Submissions to the CORE in response to its Public Consultations on its Operating Procedures

Introduction

Thank you for the opportunity to provide feedback on the CORE's proposed Operating Procedures (**OPs**). While we appreciate the engagement around this process, we share the concerns of the Canadian Network on Corporate Accountability (**CNCA**) that:

> *[u]nless and until the CORE is transformed into the promised independent office with robust powers to investigate, including the power to compel documents and testimony from companies under investigation, the CORE will not have the minimum powers required to be effective.*[1]

To that end, our submissions should not be taken as overall support for the CORE in its present form.

About Accountability Counsel (AC)

Accountability Counsel amplifies the voices of communities around the world to protect their human rights and environment. As advocates for people harmed by internationally financed projects, AC employs community driven and policy level strategies to access justice. AC has developed a new tool called Accountability Console,[2] which includes a useful benchmarking system for measuring best policies and practices for compliance review and dispute resolution processes at development finance institution accountability mechanisms.[3]

About Canadian Lawyers for International Human Rights (CLAIHR)

[1] *See* CNCA letters from February 13, 2020 and July 10, 2020.
[2] Available at www.accountabilityconsole.com.
[3] Additionally, we would like to direct you to the 2016 report "Glass Half Full? The State of Accountability in Development Finance," which analyzes the policies and practices of 11 development finance institutions and their corresponding independent accountability mechanisms (IAMs). The full report and its annexes are available at: www.glass-half-full.org. The experience and policies of IAMs are instructive for the CORE, and select policy provisions will be referenced here.

CLAIHR is a federally-incorporated registered charity. It is a non-governmental organization of lawyers, law students, and legal academics, among others, founded in 1992 to promote human rights law from a Canadian perspective through education, research, and advocacy.

Overview

We have identified four overarching themes that capture our concerns with the proposed OPs:

1. Failure to comply with the principles of natural justice in violation of the rights of requesters and complainants;
2. Lack of support for requesters and complainants;
3. Missing protections for requesters and complainants; and
4. General lack of clarity as to how the OPs will work in practice.

Each of these themes is explained in more detail below, along with a discussion of the concerning provisions.

1. The Principles of Natural Justice

Canadian common law recognizes the importance of natural justice in administrative proceedings.[4] This doctrine is composed of three overarching principles: adequate notice, fair hearing, and no appearance of bias. In other contexts, the Federal Government has provided further clarity on what is required for natural justice, outlining that it must include:

- notice;
- disclosure;
- the opportunity to present one's case;
- the opportunity to respond;
- a duty to consider all of the evidence;
- a right to counsel;
- a right to an interpreter;
- compliance with legitimate expectations;
- the right to an impartial decision maker and freedom from bias;
- institutional independence and the requirement that the person who hears the case must decide;

[4] *See, e.g.*, *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817.

- no unreasonable delay; and
- the right to reasons.[5]

At a minimum, the OPs should reflect these principles of natural justice. However, we believe that a number of the provisions are offside these principles, thereby violating the rights of requesters and complainants. In the table below, we have set out the offending provisions, why they violate the principles of natural justice, and how, if at all, these violations can be addressed.

OP Section	NJ Violation	Potential Solution
Definition of "frivolous"	This definition is too vague and violates the notice and legitimate expectations principles.	The OPs should propose a clearer definition of "frivolous."
S. 3.7	This provision is very discretionary, in violation of the legitimate expectations principle.	This provision should be replaced with a commitment to consult with requesters and complainants to determine a process that accords with their beliefs, practices, and customs, particularly where they may be Indigenous.
S. 3.12	This provision suggests that the CORE may be put in potential conflict of interest situations given that the CORE can both conduct the CDRM and provide advice to Canadian companies. Such a perception violates the right to an impartial decision maker and freedom from bias.	This provision should be removed.
S. 4 in whole	This entire section is very discretionary in violation of the notice and legitimate expectations principles. The lack of timelines is particularly problematic given that it will be in respondents' interests to delay the CORE's proceedings, while complainants will be seeking a remedy as quickly as possible. Clear timelines for	This entire section should be redrafted to set precise timelines and clarify that translation and interpretation will be provided to all requesters and complainants, irrespective of their

