

**ENGAGING THE PRODUCTIVE SECTOR IN THE CLIMATE
DEBATE: CODES OF SUSTAINABLE OPERATIONAL PRACTICES
FOR FDI**

(WITH A VIEW ON THE MINING SECTOR) ♦

A GIZ/EPF + FGV/IIU Project

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ABSTRACT

This Report boldly advocates -within a realist view of the climate debate- a shift in the COP efforts and output. The shift amounts to giving more attention and room to bottom-up agreements, in which the Conference would exert a co-ordinating role; many of its nowadays measures are eventually meaningless, lacking the full engagement of the related actors.

Voluntary Codes of Conduct, designed by the different productive sectors themselves, are at the core of the proposal. The Codes set key norms and standards to be followed worldwide, in the daily operations of a relevant group of agents. The approach is simple and reasonably costless and can be tried in areas where sustainability is at risk, due to the interaction of major productive units with manifold environmental variables. A feature of such activities is their intensive participation in foreign direct investment ventures; the extractive industries complex, mining, in particular, is a major example.

The proposed instrument is no novelty, but the Report sets constraints and principles that tailor it in a new, not yet exploited perspective. It outlines how to do this for mining; carefully describing the steps and precautions to produce a tool that complements and enriches the considerable amount of work already known. The codes follow a flexible and customised structure for answering varied sustainability demands. They can also be a factor for enlarging the scope of CSR instruments, bringing, at the side of traditional dimensions like labour, explicit and modern sustainability practices.

The approach must be spread throughout countries and partners, and the gist of its idea explained to as many as possible relevant institutions, firms and stakeholders' groups. However, this effort is not enough: the Code(s) here envisaged must be registered at the COP, opening a new activity of the Conference as a recipient body for private productive agents' initiatives.

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PROLOGUE

This Report introduces a serious pledge for a change in the emphasis prevailing in the present international mechanisms to tackle, alleviate and, eventually and ideally, solve the climate riddle the planet faces nowadays.

Ambitious as the above may sound -and indeed it is-, we call attention to two key aspects of our pledge.

The first, acknowledged by everybody involved in this debate, is that *the productive sector has, up to now, been much less involved in the needed measures than governments and selected stakeholders, like NGOs, supposedly duly representing segments of the civil society*. The result is that top down decisions -more, or less influenced by these organised segments- set the tune as regards the operational measures to deal with such a vast and differentiated portfolio of problems. It then follows that, perhaps obviously, we are not being efficient in the fight against the evident and accelerating changes.

The second, strongly correlated to the above, is that *the current toolkit of solutions, financial mechanisms, targeted funding, economic -basically fiscal- incentives (or disincentives) and goals extremely dependent on the transformation of consumption and production patterns (usually) through legal governmental intervention, is neither stable nor sufficient*. A major political turn in a key polluter -like the US- is enough to cast serious doubts on many government dependent measures. Robustness can only be achieved if more actors are engaged in novel, additional mechanisms. New and innovative tools need to be added, and a shift in the emphasis on the ones till now presented must take place.

A winding road led us in this Project to such conclusion.

At start, objectives were more modest, focussed on specific actions aimed at mobilising producers. However, the development of the very idea originally proposed revealed a double truth. First, the idea, at its core, had been discussed and tried, under

different guises and several not exactly equal purposes, since at least the second half of the nineties, in the past century. This obliged us to look backwards, to better understand what had happened and what still made sense. Second, the previous fact did not invalidate our original proposal, but the history, achievements and failures cumulated during about twenty years significantly conditioned what could be done and how it should be so. Some ongoing positive efforts, along lines similar to our original ones, suddenly seemed not to take into account quite a few lessons this very history had clearly taught.

The Report must thus re-enact the trajectory of the Project in a somewhat reverse order.

It begins with a fundamental framing of the argument that opens this Prologue. It then moves to a (much deeper than previously envisaged) analysis of the key concept of the Project: voluntary codes of conduct, to -only after- address the case study of the mining sector, judged symbolic to illustrate the contribution of the work.

The journey ends with a set of positively disruptive Guidelines.

EXECUTIVE SUMMARY

This Report boldly advocates a shift in the COP efforts and output. It adopts a realist view of the climate debate and the various current instruments used in this area.

The shift amounts to giving more attention and room to bottom-up agreements, in which the Conference would exert a co-ordinating role; most of its nowadays measures are eventually meaningless, for lack of a full engagement of the related actors.

The methodology can be applied to a variety of significant private agents, especially the productive sector, an area where there is dire need to incorporate in the climate debate.

Voluntary Codes of Conduct, designed by the productive sectors themselves, are at the core of the proposal. The Codes set key norms and standards to be minimally followed worldwide, in the daily operations of a relevant group of agents. The approach is simple and reasonably costless and should be tried in “hot areas” where sustainability is at risk mainly due to the interaction of major productive units with manifold environmental variables. An important feature of such activities is their intensive participation in international economic transactions, especially foreign direct investment ventures. A major example is the extractive industries complex, in particular, mining.

Though the proposed instrument is no novelty, the Report sets constraints and principles that tailor it in a new, not yet exploited perspective. It outlines how to do this for mining; carefully describing the steps and precautions to take into account the considerable amount of work and attempts already known.

The mining sector in Brazil could be a testing field for this endeavour, but the codes, with a flexible and customised structure for answering sustainability demands, can be applied to a variety of significant actors and situations. They can also be a factor for enlarging the scope of CSR instruments, bringing, at the side of traditional dimensions like labour and communities safety and security, an explicit sustainability dimension.

The approach must be spread through countries and partners, enlarging its positive externalities and providing grounds for improvements and complements. The gist of the idea

must be explained to as many as possible relevant institutions –domestic and international-, firms and stakeholders’ groups.

However, this effort is not enough. The envisaged Code(s) must be registered at the COP, opening a new activity of the Conference as a recipient body for private productive agents’ initiatives. The Report must be adopted by the COP

PART I

A NEW FOCUS FOR THE CLIMATE DEBATE

Chapter 1. Guiding Principles.

In which the main rationale of the Report is introduced, through a realist vision of the climate debate and its international governance.

1.1. Three concepts, in ascending order of controversy, and what they imply.

Confusion abounds in the climate change narrative.

Three concepts, not unrelated though however different, are mixed in nearly all discussions. They are:

Pollution – A word that sometimes seems to have become old-fashioned. It refers to one or a set of aggressive spill overs out of a given human activity; aggression being on the environment or on other human beings and communities. The rhetoric of ‘climate change & sustainability’ has progressively shifted attention away from pollution. However, problems like solid wastes disposal, air and water pollution, soil degradation and erosion (and also noise and visual pollution) are old riddles that have not been solved yet. They remain conspicuously in every corner of the world and must be boldly faced. Of course, they must be tackled in an ecological, encompassing way, but the important point is that they pose neither controversy nor objection: there usually is unanimity on the need to address them.

Sustainability & sustainable development – There are several definitions for these concepts, all too broad, or rather ambitious and too encompassing. The result is that, as expected, they

are easily accommodated to different purposes and forms, in different contexts¹. Truly, all definitions try to put together relevant categories like poverty alleviation, non environmentally-degrading human activities and growth, the latter not only in economic but in social and political enhancing terms as well. No wonder, the outcome is an endless debate, which sometimes reminds us of equally vapid discussions on what is democracy, another idea for which a one-size-fits-all approach is a waste of time. It is then only natural that the actual and working sustainability definitions eventually rest confined to the realm of states or nations, when not that of communities and specific cultural groups.

Climate change (or should we speak of climate cycles ?²) - The United Nations panels and related endeavours have given way to a whole set of heated discussions where it is not unusual to see people arguing and struggling for measures, policies and regulations based on probabilistic, short term –from a geological and weather science viewpoint- forecasts³. Far from pledging against the Panels’ work and conclusions –here neither is the place for this nor is it relevant to the argument-, we just raise an alert that one should be careful on drawing conclusions, and particularly active public policies, based on them. Much of the (already usually artificial) debate related to the ‘mitigation versus adaptation’ alternatives, is a sheer intellectual exercise when we look at the premises that support it.

The three concepts run from a more certain, uncontroversial standing to a less sure, (sometimes highly) controversial status. The first message of this Report is that one should clearly keep in mind all three of them in any conceivable negotiation or mechanism design:

¹ According to actors who actively participated in the elaboration of the concept, under the direction of Maurice Strong, and in the period between the Brundtland Report and the Rio 92 seminal conference, the concept was purposively designed as something broad and somewhat vague, in order to obtain the consensus of all participants in the Rio 92 Conference. Similar cases occur in many international treaties, as, for instance, at the WTO – World Trade Organization. [Personal communication by Dr. Haroldo Mattos de Lemos, former member of the Strong Group and former Secretary-General of UNEP – United Nations Environmental Programme.]

