with regards to the investigation powers and the mediation function, the latter is assigned to an external registered mediator.

⁵⁰ General Insurance Ombudsman, “How do I Make a Complaint” online: <<http://www.gio-scad.org/complaint.html>>

⁵¹ *Ibid.*

⁵² *Ibid.*

⁵³ *Ibid.*

Operational Issues

How is the Ombudsperson office staffed and resourced?

The office comprises an Executive Director and “Customer Service Officers” (CSO) who receive complaints and review the matter to determine if the company acted appropriately. The office is resourced by allocations from the Board of Directors.

How does the Ombudsperson’s Office ensure transparency?

Transparency is ensured through the commission of an annual report and financial statements to the Board of Directors and members of the GIO.

What are the parties’ obligations with respect to disclosure of information?

The disclosure requirements are not standardized but are at the discretion of the Customer Services Officer.

Are there time limits for the submission of a complaint?

Not available

Canadian Life and Health Insurance Ombudservice

Governance

From where does it derive its authority (and powers)?

CLHIO belongs to the Financial Services OmbudsNetwork (FSON), and as an independent non-profit service is governed by a Board of Directors. The CLHIO was incorporated in 2002 and remains a separate legal entity. There are two Industry Directors and five directors who are not associated with the health and life insurance industry. Directors hold office for one year but are eligible for re-election at the CLHIO Annual General Meeting.⁵⁴ Where the subject matter is outside of its scope, the consumer is referred to the appropriate ombudservice within the FSON.

To whom is the Ombudsperson accountable?

There is no Ombudsperson per se, rather it is a service comprised of staff that process and investigate complaints regarding life and health insurance services and products. The office and the staff are accountable to the Board of Directors.

How is the office funded?

Fees are levied on participating life and health insurance companies.⁵⁵ No fees are levied on consumers who use the services of CLHIO.

Functions

⁵⁴ GOC, *Submission to the Standing Senate Committee on Banking, Trade and Commerce Regarding Consumer Issues in the Financial Services Sector*. Canadian Life and Health Insurance OmbudService (Ottawa: March 2005) at p. 4

⁵⁵ *Ibid.* at p. 3

What function is the Ombudsperson's Office tasked with carrying out?

Prior to engaging the services of the CLHIO, consumers are advised to pursue the internal complaints process of the company in question. Often, companies have a three-step process. The first is to express dissatisfaction with the agent providing the service followed. If the complaint is not resolved then the consumer can contact a Client Service department. The final in-house step is often a review of the complaint by a Complaint Officer who acts as an independent mediator. Following these three steps, if the complaint remains unresolved, the consumer can approach the CLHIO. If a consumer has not pursued this avenue prior to contacting CLHIO, CLHIO staff will assist them by directing them to the correct person in the company in question and provide clarity regarding general concerns.⁵⁶

Investigation

The Ombudservice will investigate complaints where necessary. Once a complaint is filed, "with the written authorization of the consumer that is making the complaint, the CLHIO will collect information from the consumer, the financial institution, and any relevant third parties..."⁵⁷ Any information is provided in confidence and remains with the CLHIO.

Resolution

There is an informal and a formal complaint resolution system. The informal system consists of the counsellor calling the insurance provider and attempting to resolve the situation. The formal complaint process involves an "Ombudservice Officer" who is trained to assist the customer and insurance provider in resolving the issues at hand.

If no resolution arises between the two parties, a senior adjudicative officer can make a non-binding recommendation for the parties' consideration. The recommendation is non-binding but if a company refuses to take the recommended action, their name will be made public.

How do the functions relate to each other? Are there conflicts between them?

It is not clear whether the Ombudservice Officers are certified mediators or if counsellors can act in the dual function of informal and formal mediators. Again, the division between investigative powers and mediation are blurred.

Operational Issues

How is the Ombudsperson office staffed and resourced?

Counsellors are responsible for receiving and addressing consumer complaints. The counsellors can receive complaints either via telephone or a written complaint. The office

⁵⁶ GOC, Submission to the Standing Senate Committee on Banking, Trade and Commerce Regarding Consumer Issues in the Financial Services Sector. Canadian Life and Health Insurance OmbudService (Ottawa: March 2005) at p.2

⁵⁷ Canadian Life and Health Insurance Ombudsman "Privacy Statement," online: <<http://www.clhio.ca/privacy.html>>

also has Ombudservice Officers or senior adjudicative officers who function as mediators to the disputes and provide written recommendations.

How does the Ombudsperson’s Office ensure transparency?

CLHIO has a set of standards for which its officers and services are required to follow. The Service must be: accessible, accurate, clear, confidential, consistent, courteous, fair and impartial, independent and objective, knowledgeable and timely. Transparency is ensured through an annual report to the Board of Directors and CLHIO members.

What are the parties’ obligations with respect to disclosure of information?

The complainant should contain a description of the problem, the reason for the disagreement and copies of any and all correspondence and supporting information regarding the dispute.⁵⁸

Are there time limits for the submission of a complaint?

Not available

New Zealand Insurance and Savings Ombudsman Scheme

Governance

From where does it derive its authority (and powers)?

The Insurance and Savings Ombudsman (ISO) is appointed and governed by the ISO Commission. The ISO Commission is comprised of two industry representatives (appointed by the Board) two consumer representatives (appointed by the Minister of Consumer Affairs), a secretary and an independent chair. The Board of Directors is comprised of eight industry representatives. The Board’s primary function is to amend the Rules and Terms of Reference. Insurance and savings companies choose to become members of the scheme, however it appears that once you are a member of certain insurance associations or councils you may automatically become a member.⁵⁹ The scheme does not include brokers.

To whom is the Ombudsperson accountable?

Beginning in 1990, the New Zealand insurance industry adopted a scheme of self-regulation to assist with the provision of information to consumers. The complaints and review procedure under the Code of Business Practices was replaced by the ISO. The ISO is not subject to the Access to Information Act or the Ombudsmen Act of New Zealand. The ISO is accountable to the ISO Commission and must provide the ISO Commission with an annual report and yearly financial statements. The ISO can be removed by the ISO Commission if found in violation of Rule 16.5

How is the office funded?

⁵⁸ Canadian Life and Health Insurance Ombudsman “Complaints,” online <<http://www.clhio.ca/complaints.html>>

⁵⁹ Members of the Health Insurance Association of New Zealand, the Insurance Council of New Zealand and the Life Office Association of New Zealand

The ISO is funded through levies on the fire and general, life, health, savings and superannuation service providers who are participants.⁶⁰ The participants fund the ISO Board who in turn fund the ISO Commission who funds the ISO Office where complaints are investigated and resolved.

Functions

What function is the Ombudsperson's Office tasked with carrying out?

The office, working on behalf of the ISO, is tasked with mediating disputes that arise between consumers or policyholders and personal, domestic and savings services. The ISO will decide the procedure to be used in hearing complaints and will “generally adopt an inquisitorial approach in considering complaints”⁶¹ The amount in question must not exceed NZ\$150,000. Only with the consent of the participating company may the ombudsperson consider complaints exceeding this sum. The complainant must also show that they have taken up their complaint with the company in question.⁶²

Investigation

This power is limited to a review of the information provided by the two parties by a case manager who considers the information on behalf of the ISO. Once the ISO has received a complaint, it sends the details of the complaint to the company involved. Included is a signed document from the complainant asking for information from the company and their acceptance of conditions related to non-provision of information in court proceedings.⁶³ The insurance company is then asked to provide any information it has in relation to the complaint and provide reasons.

