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Alternative Dispute Resolution for Stakeholders in International Investment Law

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ABSTRACT: This article discusses several alternative dispute resolution ('ADR') mechanisms that intend to address complaints from civil society stakeholder groups that may suffer as a consequence of foreign direct investment ('FDI'). ADR methods such as mediation are well suited to resolving international investment disputes of this nature because these methods are more accessible to such stakeholders in the developing world where conventional fora such as civil courts may be unavailable, not independent or else too expensive. The article explores common stakeholder grievance procedures within the international development banks that fund investment projects in the developing world. It then examines the national contact points ('NCP') procedures established under the Organization for Economic Cooperation and Development as well as a new office maintained by the Canadian government for complaints regarding foreign investment in the extractive sector. The article concludes by recommending ways in which participation in these types of processes by investors and other stakeholders can be improved through mandatory provisions in international investment agreements ('IIA's).

I INTRODUCTION

Developing countries are becoming more dependent on foreign direct investment ('FDI') as an alternative to aid as a means of development. This shift should be viewed as a positive step towards the economic independence of these countries. FDI offers significant economic benefits such as enhanced exports, government income from concessions, employment, technology transfer, and improvement to infrastructure. Importantly it also encourages

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economic stability and long term self-reliance.¹ Yet FDI also brings with it risks to host states and its people. In addition to the danger of recession that could result from the sudden expatriation of capital as well as the risk of displacement of nascent local industry, poorly managed FDI can cause environmental degradation, risk to human and animal health and safety and erosion of local culture. FDI in the extractive sector in particular often entails significant negative impacts, presenting long term hazards that require careful management and mitigation, often in consultation with local communities. There is consequently growing international pressure to ensure that foreign investors are held responsible for their operations which may adversely affect citizens in host states.²

The necessity of greater accountability on the part of multinational enterprises ('MNE')s to local citizens must be viewed in the context of academic commentary emphasizing the one-sided nature of the legal regime governing international investment, namely the network of more than 2500 international investment agreements ('IIA')s that are typically enforced through confidential investor-state arbitration allowing for little public involvement. International investment law has been criticized for serving the interests of western MNEs to the peril of vulnerable host states in the developing world, or more pointedly, the people who live in them.³ This latter distinction reflects the reality that host states are often complicit in human rights, labour and environmental abuses in order to attract FDI through weaker regulation. This article does not intend to add voice to this view of international investment law; indeed many modern IIAs are beginning to reflect sensitivity to

¹ UNCTAD World Investment Report, 2010 (New York, USA, 2010) at 62. Although overseas development aid remains the main source of foreign capital in the least developed countries, FDI inflows have overtaken bilateral aid to these countries since 2005.

² See e.g. J Zerk, *Multinationals and Corporate Social Responsibility: Limitations & Opportunities in International Law* (Cambridge: Cambridge University Press, 2006) ch 6.

³ E.g. D Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise* (Cambridge: Cambridge University Press, 2008); M Sornarajah, *The International Law on Foreign Investment* (Cambridge: Cambridge University Press, 2010); S Subedi, *International Investment Law* (Oxford: Hart, 2008).

the social concerns of host states.⁴ However, simply empowering host states to regulate FDI in the sphere of domestic public policy by balancing the rights and obligations contained in IIAs is insufficient. In order for the concerns of civil society stakeholders (meaning individuals or groups other than investors and governments) to be addressed fully, these people need direct access to dispute settlement against foreign investors. Such dispute settlement must be practical, meaning that it must be affordable, independent, meaning that it must not be coerced in any way, and it must offer the possibility of achieving workable solutions. A number of alternative dispute settlement mechanisms for these groups have appeared in recent years, both demonstrating an increasing awareness of the importance of stakeholder rights within international investment law, as well as justifying further academic study in this area.

This article will accordingly examine informal dispute settlement mechanisms that are available to such stakeholder groups in the developing world that have been or may be adversely affected by FDI. It will argue that alternative dispute resolution ('ADR') involving strategies such as mediation are an important means by which the grievances of civil society stakeholders against foreign investors can be addressed. The article will begin by briefly outlining the advantages of ADR and the shortcomings of existing international investment arbitration in terms of practical access for stakeholders other than investors and governments. It will then discuss some of the informal systems of dispute settlement available to affected groups and individuals through the international development banks which provide funding and insurance for some of the FDI in developing countries. Informal dispute settlement processes established by the home states of MNEs will then be explored, specifically those operated under the auspices of the Organization of Economic Cooperation and Development and a new alternative dispute resolution process that has been created by the government of

⁴ See e.g. the preamble of the US Model BIT: 'Desiring to achieve [increased FDI in a manner consistent with the protection of health, safety, and the environment, and the promotion of internationally recognized labor rights']'.

Canada to monitor the operations of Canadian MNEs in the extractive sector. Finally, the article will suggest ways in which up-take of these ADR procedures could be improved by inserting obligations in the text of IIAs concluded between capital exporting and capital importing states.

II CIVIL SOCIETY STAKEHOLDERS ACCESS TO DISPUTE SETTLEMENT IN INTERNATIONAL INVESTMENT LAW

A) Advantages of Alternative Dispute Resolution

Access to justice can be significantly improved through the implementation of alternative dispute ADR methods such as mediation or conciliation. The advantages of ADR are well-recognized by commentators.⁵ Broadly speaking, civil trials as well as arbitration necessarily involve a winner and a loser and the associated adversarial procedure can alienate parties from one another. This is particularly problematic in situations where parties wish to sustain a long-term relationship, as might be the case in a large scale foreign investment project. In contrast, ADR is consensual and aimed at reaching a mutually satisfactory solution. ADR can bring specialized knowledge to the dispute which may be unavailable in conventional domestic courts, although this advantage is less relevant for treaty arbitration in dedicated investment tribunals. As with civil courts of many domestic legal systems, even specialized investment arbitration facilities must adhere to a set of procedural rules, such as those regarding evidence. These can be inflexible, removing control from the parties. While ADR mechanisms vary, they are typically not tied to a fixed procedural framework because they favour practical solutions that require compromise and negotiation. Furthermore, ADR

⁵ E.g. C Elliott and F Quinn, *English Legal System* 9th Ed, (London: Pearson Longman, 2008) at 544-545

processes are likely to be less expensive than domestic courts or international arbitration because as they are less legalized and do not require the establishment of liability, specialized legal counsel will be un-necessary. Since many ADR services can move to on-site location or operate remotely through telecommunications, there is no burden to travel, also reducing expense. Finally, more formal procedures can be intimidating to non-commercial parties, especially those from cultures that are not familiar with adversarial court-room style proceedings. In this sense ADR is much more accessible and practical for use by civil society stakeholder groups in the developing world.