² See, on this important point, Singer and Avery (2007).

³ It is false and misleading to compare the use of probabilistic forecasts in the climate debate with that arriving, for instance, in economic practice; and then concluding that what has been done is not too different from what takes place in economic decision making based on forecasting techniques. First, the success record of economic forecasting is close to dismal in many situations where it has been eagerly needed. Second, and more importantly, the complexity of weather and climate change forecasting is several degrees above the one akin to economic issues.

it will help to avoid ambitious as well as ineffective agreements and getting lost in the translation of a manifold of concepts and statements that are, *par excellence*, vague and debatable.

National decisions differ considerably. China, a major actor in the climate drama, has been leading a very hands-on, quite effective policy, which actually aims at pollution abatement; a most wise choice given the myriad of constraints they face.

As a rule, whenever one can move the discussions, policies and agreements to the less controversial concepts of the scale, the better, simpler and more transparent will be the outcome.

Taking notice of this, how should we stand in terms of active policies ?

We discuss the way they can format action along two main strands. The first is a working horse in the climate debate, green finance; the second is a relatively newer though extremely important line, the engagement of the productive sector.

Finance

The history of development finance and that of the recent experience in climate/green finance show us that ambitious ventures, financially sophisticated and with a wide scope, mostly benefit the financial system itself and its intermediaries.

The farther the donor's money is from the recipient, the greater is the likelihood that the scheme will not work. Swaps between polluting activities and various kind of credit instruments, though theoretically ingenious, may in practice produce a kind of 'licence to kill' locally. As pollution and environmental degradation are global issues, they offer a rather debatable way-out.

Targeted, regionally circumscribed and as direct as possible transactions should be the norm. If one accepts this, the previous separation of concepts can help in designing more down to earth, feasible and efficient measures.

Notwithstanding, instead of relying so much on the mischievous god of finance, we should aim at more co-operative approaches as the one below.

The Productive Sector

Engaging the productive sector means creating mechanisms –mostly rules and conditions- for involving a segment that has been, in comparative terms, considerably neglected in the COPs: manufactures and service providers and their interactions at the community, country and global level, in a concerted effort for minimising environmental (and social) damage.

There is no novelty at all in this but, surprisingly, such a crucial area has remained much less engaged than deserved, with many people still waiting for a *deus ex machina* financial help. In Drummond and Flôres (2014), and in a companion text⁴, we dwell in more detail on how to do this.

The core of the proposal is a bottom up approach, in which productive sectors themselves will fashion the constraints and codes of conduct to be followed. At the same time, keeping in mind the previous classification is an invaluable aid in putting forward ideas robust to the complex reality checks to be faced. The next section develops further this core idea, under the light of the COP21 results.

1.2. The COP21, merely a diplomatic victory? More on the bottom-up approach.

In spite of a certain number of initiatives, the productive sector has remained –and still is- relatively outside the centre of the climate debate. Several specific groups of agents have been systematically if not excluded at least set aside from the high-level negotiations, when they come to their decisive moments.

This may be argued to be nobody's fault, but merely inherent to the essence of the COPs. As in any international meeting, delegations, oftentimes led by the head of state, put on the table proposals and positions supposed to represent the different segments and voices

⁴ See Flôres (2015), related to a specific intervention in the Paris, July seminar, relative to this issue.

of each nation, but eventually negotiated with one view⁵ to the problems themselves, and another to the political *Zeitgeist* of the whole meeting.

Notwithstanding the clever and encompassing preparatory efforts by the French government, this is what once again took place at the COP21, 30 November-11 December 2015 Conference, held in Paris.

The results, considered by many a relative success –and definitely not a flop-, clearly show the limits of this high and insufficient, if necessary, level of decision making. It is hard to consider them something much more than a diplomatic victory of the French Foreign Office (*Quai d’Orsay*); a victory dearly needed since the depressing failure at Copenhagen, in 2009, on the occasion of COP15.

The final Paris Agreement, with its 29 articles, states, in Article 2, the bold desire of “*holding the increase in the global average temperature to well below 2° C above preindustrial levels and to pursue efforts to limit the temperature increase to 1.5° C above pre-industrial levels*”. A display of fake volition and wishful statements, with no inkling on a package of measures that would fulfil the tall order commanded by the Article. A tall order, by the way, originated in 2009 in Copenhagen, and again confirmed in the COP16 in Cancun, in December 2010 ...

A victory of diplomacy and face-saving, no wonder; a modest one for the climate debate (see, among others, Rajamani (2014), Vieira (2015) and Veiga (2013)).

Ironically, what is at stake is not the basic procedure of the COPs, but the fact that, once gathered together, those very delegations reproduce what usually happens in most high level international meetings: they issue, or try to issue, general and encompassing statements, sometimes conspicuously optimistic, like the one above, weakly engaging the signatories, as in any standard international treaty. Hard, tough measures are skilfully postponed, as a wishful and debatably feasible homework, to be accomplished later.

Faithful to this format, implementation, in the Agreement –always in vague terms-, is left to Articles 4, 7 and others; a first global stock-taking occurring only in 2023 (Article 14) ...

⁵ Already too general ...

Any perceptive, realistic observer of the international scene would arrive at the same conclusion: the system has reached its limits, something perhaps evident even before, Sunstein (2007). After 21 meetings, 21 years of endless discussions, the possibility of moving further and deeper seems rather unlikely.

A major effort must be made with a view *to come back and down*, from the high-level agreement, to those different segments and voices who, in the very end, will be effectively responsible for enduring, applying and implementing the conclusions.

Finance, especially through the channel of fiscal transfers, is the only broad (practical) measure that is invoked. Usually, as in Article 9 of the Paris Agreement –and as in so many other international treaties in several other areas, trade and economic development being perhaps foremost-, by reminding developed countries that they “*shall provide financial resources to assist developing country Parties with respect to both mitigation and adaptation...*”. Necessary, positive statements, but nearly vapid in the face of the present state of affairs. How many times have we read or heard such fairy tales principles and admonitions?

Environmental decisions ultimately affect the daily life of both small villages and large multinationals, metropolitan dwellers and sparse communities in rural and forest areas, local governments, cultural practices, productive arrangements and subsistence economies. The easiest outcome of a too broad, high level accord like the Paris Agreement –provided, unlike the Kyoto Protocol, *it is ratified and signed by all significant international powers-*, is similar to that with many laws in developing nations or young democracies, not to stick: remain approved and signed, without any influence on either the society or problem they were supposed to address.

The natural consequence of the frustrating above picture is the perception of the dire need for a bottom-up approach in which measures, concrete procedures and sets of actions, involving significant groups of society and the economy, would be fashioned.

In their turn, such measures would translate into real action, holding to clearly defined and (hopefully) easily controlled practices and goals, adding up to the fulfilment of the desired objectives.

Ideally, from the very COP level, recommendations and conclusions should invite, or even actually engage relevant actors outside the governmental sphere. Governments, together with the COP, would then act as facilitators, conveners, “seducers” and, when needed, skilful constrainers, helping to make true the planned outcomes. Outcomes produced by the actors themselves, who will also aid the United Nations and the COP in the monitoring and follow-up of the common endeavours.

Unfortunately, even with the openness demonstrated by the technical organisers of the Paris Conference, and a number of relevant, broadminded seminars, events and discussions previously held, not much seems to have percolated to the actual meeting. The overwhelming dynamics of the diplomatic turf wars, during the few days of intense negotiations, led content, language, style and narratives to the standard, good-for-all and so, nearly inoffensive articles of most international treaties⁶.

The desired ideal link above looks like an impossible dream, and a second, extremely hard work must be pursued to establish mini, regional or sectoral commitments that might give shape to, or concrete evolution towards the loosely defined goals of the treaty.

In this Report we answer two objectives.

The first is to outline a simple strategy to closer and more effectively engage the productive sector in the climate debate. It must be emphasized that it is just one, neither **the strategy** nor the single one available.

The background purpose is to establish the ground for changing the emphasis (and confidence) placed on the existing toolbox of measures, recalling that more actors must be involved and more mechanisms designed.

The strategy, a framework for action within the key economic activity of Foreign Direct Investment (FDI) –ultimately a way to involve the powerful transnational companies-, precisely follows the reasoning above.

The second is to explore further the proposal, by discussing it in a concrete example: the extractive industries.

⁶ Just for the sake of controversy, this does not seem to be view of the nowadays President of the United States. [this note added in a further revision of the Report]

In the next section, we continue to dwell somewhat longer on the timeliness and value of the approach, in contrast to standard themes in the climate change narrative. The framework for the codes of conduct is discussed and outlined in Part II, and the concrete case study discussed in Part III.

1.3. Mobilising actors instead of resorting to failed or misleading schemes: the elusive lure of finance and technology transfer.