[5] Government of Canada, "Citizenship: Natural justice and procedural fairness," available at https://www.canada.ca/en/immigration-refugees-citizenship/corporate/publications-manuals/operational-bulletins-manuals/canadian-citizenship/admininistration/decisions/natural-justice-procedural-fairness.html.

	review should be outlined to establish predictability in the process. Procedures should articulate that any deviations from the timeline will be discussed with requesters and complainants. More flexible timelines are to be expected in the context of mediation/dispute resolution services, but procedures should articulate that timelines will be agreed to by all parties. Also problematic is the lack of clarity around when the CORE will decide whether to accept documents in another language and which other language(s). The principles of natural justice include a right to an interpreter.	language, at no cost. Any deviations to set timelines should be clearly discussed with requesters and complainants.
S. 9.1.2	This provision is too vague in violation of the legitimate expectations principle.	The provision should include the steps that will be taken to ensure that dispute resolution processes are accessible, including consultations with complainants to develop processes that reflect their beliefs, practices, and customs, particularly where they may be Indigenous.
S. 9.8	It is unclear what the role of this CORE representative may be in any subsequent involvement in the proceedings by the CORE. For instance, if the CORE hears some sort of appeal from this mediation and/or is involved in enforcing any settlement, would this representative be involved? If so, this could violate the right to an impartial decision maker and freedom from bias, as this representative being privy to potential settlement discussions could influence his/her findings in other CORE processes. This provision also violates settlement privilege.	This provision should be removed.
S. 14.2	This provision is silent as to whether requesters and complainants will have an	The provision should be amended to clarify that

	opportunity to review any such reports before they are published. Should this opportunity not be afforded, it would constitute a violation of requesters and complainants' right to respond.	requesters and complainants will be afforded an opportunity to review any such reports to ensure that they agree with the information set out therein. Where there is a disagreement, the CORE must include any response from a requester or complainant in the final report.
S. 15 in whole	The provisions under this section neither make clear which phases of the process should be reported on, nor which reports should be published, in violation of the principles of notice, legitimate expectations, and the right to reasons. Both considerations are important for predictability and transparency.	The OPs should articulate that the CORE will publicly release reports at each process stage.
S. 15.1	This provision implies that the Minister of International Trade will have an opportunity to influence the CORE's reporting in violation of both the right to an impartial decision maker and freedom from bias and institutional independence and the requirement that the person who hears the case must decide.	This provision should be removed.
S. 15.2	This provision implies that the Minister of Natural Resources will have an opportunity to influence the CORE's reporting in violation of both the right to an impartial decision maker and freedom from bias and institutional independence and the requirement that the person who hears the case must decide.	This provision should be removed.

2. Requester and Complainant Support

The CORE will be involved in situations where there is both a power and resource imbalance between parties, namely, the respondent corporations will have much more power and resources than the requesters and complainants. Best practice demands

that the CORE work to resolve imbalances that could impact full and effective participation in its processes, including limitations on accessing information.[6] Crucial to promoting a fair, accessible, and equitable process is allowing complainants to have a say in organizing logistics like the schedule, location, and format of meetings. However, the OPs do little to account for imbalances, and generally demonstrate a lack of support for requesters and complainants. The chart below sets out our concerns about this lack of support on a provision-by-provision basis and provides some potential solutions.

OP Section	Lack of Support	Potential Solution
S. 3.9	This provision indicates that any support to ensure that all parties can participate in CORE processes equitably will be discretionary and suggests that it will not account for the international nature of complaints likely to be made to the CORE.	This provision should be redrafted to outline the specific steps that the CORE will take to ensure that requesters and complainants can participate both equally and equitably in its processes, no matter the jurisdiction they come from.
Ss. 4.2, 4.3, and 5.3.4	This provision places the burden on requesters and complainants, who oftentimes may lack the resources, to translate communications and documents submitted to the CORE. Failing to accommodate the language of requesters and complainants can effectively deny whole communities the opportunity to seek redress through the CORE, against the	The CORE must be adequately resourced and equipped to receive and translate documents, without placing the burden on requesters and complainants.