A common method of ADR is mediation. In mediation, a neutral third party helps both sides to reach an agreement that each side considers to be acceptable. It can be either evaluative, in which the mediator gives an assessment of the legal merits of a case, or facilitative, where the mediator focuses on assisting the parties in defining the issues. Where mediation is successful, meaning that an agreement is reached, parties can subsequently decide to formalize the agreed solution in a binding contract. In another type of ADR known as conciliation, the third party adopts a more interventionist role in bringing the two parties together and in suggesting possible solutions. The term mediation now tends to include conciliation and may also encompass fact-finding as well as ombudsmen. Ombudsmen are independent office holders who investigate and make decisions regarding complaints from the public relating to maladministration, often using mediation as part of their dispute resolution procedures.⁶ ADR is now widely used. The national courts of England and Wales are required to undertake case management by encouraging the parties to use ADR if the court considers it appropriate to resolve the case⁷ and parties are now encouraged to seek non-court settlements where possible in order to reduce costs and delay. Similar policies

⁶ G Slapper and D Kelly, *The English Legal System*, 10th ed. (London: Routledge Cavendish, 2009) at 378

⁷ Rule 1.4 of the Civil Procedure Rules. Courts are also allowed under Rule 26.4 to grant a stay for settlement by ADR or other means when the court considers it appropriate, although they do not have the power to force parties to try ADR: *Halsey v Milton Keynes General NHS Trust* [2004] EWCA Civ 576

exist in other jurisdictions, resulting in the increasing popularity of ADR relative to standard civil adjudication in both common law⁸ and civil law systems.⁹ China in particular has a long tradition of employing mediation as a means of resolving disputes.¹⁰ ADR, especially mediation, has enjoyed broad support as an effective means of dispute settlement in the international context by a number of commentators.¹¹ The UN Charter expressly refers to ADR techniques including conciliation and mediation, in addition to judicial settlement, as a peaceful way of resolving disputes between states.¹²

B) Limited Access to Justice for Civil Society Stakeholders in International Investment Disputes

Stakeholders in communities affected by FDI have little recourse against foreign investors in their domestic civil courts because of a lack of accessible legal infrastructure at home and abroad. Domestic courts in the developing world are often underfunded, unaffordable or lacking independence.¹³ Moreover, most disputes brought under IIAs do not normally deal with the kinds of broader concerns that are faced by civil society groups, such as employment, culture and general social well-being. This is because IIAs have the primary

⁸ For example, the United States has a long tradition of using ADR. Recent studies have shown that civil trials in both state and federal courts have declined both absolutely and as a percentage of disposition while alternative methods such as mediation have become mainstream: D Philbin, A Maness, P Loree, 'Alternative Dispute Resolution: Litigating Arbitration Slows as Mediation Becomes More Popular' 43 Texas Tech Law Review 757 (2011)

⁹ E.g. Germany: see R Trittman, 'Alternative Dispute Resolution in Germany' ADR Bulletin vol 5 no. 4, Article 3 (2002) and Italy: see A Magliani, 'Alternative Dispute Resolution in Italy' 2011 WL 190725 (ASPATORE)

¹⁰ UM Lauchli, 'Cross Cultural Negotiations: With a Special Focus on the Chinese' 26 William Mitchell Law Review 1045 (2000)

¹¹ E.g. R Golbert, 'The Global Dimension of the Current Economic Crisis and the Benefit of Alternative Dispute Resolution' 11 Nevada Law Journal 502 (2011); J Nolan-Haley, 'Self-Determination in International Mediation: Some Preliminary Reflections' 7 Cardozo Journal of Conflict Resolution 277 (2006); A Alvaredo Bowen, 'The Power of Mediation to Resolve International Commercial Disputes' 60 Dispute Resolution Journal 59 (May-July, 2005); D Wood, 'Private Dispute Resolution in International Economic Law' in A Guzman and AO Sykes, *Research Handbook In International Economic Law* (Cheltenham: Edward Elgar, 2005) at 579

¹² Charter of the United Nations, Art 33

¹³ Developing countries typically score lower on rule of law indicia such as access to civil justice and absence of corruption: World Justice Project: Rule of Law Index 2011, <http://worldjusticeproject.org/sites/default/files/wjproli2011_0.pdf> (last visited July 2011)

function of providing substantive and procedural protection for investors. Individuals and communities may thus attempt to obtain redress for their complaints through the courts of the home state of the multinational investor. Courts in some home states of MNEs have been willing to recognize jurisdiction over claims arising from civil wrongs committed abroad. Instruments such as the US Alien Tort Claims Act¹⁴ or judicial rulings as in the UK's *Lubbe v Cape*¹⁵ have been used in the manner. However as noted above, conventional litigation may be undesirable for many stakeholders, primarily because it can be prohibitively expensive for non-commercial parties, especially when taking place in a foreign jurisdiction. Moreover, civil litigation of this nature may be inappropriate for less formal complaints rooted in foreign investors' lack of sensitivity to local community needs that fall short of full civil wrongs requiring proof of negligence.

International tribunals provide limited assistance to civil society stakeholders for claims against foreign investors. Investor-state arbitration relating to breaches of IIAs through the International Centre for the Settlement of Investment Disputes ('ICSID')¹⁶ can admit non-party *amicus curiae*-type participants, but this has been done in very limited situations, requiring the consent of both the investor and the state parties,¹⁷ and again this is highly formalized arbitration that can be inaccessible, especially if taking place overseas. ICSID does offer an informal conciliation procedure for resolving disputes, however, unlike ICSID's arbitration facility, conciliation is only available to state parties or investor parties; there is no provision to allow non-parties to take part in it.¹⁸ UNCITRAL arbitration rules,¹⁹

¹⁴ 28 U.S.C. § 1350 (1789)

¹⁵ [2000] 1 WLR 1545 (HL)

¹⁶ Convention on the Settlement of Investment Disputes Between States and Nationals of Other States (ICSID Convention) (entered into force 14 October 1966), Art 23

¹⁷ ICSID now allows non-party submissions in limited circumstances, including an interest in the proceeding and no unfair prejudice to either party: ICSID Convention, *ibid*, Arbitration Rule 37. See e.g.: *Biwater Gauff (Tanzania) v United Republic of Tanzania*, ICSID Case No. ARB/05/22 (2007); and *Suez S.A and Vivendi Universal S.A v The Argentine Republic*, ICSID Case No. ARB/03/19 (2007), in which NGOs were granted the authority to make submissions.

¹⁸ ICSID Convention, above n 16, Art 28. Stakeholders would not satisfy the definition of 'investor' found in most IIAs as they would not have a significant financial interest in the activity.

which are often used in international commercial arbitration between two investors, have no provision for non-party participation, nor do they contemplate use of ADR. Some of the World Trade Organization ('WTO') agreements are relevant to international investment, notably the General Agreement on Trade in Services ('GATS'), however the dispute settlement system within the WTO is only available to the organization's Member states. Non-parties such as NGOs have been allowed on occasion to make submissions during the formal panel and Appellate Body hearings.²⁰ Whether civil society stakeholders have ever participated in the WTO's confidential ADR facility (good offices, conciliation and mediation) is unknown.²¹

While the potential for *amicus curiae* type submissions in these fora should be viewed in a positive light because they have enhanced access to justice communities and individuals, they remain inadequate for two principle reasons. First, non-party participation in this manner requires that there is an existing dispute, either between two investors, two countries, or an investor and a state. These situations will not always capture harms suffered by vulnerable groups which may have limited financial impact to the point that they are escalated to full disputes. Second, even in situations where a dispute has arisen, informal dispute settlement techniques such as ADR do not appear to contemplate civil society stakeholder involvement, the very situation where ADR is most needed.

¹⁹ United Nations Commission on International Trade Law, UN General Assembly Resolution 31/98. It may be possible for arbitrations operating under UNCITRAL rules to admit non-parties under UNCITRAL Rule 15(1) which allows the tribunal 'to conduct the arbitration in such a manner that it considers appropriate.'

²⁰ *Amicus curiae* briefs that have been attached to the submissions of parties or third parties have generally been accepted by panels and the Appellate Body of the WTO: See e.g. *US-Shrimp* (Panel Report, WT/DS58/R, adopted 6 November 1998) and *US-Shrimp* (Appellate Body Report, WT/DS176/AB/R, adopted 1 February 2002). The power to consider non-party submissions was derived from the panel's authority to seek technical advice from 'any individual or body' in Article 13.1 of the Dispute Settlement Understanding.

²¹ WTO Dispute Settlement Understanding, Article 5. This process may be requested by 'any party to a dispute' (Art 5.3).

III DEVELOPMENT BANK ALTERNATIVE DISPUTE RESOLUTION FOR CIVIL SOCIETY STAKEHOLDERS

Partly in recognition of the gap in stakeholder access described above, there is a growing trend among the world's leading development banks, which provide financial support for development-related projects, to establish internal accountability mechanisms in order to resolve complaints from project-affected groups.²² The extent to which these implement ADR will now be briefly discussed in order to illustrate the efficacy of ADR in the international investment context.