It is interesting to see how two myths of development aid: technology transfer and finance for development have spilled over to the climate debate, in spite of the highly controversial role they have played, and still play, in their original realm.

Here is not the place to elaborate a comprehensive criticism of both, something far from our original purpose. Nor is there intention to fully deny the importance both may hold, in well-defined contexts and through carefully planned actions, where simplicity and many times solidarity, or rather generosity, usually stand as main attributes.

Notwithstanding, there is legitimate concern with the excessive room they have gained in the global and COP contexts; people in developing as well as emerging economies still look at them as the universal panacea that will solve all problems and rescue them out of their polluting and environmentally destitute realities. And this in spite of the nowadays nearly classical arguments raised on their actual performance⁷, stressing how elusive –to say the least- and hard to evaluate is the (supposedly) positive impact they played in the development process.

Two sets of sad truths must be taken more seriously when giving excessive time and room to fruitless, elaborate discussions in these two areas.

As regards technology transfer, the reality is that, with very few exceptions, nobody –person, laboratory, firm, enterprise, or nation- transfers technology unless there is a clear

⁷ See, among many others, Ayittei (2005), Easterly (2001, 2006) and Moyo (2009).

perspective of either profits –direct or indirect-, or of material (or immaterial) rewards in a multitude of possible ways, or of additional power and domination prospects; the last even and not unfrequently under the soft power modality. Let us be optimistic and say that this does not completely jeopardise the idea, and that altruism is not exactly a fiction, but surely it poses major and serious constraints on its scope and effectiveness.

The question of financial mechanisms and instruments touches the worrying state of flux in which the financial system is nowadays. Again, to enlarge the discussion to this level is completely outside our aim, but it is important to emphasise three uncomfortable points.

The first is that, at present and in the nearby future, it is quite unrealistic to expect that the financial sector will be open to significant developments towards channelling more funds to green pursuits. The world itself is in a state of flux, and though money is available, it will run to precisely chosen destinations, incentives for green funding presenting, at best, moderate attraction.

Secondly, and as a complementary point, only one thing moves financial agents: profit. This renders extremely naïve various attempts based on an idyllic image of the sector. As a rule, any green fund, bond or other mechanism will only survive if procuring considerable revenues to its backers and designers. Within the complex schemes that allow for this, numerous commissions, taxes and transaction costs must be afforded along, while the money travels from the donors to the recipients. It would be enlightening to calculate, out of 1000.00 US\$ initially given to a green purpose, how much arrives at the true, final destination⁸.

Thirdly, governments, particularly those from developed countries, are still expected to provide the large majority of green funds⁹. This has to come from their respective fiscal policies, nowadays under close scrutiny by voters, given the manifold aspects of the lingering

⁸ Though this paragraph may sound disappointing, radical, or even shocking to those who bear great trust on green finance instruments, we fear it can be hardly contested. This does not mean however that we deny that redirecting private capital flows to greener investments may be a powerful instrument. Notwithstanding, without raising the following as any kind of proof, it is worth seeing how serious economists address this mined field: practically no mention in the balanced and scientifically sound Nordhaus (2013), and with great care by Nicholas Stern (see, in particular, the precautionary approach of section 3.1.5, in Chapter 3 of Stern (2015)).

⁹ See Article 9, COP21, mentioned in Section 3.

economic crisis -unemployment to begin with- and the unfinished debate on macroeconomic austerity. As governments must be elected, and re-elected, provision of sustainable official green funds ends up as hostage to the vagaries of the economic situation.

We do not rule out resorting to possibilities opened by the two classical mechanisms, but we strongly pledge for less emphasis on them, together with less expectations on their final achievements.

In spite of this, the Paris Agreement hasn't deviated from this standard approach.

Articles 9 –as said- and 10, address financial aid and technology transfer, respectively; the Technology and Finance Mechanisms, previously established by the UN Convention, shall work for making true the desired, respective objectives. A Green Climate Fund had been established by the Cancun Agreement, together with a Technology Executive Committee –to help in the identification and diffusion of technology for developing countries- and a Climate Technology Network, to help in capacity building and implementation.

All with a strong flavour of development aid mechanisms that, if not bad, nobody has a correct view of how useful they have been; and Cancun is already five years old ...

Mobilising sets of actors can eventually be less costly and more effective.

Ideally, as said before, the COPs would define the guidelines and related targets, and the actors themselves, not bureaucrats, ministers or diplomats, would fashion their collective response to each call. The Paris Conference proved, once more, this to be a too far-fetched objective.

Initiatives -in lines similar to Keohane et al. (2015)- must indeed be genuinely bottom up, coming up from the efforts of enlightened groups, think tanks, and conscious segments of the civil society. Networks of all kinds, from those like EPF¹⁰, to others apparently very distinct, of large multinationals for instance, must get together to implement the ideas.

¹⁰ The Economic Policy Forum – EPF is an initiative by GIZ, Germany, assembling think tanks from emerging and developing countries.

The next section develops one among many, that of Voluntary Codes of Conduct (for FDI)¹¹, directly engaging the productive sector.

1.4. The Sectoral Codes of Conduct for Foreign Direct Investment: preliminary outline of ideas.¹²

The contribution of each manufacturer or service provider to pollution and climate change problems varies considerably, requiring different approaches to improve the respective processes and reduce their nefarious spill-overs. Basic public finance mechanisms, like taxes and monetary penalties come immediately to mind, raising the related question of how to design and calibrate the tax grid. This leads to a plethora of imperfect solutions, ranging from uniform –and very likely unfair and unpopular- tax schemes, to flexible ones, in which usually the tax value would be proportional to a figure of (de)merit of the activity, like its carbon footprint; thus opening up another flank of controversies, as well as discussions on measurement approaches.

Mobilising the actors means leaving to them the responsibility to establish, impose and control the desirable way to conduct their own activities.

Speaking more concretely, the very actors would formulate codes of conduct, normalising how the negative aspects and externalities should be treated and describing the desirable quality levels for their operation. They also, at least partially, would exert the required controls.

Sectoral codes of conduct are no big news, and they exist already for specific, highly polluting activities –like the cement sector- or, for others, as a strong, spontaneous or forced, urge to good practices in their particular business line. For each sector, preliminary work usually has to be pursued in order to identify what exists and can be suitably translated, adapted to or adopted by the objective at stake. If conforming to the set guidelines, the actual

¹¹ In a first motivation to the theme. Voluntary Codes of Conduct are fully discussed in Part II.

¹² See also Drummond and Flôres (2014).

text can have different acceptable formats, the resulting one being close to the actors' views and possibilities.

The great diversity of sectoral characteristics and their corresponding international patterns demand a thorough previous analysis of how to launch the efforts. A sensible suggestion is to start work with a few activities, the most aggressive ones standing as natural candidates. Cement, mining and extractive industries in general, one or two branches of the petrochemical galaxy stand as important cases.

Two additional advantages would ensue from this way of working.

First, like in the (international) advertising sector, control of the fair obedience to the code would be largely exerted by the sector peers; a mechanism of self-control that has proven to be simple and effective.

Second, a problem that has become widespread would be minimised: competition issues raised by over (or under) use of subsidies and green finance loans, or by exploiting looser legislation and rules, practiced by a number of firms in the sector. While unifying and detailing the good practices, the code shall naturally create a level playing field where specific uncompetitive moves would be more difficult to pursue. Transparent rules will make it easier to set specific country legislations and contribute to their reasonable convergence worldwide.

The sectoral codes should have at least a regional homogeneity, in order to be effective. The effort, however, could start from a simpler and straightforwardly international platform: the elaboration of voluntary codes of conduct for the foreign direct investment activities in the corresponding sector. Though related, these are different endeavours, the FDI code immediately involving at least two countries and enjoying greater attractiveness to be universally adopted.

Of course, a broad, non-sectoral FDI code may establish minimal environmental standards to be followed by investors in a third country; it must be compatible with the sectoral one –which, if existing, probably will be more detailed- but, at the same time, it may complement it, by incorporating issues germane to any starting, foreign activity in a given

country. It must also comply with a set of domestic constraints, posed by the group of countries that traditionally host that kind of investment.

Two other extensions must be addressed.

The first is that the sectoral effort may be combined with a community or a regional –intra or inter-national- dimension, the code taking into account either specific geographic characteristics that may matter or existing developments or practices at levels that should be the object of regulation.

Another extension is to enlarge the idea to an upper stage, considering instead of sectors, different types of value-chains. A key advantage in adopting the value-chain perspective is that important activities with potentially serious impacts, like all those related to the specific logistics links, would be simultaneously dealt with. This line however still deserves to be better understood.

How does the idea fit into the higher-level statements and functions of the COP?

