

Comments submitted to EDC re lessons learned around the Cernavoda2 complaint

The Role of Compliance Officer/Ombudsperson

Standard Compliance positions play three roles:

- that of ombudsman (problem solving), acting as a broker between complainants, investigating complaints, resolving differences, and fostering dialogue;
- that of advisor, providing advice to staff about potentially sensitive issues, about policies, procedures and guidelines to ensure adequate due diligence;
- that of auditor, ensuring that an institution complies with its overarching policies. Such an audit is usually conducted by internal or external experts.

Export Development Canada's Compliance Position

Export Development Canada's (EDC) Compliance Officer (CO) plays all three of the above roles:

- acting as an intermediary, encouraging dialogue between EDC and the complainant;
- providing advice to EDC on ethical business practices;
- recommending compliance audits by internal and/or external professionals.

EDC's CO is mandated to pursue this role with respect to its policies and practices in the area of disclosure, environmental reviews, human rights and business ethics. The development of a compliance position is a welcome addition to the measures that EDC has put in place to enhance its accountability to affected communities and the general public.

International Standards for Compliance

OXFAM's Community Aid Abroad program has identified internationally recognized standards for Compliance positions through their work advocating for a Mining Ombudsman¹. These best practice standards are:

1. Concrete standards and policies against which Compliance can be verified
2. Independence of funding
3. Independence of assessment
4. Enforcement, of more than a voluntary nature
5. Extraterritorial jurisdiction
6. Accessibility
7. Accountability and transparency

These are the standards that all compliance mechanisms should, in our opinion, endeavour to reach. Our comments on EDC's own Compliance Mechanism, therefore, assess the CO's performance over the past two years based on these standards and our own observations as the first complainant to test this new system. We have also tried to place this performance in the context of the practices among other Compliance Mechanisms.

1. Concrete standards

EDC has disclosure and environmental policies, a statement on human rights, and a Code of Business Ethics. It is our opinion, highlighted elsewhere in more detail, that EDC's disclosure and environmental policies still fall short in a number of areas, affording the crown corporation an excessive degree of flexibility. In terms of human rights, EDC says it "values human rights and promotes the protection of internationally recognized human rights, consistent with the policies of the Government of Canada". However EDC accounts for human rights only through its political risk assessment (in itself not a public process), rather than through a separate human rights screening process or explicit policy that might guarantee real consistency with Government of Canada human rights commitments. The Code of Business Ethics provides a broad vision of how EDC is to conduct its work, without commensurate policies for realizing the expectations of this vision. As our Cernavoda complaint mentioned, flexible policies and broad statements only allow the CO to verify EDC's compliance with the "spirit", rather than the "letter", of EDC code.

¹ Oxfam Community Aid Abroad Ombudsman, Annual Report 2003, pp 12-14. On-line: www.caa.org.au/campaigns/mining/ombudsman/2003/framework.pdf

Furthermore, for its environmental review, EDC benchmarks projects against an illustrative list of international standards, without disclosing the specific standards that projects have met. The Auditor General, in her 2004 Report, recommended that EDC list the specific standards which a particular Category A project has met². Full compliance with this recommendation would be a welcome start.

However, EDC should also endeavour to close existing policy loopholes in its environment and disclosure policies in order to set real standards against which compliance can be measured. Past comments we have submitted to EDC on both the Environmental Review Directive (ERD) and the disclosure policies highlight some of these loopholes.

The CO should also use complaints to identify other loopholes and flaws in EDC's policies and practice, and address these through public recommendations to the Board. This role is within her purview as advisor to EDC to ensure adequate due diligence.

In conclusion, until EDC adopts clear, transparent and concrete policies and processes, and discloses the international standards which EDC-funded projects have met, the ability of the CO to fulfill her mandate will be somewhat compromised.

2. Independence of funding

The Compliance positions at the Japan Bank for International Cooperation (JBIC), the Overseas Private Investment Corporation (OPIC), the International Finance Corporation (IFC), the Multilateral Investment Guarantee Agency, and the European Bank for Reconstruction and Development (EBRD) are all funded by the institution itself. This is also the case with EDC.

Such a position, however, would ideally be financed from independent sources. This would ensure the ability of the CO to operate openly and frankly, while not feeling that by doing so, they might compromise their position within the organization. The Compliance Advisory Ombudsman (CAO) relies on the IFC for its funding. IFC President Peter Woicke, however, has been vocal in his support for the CAO, and the CAO itself has demonstrated its willingness in past reports to say things which IFC and MIGA management likely did not want to hear. This has demonstrated the CAO's willingness to act with integrity, independence and transparency, and has acted as a counterbalance to the CAO's dependence on the IFC for funding.

In contrast, the lack of adequate reporting out on EDC's part, the reliance on EDC's Board to actually implement the CO's recommendations, the inadequacy of the internal audits, and the lack of any public disclosure of the CO's report and recommendations to the board on the Cernavoda complaint, seriously compromise the independence and in our opinion the value of this position.