Mediation

When no agreement is reached, the case manager in consultation with the ISO will consider the information and assists the parties in reaching an agreement. Failing that, at the request of one party, the Ombudsperson will provide a written recommendation. The parties have one month to respond to the recommendation with their comments.

⁶⁰ Statistics New Zealand, “Insurance and Superannuation” <<http://www.stats.govt.nz/quick-facts/industries/insurance-and-superannuation.html>>

⁶¹ ISO Terms of Reference at 5.1

⁶² Insurance Council of New Zealand <http://www.icnz.org.nz/consumer/disputes/ombudsman.php>

- Where an amount greater than \$100,000 is under dispute (unless the insurance company agrees)
- That would be better dealt with by a court or other body
- That the complainant has not taken up with the company concerned
- That have been previously considered (unless new evidence is available)
- That have been considered by a court or any other body
- That are pursued in a trivial, frivolous or vexatious manner or in bad faith
- That relate to an insurance company's commercial judgement, and methods or procedures for determining prices or premiums payable
- That relate to an insurance company's decision to impose conditions or limitations on a policy, or terminate or refuse cover under an existing policy or agreement, as a result of material non-disclosure.

⁶³ Insurance Council of New Zealand “Insurance and Savings Ombudsman” online: <<http://www.icnz.org.nz/consumer/disputes/ombudsman.php>>

Award

If the Ombudsperson requires the company to pay an award to the complainant, he or she can only accept this payment on the condition that there will be no further action taken “without the insurance company’s consent”.⁶⁴ If the complainant accepts the award, the Ombudsperson may make an award against the company. This decision is binding on the member company so long as the sum is not over NZ \$150 000. Finally, although the decision is binding on a member company it is not binding on the complainant. The complainant retains the right to take the case through to the disputes tribunal⁶⁵ or courts.

Other Powers

The decisions of the ISO are binding on the insurance company involved as they are bound by the Rules and Terms of reference when they become a Participant. Unlike a statutory scheme, however, the ISO cannot levy penalties or fines; it can only grant awards.

How do the functions relate to each other? Are there conflicts between them?

The system does not have a distinguishable mediation process but instead mediation is regarded as an on-going process rather than a differentiated step in the conflict resolution process. It is also clear that written recommendations are to be issued by the Ombudsperson; the case managers do not have the authority to do so.

Operational Issues

How is the Ombudsperson office staffed and resourced?

The office is funded by the ISO Commission that in turn is funded by the ISO Board of Directors. The office is staffed by case managers employed by the ISO Commission.

How does the Ombudsperson’s Office ensure transparency?

According to the *ISO Terms of Reference*⁶⁶, the ISO must “consider and investigate in a fair, independent and impartial manner” all complaints arising from a service of a participant. Complaints must be resolved “efficiently and effectively”. The ISO decision cannot be appealed or reviewed by “any other person, court, tribunal, statutory complaints authority or any other body”⁶⁷

What are the parties’ obligations with respect to disclosure of information?

There is a requirement that the company and the complainant disclose all relevant information related to the complaint.⁶⁸ Prior to engaging the ombudsperson, the complainant and company must meet disclosure requirements by pursuing the formal complaints mechanisms offered by the company in question.

⁶⁴ *Ibid.*

⁶⁵ *Disputes Tribunals Act*, 1998

⁶⁶ *Terms and Reference of the Insurance & Savings Ombudsman* (1 January 2006), New Zealand (hereinafter *ISO Terms of Reference*).

⁶⁷ *ISO Terms of Reference* at s.5.9

⁶⁸ *Ibid.* at s.5.2

Once a formal complaint is filed with the company, the company must acknowledge the complaint within three working days; investigate the complaint and advise the consumer of progress and outcome; and if unable to resolve the complaint, the company must inform the consumer within two months and advise the consumer of the right to take complain to the Ombudsperson.⁶⁹

The ISO can consider any matter it considers relevant in making a decision in the resolution process, including the complainant's education, personal circumstances, manner in which the complainant was dealt with by the company and vice versa, and the degree of control the company had over the procedure or system that is the subject of the complaint.⁷⁰

Finally, with regards to confidentiality, if the complainant breaches any of the confidentiality provisions before a resolution is reached the ISO "shall discontinue consideration of the complaint and make no decision in any form in respect of the complaint."⁷¹ If, however, the breach occurs after the complaint is resolved, the ISO can, as is appropriate, disclose the terms of any agreement.⁷²

Are there time limits for the submission of a complaint?

There is a time limit of six years starting from the date on which a formal complaint was lodged with the participant company. In most circumstances, after a complaint has been pursued through the formal complaint process of the company, the company will notify the complainant that a deadlock has been reached. Upon receipt of a notification in writing from the company that a deadlock has been reached, the complainant has two months to refer the complaint to the ISO.⁷³

⁶⁹ <http://www.icnz.org.nz/consumer/disputes/complaints.php>

⁷⁰ Ibid. at s.5.7

⁷¹ Ibid. at s.5.10

⁷² Ibid.

⁷³ Ibid. at s.6.1

CORPORATE OMBUDSPERSON

IBM Global Procurement Ombudsman Process

Governance

From where does it derive its authority (and powers)?

The Ombudsperson is a creation of IBM.

To whom is the Ombudsperson accountable?

Not available.

How is the office funded?

Not available, but likely corporate funding.

Functions

What function is the Ombudsperson's Office tasked with carrying out?

“The purpose of the Ombudsman Office is to provide an avenue for suppliers and others to address procurement-related concerns and issues that, for any reason, cannot be resolved satisfactorily through normal business channels.”⁷⁴ Its main function is to resolve procurement related concerns and foster “more open, effective and productive relationships with our suppliers.”⁷⁵

How do the functions relate to each other? Are there conflicts between them?

There is an inherent conflict of interest in attempting to resolve disputes where the company that funds the ombudsperson is a party to the complaint.

Operational Issues

How is the Ombudsperson office staffed and resourced?

Not available.

How does the Ombudsperson's Office ensure transparency?

Not available.

Are there time limits for the submission of a complaint?

Not available.

⁷⁴ IBM “Ombudsman-Supplier Relations” online: <<http://www-03.ibm.com/procurement/proweb.nsf/ContentDocsByTitle/United+States~Ombudsman-Supplier+relations>> visited on 29-10-2006.

⁷⁵ Ibid.

Nestle and World Health Organization (WHO) Code Ombudsman System

Governance

From where does it derive its authority (and powers)?

In 2002 the Nestle WHO Ombudsman System was created to resolve complaints arising from staff regarding any failure to comply with the *WHO International Code of Marketing of Breastmilk Substitutes, Article 11.3 and Resolutions* (hereinafter *WHO Code*). It is not independent and reports to the Executive Committee at the headquarters in Switzerland. The Nestle WHO Ombudsman System operates in accordance with internal terms of reference and outside of line management.

To whom is the Ombudsperson accountable?

Each Country Ombudsperson is accountable to the Nestle S.A. Executive Committee at the Company's global headquarters in Switzerland.⁷⁶

How is the office funded?

The office is funded by the Nestle corporation, but it is unclear if funding flows from the Nestle headquarters in Switzerland or if it is funded by the head offices in each country.