Though a relatively costless idea, the coherent and comprehensive establishment of such codes obliges the existence of a secretariat to manage the global work, supervise that by each sectoral group and, together with the member states, to follow up the due and harmonious application of the codes, as a side entity to the sectoral control itself.

One way to establish the due link is to put this secretariat under the COP that, through its own Secretariat, would also set guidelines and conditions each code should satisfy, approving them at the Conference level. Together with the member states, the Conference could help in establishing the representative working groups that would actually write the code.

This should not be taken as mandatory, much less a certainty –specially in the beginning-, given the revealed behavioural pattern of the COP until now; however, paragraphs 118-120, and 134-137 (making for ‘Section V. Non-party stakeholders’), of the Adoption of the Paris Agreement decision, open an interesting niche for it.

The codes could be hosted in the Non-State Actor Zone for Climate Action platform, defined in the already mentioned paragraph 118.

PART II

VOLUNTARY CODES OF CONDUCT

Chapter 2. Brief history and general issues.

In which existing knowledge on Corporate Codes of Conduct is presented in a condensed way, tailored to the use that will be made of them in this Report.

2.1. Introduction.

Codes of conduct started to gain visibility during the nineties, in the past century, when the phenomenon of transnational corporations became definitely recognised and accepted. Given that these new entities had become an integral part of the world economic landscape, concern about their responsibility increased, and governments as well as society started to demand minimum requirements for their activities. This movement gave way to the concept of Corporate Social Responsibility – CSR, given the manifold interactions transnationals took part in the global society; a joint, related outcome was the production of Corporate Codes of Conduct (CCC), notably in the areas of labour and environmental standards.

The gist of the CSR and CCC ideas laid in the self-regulatory mode for business activities; social and environmental impacts, instead of being primarily and uniquely of concern of governments, became, at least partially, matters of corporate responsibility to be controlled by the companies themselves, or their industries. At the same time, transnationals recognised that they needed more pro-active responses to answer new and deeper questioning from states and organised society in the growing globalisation context; not only to create favourable operating conditions for them, *but also to reduce the pressure for increasing and ever more encompassing regulation.*

Back in the late seventies, corporate codes could be found mainly as a result of anti-corruption practices by governments in developed countries, notably the US. According to Kline (1985), out of 174 codes existing in 1978, more than half addressed questionable payments and financial practices.

Pressures seemed to diminish during the eighties, but during the nineties, as mentioned in the beginning, the OECD surveyed 246 codes, 60% referring to labour standards, 59% to environmental ones, and only 23% referred to bribery and corruption practices, OECD (2000). It is during this period that important, internationally conspicuous companies started to voluntarily publish their own codes. This also addressed fears of loss of nation state sovereignty, thanks to the ever-growing activity of the transnationals.

Nowadays, it is estimated that the number of codes of conduct, by individual companies, industries, clusters of industries, producers' associations and NGO's, is superior to 500.

By their very nature, they encompass or impact different sets of stakeholders, commonly classified into the following ten groups, Jenkins (2001):

- a) the large corporations themselves;
- b) smaller producers;
- c) NGOs, with oftentimes different reactions in the North from the South;
- d) trade unions;
- e) shareholders and investors;
- f) consumers;
- g) consultancy firms and verifiers;
- h) producers, exporters and workers in the South;
- i) local communities;
- j) and, finally, governments, with impacts and reactions in the North being usually different from those in the South.

The dynamics within each of these ten categories has been extensively studied and it is not the case to dwell on it here, given our objectives. What effectively matters is that whenever discussing or formatting a proposal, awareness of all these groups must be duly taken into account, at the risk of producing a code that is not used, or raises unexpected opposition, for having failed to pay due attention to the interests of one of the above constituencies.

The codes can, of course, be produced by a sole company, by a group of similar ones, or the whole trade or sector. But they can involve negotiations among several stakeholders, like NGOs and specific communities, beyond the corporation(s), being then called multi-stakeholder codes. They can also be produced by a sectoral association or representative, usually as guidance for individual members codes, and are known as model codes.

2.2. The question of implementation.

It is not enough to produce a code; in order to be meaningful, it must also have clear methods of implementation, followed by procedures that ensure it is being duly and correctly used. This raises the important issue of monitoring.

Already at the turn of the century, out of the 246 codes analysed by OECD (2000), only just over 10% had due provisions for monitoring. By due provisions, we mean that monitoring must be conducted by independent agents not involved in the activities which are the subject of the code and, usually, the corporation itself. That's why group g) above is impacted by any given code. *Without independent monitoring, codes do not differ much from general statements of business principles or so-called good behaviour, lacking effectiveness and failing to fulfil their expected social role.*

This deficiency is particularly acute in environmental and sustainability-related codes, *which merely re-state a portfolio of good practices without any specific way of ensuring their actual inclusion in the daily activities.* Incorporation of the code in the company statutes or internal rule does not assure at all that it will be observed.

Usually, the question of implementation is related to what was the main factor responsible for the elaboration of the code. In the cases when it had been driven by a specific group, like consumers of a given product, its members will naturally make for a relevant party in the monitoring team, not allowing that statements on standards and duties be left open or loose, their fulfilment at the discretion of the formulators of the code.

This poses a further alert to our case, as many sustainability codes have been borne out of broad concerns of an industry association, or of the good efforts of an international agency or organism, lacking, thereafter, a continuous and rigorous supervision mechanism for the (undoubtedly positive) output represented by the signed code. We shall come back to this issue later.

2.3. Voluntary codes as private law.

A CCC is, in the legal jargon, a private law, i.e., a promise voluntarily made by a company or sector, making for a public commitment to abide to certain standards and practices all along its activities.

The producer of the code has thus a large degree of flexibility in designing the text, by selecting, for instance, the dimensions and standards through which he desires to be measured and evaluated. However, two points constrain this private law character of the code.

First, in order to be credible -and, actually, effective- the code must minimally meet the expectations of the groups and forces pushing for its existence. A further reason for, in the sustainability context, to well characterise the *demandeurs* of the code.

Second, obligations of the code producer, in spite of the discretionary powers he/she enjoys, are not reduced. He continues to bear the burden to ensure that the most sceptical drivers of the code believe in the proposed statements and performance claims; what reinforces the crucial role of independent monitoring schemes.

Of course, it is implied that all parties involved have a genuine interest to resolve, or at least advance the issues at stake, within realistic market and financial constraints.

Here resides another crucial point in our proposal. Linking to the discussion in Chapter 1, a positive mood of engagement must be created, something that hasn't been addressed yet by any COP. *This and similar endeavours lie nowadays outside the scope of the Conferences, what illustrates one of the originalities -or potential problems, if wanted- of the new realm of measures advocated in this Report.*

2.4. Pros and cons of the CCC approach.

As any public solution to conflicting interests, a CCC enjoys negative and positive aspects. We begin with the downside.

A first problem is to see them as, or expect, more than they can deliver. Truly, many are just a way to avoid or minimise public criticism, and others have been elaborated with not the best of intentions, carefully managing to include a majority of innocuous clauses. Sometimes, well-intentioned texts may fail in operation, and their ensuing effects may prove nearly disappointing. The main reason for this lies in the point that the statements that bite usually involve prohibitions, and these, quite often, may either have negative, unintended spill-overs or, due to unaccounted for general equilibrium effects, may turn out less performing than expected. Examples are numerous, be it in the area of labour relations, in environmental practices (here, indeed, due to general equilibrium interactions, meteorological ones included) and whenever several (and varied) agents are involved, making proper monitoring of the prohibition difficult to be achieved.

Also, CCCs do not replace government regulations, though the fact that they usually reduce regulatory pressures and official enforcement measures may lead to this situation or, at least, induce it. Identically, they should not limit the space for trade unions or other specific social organisations to act.

Codes and local cultures interact. The same practice may be judged socially responsible and acceptable in one place/society and irresponsible or intolerable in another culture. This brings additional problems as it favours regionalisation and fragmentation of the code, according to different realities, something that weakens its supposedly universal, i.e. global, reach. A balanced view, depending on the activity, is not easy to be reached.

All the above contributes to the view that considers CCC as public, pro-forma statements of soft corporate intents, short on what really matters. The current situation in many areas is not encouraging, with public trust on the effectiveness of the CCC solution standing quite low.

Moreover, industry wide and sectoral codes -as, in principle, proposed here- may be an incentive for collusion among the sector members, against more socially responsive items. The larger the number of corporations in the industry, the higher will be the probability that procedures and standards accepted will be the lowest common denominator of all possible views. Adverse selection and free rider problems are also due to be intensified.

As to the positive side, there is significant evidence that they can and have generated positive outcomes to most of the stakeholders and groups outlined in section 2.1. It is undeniable that they provide leverage on the unavoidable conflict between corporate behaviour and social and environmental impacts. Transparency and public knowledge of the code place concrete limits on corporate misbehaviour and any unsound excuse to bypass somehow the published code.