A) The World Bank

The most important of the development banks is the International Bank for Reconstruction and Development, better known as the World Bank Group, which is an international institution that provides leveraged loans for poorer countries for programs aimed at poverty reduction. It maintains the Inspection Panel, which is a grievance procedure that is available for use by project-affected individuals. The World Bank's Inspection Panel is an internal dispute settlement body established to evaluate whether the contract between the bank and a borrowing investor follows the bank's operational policies regarding responsible investment.²³ During this process, affected groups of persons, meaning at least two individuals, located in a project-affected country may submit a complaint for failure of the Bank (not of the borrower itself) to comply with Bank policies concerning financing an investment project and this has affected them in a material way. Requests for inspection, which may be submitted in any language, can also be submitted before anticipated harm has

²² See generally R Bissell and S Nanwani, 'Multilateral Development Bank Accountability Mechanisms: Developments and Challenges' 6 *Manchester Journal of International Economic Law* 2 (2009) and E Suzuki and S Nanwani, 'Responsibility of International Organizations: The Accountability of Mechanisms of the Multilateral Development Banks' 27:1 *Michigan Journal of International Law* 224 (2005)

²³ Established by Resolution IBRD 93-10 and Resolution IDA 93-6, 22 September 1993.

occurred. Requests may be made by telephone, e-mail or in writing to the Bank's headquarters in Washington DC and the complainants may keep their identities confidential if they wish. If the request passes the early stages of the panel's scrutiny, a fact-finding mission to the affected project site may take place. After concluding its investigation and assessment, the Panel issues a report on the request which includes a recommended course of action.²⁴ Whereas at one time the Panel had been criticized for its lack of transparency,²⁵ a database of the 72 cases that the Panel has evaluated, as of June 2011, is now maintained on the World Bank's website, including all of its reports and recommendations. Recommendations are submitted to the management of the World Bank itself, which may then be passed on to the investors in order for them to bring the project into compliance with the recommendations. It is unclear what the result will be if Bank borrowers do not implement these recommendations, such as whether some form of sanction may be applied. Indeed one of the chief criticisms of the Inspection Panel is its failure to engage in long-term monitoring of recommendations following the initial dispute resolution phase.²⁶ Moreover, the Inspection Panel process does not appear to involve participation of the investor itself at any stage. The process is therefore clearly intended to facilitate dialogue and improve relations between the Bank and the public, not between international investors and the public.

The Compliance Advisor Ombudsman is an independent agency that responds to complaints against two of the World Bank's development agencies established for assisting private investors with projects that have a development purpose: the International Finance Corporation ('IFC') and the Multilateral Investment Guarantee Agency ('MIGA'). The IFC fosters sustainable economic growth in developing states by financing private sector loans for

²⁴ www.worldbank.org/website/external/inspectionpanel (last visited June 2011)

²⁵ R Sarkar, 'Exercising Quasi-Judicial Review Through a World Bank Appellate Body' in C Picker, I Bunn and D Arner eds., *International Economic Law: The State and Future of the Discipline* (Portland: Hart, , 2008) at 301

²⁶ D Hunter, 'Using the World Bank Inspection Panel to Defend the Interests of Project-Affected People' 4 *Chicago Journal of International Law* 201 at 210 (2003)

specific projects such as highways, dams, factories and other large scale infrastructure projects. Generally the IFC helps private companies investing in emerging economies acquire capital as well as improve their corporate governance. MIGA supplies financial insurance for investors against non-commercial risks in developing host states. It also operates a dispute mediation service; however it is only available for disputes between MIGA itself, representing the investors for which it has provided a guarantee, and host states.²⁷ Established in 1999, the Compliance Advisor Ombudsman receives complaints from individuals or communities that have or may suffer adverse environmental or social consequences from investment projects that have received assistance from the IFC or MIGA. The Ombudsman's ambit is wide: complaints relating to any aspect of the planning, implementation or impact of an IFC or MIGA supported project may be received at the Ombudsman's office in Washington DC by email or post in any of seven languages. Following an initial screening, the Ombudsman will attempt to achieve a collaborative settlement between the parties and if this is unsuccessful an audit of the operation may be undertaken, which will culminate in recommendations to the World Bank. The extent to which these recommendations are implemented will be monitored over time. The Ombudsman has no direct sanctioning power against the IFC, MIGA or private borrowers, it merely encourages parties to adopt the recommendations it tenders following the complaints process in order to achieve a satisfactory solution for all parties. The settlement stage may include active intervention on the part of the Ombudsman or third party specialists in the form of mediation or conciliation, which requires the consent of all parties.²⁸ The Compliance Advisor Ombudsman has heard approximately 85 cases from developing regions around the world. Many of these have implemented mediation or conciliation strategies.

²⁷ Convention Establishing the Multilateral Investment Guarantee Agency, Art 57 (amended 14 November 2010)

²⁸ Compliance Advisor Ombudsman Operational Guidelines, April 2007, at 17

B) The African Development Bank

Established in 1963 and consisting of 53 African and 24 non-African member countries, the African Development Bank provides low interest loans to investors investing in development oriented projects in Africa. The Bank maintains the Independent Review Mechanism ('IRM') which provides a means by which individuals who have or may be adversely affected by a Bank-funded project can bring complaints to the Bank. The newly revised process aims to ensure that Bank funded investors bring their activities in line with the Bank's policies regarding social as well as environmental responsibility. Requests may be submitted in English or French only by a group, consisting of at least two people where an African Development Bank financed project is located to any of the Bank's regional headquarters or by e-mail. Requesting parties may remain confidential if they so choose. Once the request has passed an initial assessment to ascertain its merit, the Director of the IRM may either submit the matter to mediation, or else it will be referred to a team of three external experts, appointed for five-year terms, for a further Compliance Review assessment. The Compliance Review process does not involve the public directly; however the inspectors may engage in fact-finding missions during their evaluation of the claims brought against investors. The mediation process, described as 'problem solving' engages the requesting members, members of the African Development Bank, as well as other interested parties, although there is no requirement that the investors themselves will take part in this exercise. Thus, like the World Bank's Inspection Panel, the IRM process is aimed at redressing grievances between the Bank and the public, not resolving disputes between third parties and investing MNEs. The IRM process can culminate in a recommendation to be issued to the managers of the African Development Bank which will be followed by monitoring to ensure the implementation of changes to the investor's conduct. The efficacy of the

recommendations is unclear as it is not evident that the Bank can impose sanctions against investors. Requesting parties and stakeholders cannot receive any monetary compensation as a result of the IRM process.²⁹ Reports of the IRM regarding accepted requests are published on the African Development Bank's website. Six reports are currently listed.³⁰ It is unclear whether mediation was attempted in any of these circumstances.

C) The Asian Development Bank

The Asian Development Bank extends loans to developing country members for development-related projects and also facilitates public and private investment for development projects. Established in 1966, the bank is based in Manila and composed of 67 Member countries, including 44 developing countries from the region. The Compliance Review Panel of the Asian Development Bank investigates alleged noncompliance by the bank with its operational policies and procedures concerning the implementation of an assisted project that may adversely and materially affect local people. Requests for review of the bank's actions may be submitted to the Panel by a group of at least two people by post or e-mail in any of twenty languages using templates forms that are available on-line. The three-person Panel does not examine the acts or omissions of the borrowing country or the foreign or local private investors engaging in the project, but rather the actions of the bank itself in that they have not complied with their own guidelines. During the strictly-timed review process the Panel will seek comments from the bank as well as requesting parties and then issue its findings to the Asian Development Bank's governing body. These findings may

²⁹ African Development Bank, Independent Review Mechanism: Operating Rules and Procedures (16 June 2010)

³⁰ <http://www.afdb.org/en/about-us/structure/independent-review-mechanism/requests-register/> (last visited June 2011)

include remedial changes in the scope or implementation of the relevant project.³¹ The Compliance Review Panel maintains an on-line database of all five requests that have been filed, including two requests in 2011 relating to a coal-fired power plant in the Philippines and a road project in the Kyrgyz Republic respectively.³² While there is no purview for mediation within the Compliance Review process, both the Asian Development Bank managers and the requesting parties may submit further comments following the initial review and the submission of the Panel's draft report. The requesting parties and the bank do not meet at any time, either face-to-face or virtually.