Functions

What function is the Ombudsperson's Office tasked with carrying out?

In each country, the Ombudsperson can receive complaints from staff for violations of the WHO Code.⁷⁷ Complaints are raised confidentially and outside of line management.⁷⁸ This system is one part of a set of voluntary monitoring activities implemented by Nestle in order to ensure its numerous overseas operations comply with the WHO Code. The purpose of the ombudsperson system is to fulfill all monitoring obligations according to the national measures where they have operations and or, where such measures do not exist, the WHO Code and the Nestle Instructions⁷⁹ (the corporation voluntarily drafted instructions to assist with the international implementation of the WHO Code).⁸⁰

Investigation

⁷⁶ *Nestle Corporate Business Principles* (3rd Ed) Nestle S.A. Public Affairs, Switzerland (2004) <www.nestle.com/NR/rdonlyres/8E1A804C-C292-4075-BFA2-2908C094D739/0/Corporate_Busines_GB.pdf> at p.9

⁷⁷ The WHO Code recommends to all WHO Member States to encourage breastfeeding and give adequate guidelines on how breast milk substitutes should be marketed. The WHO adopted the WHO Code by resolution in 1981. See WHA34/1981/REC/2, 21 May 1981. Within the WHO Code is article 11 whereby

⁷⁸ Nestle "Ombudsman Code" online:

<<http://babymilk.nestle.com/Who+Code+Issues/Allegations/Allegations.htm>>

⁷⁹ In 1982 Nestle created and implement the Nestle Instructions that voluntarily and unilaterally apply the WHO Code in all developing countries. The Instructions are applied where local legislation is less strict, imprecise or no code exists. The instructions were reviewed by the International Nestle Boycott Committee, the WHO and UNICEF and were revised in 1996.

<<http://babymilk.nestle.com/Who+Code+Issues/Nestle+Code+Compliance/>>

⁸⁰ Nestle "Ombudsman Code" online:

<<http://babymilk.nestle.com/Who+Code+Issues/Nestle+Code+Compliance/>>

The designated country ombudsperson investigates alleged violations of the WHO Code (including national measures) or Nestle Instructions.

Reporting

The Country Ombudsmen report directly to a member of the Nestle S.A. Executive Committee at the Company's National Headquarters in Switzerland. There do not appear to be any standardized reporting requirements or mechanisms in place to secure the confidentiality of reporting staff members.

How do the functions relate to each other? Are there conflicts between them?

There is an obvious concern regarding whistleblower protection for employees who chose to report a violation of the WHO Code or Instructions. It is not clear who conducts investigations and how conflict resolution is undertaken and for what end.

Operational Issues

How is the Ombudsperson office staffed and resourced?

There is an ombudsperson in each country empowered to receive complaints from employees. The office is resourced by Nestle.

How does the Ombudsperson's Office ensure transparency?

There are regular audits on a worldwide basis pertaining to the implementation of the WHO Code and this can include the work of the WHO Ombudsman System. As indicated earlier, the WHO Code Ombudsman System is one of six internal mechanisms aimed at ensuring compliance with the WHO Code. There is no mechanism in place for the work of the ombudsmen to be directly reviewed by a third party.

What are the parties' obligations with respect to disclosure of information?

There do not appear to be any obligations with respect to disclosure of information by the employee or Nestle.

Royal Bank of Canada (RBC) Financial Group Ombudsman

Governance

From where does it derive its authority (and powers)?

Established in 1995, the Office of the Ombudsman is empowered to review the compliance by the RBC Financial Group and member companies with proper business procedures.

To whom is the Ombudsperson accountable?

The Ombudsperson is accountable to the RBC Board of Directors.

How is the office funded?

The RBC Financial Group Ombudsman Office is funded by the Royal Bank of Canada.

Functions

What function is the Ombudsperson's Office tasked with carrying out?

The office receives complaints from both consumers and employees and is intended to function as a neutral process for the voluntary resolution of conflicts. The Office of the Ombudsman is set up to “assist each RBC unit fulfill its business purposes, mindful of how each interaction may affect a client’s overall relationship with RBC”⁸¹ The majority of the time, the Office refers customers to the RBC Customer Relations Centre.

Investigations

When the Office decides to do a complete case assessment it will do preliminary investigations and assist RBC and the client to arrive at a resolution. In 2005, the majority of case assessments concerned consumer account transactions.⁸²

Mediation

The Ombudsman Office assists clients in resolving the conflict with an RBC business, and when necessary, an external mediator can be brought in. Recommendations are not binding and clients can pursue other forms of conflict resolution.

If the client is not able to attain a satisfactory agreement via the RBC Ombudsman, they can take their complaint to the Ombudsman for Banking Services and Investments.

Other Powers

The Office can and make recommendations to RBC to improve operations or products and services where it will improve customer service.

How do the functions relate to each other? Are there conflicts between them?

There does not appear to be a division or distinction made between who investigates the complaint in a case assessment and the mediation function except in circumstances where the services of an external mediator are used.

Operational Issues

How is the Ombudsperson office staffed and resourced?

The Office of the Ombudsman is staffed and resourced by RBC. The office is made up of dispute resolution specialists. It is the last point of appeal once a client has gone through all other available channels.

How does the Ombudsperson's Office ensure transparency?

⁸¹ RBC Financial Group “Office of the Ombudsman” online:
<http://www.rbc.com/ombudsman/annual_report/index.html>

⁸² RBC Financial Group “Office of the Ombudsman” online:
<http://www.rbc.com/ombudsman/annual_report/stats.html>

The Office issues an annual report that provides the Board of Directors and shareholders with statistics and analyses of what kinds of complaints and actions are taken. These reports are made public and published on its website.

What are the parties' obligations with respect to disclosure of information?

Not available

INTERNATIONAL DEVELOPMENT OMBUDSPERSON

Compliance Advisor Ombudsman (IFC/MIGA)

The Compliance Advisor Ombudsman (CAO) is an independent body set up to resolve disputes arising from the implementation of projects funded by the International Finance Corporation (IFC) and the Multilateral Investment Guarantee Fund (MIGA). Both these organizations provide financing to the private sector for projects in developing nations.

Governance

From where does it derive its authority (and powers)?

The CAO was established by the president of the World Bank, and derives its authority from Terms of Reference (TOR) and Operational Guidelines, which define the ambit of the office's powers and responsibilities. These guidelines were a product of consultation with NGOs in developing countries, industry representatives, managers within the IFC and MIGA, and the public.⁸³

To whom is the Ombudsperson accountable?

The CAO office is independent of IFC/MIGA and of the communities that may be affected by development projects. The office is accountable to the World Bank Group president.

The CAO aims toward full disclosure as much as possible, particularly with regard to compliance reports and complaint resolution.

The CAO has conducted an in house review of its own activities,⁸⁴ concentrating on effectiveness and accountability. This report found that only one percent of IFC/MIGA projects prompt complaints from eligible parties, and that such complaints arise in areas of political unrest. Given this, the CAO had to vigilantly maintain independence, and be seen to have done so, so as to avoid being tainted with the appearance of corruption often prevalent in such regions. The report also found that the CAO needs to be aware of the prevailing circumstances in the region of each project when choosing to continue with the collaborative process under the ombudsperson, or whether compliance should be ordered.

How is the office funded?

The CAO is funded directly by the office of the World Bank Group president.