To address these shortcomings, the Government should consider funding the CO position separately, perhaps through the Treasury Board, and EDC's President and CEO should assert his commitment to the CO by making the full disclosure of this process and all outcomes, recommendations and reports a key priority.

3. Independence of assessment

In addition to the details highlighted above, we wholeheartedly question the use of an internal audit team to conduct the compliance audit.

Following the initial review of the complaint by the CO, the CO recommended to the Board that a follow-up internal audit be conducted. Although we welcomed the agreement of the Board to pursue other avenues for resolving the complaint, we find the use of internal auditors to conduct this secondary process is entirely inappropriate. The continued use of internal auditors, or any other front-line staff or employee of EDC other than the CO to establish EDC's compliance, will discredit the process and its independence. EDC should only use external auditors in the future and should immediately put an end to the use of internal auditors to conduct such reviews. Not doing so could result in EDC losing credibility for, and confidence in, this mechanism among both civil society and partner financial institutions.

² Auditor General of Canada (October 2004), *Environmental Review at EDC*, "8. Revealing the specific international standard upon which it has based its determination would give the public and Parliament a greater measure of confidence that EDC is applying appropriate standards when it supports exports."

Rather, the CO should have the authority to conduct any additional follow-up steps to resolve the issue, and should have sufficient resources and complete access to all staff and files in order to achieve this goal. The CO should have also produced and made public her own report separate from the internal audit.

4. Enforcement, of more than a voluntary nature

EDC's CO can make recommendations to the Board following the initial review of the complaint. Most Ombuds positions are of a voluntary nature, and dependent on the will of the institution to carry forward the recommendations, so the lack of enforcement is not uncharacteristic of this type of a position. That said, some institutions have recognized that even without the support of the Board, it may be necessary to carry out the recommendations in order to resolve the dispute, and maintain the integrity and independence of the mechanism.

Few institutions will be willing to adopt a position whose recommendations are requirements, but until the Compliance Officer is able to operate with greater independence and transparency, the Board will continue to impede the satisfactory resolution of complaints.

5. Extraterritorial jurisdiction

EDC's Compliance Officer can investigate complaints against Canadian companies in which EDC has been involved anywhere in Canada or abroad. EDC should maintain this characteristic.

6. Accessibility

EDC's Compliance mechanism is distinctive in that it is open to complaints from any individual, group, community, entity or other party affected or likely to be affected by an EDC-funded project. This makes the position quite unique among the accountability mechanisms used at all *multilateral* financial institutions, and some bilaterals (OPIC and JBIC), in which usually only persons from affected communities can file the complaint. EDC should maintain this characteristic.

7. Accountability and transparency

In addition to the issues highlighted above, the credibility of this mechanism rests heavily on the transparency of the process and the disclosure of final outcomes. EDC's CO provided periodic letters outlining the process under way. This was useful. However, the Compliance Officer did not provide any detailed report of her findings in October following her initial assessment, and no findings were disclosed until 10 and 11 months after the complaint was filed.

On top of the long delay, the initial Disclosure Audit seemed wholly inadequate. All of the questions were closed 'yes/no' questions, leaving no room for the Audit to explore 'how' EDC complied with its policies. Consequently, all the questions seemed to be designed to ensure that the answers were always in the affirmative, even though there was no evidence to substantiate this claim, other than "verified".

The follow-up Environmental Audit was, relatively speaking, much better, as it at least identified the findings of the report that were used to substantiate the general conclusions reached that EDC was in compliance.

Consequently, we were not only disappointed with the outcome of the investigation, but even more so with the lack of evidence to demonstrate how EDC had reached these conclusions. Audits may be a useful tool for ensuring compliance from EDC's perspective, but the current format's lack of content does little to satisfy the complainant. A preferable approach would be for reports to include the following: an introduction and overview; approach and methodology for the review; assessment of EDC's disclosure and environment policies, and its business ethics, substantiated in documentation; interviews and audits; and, conclusions and recommendations coming out of the investigation. These reports would then be more in line with those produced by the CAO's office. The audits might be included as an Appendix to such a report.

We understand that commercial confidentiality may limit the degree of transparency at EDC. However, commercial confidentiality covers very specific areas, and should not forestall the disclosure of such reports. To address this issue, EDC should consider allowing the company or appropriate EDC staff to review the report for technical accuracy and clarity, and to ensure that there is no proprietary information

within the report that harms competitiveness – of course, still leaving final editorial control to the CO. The EBRD, CAO and JBIC have provisions for doing this. EDC may find that fuller disclosure may actually bring broader acceptance among companies, communities and civil society, since transparency brings with it a level of certainty. In contrast, non-disclosure is oftentimes more damaging.

For the actual compliance review to be seen as legitimate, the whole process must be much more transparent. To this end, EDC would do well to explore the value, rather than the cost, of fuller disclosure.

Process improvement

This section relates to immediate improvements that could be made to the existing system, and reflect specific concerns we had relating to our experience in filing a complaint around Cernavoda2.