D) The Inter-American Development Bank

The Inter-American Development Bank ('IADB') was established in 1959 in order to reduce poverty and assist in sustainable development through financing projects in Latin America and the Caribbean. Its membership consists of 46 countries, including 26 developing countries in the region that receive funds. Its stakeholder complaint facility, the Independent Consultation and Investigation Mechanism, was established in February 2010 as a modification and enhancement of the earlier system that had been in place since 1994. The Mechanism is an independent forum that receives and processes complaints from communities or individuals who allege that they are or might be adversely affected by bank funded foreign investment operations. Complaints may be submitted by individuals (one person on his or her own) or groups by e-mail or post to the IADB's office in Washington, DC in any of four languages outlining the acts or omissions of the bank in relation to the implementation of its operational policies for project funding. The complaint process,

³¹ Asian Development Bank Accountability Mechanism: Operating Procedures for the Compliance Review Panel, 5 June 2004.

³² Requests 2011/1 and 2011/2: <<http://compliance.adb.org/dir0035p.nsf/alldocs/BDAO-7XGAWN?>> (last visited July 2011)

conducted by three panellists, includes several screening stages, a consultation phase, and a compliance review stage in which results are presented and remedies recommended. The process is managed by a Project Ombudsperson who engages with the complainant and relevant members of the bank, ultimately issuing a final report.³³ Ten cases are listed on the on-line registry of cases which generally involve infrastructure projects such as highways and power plants.³⁴ Importantly for the purposes of this article, the consultation phase may include active mediation or conciliation, which is designed to be flexible and tailored to the needs of each particular case, such as for example whether the harm is to the environment of an area, or relates to dangerous working conditions.³⁵ Mediation was used in four of the listed cases.³⁶

E) European Bank for Reconstruction and Development

Established in 1991, the European Bank for Reconstruction and Development ('EBRD') provides project financing for banks, industries and businesses engaging in development related activities from Europe to Central Asia. In other words, it lends to both foreign governments as well as private investors, including local companies and MNEs operating across borders. The EBRD invests in projects that could otherwise attract funding from commercial lenders. Generally speaking, the EBRD assists countries in the transition towards market economies, while pursuing the objective of environmental sustainability. It maintains the Project Complaint Mechanism ('PCM'), an internal body constituted in 2010 that

³³ Policy Establishing the Independent Consultation and Investigation Mechanism, 17 February 2010 (last visited July 2011)

³⁴ <<http://www.iadb.org/en/mici/registry-of-cases,1805.html>> (last visited July 2011)

³⁵ Policy Establishing the Independent Consultation and Investigation Mechanism, at [46]

³⁶ Argentina-Provincial Agricultural Services Program II (3 November 2010); Paraguay-Development of the Industry of Projects of the Vegetable Sponge (10 February 2010); Brazil-Estrada Nova Watershed Sanitation (4 October 2010); and Panama-Pando Monte Lirio Hydroelectric Power (12 March 2010)

evaluates complaints from individuals and local groups that may be directly and adversely affected by an investment project funded by the bank.³⁷

The PCM has two functions: compliance review, wherein a bank approved project is assessed for compliance with bank policies; and problem-solving, wherein the PCM attempts to facilitate dialogue between the parties and to resolve the underlying issues that led to the grievance. This second function resembles ADR in that it may include conciliation and mediation as well as independent fact finding. Complaints may be submitted by one or more individuals located in an area where a bank project may have an impact, or who have an economic interest in an area where there may be such an impact. Requests for problem-solving must be in writing in one of the four official languages of the bank to its head office in London or any of the regional offices. The PCM will screen complaints for legitimacy based on the nature of the claims, such as whether it is an environmental or social impact, parties and attempts to resolve the matter, for example by use of the client borrower's internal grievance procedure. If the complaint is considered eligible for problem-solving by the PCM, then one of four problem-solving experts will be appointed, who will assist the parties in achieving agreement and then issue a report outlining the results. Comments may be received from all parties on this report before final recommendations are made by the PCM, which are published on the European Central Bank's website, maintaining the confidentiality of the complainants. If during this process the PCM believes that serious or irreparable harm may result from the continued operation of the investment, the PCM may recommend a cessation of disbursements from the bank to the relevant project.³⁸ Interestingly, unlike some of the other development bank complaints systems, the PCM handles complaints that may arise between affected individuals and investing borrowers, not only between complainants and the

³⁷ <<http://www.ebrd.com/pages/project/pcm.shtml>> (last visited July 2011). The EBRD maintained a similar mechanism, the Independent Recourse Mechanism until 2010 which operated under a similar procedure.

³⁸ European Central Bank, Project Complaints Mechanism: Rules of Procedure

bank itself.³⁹ Five complaints are recorded on the PCM's on-line register, but only one includes a published final report. This report did not include problem-solving and as such there is no indication as to the usage or success of mediation within the new PCM, however problem-solving had been used successfully under the PCM's predecessor body.⁴⁰

F) Overseas Private Investment Corporation

While it would be impractical to discuss the dispute settlement mechanisms within all of the national development banks in the world, some mention should be made of that of the United States, as the home of many of the largest MNEs. The Overseas Private Investment Corporation ('OPIC') is a branch of the US Government created in 1969 to lend money and provide insurance against non-commercial risks to American companies operating internationally with a view to assist in economic development and the establishment of market economies.⁴¹ OPIC's mandate emphasizes the importance of workers' rights as well as the need for environmental protection in all funded projects.⁴² Established in 2005, OPIC's Office of Accountability ('OA') receives and assesses complaints concerning OPIC-supported investments from individuals and communities in host states. The OA process consists of problem-solving and compliance review, the former of which may include fact-finding, dialogue facilitation and mediation. A request for problem-solving consultation may be submitted to the OA by a member or members of the local community who are or who are likely to be materially, directly and adversely affected by an OPIC supported project or their representatives. Complaints may involve issues of non-compliance with OPIC policies and rules as well as environmental and social concerns, labour and human rights violations. Good faith efforts to resolve the complaint must have been made before the request will be

³⁹ Ibid, definition of 'relevant parties' includes the client or any other project financiers.