Functions

⁸³ "Operational Guidelines", <www.cao-ombudsman.org/html-english/about_operational.htm>

⁸⁴ "Retrospective Analysis of CAO Interventions, Trends, Outcomes and Effectiveness 2006", <www.cao-ombudsman.org/html-english/aboutretrospectiveanalysis.htm>

What function is the Ombudsperson’s Office tasked with carrying out?

The CAO has three major branches to its mandate, which include a compliance review section, a research and advisory section, and a dispute resolution ombudservice.

Compliance

In order to ensure projects are congruous with the social and environmental policies and guidelines set out by the IFC and MIGA, projects can be audited by the CAO. Audits can be conducted at the behest of IFC or MIGA, the World Bank Group president, or as a result of a complaint lodged with the Ombudsperson. The requests are judged against admissibility criteria, which are a determination of whether evidence or a perceived risk exists that shows policies have been disregarded or protections not provided. The likelihood of an audit yielding useful information is also considered. If a request for an audit is accepted, the CAO must notify the IFC or MIGA, and explain the impetus and rationale for such action in writing.⁸⁵

The CAO operational guidelines set out the structure audits must take, mandating that Terms of Reference be devised that detail the actions of each audit team and specific project in advance. Auditors are then bound by these terms. Auditors may conduct their investigations on site, as well as consult the local community.⁸⁶

Audits will generally include an examination of the extent of compliance with applicable rules and guidelines, in addition to a set of recommendations. The report is expected to identify the cause or causes of the social and environmental impact, and determine if non-compliance is at the root of these causes. Recommendations should be corrective in nature, and focus on “practical, policy, or procedural matters”.⁸⁷ Reviews can then be conducted at a later date to ensure criticisms were taken into account and recommendations for compliance heeded.

Advisor

In the capacity of advisor, the CAO offers advice on “environmental and social policies, guidelines, procedures, strategic issues, trends and systematic issues”⁸⁸, with the aim of improving the overall institutional approach. This service is provided to World Bank Group president and to IFC/ MIGA managers. The advisory branch expands on lessons learned in the course of the ombudsperson and compliance functions, but does so in a general way, so as to be able to give guidance on policy issues and not on specific projects.

Requests for advice must meet the admissibility criteria. These include that the structures or expertise already existent are inadequate, that advice will not deal with a specific project, and whether the CAO has sufficient resources to deal with the request. If the

⁸⁵ CAO Operational Guidelines, 2006, p. 23. <<http://www.cao-ombudsman.org/html-english/documents/OperationalGuidelineswithAuditUpdates2-14-2006.pdf>>

⁸⁶ Ibid.

⁸⁷ Ibid. at 31.

⁸⁸ CAO Annual Report, 2003/2004, p. 17. <<http://www.cao-ombudsman.org/pdfs/Englishtxt.pdf>>

request is accepted, terms of reference are drawn up that set the parameters, timelines, and administrative details for the team of advisors. Advisors conduct both desk and field research, and submit a draft report to the requesting body for comment. Final reports are then submitted, and information disclosed to the public. However, disclosure is limited in that specific project information used cannot be released. The World Bank Group president must approve the version of the report disclosed to the public.

Of particular relevance to the extractive industries, the advisory branch published a report entitled “Extracting Sustainable Advantage: A Review of How Sustainability Issues Have Been Dealt With In Recent IFC & MIGA Extractive Industry Projects”.⁸⁹

Ombudsperson

The ombudsperson function is the complaints mechanism of the CAO, and facilitates the resolution of disputes between IFC/MIGA projects and those affected adversely by their implementation. As stated in the operational guidelines, “the focus of the ombudsman role is what is going to happen in the future, rather than what has happened in the past”.⁹⁰ In this regard, the system is unlike a court, where the emphasis is on laying blame and filling the record. The CAO Ombudsman assists the parties involved in finding solutions.

The ombudsperson is appointed for a term of 3-5 years by the World Bank Group president, and is a member of staff bound by World Bank staff rules and disclosure policies, although the office operates with independence. The ombudsperson is expected to communicate with the president, IFC/ MIGA management, sponsors, and parties affected.

Complaints can be made by “any individual, group, community, entity or other affected or likely to be affected by the social and /or environmental impacts of an IFC or MIGA project”.⁹¹ Such persons can appoint a representative to lodge a complaint on their behalf. Representatives may have to prove their authority to act on behalf of others, and prove a connection to the local community.

Complaints are vetted by the CAO to ensure they meet the acceptance criteria of involving IFC or MIGA actors, and credible social and environmental impacts.

Complaints can be grounded in the following:

1. *Processes followed in preparation for a project.*
2. *The adequacy of measures for the mitigation of social or environmental impacts of the project.*
3. *Arrangements for involvement of affected communities, minorities, and vulnerable groups in the project.*
4. *The manner in which the project is implemented.*⁹²

⁸⁹ CAO Final Report, April 2003. <<http://www.cao-ombudsman.org/html-english/documents/FINALExtractiveIndustriesReviewReport.pdf>>

⁹⁰ Above note 3, at p. 9.

⁹¹ Ibid.

⁹² Ibid.

The complaints system is formally structured, with a general timeline of 50-110 days from receipt of complaint to settlement. After a complaint has been received and accepted, the assessment phase begins. This includes a preliminary investigation, a request for a response from the management of IFC or MIGA, and notification of the private sector project sponsors and other involved parties. Assessment can include meetings with parties, public consultations, site visits, and general research and analysis. The CAO then makes a decision on the course of action best suited in the situation, and notifies all parties. Action may include mediation or conciliation, interim reports, investigation, or the opening up of a dialogue and consultation process. The Ombudsperson may also decide to deal with the complaint under the advisory or compliance branches on the CAO instead, referring the complaint to a compliance audit or for advice. This decision is based on the ombudsperson's consideration of a number of factors, listed below:

1. *The threat of irreparable harm if the complainants concerns are not addressed in a timely manner.*
2. *The seriousness of the issues or policy violations alleged.*
3. *The number of people or communities (potentially) affected by the complaint and the seriousness of the environmental and/or social impacts.*
4. *The phase reached in project approval and implementation.*
5. *The centrality of the issues raised by the complaint to the CAO's overall mandate.*
6. *The likelihood that the CAO's intervention could have positive results.*⁹³

When the complaint has been settled, reports are made to the World Bank Group president and to the parties, as well as to the public (subject to any limitations on confidentiality or disclosure). After a complaint has been resolved, it may still be subject to monitoring and reporting.

Operational Issues

How is the Ombudsperson office staffed and resourced?

As stated in the CAO operational guidelines, the CAO is actually located within the same facility as the IFC, but independence is maintained by securing the area and limiting access only to CAO staff. Staff are recruited internally by the CAO, and are not staff of the IFC/MIGA.

How does the Ombudsperson's Office ensure transparency?

Transparency is assured by annual reports detailing the work of each branch with relation to specific IFC/MIGA projects. There are also a number of external reviews conducted that examine both substantive and operational issues, from the office's effectiveness in resolving disputes, to the compliance with budgetary plans.⁹⁴ These report found that only one percent of IFC/MIGA projects prompt complaints from

⁹³ Ibid. at p. 15.