Better system chart

In terms of process, we have developed a revised version of the existing Compliance system chart based on its experience in filing the complaint on Cernavoda 2. It is our recommendation that this system chart be revised to reflect some of the suggestions made in these comments, and that it be further revised on an annual basis as complaints come in to add clarity to the process as it is tried and tested. Our adjusted systems chart is attached at the end of this document.

Application process

Attempts to resolve the issue - The Compliance Officer noted that the initial complaint submitted by HI did not indicate whether HI had attempted to resolve our concerns with EDC by any other means (one of the points in “What to include in a complaint”). In our complaint, however, we highlighted a various meetings and measures we had taken to raise our concerns with Parliamentarians, government bureaucrats and EDC. This item should be slightly more explicit in terms of what your require so as to avoid confusion or delays.

Opinion of the desired result – This was presumably intended to provide EDC with an understanding of what the complainant expects from the process. Articulating what the complainant expects from the process, however, has a tendency to inadvertently raise expectations about what the process might achieve, and ultimately can lead to disappointment. EDC should be clearer on what information it is seeking on this point (perhaps through an illustrative list), and the Compliance Officer in their initial response should clearly address what expectations are reasonable, and what are not, in order to ground the expectations of the complainant from the outset. ‘Reasonable’ should be interpreted to mean “leading to the satisfactory resolution of the complaint”. From our perspective, none of the desired outcomes highlighted in our complaint were actually addressed.

Terms of Reference and Timeline

When reviewing a complaint, the CAO provides the complainants with a terms of reference – what they are going to do, and a timeline for doing it. HI was merely informed that a fact-finding exercise would be conducted, with little explanation of what this entailed. Admittedly, the Compliance Officer is still in its early days and may not have enough experience with complaints to develop such terms and a timeline, but it would be worthwhile developing such an arrangement. This would have the advantage of trying to set some reasonable time limits for responding to a request, and responding to complainant expectations about how long the process will take. Six months (as per the CAO’s office) to complete the full review seems appropriate.

Don’t punish the complainant

With respect to confidentiality and disclosure, the EDC resolution guidelines for the CO state that “an open and flexible attitude toward problem-solving is more likely if resolution processes are conducted with a reasonable level of confidentiality. Therefore, communication with parties during the course of dispute resolution processes will be regarded as privileged. Similar constraints will apply when confidential business information is received during investigations”.

Confidentiality is important. However, the above suggests that greater confidentiality is more conducive to a better process and outcome. This, however, does not take into account the power imbalances that often exist between the complainant and the company or institution involved. It should be left to the discretion of

the complainant to establish the level of confidentiality, and the complainant should not be punished for electing a greater level of transparency.

In the Cernavoda case, HI chose to make all information related to the complaint public. We felt that by making the complaint public, it would be treated more seriously.

That said, in hindsight, we also feel that our commitment to transparency hindered the full disclosure of the final outcome. Knowing that the end report would be made public, EDC's Board may have been more careful in the option they selected (an internal audit) to resolve the complaint, and in the degree of information they were willing to disclose. We base this comment on the very poor quality of the final Disclosure Audit. While confidentiality provisions are put in place to protect the complainant, breaking these provisions may have inadvertently led to our being punished for doing so, and our receiving a less than satisfactory resolution to this complaint.

We reiterate our earlier comments that it is the role of the Compliance Officer to establish compliance, not an internal audit team or any other EDC staff member. We would also echo earlier comments that without the disclosure of clearer public policies, processes and standards, the Compliance Officer is severely compromised in their role, and the value of the mechanism is severely undermined.

Promoting Dialogue

One of the roles of the CO is to promote dialogue. While the CO did her best to keep us informed of developments in the complaint, and always made herself available to questions or comments, we were disappointed that not more was done to foster actual dialogue on the complaint.

The CO made her assessment based on the content of our written complaint. There is no evidence to suggest that she conducted any interviews with any individuals outside of EDC, or made any field visits to Romania. Field visits and interviews are standard practice for any Ombudsperson (see, for example, JBIC, EBRD and OPIC), and EDC should consider incorporating this into its future practices.

Moving beyond professional judgement to compliance

The 2004 Auditor General report on EDC highlights that there is a great degree of discretion and judgment left to EDC staff around implementing the environmental and review policies. As long as EDC's policies remain flexible, the Compliance Officer will not so much be judging whether EDC is complying with its policies, procedures and guidelines, but rather whether staff have used their discretion wisely. To this extent, compliance assessments pitch one person's professional judgment against another's.

EDC should really be ensuring whether demonstrable environmental and social harm has occurred in a project area, *despite* the environmental review, the decision to support a project, and the economic covenants and mitigation plans put in place. This would allow EDC to move beyond interpreting the specifics of the policy, to looking at whether there is actual harm or not despite those policies. This moves beyond establishing whether or not there is a problem, to thinking about how to fix that problem.

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Our coalition hopes that the lessons of our experience can be shared and acted on to promote a more transparent and accountable EDC, and more effective compliance mechanism.

EDC's Compliance Mechanism – A Map of the Process based on the Working Group's experience with the Cernavoda 2 complaint