Moreover, by their scope, they draw the attention of all stakeholders to the multiple interactions generated by the micro-operation of the company, which usually touches several agents as, for instance, in the case of value chains. If successful, they may outreach their original objectives and display a multiplier effect, in terms of positive impacts.

In the case of sectoral codes, counter-acting the shortcomings previously outlined, *they could successfully replace numerous individual codes that would render comparisons and performance evaluations among corporations difficult if not senseless.* The sector would also benefit from a united position to more consistently face the public at large, as well as all segments concerned with its activities.

CCC are however no panacea and the extent to which they have been applied up to now is still fairly limited, in spite of their consistent growth.

Most are still very general, making for a somewhat improved wish-list, not offering material for a valuable test of their performance. This will become more evident in Part III, when concrete existing proposals for a major area –the extractive industries- will be analysed. Performance, even in such an important case, remains an unanswered issue.

Chapter 3. Going deeper on Corporate Codes of Conduct.

In which less debated features of a CCC are discussed and the need for a structural framing of the Code is highlighted.

3.1. A general framework for evaluating the codes.

3.1.1. A two-dimensional map.

Professor S. Prakash Sethi, from the City University of New York, USA, has proposed a two-dimensional space where different codes could be mapped.

The horizontal scale (see Exhibit 1) depicts the cohesiveness of the group sponsoring the code, represented by the amount of shared interest in formulating, implementing and monitoring the standards. The vertical dimension translates the scope and specificity of the recommendations and commitments. Higher cohesiveness moves to the right (East), higher specificity moves upwards (North).

Combination of the two dimensions produces four quadrants where given codes can be mapped and evaluated. For the purposes of this Report, the two related to higher cohesion groups are of interest: northeast and southeast. However, just to give a flavour of how the framework operates, the famous UN Compact¹³, a pioneering global CCC initiative, lies in the southwest quadrant, as it addresses a wide audience (low cohesion) and consequently its principles and standards are kept deliberately broad and vague (too broad scope).

¹³ Also known as the UN Global Compact (www.unglobalcompact.org), a broad code consisting of a set of principles to be followed by all businesses, in key areas like human and labour rights, environmental responsibility and basic societal goals.

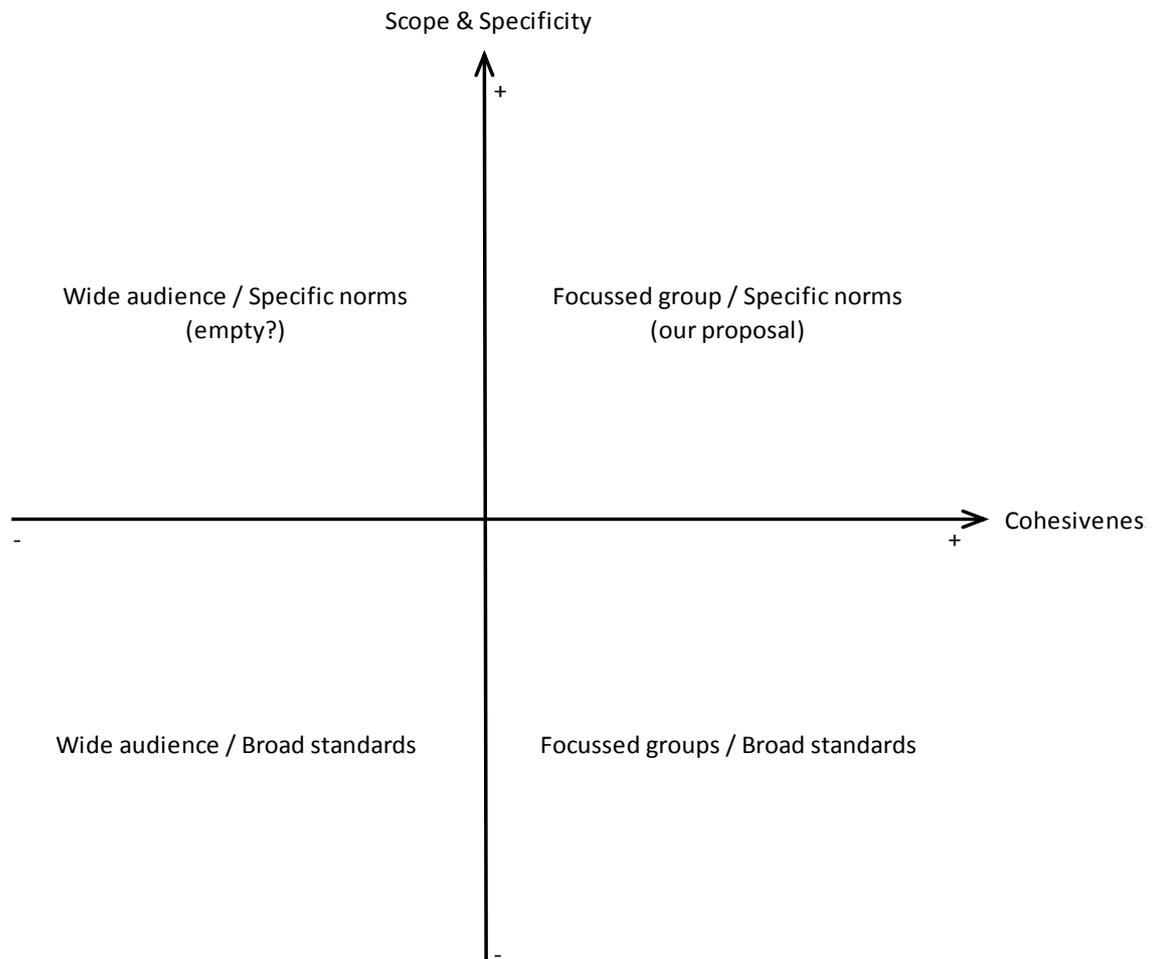


Exhibit 1: A two dimensional diagram for mapping CCC's (see text).

Universal codes can also be found in the northwest quadrant, provided they address, for instance, key moral or ethical dimensions, strongly demanded by most stakeholders. Sponsors of the code, in this case, must enjoy a high degree of trust, what would add credibility to the independent verification systems mandatorily included in the code.

3.1.2. The mining industries quadrant.

Extractive and mining industries initiatives are usually portrayed in the southeast quadrant. The sector is in principle highly cohesive but, together perhaps with the chemistry industry, is the subject of strong external pressures in nearly all socioenvironmental aspects, being one of the demons of the sustainability debate.

The usual consequence is that, while the companies will not risk cheating what has been agreed in the code, *they will fight for vague and loosely interpreted provisions and standards.*

Given the extent, size, inherent risk and complexity of their operations, cost is a major factor and will stand as a main driving force in the choice of areas and items that will enter in the code.

More than in other sectors, performance standards must be realistic, taking into account the financial situation of the companies and the competitive environment where they act. The urge to address all sustainability aspects must be balanced against the risk of obliging the signatories to exaggerated promises and implausible commitments – something, as said above, they'll hardly accept. Additionally, and specially because as all measures must be internally implemented by the companies, they must not create a disruptive internal situation.

3.2. The Code is more than the CCC.

Codes must be seen as a dynamic structure, evolving in time –in a maximum transparency and verifiable sector performance disclosure mode- in accordance to the corresponding evolution of all stakeholders listed in 2.1.

Deliberate use has been made of the term structure as other elements, in most cases disregarded, are needed for an efficient CCC. Two, in particular, are essential to any serious proposal: the governance and the verification modules.

Dynamics implies governance and, though supple, governance must be strong. Weak, or non-existing, or poorly defined governance arrangements end up in lack both of internal control of the evolution and external trust. The poorly defined structure is reduced to an exercise in superficial change, unlikely to eventually carry out the transformations that were expected.

The result is a progressive erosion in the public credibility of the Code and its reported outcomes.

Depending on the credibility of the main sponsor of the Code, it may remain as an interesting case study or –at best- as a relevant model code. It is not unfair to say that, deservedly praised as they are, the UN Global Compact and several OECD Codes have moved to such qualification, exactly for lack of adequate (dynamic) governance.

An independent monitoring and verification system is the core element for establishing a solid reputation for and widespread trust on a given voluntary code. It is not easy to design such a system in the face of unavoidable resistance by the corporations to any attempt at invasion or surveillance of their operation by external agents. A significant amount of unpublished disputes on this exists, corporations arguing that independent verifiers would be seen as undesirable “police officers”, *something actually in contradiction to the very essence of a voluntary code*.

The brief expositions above may explain why the “code structure” is, until now, surprisingly neglected (or forgotten) in nearly all modern texts; as further exemplified in the cases discussed in Part III.

We however do not agree with such attitude and this Report advocates a drastic turn on it.