⁹⁴ See "External Review of CAO" at <http://www.cao-ombudsman.org/html-english/archive.htm>

eligible parties, and that such complaints arise in areas of political unrest. Given this, the CAO had to vigilantly maintain independence, and be seen to have done so, so as to avoid being tainted with the appearance of corruption often prevalent in such regions. The report also found that the CAO needs to be aware of the prevailing circumstances in the region of each project when choosing to continue with the collaborative process under the ombudsperson, or whether compliance should be ordered.

In order to increase access to the dispute resolution mechanism of the CAO and ensure that communities adversely affected have limited technical barriers to participation, the CAO has taken a number of practical steps. Information on the CAO and the services they provide are published in languages relevant to the local community, and are made available electronically and locally, through NGOs and project sponsors. Experts on the regional areas and local communities are sought and consulted. Complaints will be accepted by the CAO in any language, and translators will be used to ensure effective oral and written communication in that local language.

What are the parties obligations with respect to disclosure of information?

The CAO is bound by the disclosure policies of the IFC/MIGA, but recognizes the importance of disclosing findings to the public as a deterrent against improper behaviour. The CAO will disclose their findings to the extent that information was not “received in the course of an investigation, if the disclosure of that material is restricted under IFC or MIGA disclosure policies”.⁹⁵

Asian Development Bank (ADB)

The Asian Development Bank (ADB) finances projects and provides technical assistance to the private sector with the goal of development throughout Asia. The institution has created an accountability mechanism to ensure that projects are carried out in accordance with the policies and principles of the ADB, and to provide an avenue to redress for communities negatively impacted.

Governance

From where does it derive its authority (and powers)?

The ombudsperson (Special Project Facilitator) derives power from the operational guidelines set out to guide the accountability mechanism of the ADB by the Board of Directors.

To whom is the Ombudsperson accountable?

The SPF is accountable to the president, by whom he or she is appointed. The CRP is accountable to the Board Compliance Review Committee (BCRC), which provides oversight with respect to the terms of reference the CRP sets for itself, and the monitoring processes drawn up by CRP to ensure recommendations are being implemented.

⁹⁵ Above note 4. at p. 6.

How is the office funded?

The office is funded by the President of the Asian Development Bank.

Functions

What function is the Ombudsperson's Office tasked with carrying out?

Consultation

Complaints from affected groups are referred to the Special Project Facilitator (SPF), who controls the entire consultation process. The SPF essentially fulfills the role of an ombudsperson, and encourages the parties to deal with disputes through communication, consultation or mediation. The SPF can hold meetings with each of the parties, conduct on site visits, and hold public consultation sessions. However, consent of the parties involved is required. The SPF can also function as an advisor to operations departments within the ADB.

Complaints can be filed by the following entities:

1. *Two or more people in an ADB borrowing country where the ADB-assisted project is located or in a member country adjacent to the borrowing company*
2. *A local representative of the affected group*
3. *A non-local representative, in exceptional cases where local representation cannot be found and the SPF agrees.*⁹⁶

Unlike the CAO complaints mechanism, there is information that must be included in a complaint in order for it to be considered. The complainant must show that they are directly materially and adversely affected by a project; that the harm is attributable to an act or omission of the ADB during the planning and implementation of the project; and that they have already attempted to resolve the problem directly with the department responsible for administering the project. There is a list of criteria that the complaint is judged against to determine if it is admissible.

The ADB attempts to deal with complaints in 90 days from when the complaint is first received to when the SPF delivers his or her assessment. This assessment is then presented to the complainant and implicated operations department for comment. The complainant can choose to end the consultation process at this point, and file a request to move on to the second function of the accountability mechanism, the compliance review. However, if the complaint opts to continue consultation, the SPF, together with the affected parties, determines a course of action for the specific situation based on “the type and seriousness of the problem, the principal parties to the problem, the remedies being sought by the complainant, the urgency required in fashioning appropriate mitigation measures, and the likelihood of positive outcomes”.⁹⁷

⁹⁶ ADB Accountability Mechanism, Operations Manual Bank Policies, at para. 7. ≤ http://www.adb.org/Documents/Manuals/Operations/OML01_29oct03.pdf>

⁹⁷ Idid. at para. 23.

Compliance Review

The compliance review function of the ADB is quite separate from the consultation function. The Compliance Review Panel (CRP) only examines the conduct of organs of the ADB itself, and the compliance of those organs with operation policies of the ADB itself. Private sector companies or government departments in project companies are not eligible for review. The CRP can liaise with all parties involved in a review, and makes reports and recommendations aimed at improving overall institutional performance, as well as at remedying non-compliance on specific projects.

Requests for compliance review can be brought by the same classes of entities listed earlier, with the addition of members of the ADB Board of Directors who suspect serious violations and impropriety respecting operational policies. The list of factors relating to material damage and irreparable harm required to make a complaint under the consultation function are substantially the same as what is required here. Those factors that cause a complaint to be rejected under the consultation function also exclude the request under the compliance review function. The CRP decides whether to recommend a review, and this must be approved by the oversight mechanism, the Board Compliance Review Committee (BCRC). After conducting the review, the CRP releases a draft report to management and the requesting entity for comments. The final report is then released to the BCRC, who may approve recommendations and add additions.

Operational Issues

How is the Ombudsperson office staffed and resourced?

The SPF is appointed by the President of the ADB for a term of three years, and can not have been an employee in a project-implementing department of the ADB for at least five years. The CRP consists of three members, each of whom is appointed for a 5 year term. The selection criteria are as follows:

1. the ability to deal thoroughly and fairly with the request brought to them;
 2. integrity and independence from management;
 3. exposure to developmental issues and living conditions in developing countries; and
 4. knowledge of and experience with the operations of ADB or comparable institutions, and/or private sector experience.⁹⁸
- President.

How does the Ombudsperson's Office ensure transparency?

The operational guidelines of the Accountability mechanism state that the process aims to be as transparent as possible, and states that although “general descriptions about the process can be made public, substantive details about the discussions will be kept confidential until a final solution is reached”.⁹⁹

⁹⁸ Ibid. at para. 35.

⁹⁹ Ibid. para. 29.

What are the parties' obligations with respect to disclosure of information?

The actors in the accountability mechanism must comply with the policies and procedures of the ADB, "including those provisions aimed at ensuring that confidential business information is not disclosed".¹⁰⁰

NON-GOVERNMENTAL OMBUDSPERSON

Oxfam Australia Mining Ombudsman (AMO)

The mining ombudsman set up by the nongovernmental organization Oxfam is largely based on the precedent set by the CAO. However, the AMO's mandate is specifically limited to the activities of Australian mining companies operating territorially and extraterritorially in the mining, gas and oil industries. The AMO has adopted a rights based approach, and is chiefly concerned with advocacy for indigenous groups affected by mining projects. Activities include providing technical assistance to groups affected, creating standard setting instruments for industry regarding human rights and business practices, and lobbying government to legislate binding extraterritorial controls to force compliance of industry with those standards.

Governance

From where does it derive its authority (and powers)?

The AMO's mandate is to ensure Australian mining companies are treating local communities in a fair and equitable manner, and respecting human rights.¹⁰¹ Its functions are advocacy through standard setting and benchmarking, and a complaints mechanism. It was created by the Board of Directors of Oxfam Australia, and functions in accordance with the its operational guidelines.

To whom is the Ombudsman accountable?

The AMO is accountable to the Board of Directors of Oxfam Australia and the public through required annual reports.

How is the office funded?

At present, the AMO is funded by the budget of Oxfam Australia, a not-for-profit, non-governmental organization.