⁴⁰ Main Baku-Tbilisi-Ceyhan (BTC) Oil Pipeline Project (Atskuri Village, Georgia) No. 2007/02;

⁴¹ Foreign Assistance Act 1969 (Public Law 91-175) Title IV s.231(revised January 2006)

⁴² Ibid s.231A

reviewed and the complaint must indicate what outcome is sought. Requests can be in English or any other language in writing to OPIC's headquarters in Washington, DC and confidentiality of requesting parties will be maintained. While a precise timeline is not specified, the OA will duly review the request, implement the problem solving initiatives where necessary and then submit recommendations to the President of OPIC regarding potential ways to resolve difficulties. The Office is empowered to engage outside experts in order to resolve specific issues that are raised in the complaints process.⁴³ Reports of the OA are disseminated on OPIC's website. To date, problem-solving was sought in only one instance; however mediation was not pursued because consent for this procedure was not granted by all parties, an essential element of mediation.⁴⁴

G) Development Bank Dispute Settlement: Overview

The dispute settlement systems within the development banks are broadly similar in terms of their objectives and processes. Stakeholders are able to bring complaints for possible breaches of the lender's own policies, as well as in some cases regarding actions of the investor/ borrower that have led, or will lead to environmental and social harms. The option of mediation is a common feature within this process, as is initial screening and publication of the results while maintaining confidentiality. Dispute settlement mechanisms generally result in recommendations only. Commentators have observed that the development bank accountability mechanisms tend to be very user-friendly and accessible, ensuring that complainants are able to participate effectively in the process.⁴⁵ The success of the various bank dispute settlement systems in terms of fully addressing the concerns of civil society

⁴³ Accountability and Advisory Mechanism for the Overseas Private Investment Corporation, BDR(04)33, approved by the Board of Directors of OPIC, 20 September 2004

⁴⁴ Coeur D'Alene Mines/ San Bartolome Project (Bolivia), February 2009

⁴⁵ Bissell and Nanwani, above n 22 at 28

stakeholders is unclear given their relatively short record and the abbreviated nature of the publicly available information. There are indications that mediation has been used successfully on a number of occasions.

While the ADR systems within the development banks should be applauded for augmenting access to justice for community groups that may be harmed by FDI, investing funded by development banks is only a very minor component of all FDI into the developed world. Many MNEs operating in vulnerable communities will be funded from private commercial banks or simply funded by their own institutional investors. In this regard, a large number of the world's leading private investment banks have adopted the Equator Principles, which are guidelines for assessing and managing the social and environmental risks in project finance. The Equator Principles require simply that borrowers, not the lending banks, make available "grievance mechanisms" for project-affected communities, the precise features of which will vary depending on the borrowing institution.⁴⁶ A more detailed analysis of how this principle has been implemented in the context of FDI into the developing world is beyond the scope of this article. While many investors declare their adherence to Equator Principles, it is unlikely that they will maintain publicly accessible records of either how and when these processes have been used or whether they implement ADR techniques such as mediation in these situations. It is expected that civil society will place greater demands upon private financiers' dispute resolution mechanisms in light of advancements in these processes within the development banks noted above.⁴⁷

IV THE OECD NATIONAL CONTACT POINTS

⁴⁶ The Equator Principles, Principle 6, June 2006 < <http://www.equator-principles.com> > (last visited July 2011)

⁴⁷ Bissell and Nanwani, above n 22 at 35

One of the best recourses for the resolution of disputes against MNEs from individuals or groups in the developed world in respect of projects that are not funded by one of the development banks are the Organization for Economic Cooperation and Development ('OECD') National Contact Points ('NCP')s. While this article will not examine each of these bodies individually, some general trends in civil society stakeholder ADR among the NCPs can be explored briefly. Again this will illustrate that informal dispute settlement techniques such as mediation have begun to play an important role for non-parties in international investment law.

A) The OECD and the Guidelines on Multinational Enterprises

The OECD is a forum for governments to consider and promote policies to improve economic and social conditions of people around the world.⁴⁸ It was established in 1960 and consists of 34 member countries, including many of the world's most advanced nations and some of the emerging economies. Each nation provides funding to the organization based on their economic size. Collectively these countries represent all regions of the world and account for 85% of FDI.⁴⁹ A major part of the OECD's mandate is to promulgate model laws that facilitate economic growth and development while maintaining sensitivity to social concerns such as the environment and human rights as well as improve the accountability of companies that operate internationally. One of its principle instruments in this regard are the OECD Guidelines for Multinational Enterprises, a set of voluntary recommendations relating to business ethics, including labour relations, human rights, accountability and disclosure as well as environmental protection. Updated most recently in 2011, the Guidelines are adhered to by all government members of the OECD which in turn encourage their enterprises to

⁴⁸ Convention on the Organization for Economic Cooperation and Development; Paris, France, 14 December 1960

⁴⁹ As of 2011 the adhering governments were all member states of the OECD as well as Argentina, Brazil, Egypt, Latvia, Lithuania, Morocco, Peru and Romania. OECD Guidelines for Multinational Enterprises: Recommendations for Responsible Business Conduct in a Global Context (25 May 2011)

observe the guidelines wherever they operate. It is important to recognize that the guidelines are not binding rules and as such there is no requirement that MNEs observe them, nor are there any sanctions that can be imposed by national governments for a MNEs' failure to follow them. Indeed the Guidelines have been criticized for their failure to ensure investigative and sanctioning powers for breach.⁵⁰

B) ADR and the OECD National Contact Points

The Guidelines require adherent states to establish National Contact Points ('NCP's) to, amongst other roles, handle enquiries and contribute to the resolution of issues that arise as a consequence of MNE's implementation of the Guidelines in specific instances.⁵¹ NCPs must be visible, accessible, transparent and accountable. NCPs from each state are meant to be functionally equivalent to each other to achieve consistency in Guideline implementation around the world. These bodies can adopt various institutional structures, including government offices, groups of senior officials within government, and they may include independent experts such as members of the business community.⁵² Most importantly for the purposes of this article, NCPs should offer a forum for discussion to assist the business community, worker organizations, non-governmental organizations and other interested parties to resolve disputes that are raised by the Guidelines.⁵³ This issue resolution process is not explained in detail, however the Guidelines note that there should be an initial assessment of enquires to ascertain whether further examination is warranted in each instance. The NCP should offer good offices and a forum for discussion to resolve the issues, which will involve a consultation with the parties themselves as well as external parties where relevant.⁵⁴ If the

⁵⁰ OECD Watch Statement on the Update on the OECD Guidelines for MNEs (25 May 2011)

⁵¹ OECD Guidelines for Multinational Enterprises at 66

⁵² Ibid at 68

⁵³ Ibid

⁵⁴ Ibid

parties involved agree, the NCP should facilitate access to consensual and non-adversarial means of dispute resolution, such as conventional ADR techniques of conciliation or mediation. The results of this process should be made publicly available, subject to sensitive information and the need to protect the privacy of stakeholders. Reports should be issued outlining what steps were taken and whether agreement was reached between the parties.⁵⁵ Clearly the NCPs are not intended to provide binding decisions on contentious issues but rather to assist in reaching agreeable solutions through dialogue and consultation. Mediation appears to have been used to resolve disputes brought by communities to the NCPs on a number of occasions.⁵⁶ Unlike the Development Bank ADR processes, the NCP ADR procedures are advantageous to civil society stakeholders because they are *inter partes*, meaning that complainants may interact directly with the investors, albeit with the assistance of a neutral third party, rather than simply with representatives of a body that has provided funding to the investor and may itself have a limited role in the harmful activity.

Complaints should be lodged with the NCP in the state in which the violation of the OECD Guidelines has allegedly occurred, namely the host state that has received inward FDI. Should the violation of the Guidelines have allegedly occurred in a non-OECD state, complaints may be brought in the home state of the MNE. This feature of the NCPs enhances access to justice because it allows complaints to be brought against some of the largest foreign investors in the world, as well as their related entities, which often operate in non-OECD locations where no NCP offices exist, and where other means of dispute resolution are likely unavailable. This flexibility has allowed, for example, NCPs in MNE home states of

⁵⁵ Ibid at 70

⁵⁶ OECD Guidelines for Multinational Enterprises: Specific Instances Considered By National Contact Points (7 October 2009)

Denmark, Netherlands, Norway and Sweden deal with disputes that have arisen in countries like Ecuador, Belize, India, the Philippines and Ghana.⁵⁷

The ADR processes implemented by the NCPs have been criticized for the lack of a requirement that the NCPs must make a statement on the validity of a complaint and the associated failure of an MNE to observe the Guidelines when mediation has failed. In addition to this lack of reprimand, the Guidelines do not specify that there are consequences for MNEs which refuse to engage in the mediation process.⁵⁸ These criticisms are inappropriate because any pressure upon a party to engage in the mediation process, or to conclude it with successful agreement, is fundamentally counter to the spirit of mediation which by its nature must not be coerced. Related complaints that the NCPs are merely mediation organizations rather than judicial bodies capable of implementing binding judgments⁵⁹ fail to appreciate the purpose of mediation, which is to achieve a mutually satisfactory solution rather than mete punishments or establish guilt. Still, it is not always clear why an MNE would be motivated to engage in mediation exercises with citizen groups unless there was an incentive to do so. Observed participation in NCP ADR may be explained by the fact that MNEs may advertise their willingness to engage with civil society through such processes in the company's promotional material. This signals a high level of ethical awareness which could be attractive to consumers or investors. Of course such disclosures equally reveal that a dispute occurred in the first place, which may be indicative of problematic behaviour on the part of the investor.