PART III

THE EXTRACTIVE (MINING) INDUSTRY

4. Codes of Conduct for FDI in the Extractive Industries.

In which the existing Codes of Conduct for the extractive industry are analysed under the objectives and conditions set up in the previous chapters.

4.1. The mining industry.

Extractive industries play a major role in the world economy and, in the case of developing and some emerging economies, they are simply a vital element of their growth strategy. In terms of origin, the industry is heavily concentrated in a few specific countries. Out of the top 40 companies in 2017, China/Hong Kong, UK/Australia and Canada are the three key locations of the bigger ones, followed by the US and Russia, with presences of Brazil, Japan and India, among others (PwC Mine 2015).

According to the International Council on Mining and Metals - ICMM, FDI in the mining sector accounts, on average, for 60-90% of total FDI in low- and middle-income resource rich countries; countries where sustainable development problems are more serious, requiring urgent and efficient solutions.

Mining activities generate a variety of environmental problems, from erosion and sheer destruction of soils and landscapes, to severe carbon emissions and air pollution, becoming nastily interspersed with health and sanitary problems of many sorts. They usually produce huge negative externalities, related to the associated transportation and local facilities complex, and to the aftermath of their activities. They are catastrophe prone, leading to unexpected, dramatic landslides, floundering and destruction of large tracts of land that

may encompass areas outside the mining fields themselves. Moreover, after their lifetime, the usual outcome is a desert, fully destroyed surface.

As if all such problems were not enough, they are also the source of serious social unrest. Taking only Latin America, in early 2016, Mexico, Peru and Chile championed the list of ongoing mining disputes, with, respectively, 37, 36 and 35 ones. Argentina and Brazil, displayed 26 and 20, resp., and Colombia 13¹⁴.

The lure of attracting the investment, and the expectation of job creation and of the flow of hard currencies to the economy, makes less developed economies to overlook the damages provoked by the activity, being lenient in their control, as regards environmental impacts.

The sector, in spite of the geographic concentration of the companies' origins, is less cohesive than might be expected¹⁵; lacking a single consistent representative.

The above mentioned ICMM probably is the largest and soundest, with 23 member companies and 34 national and regional mining associations, through which they claim to reach 1.500 extra companies more. The 23 member companies show a predominantly anglo-saxon origin, with 15 distributed along UK/Australia, South Africa, Canada and the US. No Chinese company is a member, neither is Vale, from Brazil.

ICMM obliges all members to subscribe to 10 guiding principles, nearly all related to sustainable practices, five in a most explicit way.

At the side of ICMM there are powerful national associations, notably in Australia and Canada. The Chinese also have their groupings, notably the China Chamber of Commerce of Metals, Minerals & Chemicals Importers and Exporters – CCCMC.

Of course, codes of conduct –in a more or less explicit form- are debated and produced by these entities, and a few ones will be discussed in the next section.

¹⁴ Source: The Observatory of Mining Conflicts in Latin America.

¹⁵ See also previous subsection 3.1.2.

There are also two general-purpose guidelines, not specifically addressed to mining but worth mentioning. They are the Guidelines for Environmental Protection in Foreign Direct Investment and Co-operation, and normative ISO14001.

The Guidelines were established by the Ministries of Commerce and of Environmental Protection of the Popular Republic of China, and date from 2003¹⁶. They are a set of non-mandatory standards and practices, related to the environment, to be followed by Chinese companies investing abroad.

ISO14001 is a classical normative, outlining 17 requirements to be incorporated by the environmental management system of any sizeable company. The requirements deal with different kinds of processes and refer to five groups or themes: environmental policy, planning, implementation and operation, checking and corrective action, and critical analysis.

4.2. The codes in the mining industry.

4.2.1. The idealised format.

There is a general consensus that the Code should contemplate a set of minimum standards for the operations that would ensure relatively predictable and moderate impacts. It must also duly consider safety aspects of the installations and civil works ancillary to the mining or extraction activities. Moreover, it has to account for measures, both concomitant to and after the lifecycle of the exploration has ended, that would aid in the re-colonisation of the field.

The basic processes and production methods (PPM)¹⁷ should be clearly codified, with their environmentally damaging steps identified, as well the respective needed green counter-measures.

¹⁶ Their English translation can be found at english.mofcom.gov.com.

¹⁷ On PPM see, for instance, Cottier (2015).

To construct a new Code, an initial mapping of the current plethora of standards – domestic and international- together with their scope, coverage and proven effectiveness respective to the climate change issue, is mandatory. *Here is another instance where the COP and existing institutions could prove very useful.* From this mapping, a multi-stakeholder consultation may ensue and a preliminary proposal be formulated.

Once the Code has been approved and signed by the greatest possible number of parties, an index of responsible miners, investors and shippers could be extracted from its normal, continuous usage. In principle, it should then be part of any FDI contract, and figure as well in regional investment and trade agreements.

As stressed more than once in this Report, a subtle balance must be achieved, combining the environmental interests, those of the miners and those of the possible hosting countries, many times not exactly eager to enforce too rigid regulations.

Attempts at such endeavours do exist, though not many, as will be seen below. From one side this is positive, from the other side it raises a flag on how slow the needed developments are and, actually, how poorly motivated are the main agents.

4.2.2. An analysis of existing codes.

We discuss five examples which display different approaches to the question. The two first ones are specific proposals which suffer from a somewhat limited scope, though being, in principle, broad-based in their original intention. One is actually more focussed on the activities linked to the precious stones and jewellery sector, and the other is still restricted to Canadian agents. Then, we address an Australian and ICMM attempts, to conclude with an ambitious recent proposal by the CCCMC, elaborated with the help of GIZ itself.

Care must be taken as what can or may be included in the sector. Indeed, the ‘whole sector’ may stand as an over-extension, as idiosyncratic activities, like artisanal gold mining, Sousa et al. (2011), are for sure outside this debate, while very localised ones, like the dimension stone industry, Macedo et al. (2017), may perhaps be better off with more specific solutions.

The five Codes are:

IRMA – Initiative for Responsible Mining Assurance

The initiative aims at establishing an allegedly multi-stakeholder and independently verifiable responsible mining assurance system, dedicated to improving social and environmental standards. It is not clear how much support it has captured so far. A first draft has been released in 2014, open to comments; according to information in their website, more than 1400 comments were received, submitted by more than 70 individuals and organisations.

A second draft was supposed to be released by mid-2015, and the whole system to be launched by the end of the same year. Both did not happen, but are expected to come true in 2016. The Steering Committee pools together downstream users (mostly big jewellers), trade unions, mining companies, affected communities and non-governmental organisations.

It is an interesting example of a multi-stakeholders code (southwest quadrant in Exhibit 1, chapter 3) and, as such, risks ending up as rather vague.

TSM – Towards Sustainable Mining

An initiative of the Mining Association of Canada (MAC), launched in 2004, it proposes guidelines to members' performance in specific areas such as tailings management, external outreach, crisis management and energy use, and assures that actions follow the guidelines.

TSM is mandatory for MAC members in their Canadian operations, but it is not clear whether in their FDI activities; the Finnish Network for Sustainable Mining is implementing it in Finland. Notable members include Anglo American Metallurgical Coal Canada, ArcelorMittal Mines Canada, BHP Billiton Canada Inc., Rio Tinto Canada, Shell Canada Ltd. and Vale Canada; what testifies to its rather local scope. It does remain until now nationally based and under the supervision of the Association.

Australian Minerals Industry Code for Environmental Management

The Code was launched in 1996 by the industry, greatly as a response to pressures for improved regulation, strongly supported by NGOs. Unfortunate experiences and bad reputation from international operations were also a key motivation.

As an industry code, it is principles-based, but no performance standards are set; they are left to the individual companies. It deals in a encompassing way with all phases of operation, from initial exploration to closure and final rehabilitation –regarding the latter, it was one of the first codes to comprehensively address it. The industry has welcome its flexibility, though NGOs criticised it, as not having ensured improved performance across the whole industry.

In 2002, adherence to the Code became mandatory to all members of the Minerals Council of Australia. More was then added on verification: a self-assessment protocol –the Implementation Survey- was introduced and an accredited auditor must verify the results of the survey at least once every three years. An External Environmental Advisory Group has been created that, together with key stakeholders, has been supplying further initiatives and improvements to the Code, particularly as regards independent auditing procedures.

Foreign operations of the industry are clearly covered by the Code, which nowadays supervises more than 90% of the country’s mineral production, the great majority of foreign sites as well as contract services providers to the industry.

An interesting feature is a system of incentives to help reduce failures, improve performance and reward success; ensuring excellence and innovation in environmental performance are recognised and rewarded. Incentive schemes like this are an idea that could be more exploited.