[6] *See, e.g.,* Guidelines for the Consultation Phase for the Conflict Resolution Process Policy of the Independent Consultation and Investigation Mechanism of the Inter-American Development Bank, para. 3.10 ("Attention to Asymmetries: [Consultation Phase] processes should be particularly sensitive to the existence of considerable asymmetries between the Parties so as not to undermine the possibility of reaching satisfactory results. Particular attention is to be paid to asymmetries in availability of the information needed, and in the capacity and ability to participate effectively in these processes. MICI officials may propose capacity building activities and exercises to facilitate the Parties' effective and fruitful participation").

	principles of stakeholder engagement.[7]	
S. 5.3.6	Many Canadian companies have complex corporate structures and often rely on subsidiaries for their operations abroad. It is unlikely that requesters will know who the appropriate legal entity is, yet alone its contact information.	The OPs should clarify that the CORE will assist requesters with identifying the appropriate legal entity.
S. 5.6.2	Many requesters may not be familiar with international human rights vocabulary, which can be both legal and technical. As a result, they may not be able to frame the harms they have suffered in this way.	The OPs should clarify that requesters need only file an alleged harm with the CORE and the CORE will assist in any framing of the harm as a violation of international human rights.
S. 6.3	This provision overlooks the importance of collecting and maintaining a database of all complaints submitted to the CORE as a means of promoting institutional learning and capturing systemic issues. Beyond informing complainants and respondents on decisions related to the disposal of complaints, best practice dictates that the CORE make public all complaints, eligible and ineligible, taking into consideration the requested confidentiality of complainants.[8]	The OPs should articulate procedures for publishing and storing all complaints submitted to the CORE.
S. 8.4	Best practice dictates that all complaints be published upon receipt. Doing so serves to balance power dynamics between requesters and respondents, providing the oft-needed leverage to encourage response	The provision should be modified to require that the CORE publish all complaints when received.

[7] Most major accountability offices allow requests and complaints to be filed in any language. *See, e.g.,* Operational Guidelines of the IFC's Compliance Advisor Ombudsman (CAO), para. 2.1.3; Operating Procedures of the World Bank's Inspection Panel, para. 2.3.15; UNDP Social and Environmental Compliance Unit Investigation (SECU) Guidelines, "Intake of Complaints and Eligibility Assessment"; Operating Rules and Procedures of the AfDB's Independent Redress Mechanism (IRM), S. III.d.12; Policy of the Independent Consultation and Investigation Mechanism (MICI) of the IDB, S. F.16.b; and Policy of the Independent Complaints Mechanism (ICM) of Proparco, para. 3.1.1, Deutsche Investitions- und Entwicklungsgesellschaft (DEG), para. 3.1.1, and Entrepreneurial Development Bank (FMO), para. 3.1.

[8] *See, e.g.*, CAO Operational Guidelines; paras. 2.3, 4.2.2; Inspection Panel Operating Procedures, para. 3.2.50, 3.1.22, 3.1.26; Complaints Mechanism Policy of the European Investment Bank (EIB), S. 8.6-8.7, 4.6.4; Project Complaint Mechanism Policy of the European Bank for Reconstruction and Development (EBRD), para. 31, 33(a); IRM Operating Rules and Procedures, S. VII.b.54, IX.b.79.c; Policy of the MICI, S. F.20.c, G.23.h, I.41, K.62; SECU Investigation Guidelines, "SECU Public Disclosure Policy"; and Accountability Mechanism Policy of the Asian Development Bank (ADB), S. 155, Appendix 9 (1 and 3.iii).

	and engagement on the issues.	
S. 9.1.1	While this provision acknowledges the imbalance of power between potential parties to a CORE proceeding, it implies that the CORE will not actually do anything to address this imbalance, but will instead rely on outside parties. These parties are then expected to assist requesters with their often already overstretched resources (i.e. civil society organizations) or with no resources (i.e., pro bono counsel).	The OPs should set out the resources the CORE will provide to address power imbalances, taking into account the beliefs, practices, and customs of requesters and complainants, particularly where they may be Indigenous. These resources may include providing funding for counsel and translation.
S. 9.5	Confidentiality agreements should be considered in the context of the circumstances. Complainants should not be preempted from discussing the existence of complaints and their contents.	The OPs should not preclude complainants from publicly advocating for their interests.
Ss. 9.6 and 9.7	The OPs are silent as to who will pay for any mediator. Additionally, the OPs should clarify that any mediator engaged by the CORE must be mutually agreed upon by the parties.	The OPs should clarify that the CORE will be responsible for covering any mediation costs and that parties must agree to using the selected mediator. A disagreement with respect to a mediator shall not compromise the status of a complaint.
S. 12.7	This provision is not clear about who will supply the resources for this committee or working group.	The provision should be amended to make clear that the CORE will be supplying any resources required by such a committee or working group.
S. 13.2	This provision is not clear as to whether the CORE will explain the complainant's other options and how they may be impacted should the complainant proceed with the CORE's processes.	The provision should be amended to make clear that the CORE will explain the complainant's other options and how they may be impacted should the