While it is not the place to engage in a full critique of the NCPs here, it should be noted that NCPs have been further disparaged for inconsistencies in the thoroughness of

⁵⁷ See OECD, Annual Report on the OECD Guidelines for Multinational Enterprises: Enhancing the Role of Business in the Fight Against Corruption 18- 20 (2003).

⁵⁸ OECD Watch Statement on the Update on the OECD Guidelines for MNEs (25 May 2011)

⁵⁹ SF Vendzules 'The Struggle for Legitimacy in Environmental Standards Systems: The OECD Guidelines for Multinational Enterprises' 21 Colorado Journal of International Environmental Law and Policy 451 (2010) at 467

approach from country to country⁶⁰ as well as differing treatment of supply chain responsibility of foreign investors.⁶¹ This latter issue refers to problems of identifying responsibility of individual MNEs for particular Guideline failures where a number of companies are involved with the delivery of a product or service along a complex global supply chain. A final concern with respect to the NCPs is the way in which they take into account changes in corporate ownership that remove a particular investor from an individual NCPs control as an office of the home state. In Malaysia for example, former OECD domiciled investors have been taken over by Malaysian companies, removing them from the purview of bodies like the NCP.⁶² One advantage of mediation and other voluntary procedures within ADR is that investors would only become involved in these processes where they believe that they may be able to contribute meaningfully to the resolution, precluding the need for the establishment of responsibility or blame in specific situations.

V THE CANADIAN OFFICE OF THE EXTRACTIVE SECTOR CORPORATE SOCIAL RESPONSIBILITY COUNSELLOR

In addition to its obligation to maintain an OECD NCP, Canada has created a new additional ADR body to improve civil society stakeholder access to justice arising from FDI from Canadian extractive sector companies. This demonstrates recognition of the importance of providing meaningful access to dispute settlement for individuals and communities as well

⁶⁰ M Kita, 'It's Not You, It's Me: An Analysis of the US' Failure to Uphold Its Commitment to OECD Guidelines for Multinational Enterprises In Spite of No Other Reliable Alternatives' 29 Penn State International Law Review 359 (2010), generally observing that the UK NCP is better than the US NCP.

⁶¹ Vendzules, above n 59 at 467-474

⁶² A Margolis, 'Global Corporate Accountability' 64 No. 6 International Bar News 43(December 2010) at 46

as some of the deficiencies observed in the above noted development bank and NCP facilities.

A) Origin and Mandate

The Office of the Extractive Sector Corporate Social Responsibility Counsellor ('The Office') was created in October 2009 to review the corporate social responsibility practices of Canadian extractive sector MNEs operating abroad and to receive and attempt to resolve complaints brought by individuals or communities resulting from the actions of these companies.⁶³ Unlike many of the NCPs, the Office is totally independent from the government; its employees are appointed for limited terms and are not directly answerable to any government department. This distance is intended to give the office objectivity and to remove any potential political influence from constituents within Canada.⁶⁴ The performance guidelines that the Office implements are the International Finance Corporation's Performance Standards, the Voluntary Principles on Security and Human Rights, the Global Reporting Initiative and the OECD Guidelines on Multinational Corporations. Although a full discussion of these instruments is beyond the scope of this article, a few brief comments on the first three should be made, as the OECD Guidelines have already been mentioned.

The International Finance Corporation's Performance Standards on Social and Environmental Responsibility outline borrowing clients' duties and responsibilities for managing projects that have received IFC funding. They include requirements relating to labour and working conditions, pollution and community health, biodiversity and sustainable development as well as cultural preservation. In addition to identifying and managing risks in these areas, foreign investors following these standards are required to disclose

⁶³ Established by the Government of Canada in Order-In-Council 2009-0422 under 127.1(1)(c) of the Public Service Employment Act, 2003 (25 March 2009)

⁶⁴ Interview with Erica Bach, Senior Advisor of the Office (29 August 2011)

information relating to actual or potential impacts that may result from their activities.⁶⁵ The Voluntary Principles on Security and Human Rights are a set of non-binding principles developed in 2000 to balance the need for safety and security in commercial operations against risks to the human rights of workers and communities. Established through dialogue between NGOs, governments, and the extractive sector industry, the Voluntary Principles are not affiliated with an institution, nor are they linked to financial support for development-related FDI. The principles acknowledge that MNEs play an important role in safeguarding human rights and should consequently engage in risk assessment and monitoring of potential human rights abuses that may arise as a consequence of their operations, including those relating to the use of force. Companies must be sensitive to adverse impacts that may arise from companies' use of private security to protect investment property.⁶⁶ Lastly, the Global Reporting Initiative Sustainability Reporting Guidelines consist of principles for ensuring the quality of information reported by organizations relating to their economic, social and environmental performance. These Guidelines are intended for use by all varieties of organizations, including MNEs, and generally embody a commitment to accuracy, transparency as well as clarity in performance data disclosure. The primary policy objective of the guidelines is one of sustainability; organizations should be forthright in demonstrating the impacts of their activities upon future generations.⁶⁷ Based in the Netherlands, the Global Reporting Initiative describes itself as a network-based organization⁶⁸, not affiliated with any government, but maintaining strategic alliances with the OECD.

The relationship between the new Office and Canada's existing NCP is complementary. Canada's OECD NCP is charged with disseminating the OECD Guidelines

⁶⁵ International Finance Corporation's Performance Standards on Social and Environmental Sustainability, 30 April 2006

⁶⁶ Voluntary Principles on Security and Human Rights:
<http://www.voluntaryprinciples.org/files/voluntary_principles_english.pdf> (last visited July 2011)

⁶⁷ Global Reporting Initiative Sustainability Reporting Guidelines, Version 3.1, 2000-2011

⁶⁸ <<http://www.globalreporting.org/AboutGRI/WhatIsGRI/>> (last visited July 2011)

as well as contributing to the resolution of issues that arise relating to the implementation of the Guidelines in specific instances. The NCP, not the Office, is therefore the primary authority in Canada concerning the OECD Guidelines. A request for review from a stakeholder concerning the OECD Guidelines should be referred to the NCP and not to the Office, even if it is with respect to an extractive sector investor. If the review relates to other performance standards, such as those of the IFC, then the Office will take the lead and consult with the NCP on the OECD Guidelines issues. Thus close cooperation between the two organizations is contemplated. Indeed, each body should inform the other when it receives a request for review in order to identify areas of special expertise.⁶⁹ In that sense the Office will deal with issues that have a somewhat narrower focus than the more general OECD Guidelines. Clearly also the Office is concerned only with the breaches of standards by extractive sector companies, reflecting the highly instructive nature of this type of FDI in terms of environmental degradation and labour conditions. Indeed it is worth noting that of the 124 recorded cases that have been brought before the NCPs around the world as of June 2011, 51 cases (or almost half) have been in the extractive/mining sector.⁷⁰ This approach, in which sensitivity to issues that are particular to the extractive sector can be fostered, is also believed to be unique to international accountability mechanisms worldwide.⁷¹

As part of its larger role the Office aims to reduce negative impacts from FDI, increase community benefits from projects and maximize the potential local benefits of resource exploitation. During the consultation phase of the Office's creation, input was sought from stakeholder groups (both civil society and industry) within Canada as well as in Mexico, Mali and Senegal. The Office's mandate is two-fold: to review the corporate social responsibility ('CSR') practices of Canadian extractive sector companies operating outside of

⁶⁹ Protocol: The Office of the Extractive Sector Corporate Social Responsibility Counsellor and National Contact Point for the OECD Guidelines on Multinational Enterprises, Department of Foreign Affairs and International Trade (4 October 2010)

⁷⁰ OECD Watch Case Database, < <http://oecdwatch.org/cases> > (last visited July 2011)

⁷¹ Interview with Erica Bach, Senior Advisor of the Office (29 August 2011)

Canada in the context of these standards, and to advise stakeholders on the implementation of the endorsed performance standards.