In overall terms, the Australian code, though complete and reliable evidence of improved industry performance thanks to it is still lacking, is a positive endeavour that illustrates many questions akin to industry-wide codes, especially the guarantee of minimum standards and the whole verification and independent assessment issue. In specific areas, like transparency and serious environmental reporting, it has already achieved pluses. Its original features are worth noticing and deserve a more careful analysis.

The ICME/ICMM Sustainable Development Charter

The Charter was also developed in 1999, with the help of the World Bank, by the International Council on Metals and the Environment – ICME and nearly immediately adopted by the ICMM. It has been updated since then.

It is cited here as a didactic contrast to the Australian initiative, given that, as the sponsors are even more diffuse and spread, we fall into the problem discussed in section 3.1, and the document is unable to evolve beyond a set of principles. It is telling that the largest transnational and domestic companies in the sector have actively supported it: cynics would say that, given the general character of its text, this came at no cost (and only positive publicity). In spite of this, it clearly lacks representativeness in term of members.

This reminds one that quality is a necessary dimension of the codes, but far from sufficient for its effective role. Good though broad codes risk being captured –in the wrong way- by companies, as a protective regulatory shield, and end up being perceived by the remaining stakeholders as a little more than loose commitments. After (usually) having demanded considerable effort, they remain insufficient to ensure more sustainable performances and produce mechanisms that, by checking and demonstrating the improvements achieved, would boost the credibility of both the code and the companies themselves.

The Guidelines for Social Responsibility in Outbound Mining Investments

The Guidelines have been recently issued by the China Chamber of Commerce of Metals, Minerals & Chemicals Importers and Exporters – CCCMC, and can be found at www.cccmc.org.cn/docs. It is an ambitious document which involved several institutions and associations, notably eight agencies of the Chinese Government. It also had the support of twelve international organisations and NGOs; in particular, GIZ (Germany), the WWF, the International Labour Office and the International Trade Center, in Geneva, and the United Nations Development Programme – UNDP; eight large Chinese enterprises also support it.

The Guidelines are based in seven standard, well-recognised principles –like adherence to ethical business practices and transparency- and address eight topics in a rather comprehensive way: organizational governance; fair operating practices; value chain management; human rights; labour issues; occupational health and safety; environment and community involvement & engagement.

Each clause in the text is the result of careful cross-examination of 28 main standard codes, notably from ICMM, ILO, OECD and UN, among other established attempts. A useful table –which is also a display of professional rectitude- in Annex 1 of the document shows the nature of the interrelationship between the Guidelines clauses and the 28 codes.

Unfortunately, the clauses cannot however go much beyond their name and the very nature of their effort. In spite of the insertion of sub-clauses which ”suggest approaches, measures and pathways for implementing the main clauses”, most statements are very general or too broad, no standards are set as well as no operationally credible verification and monitoring mechanisms. Indeed, these are left to the responsibilities of the companies themselves; a well-known shortcoming widely denounced by several critics, the majority of NGOs included.

Given the scope and relevance of Chinese extractive industries, especially in outbound activities throughout the world, the Guidelines, beyond welcome, have a near necessary dimension. Notwithstanding, they continue to qualify as part of a solution, failing to exploit to the full the benefits of a code of conduct. Ironically, one of the reasons for this may have been the great number of institutions involved, while stakeholders were, mostly, implicitly represented either by them or the numerous codes and regulations carefully taken into account.

4.3. Coda.

We believe the analysis conducted so far illustrates the difficulties and limits of the Codes of Conduct approach. The Australian and Chinese initiatives display relevant features, with the former standing perhaps closer to our purposes.

Is there a sort of “third way”, or innovative alternative for constructing Codes nearer to what has been originally envisaged in this Report?

Chapter 5. Outline of the Ideal Code.

In which we arrive at the essence of the Report, in its practical side.

5.1. Four guiding principles - the Code as a package.

On the grounds of the analyses and concrete initiatives exposed so far, and quite a few talks with sectoral experts, we believe there is room for outlining the kind of text, and broadly, instrument, which makes for the core of our proposal.

We begin by identifying four bullet points to be observed by any universal but effective code for the sector, as here envisaged. All follow from background principles, judged evident from the discussions in the previous sections:

A: Comprehensiveness weakens the code,

the urge to address all dimensions of the mining activity leads to broad statements on all of them, and leaves unclear the real target of the code. Faithful to our plea in Part I, the proposal in this Report aims at *key and crucial* aspects of sustainable development, particularly, as expounded in Chapter 1, on the polluting sides of the activity, which bear more explicit causal relations with climate change;

B: Setting clear standards is fundamental,

a code either general or incomplete in this aspect, or which delegates this task to the individual companies, or refers to other ones, *loses clout, credibility and effectiveness, beyond producing a grey area for the evaluation of its efforts.*

C: The code cannot be circumscribed to its text,

it must be a full package, comprising a minimal organisation and a few ancillary structures, notably for its dynamic governance and independent monitoring and verification responsibilities.

D: Start with a not very large number of parties,

if, on one hand, involvement of several institutions and associations gives, from the start, visibility and an aura of credibility to the code, on the other hand this inevitably leads to texts which are the minimum common denominator –even if encompassing and erudite– of all parties’ views and interests. The closer the code sticks to the focus sector and the main stakeholders the better.

These considerations oblige to formulate the Code as a unified package, with the text itself that contains the code as a centrepiece, surrounded by a minimal structure and a few ancillary bodies, supposed to operate on a continual basis. The question of costs is then unavoidable, and must also be faced.

The next section discusses content and the last one the ancillary elements of the package.

5.2. Content.

The first point is focus, which here also means avoiding duplication, either from existing documents or similar attempts.

Examples abound.

As for labour standards, there are already plenty of initiatives, conventions and regulations, a great majority anchored at the ILO documents and norms, which –if needed- should only be invoked or mentioned in the Code.

In the case of protection of natural communities and environments, much is already well-developed –Canadian initiatives being close to a model standard- and numerous international experiences have taught precious lessons which are nowadays almost common knowledge.

This dimension includes however a kind of open problem which we would rather leave outside the code: it refers to the very location of the extractive investment, here included the extraction site together with the roads, pipelines and all sorts of transportation networks connected with it. As the recent (nowadays) conflict over the pipeline through the Standing Rock Sioux Reservation in North Dakota, US, shows, this, though being a major problem, is a public choice one to be equated and solved at the level of the local –municipal, state or (even) federal/national- authorities and not be the subject of a universal statement. Though there is nothing against mention of the issue in a global code, it is in reality vapid.

The same applies to principles of business ethics and fair conduct, particularly in the case of corruption. Truly, the ever widespread increasing of corruption in transnational business in general, side by side with that of anti-corruption regulation and procedures at the domestic, regional and global level, may seem alarming (and disappointing). Nevertheless, thanks to this, the subject has been acquiring a status of its own, being, in principle, a waste of time to dwell on it in a specific code.

All the above does not imply that these areas should not be mentioned at all, but that mention –if made- should refer and incorporate the existing material on them: *avoid duplication*¹⁸.

¹⁸ The reason for such insistence is that nearly all the top ten mining companies –just to stay in this group- have quite good and comprehensive codes and regulations on many instances of their operations, being completely senseless to double or repeat them –probably in a lower quality or less professional version. This is not the purpose of the Ideal Code outlined in this section, targeted to climate sustainability issues, under the light of the scientific panels that support the COPs. (see also the next footnote)

The second point deals with effects which we would call second-order ones, like the extension of norms and standards all along the value chain. This is a very appealing idea that bears however a double face.

Many times, control of connected links is neither smooth nor as simple as it might seem, and enforcement by the mining company of standards and procedures along the chain may result costly. In the same vein, rules of local procurement and manufacturing, related to ancillary equipment and products should be introduced with care. They are really second-order concerns and the gains from the insertion must be well evaluated.

The core of an effective Code of Conduct for the extractive industries, at the present stage of knowledge, should consist of the environmental clauses, together with safety and risk management procedures and (occupational) health considerations¹⁹.

Environment clauses should address all activities, from the extraction operations, infrastructure works, transportation and logistics, spill-overs and chemical externalities, impacts on water, soil, air and biota, stocks, and effects and procedures related to cessation and closure of operations.

A combined set of standards, with core attention to pollution and greenhouse gases emissions indicators, should be coupled to the described practices. The same should apply to the health and safety considerations.

The risk management clauses should encompass the main catastrophe prone situations and list a set of averting and mitigating procedures. Additional operating standards must be included, in order to guarantee acceptable risk levels according to a minimum number of credible scenarios.

Standards may vary according to the nature and scope of the extraction, and also to eco-systemic or even socio-environmental contexts.

¹⁹ As referred to in the previous footnote, the Ideal Code is mostly an instrument to answer the criticisms and fill one of the gaps discussed in Chapter 1. In this vein, it does not compete with existing technical, companies' codes, nor either with broad texts, with similar objectives but with a bigger scope and no enforcing clout, as, for instance, the well-known ISO26000, a positive, general-purpose initiative by ISO itself.