		complainant proceed with the CORE's processes.
S. 18 in whole	The OPs are silent as to who will pay for any arbitration.	The OPs should clarify that the CORE will be responsible for covering any arbitration costs.
S. 18.1	The OPs are silent as to the criteria that will be applied to determine whether a complaint should be referred to arbitration. Moreover, the OPS lack considerations about how complainants will be supported through the arbitration process.	The OPs must outline the criteria for referral to arbitration and provide guidance on how the CORE will support complainants through this process.

3. Protection of Requesters and Complainants

Requesters and complainants are putting their lives at risk to assist the CORE in identifying bad Canadian corporate actors. They are often vulnerable and may face retaliation for their efforts to hold Canadian companies accountable. They should be guaranteed the protections of human rights and environmental defenders and any other whistleblowers. The Federal Government has recognized the risks faced by these individuals and has provided guidelines that outline how to support them.[9]

The CORE must take all steps possible to ensure that requesters and complainants remain protected. We have identified a number of provisions in the OPs that either put these groups at risk or provide them with insufficient protection. Our concerns, along with how they can be addressed, are detailed in the table below.

OP Section	Risk of Harm or Lack of Protection	Potential Solution
The definition of "internationally recognized human right"	This definition excludes the human rights included in a number of international human rights instruments to which Canada is a party.	The definition should be amended to include all human rights instruments to which Canada is a party.

[9] Government of Canada, "Voices at Risk: Canada's Guidelines on Supporting Human Rights Defenders," available at https://www.international.gc.ca/world-monde/issues_development-enjeux_developpement/human_rights-droits_homme/rights_defenders_guide_defenseurs_droits.aspx?lang=eng.

S. 4 in whole	Please see the Principles of Natural Justice chart for the specific concerns with this section. While we noted the parties' respective interests in the timeliness of the proceedings, we also wish to draw your attention to the fact that the longer the proceedings take, the more time that requesters and complainants will be put at risk.	Please see the Principles of Natural Justice chart.
Ss. 5.3.7, 6.1.3, and 14.1.2	As a matter of best practice, requests should not be disregarded for touching on issues raised in other venues. While there may occasionally be opportunities for collaboration amongst accountability mechanisms, complaints should not be dismissed solely on the basis of parallel proceedings. Not only is this a matter of best practice, but the outright dismissal of requests due to parallel proceedings does not take into account situations where these other fora may have been corrupt or otherwise inappropriate. Where complaints may be raised in fora provided by project co-financiers, the CORE should look for opportunities to jointly resolve issues. The CORE should also be aware of potential strategies by respondents to force the dismissal of complaints through the filing of defensive lawsuits.	The OPs should be redrafted to state that parallel proceedings will not preclude consideration of requests and complaints. The OPs should either eliminate the discretion to dismiss a complaint due to parallel proceedings or clearly set out the criteria that will be used to determine when such parallel proceedings serve as a bar to proceedings before the CORE. The OP should also make clear that where the CORE does decide to review a complaint, this review is in no way intended to disrupt, replace, or preclude any other process through which a requester or complainant may obtain justice, such as a judicial proceeding. Furthermore, the CORE should never unilaterally dispose of a complaint without consulting with complainants about the situation, apprising them of options, and providing them with an opportunity to resolve any issues that compromise the status of their complaint.
S. 6.4	This provision puts the complainant at risk.	The provision should be removed.