Functions

What function is the Ombudsman's Office tasked with carrying out?

Complaints

Complaints can be directed towards the AMO from individuals or affected communities, their representatives, or local NGOs . They must be directed towards an Australian company. The AMO determines if a complaint has any credibility by conducted initial

¹⁰⁰ Ibid. para. 29.

¹⁰¹ <http://www.oxfam.org.au/campaigns/mining/ombudsman/>

research such as interviews and desk research. If the claim is found to be credible, a site visit is conducted. The AMO may hold public meetings and meet with all interested parties, contacting the mining company on behalf of the complainants once specific grievances have been identified. The rest of the process depends of the willingness of the corporation involved to participate in a resolution with the community. Mediation, consultation or dialogue processes can be implemented by the AMO as the situation dictates, and a report is published on the issues involved and the corporate response. Being an NGO based system, enforcement is at issue. Being as there is no connection of the ombudsperson and his or her finding to the corporate policy making apparatus, such as a board of directors or president in the cases of the institutional systems, enforcement can only be of the 'name and shame' variety. Companies that do not react effectively to AMO criticisms are lobbied against and reprimanded publicly, but no greater sanctions exist.

Advocacy

The AMO presents itself as an interim measure, and advocates the creation of a formal ombudsperson within the mining industry in Australia. The recommendations as to form and process largely follow the example of the IFC/ MIGA system as set out above. This system should hold Australian companies operating overseas to the same standards regarding human rights that are expected on Australian soil. The AMO calls on the Australian government to legislate such norms and standards extra-territorially, and create penalties for corporations and allow the piercing of the corporate veil to sanction officers and directors directly. Independence and impartiality are emphasized with regard to funding, and operational activities. A periodic independent verification process is suggested, one that would ensure the ombudsperson system is not bowing to industry pressures. The AMO recommends that both government and industry, with some sort of aggregated system to require higher contributions from corporations who proportionally accrue a higher number of complaints, fund such an office. The AMO also advises that a formal system should be accessible in any language and free of costs for complainants. The system should also provide free legal and technical assistance to communities to be sure that they understand their rights, hearings should take place in that community, and should be done so with appropriate cultural adjustments. To promote accountability, the AMO recommends that reports of a formal ombudsperson be delivered to the Australian stock exchange and disclosed fully to the public.¹⁰²

Operational Issues

How is the Ombudsperson office staffed and resourced?

The ombudsperson is appointed by the Board of Directors of Oxfam Australia, and staffed by Oxfam employees. The NGO has no connection to government or industry.

How does the Ombudsperson's Office ensure transparency?

Transparency is assured by annual reporting.

What are the parties obligations with respect to disclosure of information?

N/A

¹⁰² http://www.oxfam.org.au/campaigns/mining/ombudsman/complaints_mechanism.html

APPENDIX 5 - IMPROVING THE FUNCTIONING AND GOVERNANCE OF THE CANADIAN NATIONAL CONTACT POINT FOR THE OECD GUIDELINES

Introduction

The National Roundtable on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries outlined several actionable ideas with respect to the OECD Guidelines at its Toronto meeting in 2006. They included the following:

1. “Clarify and strengthen National Contact Points (NCP) in cooperation with other OECD Countries with the aim of expanding and enhancing monitoring and reporting requirements.
2. Establish an internal governmental ombudsperson’s office based upon an enhanced NCP function to investigate complaints regarding the activities of extractive companies operating in developing countries.
3. Canada should support or lead within this arena for the development of standards that would support the dispute resolution mechanism. This could focus on the OECD and initiate expanded OECD guidelines for human rights, as well as an expanded role for the national contact point.”¹⁰³

The purpose of this paper is to review the operations and decisions of the Canadian NCP and to formulate options for its improvement in accordance with these actionable ideas. This paper begins with a review of the OECD Guidelines and their implementation; this includes a discussion of governance and restructuring issues in other NCPs. Then it considers the operation of the Canadian NCP.

Components and Character of the OECD Guidelines

The OECD Guidelines are part of the OECD Declaration and Decisions on International Investment and Multinational Enterprises. To understand the nature of this document and the OECD Guidelines, it is first necessary to consider the Convention for the Organization of Economic Cooperation and Development as its provisions have implications for the character of the OECD Guidelines and its implementation.

The Convention for the Organization of Economic Cooperation and Development

This Convention establishes the OECD and outlines state obligations, powers of the organization and its main decision making bodies. The Convention establishes a Council, which is composed of all members of the organization and is “the body from which all acts of the organization derive.”¹⁰⁴ The OECD achieves its aims through the three methods outlined in Article 5 of the Convention. These include taking decisions,

¹⁰³ National Roundtable on Corporate Social Responsibility and the Canadian Extractive Industry in Developing Countries, Meeting Summary, Toronto 12-14 September 2006 (Draft version).

¹⁰⁴ *Convention for the Organization of Economic Cooperation and Development*, 14 December 1960, article 7.

which are binding¹⁰⁵, making recommendations to members¹⁰⁶, and entering into agreements with members, non-member states and international organizations.¹⁰⁷ With respect to decisions of the Council, article 6(3) of the Convention states “No decision shall be binding on any Member until it has **complied with the requirements of its own constitutional procedures**. The other members may agree that such a decision shall apply provisionally to them.”¹⁰⁸

OECD Declaration and Decisions on International Investment and Multinational Enterprises

This document consists of four elements, the Guidelines for Multinational Enterprises, National Treatment, Conflicting Requirements and International investment incentives and disincentives. Each of these documents is accompanied by a decision of the OECD council with respect to follow-up procedures. The two documents that are relevant for the purposes of this paper include the OECD Guidelines for Multinational Enterprises and the Decision of the Council on the OECD Guidelines for Multinational Enterprises.¹⁰⁹

The Guidelines for Multinational Enterprises are recommendations to Multinational enterprises addressed by government. They are voluntary standards covering areas such as, employment and industrial relations, human rights, environment, information disclosure, combating bribery, consumer interests, science and technology, and taxation.

The Guidelines were adopted in 1976, and most recently revised 27 June 2000. The most recent revision has resulted in revised procedural guidance for NCPs. However, another important aspect of this revision is the extension of the OECD Guidelines beyond OECD member states. The Guidelines state, “the NCP will ... encourage the enterprises operating on their territories to observe the Guidelines wherever they operate while taking into account the particular circumstances of each host country.”¹¹⁰ This is combined with Section C paragraph 5 of the procedural guidance, which states that “if issues arise in non-adhering countries, [NCPs will] take steps to develop an understanding of the issues involved, and follow these procedures where relevant and practicable.”¹¹¹ Thus the new version of the guidelines attempts to extend application beyond OECD member states.

The OECD guidelines address human rights issues in two places. The guidelines recommend that Enterprises “should take fully into account established policies in the countries in which they operate, and consider the views of other stakeholders. In this regard, enterprises should: ... (2) Respect human rights of those affected by their

¹⁰⁵ Ibid. Article 5(a) [emphasis added].

¹⁰⁶ Ibid. Article 5(b).

¹⁰⁷ Ibid. Article 5(c).

¹⁰⁸ Ibid. Article 6. [Emphasis Added]

¹⁰⁹ OECD Guidelines for Multinational Enterprises, 27 June 2000, 982nd session of the council, [C/M(2000)17/Prov].