A complete guideline, with all standards, how they're measured –context, procedures and devices- and at which frequency, must be an integral part of the code. Measurements must be made under previously established periodic bases and be audited by an independent body every two or three years. Auditing includes analysis of the historical data, of on spot procedures and overall adhesion to the clauses.

Either negative or positive, auditing results are informed to authorities, peers and relevant stakeholders. They can be made public.

5.3. The ancillary elements.

Whether made by a group of main companies, or an industry association, the Code needs a supporting structure which, for lack of a better word will be called the Secretariat. It will be responsible for the deposit of the text -as a private law document with the flavour of a proxy of an international public law-, the register of the signatures and the overall care of its existence.

In an instance that sets the Code here envisaged apart from other attempts until now, it must be registered at the COP, *opening a new activity of the Conference as a recipient body for private productive agents' initiatives.*

Together with the Secretariat, there must be an Independent Verification and Evaluation Body – IVEB, with the clear task of following up the operations under the responsibility of the code signatories, receiving datasets of measurements, conducting the periodic evaluations and compliance checks in general, and writing or receiving auditing reports on the status of the different operating sites.

Though the companies will be represented in the IVEB, actual verification and evaluation procedures must be conducted by third parties. Outsourcing part of these activities may be a solution, beyond an easier way to reach a compromise with opposition from the corporations to such initiative.

The remaining ancillary body would be a small Code Steering Committee – CSC which would be responsible for keeping the text abreast with the developments in the sector and in the sustainability debate, the COP decisions and evolution, and changes in stakeholders’ composition and expectations.

The CSC would establish contact with all code signatories and, if needed, convene a meeting of them to update clauses and standards. It would also tackle the policy of expanding the number of signatories and disseminating the Code.

The Secretariat would be the link between the two bodies and provide additional administrative help to them. All structures however should be kept to a minimal size.

It is then evident that some funding, though quite modest, will be required for sustaining this system. Sources can be varied but perhaps the simplest option is to use a very small percentage of the yearly foreign revenues to create a fund for the Code. This could be tried for the three to five initial years (including the one in which work on the Code started), and revised afterwards, both in terms of the individual corporate amounts and periodicity.

Some support from international organisations is of course welcome, but, ideally, and faithful to what has been pledged in Chapter 1, the whole initiative should be self-contained within the private productive sector.

Chapter 6. Strategies Once More, a Few Last Words.

Preliminary steps might not be so difficult.

Which is the best strategy to start such endeavour?

Broadly, one could now gather the relevant institutions, firms and subgroups –many of which have started efforts in this direction- and put them around the same table, to produce a meaningful and fairly universally accepted first draft.

Notwithstanding, Chapter 4 has shown that the sector already counts with relevant –if not perfect- initiatives already, being somewhat senseless to start from scratch. Once a clear will is manifest, and support from the COP is made true, one could pick up an existing text as ground material for the Code.

By its comprehensive and more up to date character, and the fact of counting with the approval of the important Chinese operators, the CCCMC proposal could be chosen as a first template, without losing sight of (at least) the Australian code.

The ground text would be both streamlined and detailed, following the principles and guidelines in the previous Chapter. The important issue of the structure surrounding the code would be discussed in detail, in order to arrive at concrete outlines of both the IVEB and the CSC.

Ways to achieve, consolidate and operate a first code naturally involve persistent work towards *all agents* in order to create a consensus on the need of such pursuit, but the Code can be launched with around thirty signatories, among the forty top mining corporations, involving three big FDI source areas (UK/Australia, China/Hong Kong and Canada), plus at least two other countries.



Once established, duly registered at the COP and in full, normal operation, we see no major barriers for its widespread adherence by all companies in the sector.

PART IV

CONCLUSION

Chapter 7. Policy Guidelines.

We advocate here a shift in the COP efforts and output.

The shift amounts to **giving more attention and room to bottom-up agreements in which the Conference would exert a co-ordinating role**, the measures being meaningless without the full engagement of the related actors.

By *engagement*, it is meant not only their participation and adherence once the measure has been approved, *but their involvement in the design of the measure itself*. By receiving in its structure such initiatives, the COP would give an official, international standard recognition and enforcement to each final decision.

The methodology can be applied to a variety of significant groups of private actors. Especially, it should be used with the productive sector, an area where there is dire need to fully incorporate in the climate debate.

A concrete version of the methodology, here proposed, are (Voluntary) Codes of Conduct designed by the different productive sectors themselves. The Codes set norms and standards related to the climate debate, to be minimally followed worldwide, in the daily operations of a relevant group of agents.

The approach is simple and reasonably costless. It should be tried in “hot areas” where sustainability is at risk, mainly due to the productive units interaction with nearly all environmental variables.

A key one, with a specific sector that should be dealt with first, is the extractive industries complex, mining in particular. An important feature of its activity is intensive international economic transactions, and, within it, foreign direct investment ventures.

We outlined how to do this for mining; carefully describing the steps and precautions to produce an instrument that takes into account the (usually considerable) amount of work and attempts already at our disposal. Focus and adherence to key COP concerns is fundamental.

This effort is not enough, unfortunately.

The gist of the idea here described must be explained to as many as possible relevant institutions –domestic and international-, firms and stakeholders’ groups.

It must be adopted by the COP.

References

- Ayittey, G. 2005. *Africa Unchained: The Blueprint for Development*. New York/London: Palgrave/MacMillan.
- Cottier, T. 2015. Renewable energy and process and production methods. Think Piece, E15 Expert Group on Measures to Address Climate Change and the Trade System. Geneva: ICTSD and World Economic Forum.
- Drummond, M. C. F. P. D. and R. G. Flôres Jr. 2014. Engaging the productive sector in the climate change negotiations. Working Paper 18/14, November 2014, Climate. Paris: SciencesPo/IDDRI.
- Easterly, W. 2001. *The Elusive Quest for Growth*. Cambridge, Mass.: MIT Press.
- Easterly, W. 2006. *The White Man's Burden*. New York: Penguin Press.
- Flôres, R. G., Jr. 2015. Engaging the productive sector in the climate debate: a few bullet points for the COP21. Processed, available at the EPF/GIZ network.
- Jenkins, R. 2001. *Corporate Codes of Conduct : Self-Regulation in a Global Economy*. UNRISD Programme on Technology, Business and Society : Paper Number 2. Geneva : United Nations Research Institute on Social Development.
- Keohane, R. O. and D. Victor. 2015. After the failure of top-down mandates: the role of experimental governance in climate change policy, in S. Barrett, C. Carraro and J. de Melo, eds., *Towards a Workable and Effective Climate Regime*, downloaded at [//www.voxeu.org/content/towards-workable-and-effective-climate-regime](http://www.voxeu.org/content/towards-workable-and-effective-climate-regime). Kline, J. 1985. *International Codes and Multinational Business : Setting Guidelines for International Business Operations*. Westport, Connecticut : Quorum Books.
- Macedo, D., R. Mori Junior and A. M. P. Mizusaki. 2017. Sustainability strategies for dimension stones industry based on Northwest region of Espírito Santo State, Brazil. *Resources Policy*, 52 ; 207-16.
- Moyo, D. 2009. *Dead Aid: Why Aid is not Working and How there is a Better Way for Africa*. Great Britain: Allen Lane (Penguin Books).

- Nordhaus, W. 2013. *The Climate Casino*. New Haven: Yale University Press.
- OECD. 2000. *Codes of Conduct: An expanded review of their contents*. Working Party of the Trade Committee, TD/TC/WP (99)56/Final. Paris: OECD.
- Rajamani, L. 2014. The Warsaw Climate Negotiations: emerging understandings and battle lines on the road to the 2015 climate agreement. *International and Comparative Law Quarterly*, 63(03); 721-40.
- Singer, S. F. and D. T. Avery. 2007. *Unstoppable Global Warming – Every 1,500 Years*. Lanham, Maryland: Rowman & Littlefield Publishers Inc.
- Sousa, R., M. Veiga, D. Van Zyl, K. Telmer, S. Spiegel and J. Selder. 2011. Policies and regulations for Brazil's artisanal gold mining sector: analysis and recommendations. *Journal of Cleaner Production*, 19; 742-50.
- Stern, N. 2015. *Why Are We Waiting?* Cambridge, Mass.: The MIT Press.
- Sunstein, C. R. 2007. Of Montreal and Kyoto: a tale of two protocols. *Harvard Environmental Law Review*, vol. 31, n. 1; 1-65.
- Veiga, J. E. 2013. *The Global Disgovernance of Sustainability*. São Paulo: Anadarco Editora.
- Vieira, L. 2015. COP21: sucesso diplomático, fracasso climático. *ECO-21*, XXV(229); 15.