S. 9.4	This provision implies that a potential violation of law will be dealt with by mediation. This is not an appropriate response.	Where the CORE determines that a human-rights related dispute may escalate, causing further violations of international law, such potential violations should be referred to the appropriate channels, including law enforcement, but only after consulting with requesters and complainants to ensure that such a referral would not put them at further risk.
S. 10 in whole	This section is silent on whether the CORE will consult with victims before initiating a review. There may be circumstances where victims of human rights abuses do not want the CORE's involvement, either because it could put them at risk of additional harm or because it might interfere with another process through which they are seeking justice.	This section should clarify that the CORE will not undertake a review without first consulting with victims, or, where such victims are deceased, their family members, and obtaining their consent. It should also set out what precautions it will take to ensure that any such consultations remain confidential, so that victims and their family members are not put at further risk.
S. 11.4	This provision minimizes the seriousness of retaliation and reprisal, which can be illegal actions.	The provision should be amended to clarify that where retaliation or reprisal is illegal, it will be referred to the appropriate authorities.
S. 11.5	This provision is not clear as to whether the CORE will be able to take these steps should a respondent fail to implement any terms of settlement.	The provision should be amended to include a respondent's failure to implement any terms of settlement.
Ss. 11.5 and 11.10	These consequences for acting in bad faith and/or further harming requesters and complainants are far too limited and will not serve as sufficient deterrence against such actions.	The provisions should be amended to include referral to other government agencies, including law enforcement, where applicable and with consent of the requesters/complainants, and banning the respondent from bidding on public contracts.
S. 11.8	Retaliation should also include	The provision should be amended

	legal actions, such as strategic lawsuits against public participation (**SLAPPs**).	to include legal actions as a form of retaliation.
S. 13.1.1	This provision does not take into account situations where a requester or complainant is more likely to receive justice from the CORE than from the NCP.	The provision should include a clarification that where a requester or complainant would prefer to proceed with the CORE, the CORE will continue with the proceedings, rather than refer them to the NCP.
S. 14.1.6	This provision refers to "effective remedy" serving as a reason to terminate proceedings before the CORE, but "effective remedy" is not defined in the OPs, nor is it clear who determines whether remedy has been effective.	The OPs should define "effective remedy," making clear that it must be determined by the complainants.
S. 14.2	Any public information about complaints could put their personal safety at risk. This provision is silent as to whether requesters and complainants will have an opportunity to review any such reports before they are published.	In addition to the suggestions made in the Principles of Natural Justice chart, we note that the provision should be amended to clarify that requesters and complainants will be afforded an opportunity to review any such reports for security reasons as well.
S. 17.3	This provision is silent on whether the CORE will consult with requesters and complainants prior to advising the relevant NCPs. It is possible that such a communication could put the personal safety of requesters and complainants at risk. The CORE should obtain their consent to such a referral before taking such a step.	The provision should be amended to clarify that the CORE will not undertake a review without first confidentially consulting with requesters and complainants and obtaining their consent.

4. Lack of Clarity

Overall, we found the OPs to lack details as to how they will function in practice. The chart below outlines which provisions we found to be particularly unclear and why.

OP Section	Lack of Clarity
S. 3.12	The mediation process is generally unclear. For instance, who pays for the mediator? How is the roster of mediators developed? Can requesters/complainants select a mediator outside of the roster? How are complaints against mediators handled?
S. 5.7	Is there any right to appeal/review?
S. 9.6	In addition to the lack of clarity around who will pay for this, what will happen if the CORE does not engage a mediator or if the parties do not agree on a selected mediator? Will the Ombudsperson conduct mediation?
S. 10.1	What are the “established criteria”?
S. 11	Does the “good faith” requirement apply to complainants? If so, how will the Ombudsperson apply this requirement to complainants in consideration of potential resource limitations that may make it more difficult to engage in the process?
S. 13.1.1	When would a matter be referred to the Canadian NCP?
S. 14.1.4	What does this mean? How much information is required? What weight will be given to oral testimony? What efforts will be made to collect more information?
S. 18 in whole	In addition to the lack of clarity around who will pay for this, as outlined above, the OPs do not provide any information on when the CORE will proceed with mediation versus arbitration.

Conclusion

Thank you for your consideration of our submissions. We would be pleased to discuss any questions and can be reached at the following contact information.

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