B) Review Mechanism

Most importantly for the purposes of this article, the Office embodies a review mechanism which is essentially a dispute resolution process informed by a multi-perspective (all stakeholder) dialogue. This mediation-structured dispute mechanism responds to the interest expressed during consultations for “a safe space for constructive problem-solving”⁷² rather than an adversarial legal procedure resulting in a binding ruling that could exacerbate existing tensions between investors and host state groups, one of the traditional advantages of ADR over litigation. The review process permits Canadian mining, oil or gas project-affected communities, groups or individuals to bring a request before the Office’s Counsellor, who operates out of Toronto, Canada’s largest city and world centre of mining finance. The Counsellor may also travel to project-affected areas to facilitate the resolution of complaints.

The review process of the Office is structured as follows: First, a request for review is submitted to the office in Toronto in writing in English or French by an individual, group or community that believes it has been adversely affected by a Canadian extractive sector company operating in a country other than Canada. Complaints can also be brought by Canadian extractive sector companies who believe they are the subject of unfounded allegations relating to a specific CSR policy, and a responding party can be identified. Only publicly available (non-confidential information) may form the basis of the request and the identity of the requesting party is normally shared with the responding party – situations in which this will not be done are unspecified but presumably this might occur if there was fear of intimidation. Parties must also identify their desired outcome from the review process. The

⁷² Above n 69 at 2

Office will send an acknowledgement to the person(s) making the request within five days. It will then assess the eligibility of the requesting party, making a decision within a maximum of forty days.

The activities which form the basis of the complaint must have occurred after the Office was created, must be tied to one of the above noted CSR-related guidelines, and importantly, an effort must have been made to resolve the situation. This stage could thus be described as a summary dismissal or screening mechanism, similar to that of the Development Banks and OECD NCPs. If the request is accepted, the CSR Counsellor will request a letter of intent to participate from the parties and once this is received, she will engage in informal mediation with the relevant parties in order to build trust, a process which will take no more than 120 days. If necessary after this stage, the CSR Counsellor and the parties may engage in further informal mediation that includes structured dialogue. During this stage, also limited to 120 days, the Office mediator will travel to the affected community and meet with the individuals concerned. The parties have the option to work with a formal mediator that is external to the Office in order to resolve any issues of concern. The CSR Counsellor may assist in the appointment of a suitable mediator for this purpose. As the process is voluntary, parties are free to withdraw at any time and the Office has no powers to order the production of evidence relating to disputed claims. Finally, the CSR Counsellor will write reports about the requests for review, including final public reports at the end of the process.⁷³ A possible outcome would likely involve recommendations for improved relations between the parties. Although the Office does not have direct sanctioning power under Canadian domestic law, it is believed that its actions and words, as indicated in the final reports that the Counsellor issues, can have reputational impact on the investor in question, be it positive or negative. It is thought that the Office's understanding of the issues can also

⁷³ Review Process, <http://www.international.gc.ca/csr_counsellor-conseiller_rse/index.aspx> (last visited July 2011)

influence stakeholders who look to it as a source of expertise.⁷⁴ These claims are somewhat suspect given that requesting parties can choose to have their identities kept confidential, meaning that they will not be published in any reports or on the Office's website.⁷⁵

Many questions remain unanswered regarding the Office's performance thus far. It is not clear how many consultations have been launched or how many reports have been issued by the Counsellor, as none appear to have been made public yet. One or two requests for consultations are anticipated per year, although this is expected to increase as stakeholders become aware that the mechanism is available to them.⁷⁶ There has been no information released from the Office on the nature of the issues that have come before the Office during its first years of operation, such as whether they have primarily involved environmental, labour / human rights matters, or if there have been allegations of bribery / corruption involving host state officials or courts. No reports have been issued from the Office, although it is expected that this will happen in the near future, likely through the Office's official website, as is the practice with the development bank complaints mechanisms and the OECD NCPs. The Office has stated that there has been 100% participation in the process by Canadian mining companies so far.⁷⁷ Given the extent of involvement of industry in the initial establishment of the Office, it may be expected that there will be a relatively high degree of uptake by Canadian extractive MNEs in this process.

It is not clear whether complainant citizen groups in foreign countries can meaningfully access this process on the other side of the world other than through letters, telephone calls and e-mails, if these means of communication are even reliably available in all host states. The remoteness of the Office from its users was criticized during the development stage. The NGO OECD Watch, an international network of civil societies

⁷⁴ Report to Parliament, above n 69 at 27

⁷⁵ Review Process, above n 73

⁷⁶ Interview with Marketa Evans, Office CSR Counsellor (25 May 2011)

⁷⁷ Interview with Erica Bach, Office Senior Advisor (29 August 2011)

promoting corporate accountability, was particularly vocal in this regard.⁷⁸ Given that success has been observed in other remote or on-line mediation fora,⁷⁹ including with the development banks and NCPs, there is no reason why the Office's location in Canada should necessarily be problematic. Moreover, the fact that the Office's CSR Counsellor can travel in person to the affected communities should obviously improve the efficacy of the process. While project affected communities have apparently been notified of the Office's existence, the Office concedes that the functionality of the consultations is limited by the capacity to communicate with individuals in often poorly developed areas.⁸⁰ In this regard, NGOs are envisioned as a kind of interlocutor; it is hoped that these agencies may inform stakeholders about the existence of the Office as contact points, especially in rural communities. NGOs may represent affected communities provided that a clear and direct relationship between the NGO and the people is demonstrated.⁸¹ The Office aims to raise awareness of its existence among NGOs and community groups, as well as the academic community before complaints occur in order to resolve complaints before any irreversible harm occurs.⁸²

The Office may have already achieved an important objective for the government of Canada as well as Canadian MNEs who were consulted during its inception. The Office acts as a signalling device to host states that Canadian outward FDI in the extractive sector is more committed to safeguarding stakeholder interests than that from other countries. This may serve to augment Canada's extractive sector FDI flows into the developing world. This strategy is partially reflected in the Canadian government's various official publications on the Office which refer explicitly to CSR adoption as an aspect of "the Canadian

⁷⁸ Interview with Marketa Evans, Office CSR Counsellor (25 May 2011)

⁷⁹ See E Cunha, 'The Potential Importance of Incorporating Online Dispute Resolution Into a Universal Mediation for Child Abduction Cases' 24 Connecticut Journal of International Law 155 (2008)

⁸⁰ Interview with Marketa Evans, Office CSR Counsellor (25 May 2011)

⁸¹ Ibid

⁸² Interview with Erica Bach, Office Senior Advisor (29 August 2011)

Advantage.’⁸³ Perceived socially responsible FDI may also be appealing to portfolio or institutional investors who seek ethical companies in which to invest, as well as consumers of Canadian products. As such the Office may assist in building the reputation of Canadian extractive companies with a view to enhancing their capacity for capital generation. The Office’s Counsellor has acknowledged this role, referring to the diplomatic component of the consultation process; open engagement with business is an important aspect of strengthening ‘brand Canada.’⁸⁴