¹¹⁰ Ibid. Paragraph 2.

¹¹¹ Decision of the Council on the OECD Guidelines for Multinational Enterprises, 27 June 2000, 982nd session of the Council [C/M(200)17/Prov].

activities consistent with the host government's international obligations and commitments.”¹¹² The commentary provided by the OECD states that

“while promoting and upholding human rights is primarily the responsibility of governments, where corporate conduct and human rights intersect enterprises do play a role, and thus MNEs are encouraged to respect human rights, not only in their dealings with employees, but also with respect to others affected by their activities, in a manner that is consistent with host governments' international obligations and commitments. The Universal Declaration of Human Rights and other human rights obligations of the government concerned are of particular relevance in this regard.”¹¹³

The Guidelines thus while recommending that enterprises respect human rights qualify this statement considerably with the phrase “consistent with host governments' international obligations and commitments.”¹¹⁴

However, the commentary makes clear at the same time that MNEs are encouraged to respect human rights, of their employees and others affected by their operations. The general problem that the human rights provisions suffer from is the lack of specificity that exists in the guidelines. To which human rights standards and obligations are companies committed? How is a company to operationalize human rights standards that are addressed to governments?

More concrete than the human rights provision is the Employment and Industrial Relations chapter of the Guidelines. In contrast to the human rights provision, this chapter has more specific recommendations to MNEs. For example, paragraph 1 b and c illustrate that MNEs cannot eliminate child or forced labour on their own and thus recommend that enterprises contribute towards their elimination.¹¹⁵ This example illustrates more realism in the nature of obligations that a company holds with respect to human rights. Similar observations can be made with respect to the industrial relations, health and safety and training provisions.

Implementation of the OECD Guidelines

The implementation of the OECD Guidelines is outlined in the Decision of the Council on the OECD Guidelines for Multinational Enterprises (June 2000). This document outlines two key bodies that have responsibilities with respect to implementing the guidelines – National Contact Points and the OECD Committee on International Investment and Multinational Enterprises (CIME).

First adhering countries are required to set up NCPs. These undertake promotional activities, handle inquiries and contribute to the solution of problems related to the guidelines. In doing so they are required to take “due account” of the procedural guidance.¹¹⁶ The NCP is also required to inform business, labour and other “interested parties of the availability of such facilities.”¹¹⁷ NCPs are required to cooperate if the need

¹¹² Paragraph 2.

¹¹³ OECD, “The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications” DAF/IME/WPG(2000)15/FINAL, p. 12.

¹¹⁴ Ibid.

¹¹⁵ Chapter IV, para. 1(b)&(c).

¹¹⁶ Paragraph 1.

¹¹⁷ Ibid. Paragraph 1.

arises on matters covered by the guidelines. Finally they are required to meet annually to share experiences and report to the Committee on International Investment and Multinational Enterprises.¹¹⁸

The second body entrusted with the implementation and promotion of the guidelines is the Committee on International Investment and Multinational Enterprises (CIME). CIME is required to hold exchanges of views on matters related to the guidelines, invite BIAC and TUAC and other non-governmental organizations to express their views on matters covered by the Guidelines. It is also required to hold exchanges of view with representatives from non-adhering countries and issue clarifications of the Guidelines. In performing these duties the committee is also required to take due account of the accompanying procedural guidance and report to the OECD council.¹¹⁹

Governance of other NCPs

NCPs in OECD countries have utilized 4 major structures. Tripartite NCPs exist in 8 countries.¹²⁰ In 20 countries the NCPs are a single government department, usually within a Ministry of Finance, Foreign Affairs or Economic Affairs.¹²¹ In 9 countries the NCP consists of multiple departments or ministries.¹²² Finally in two countries the NCP is quadripartite, meaning that it includes government, business, labour unions and NGOs.¹²³

Experience in Restructuring NCPs

The United Kingdom launched a review of its own NCP after a report of an All-parliamentary Committee on the Great Lakes Region and Genocide Prevention. The Government received 10 written responses and established a Joint Working Group (JWG). The Government responded July 13th to the JWG's report, and has launched a new NCP in September 2006. While specific information on how it functions and whether the government response to the consultation procedure was adequate has yet to be determined, the government has committed itself to a series of proposals the majority of which relate to the specific instances procedures and disclosure issues.

While there are numerous recommendations the vast majority of these are fairly small steps forward. A few exceptions are outlined below. For example,

“in the event that a party unreasonably fails to meet timescales, the NCP reserves the right to draw conclusions on the information available and to comment on the party's engagement in the process in any statement.”¹²⁴

¹¹⁸ Ibid. Section I, paragraphs 2-3.

¹¹⁹ Ibid. Section II, paragraphs 1-7.

¹²⁰ Belgium, Denmark, Estonia, France, Latvia, Lithuania, Luxembourg, and Norway. In the cases of Denmark, Estonia, France, and Latvia the NCP also includes other government ministries.

¹²¹ Argentina, Australia, Austria, Brazil, Czech Republic, Germany, Greece, Ireland, Italy, Israel, Mexico, New Zealand, Poland, Portugal, Slovak Republic, Slovenia, Spain, Switzerland, Turkey, USA

¹²² Canada, Hungary, Iceland, Japan, Korea, Netherlands, Romania, Sweden, UK.

¹²³ Chile and Finland.

¹²⁴ Department of Trade and Industry (United Kingdom), Government Response to the Consultation on the UK National Contact Point's Promotion and Implementation of the OECD Guidelines for Multinational Enterprises, 13 July 2006, p 9.

“The NCP will make statements with the intention of providing specific guidance to businesses in respect of their future conduct. They will also highlight good practice where this has been evidenced. Nonetheless, where the NCP concludes on the basis of the information available that a breach of the Guidelines has occurred, statements will say so.”¹²⁵

“The NCP will assert an opinion on aspects of a complaint – or on a complaint itself – that it considers to be unfounded, frivolous or vexatious.”¹²⁶

“The NCP will, where appropriate and following discussion with the parties concerned, include in any statement a commentary on the willingness of the parties to engage meaningfully.”¹²⁷

These four recommendations demonstrate an intention to provide more public information. The procedural guidance is very restrictive with respect to the public statements that an NCP is allowed to make. Paragraph 4(c) of the procedural guidance states that the NCP will “after consultation with the parties involved, make publicly available the results of these procedures unless preserving confidentiality would be in the best interests of effective implementation of the Guidelines.”¹²⁸ Thus these 4 things represent a significant expansion of the disclosure practices in the UK NCP.

Another important change that the UK NCP is implementing is the creation of a steering board that would oversee the operation of the NCP. The board will include members from other departments as well as independent members. This steering board is entitled to draw up its own terms of reference and will meet twice a year. A true assessment of the steering board function can only be performed when the terms of reference are established. However, this commitment is significant as the way the terms of reference are drafted could considerably change the governing structure of the UK National Contact Point.

The UK NCPs restructuring is significant for two reasons. First it demonstrates that NCPs need not be tied to procedures laid out in the procedural guidance document of the OECD. Individual NCPs can and have gone beyond these procedures to develop more effective and efficient procedures as the UK case demonstrates. Other countries should consider reviews of their national contact points.

Structure and Functioning of the Canadian National Contact Point

The Canadian NCP performs the 4 functions that are assigned to it by the Decision of the Council which include institutional arrangements, information and promotion, implementation in specific instances, and reporting. However, its web site refers to the Decision of the Council in terms of a non-binding procedural guidance document.¹²⁹ It is important to note as discussed above that OECD Council Decisions are binding once a member country has fulfilled its own constitutional obligations, which in the case of Canada would (arguably) require implementing legislation to be passed by

¹²⁵ Ibid. p. 10.

¹²⁶ Ibid.

¹²⁷ Ibid. p. 11.

¹²⁸ Paragraph 4(c).

¹²⁹ See http://www.ncp-pcn.gc.ca/about_guidelines-en.asp visited on September 30, 2006.

Parliament. Thus the non-binding character is a result of choice by the government of Canada rather than a specific character of the Decision of the Council.

The Canadian NCP's website refers to it as an "interdepartmental committee." Government departments involved currently include Foreign Affairs and International Trade Canada, Industry Canada, Human Resources Development Canada, Environment Canada, Natural Resources Canada, Department of Finance and the Canadian International Development Agency.¹³⁰ There are two aspects to the NCP that need to be considered – the functioning and membership.

Little is known regarding the functioning of the NCP. How decisions are made with respect to specific instances? How are the reports prepared? What is the precise role of the various ministries? How are decisions made within the interdepartmental committee? While it does outline its procedures with respect to specific instances, application of the guidelines in non-adhering countries and transparency, it seems to only repeat the basic implementation structure laid down in the decision of the Council regarding procedural guidance.

One of the most important functions the NCP performs for the purposes of the National Roundtable is its Specific Instances Procedures.¹³¹ There are 3 discernable steps to the Canadian NCP's Specific Instances Procedures, which seem to follow the basic guidance laid out by the Decision of the Council. These steps include an initial assessment, the response, and the offering of good offices functions. The NCP's own statements with respect to these steps are discussed and critiqued in the following 3 sections.

Step 1 – Initial Assessment

The purpose of the initial assessment is to determine if the issue merits further examination. The NCP will take account of the following factors.

- The identity of the party filing the complaint and its interest in the matter;
- Whether the issue is material and substantiated;
- The relevance of applicable law and procedures;
- How similar issues have been, or are being, treated in other domestic or international proceedings;
- Whether the consideration of the specific issue would contribute to the purposes and effectiveness of the *Guidelines*.

The factors to be taken account of by the NCP in the initial assessment correspond directly to an OECD document "The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications"¹³² It is problematic that neither this document or the procedures set down by the Canadian NCP discuss *how* these factors are to be taken

¹³⁰ The following people are members of Canada's NCP: Steve Brereton (DFAIT), Ready Robert (ICQU), Pierre Villeneuve (HRDC), Ann Dostaler (EC), Clifford Megan (FIN), Rhyan (NRCAN), Dinesh Parakh (CIDA)

¹³¹ Section C, para 1-5.

¹³² OECD, The OECD Guidelines for Multinational Enterprises: Text, Commentary and Clarifications, Working Party on the OECD Guidelines, DAF/IME/WPG(2000)15/ FINAL, p 51.

into account. For example, if a party using the specific instances procedure does not understand what level of interest is required, what the NCP considers “material” or “substantiated”, or how the NCP might rule with respect to the relevance of applicable law or procedures it is difficult for the party making a complaint to know what information to include certain information or even to proceed with a complaint

Step 2 - Respond to the party that raised the issue

If deemed to merit further consideration, the NCP is required to notify the party that made the complaint. Neither the procedural guidance nor the commentary refer to the manner by which this is to be communicated, the timing of the notice or any other procedural requirements. It does impose a substantive requirement by requiring the NCP to give “reasons for its decision.”¹³³

The primary problem with this step is that there is no appeal to the NCP’s decision. This effectively ends the complaint. As there has been no enacting statute for the Canadian Government’s obligations under the Council Decision, there is (arguably) no basis on which to seek judicial review. There are also some procedural issues that could be addressed. Are there procedural requirements that could be created for the communication by the NCP, for example time requirements?

Step 3 – Good Offices and Decision

Where an initial assessment has been determined to have merit, the Council Decision requires the NCP to offer its “good offices” “to help the parties involved to resolve the issues.”¹³⁴ According to the Canadian NCP the aim of these activities is to reach an agreement with all the parties on the issue raised and for the enterprise to take appropriate action to resolve it.¹³⁵ The NCP will use consensual and non-adversarial procedures such as conciliation and alternative dispute resolution. Where it is not possible to reach a resolution the Canadian NCP will “make a statement, and recommendations as appropriate, on the implementation of the guidelines.”¹³⁶

It would be useful to specify which conciliation or ADR process is going to be used, or at least the menu of options that parties have to choose from. With respect to situations where no resolution is possible the NCP’s statement and recommendations are very important. These are a means of furthering the effectiveness of the guidelines. However, an NCP’s ability to issue one of these is subject to a caveat preserving confidentiality if in the best interest of effective implementation of the guidelines.¹³⁷ Within this context the Canadian NCP claims to handle the transparency and confidentiality in accordance with the Canadian Access to Information Act, but it is not clear what implications this Act will have for the balancing of transparency and

¹³³ Ibid.

¹³⁴ Section C.2.

¹³⁵ “The OECD Guidelines for Multinational Enterprises: The Role of the National Contact Point in Helping to Resolve Issues” Online: The Canadian National Contact Point <<http://www.ncp-pcn.gc.ca/resolve-en.asp>>.

¹³⁶ Ibid.

¹³⁷ Section C, paragraph 4(b).

confidentiality. The Act allows people to access documents in the government. However, its exemptions could be seen as very broad thus limiting the amount of information anyone could request from the NCP.

Analysis of Canadian NCPs Specific Instances Decisions

The Canadian NCP has dealt with five specific instances. Thus far only one specific instance appears to have been resolved. This case concerned a Zambian mining company that had been acquired by a Canadian and Swiss multinational. In another case, a complaint regarding a Canadian Multinational's operations in Burma the NCP was unsuccessful at bringing the parties together. There are three existing specific instances that have yet to be settled. All specific instances procedures have concerned the employment and industrial relations chapter and the human rights provisions of the OECD Guidelines.

While not a specific instance the Canadian NCP also dealt between 2003 and 2005 with the cases of 8 Canadian MNEs, which were listed in the UN Panel of Experts Report on the Democratic Republic of the Congo. In these cases the NCP played a role in encouraging contact between the Canadian Companies and the UN Panel. In 7 of these cases the issues were resolved with the panel when the NCP encouraged the companies to meet with the Panel. In the 8th case the NCP followed up with the company and was able to determine that the company had ceased operations in 2004 and had not been active since 1997.

Recommendations

- Canada should undertake a public consultation process on the restructuring of its national contact point.
- Canada should adopt implementing legislation concerning its obligations with respect to the OECD Council Decision on Procedural Guidance
 - o The public consultation process should inform this legislation and the accompanying regulations.
 - o This should include the development of regulations for the operation and responsibilities of the NCP.
- Canada should introduce a proposal at the CIME or the next annual meeting of National Contact Points that CIME enter into an agreement with the International Labour Organization with respect to the Guidelines
- Canada should conduct Alternative Dispute Resolution Training for the NCP in Canada and similar training for Canadian Embassy officials responsible for the guidelines.
- If Canada creates a national ombudsperson's office for Canadian extractive companies its relationship to the NCP should be carefully worked out.