VI AUGMENTING UPTAKE OF ADR BY STAKEHOLDERS AND INTERNATIONAL INVESTORS THROUGH INTERNATIONAL INVESTMENT AGREEMENTS

While it is too early to tell how the Canadian Office will be received by civil society and investors, based on the information that is publicly available on the internet there appears to have been some success in the usage of the ADR facilities of the Development banks and the NCPs, as noted above. Further research into the practical benefits derived from these services within community groups is warranted. For the time being, it is suggested that these types of procedures should be made more readily available to civil society stakeholders and investors should be encouraged to participate in them in good faith. This will help ensure that FDI developing regions is conducted in a manner that is sensitive to the concerns of local people who may be unable to have their grievances heard through more conventional dispute settlement routes. In order to facilitate more full usage of ADR in international investment related disputes, provision for these informal mechanisms could be included in the text of

⁸³ E.g. ‘Building the Canadian Advantage: A Corporate Social Responsibility (CSR) Strategy for the Canadian Extractive Sector’, Canadian Department of Foreign Affairs and International Trade, March 2009, <<http://www.international.gc.ca/trade-agreements-accords-commerciaux/ds/csr-strategy-rse-strategie.aspx>> (last visited July 2011)

⁸⁴ Interview with Marketa Evans, Office CSR Counsellor (25 May 2011)

international investment agreements ('IIA's). The many hundreds of worldwide IIAs, which are typically concluded between capital importing and capital exporting states as a means of increasing FDI by reducing foreign investors' exposure to non-commercial risks in host states, could augment stakeholder ADR update in two key ways.

First, IIAs could require that party governments maintain bodies such as that of the Canadian Office, offering structured ADR facilities like mediation and conciliation for individuals or groups at risk from FDI activities. In OECD member states this requirement could be satisfied by existing NCPs. A treaty-based requirement would compel countries that do not already operate NCPs, such as many host states in the developing world, to create a dispute settlement service for civil society groups located within their territory. This would enhance access for local people by obviating the need to deal with a mediator located in another country. In host states with insufficient resources to fund these services, such as many of the least developed countries in the world, capital exporting treaty parties could be required to offer financial assistance for this purpose. IIA parties would be further charged with advertising the availability of ADR services to communities and NGOs, which could be achieved with assistance from foreign investors. Additionally, IIAs would include a 'best efforts' clause in which party states would encourage investors to participate in these voluntary ADR initiatives, in either their home states or in host states where civil society stakeholders are resident. Of course, one of the foundational principles of mediation and conciliation is that it must be voluntary as it is aimed at identifying problems and reaching a mutually acceptable solution through open, non-coerced dialogue. Consequently any encouragement placed upon investors must not reach the level of pressure, such as might result from the country's withholding of key financial incentives for non-participation. In disseminating information about stakeholder ADR facilities to the public and to industry, emphasis would need to be placed on the cooperative, non-adversarial character of these

processes. This would undoubtedly foster involvement from investors as well as citizens, who might otherwise feel intimidated about bringing claims.

The voluntary nature of these processes underscores the second way in which IIAs could be used to increase ADR uptake by stakeholders and foreign investors. Treaty parties could foster use of ADR by removing some of the impediments to investors' participation in them. Thus, IIAs could clearly specify that stakeholder mediation processes should not act as a bar to other conventional dispute settlement routes like international investor-state arbitration. This assurance would counter any fears of foreign investors that participation in ADR would undermine their right to bring their own claims against host states, for example under ICSID's exclusivity requirement.⁸⁵ Fork-in-the-road clauses common to IIAs which compel investors to choose between domestic or international dispute settlement would expressly not be engaged by these informal voluntary processes. Furthermore, it must be made clear in the text of the IIAs, not simply in the procedural guidelines for each ADR facility, that any admissions made by parties during mediation should be strictly on a without prejudice basis and accordingly arbitration tribunals or courts should refuse to admit such evidence that might be presented in any subsequent formal hearing. A stronger version of this assurance would involve a *lis pendens* type guarantee in the IIA: treaty parties would promise that their domestic courts would refuse jurisdiction or stay existing proceedings in connection with a related lawsuit against the same investor until the ADR exercise was completed in good faith.⁸⁶ This guarantee would give ADR procedures a more formal status in international law, encouraging investors to pursue it as a way of minimizing their exposure

⁸⁵ ICSID Convention, above n 16, Art 26

⁸⁶ As in Art 27 of the EU Regulation on Jurisdiction and Judgments, EU Reg 44/2001, 2001 OJ(L12) (requiring however that the related lawsuit must involve the same parties, which would not be the case where stakeholders were not involved in the first litigation against the investor). Similarly, the New York Convention requires that courts of contracting states must refuse to hear a case where there is an agreement to arbitrate, protecting defendants from multiple litigation: United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Art II, (UN, 1958).

to litigation in other fora. MNEs would hopefully engage in stakeholder mediation exercises as a way of temporarily shielding themselves from other lawsuits. By analogy to the victim status in international human rights law, in order to curtail excessive litigation that would be oppressive to investors, access to ADR must also clearly be limited only to individuals who are directly affected by the investor's actions.

Provisions such as these in IIAs could further increase access to ADR for stakeholders if these treaty requirements are supported by the development banks. It is believed that development banks, such as MIGA, grant favourable pricing for political risk insurance premiums to investors that invest in countries which have signed IIAs.⁸⁷ In a similar fashion, development banks should accord preferential terms in loans and insurance contracts for investments in countries that have signed IIAs which contain the above ADR obligations. Knowing this, host states would be motivated to include provision for ADR facilities into their IIAs because it would make them more attractive (lower cost) destinations for FDI, while not actually forcing investors to use the facilities. Equally importantly, the development banks must emphasize that borrowers are aware of ADR schemes such as those operated by the banks themselves as well as through local NCPs or specialized mechanisms such as the Canadian Office. The banks should require that borrowing investors disclose the availability of these procedures to civil society stakeholders as a condition of receiving support. Investors should be prompted by the banks to make every effort to meaningfully participate in the process, on the understanding that frivolous claims will be duly screened in advance and that sensitive information will remain confidential. Finally, although it was not discussed in this article, private project-financiers should be encouraged to bring the existence of these informal dispute settlement facilities to the attention of their borrowers in each of the states in which they operate. In so doing private banks must emphasize the solution-oriented, dialogue

⁸⁷ S Montt, *State Liability in Investment Treaty Arbitration*, (Oxford: Hart, 2009) at 115

based nature of mediation. This should help to draw investors to these mechanisms as a means of enhancing goodwill and ultimately improving their worldwide reputation with consumers. It may be that enhanced procedural protections for communities and individuals within IIAs, such as those discussed here, will be insufficient on their own. Whether IIAs should be expanded in their scope to include substantive protections for civil society or to require substantive standards of conduct by investors and thereby address more fully the harms that may be caused by FDI is a separate issue.

VII CONCLUSION

Vulnerable individuals and communities in developing countries may face hardships as a consequence of FDI and yet have little recourse to have these problems resolved because of deficient legal infrastructure in their home countries. As a consequence of this dilemma, many international organizations, including the development banks and the OECD have established grievance procedures by which members of the public can attempt to achieve resolution to disputes that have arisen with foreign investors. Many of these bodies involve ADR, including voluntary mediation in which complainant stakeholders and investors engage in problem-solving activities under the supervision of a neutral mediator. As a home state of many large multinational mining companies, Canada has established a special office to facilitate this type of procedure for individuals or groups adversely affected by the extractive operations of Canadian MNEs. While the publicly accessible records of these informal techniques are limited, until further research is conducted there are indications that these ADR processes have been successful on a number of occasions.

In recognition that non-adversarial ADR processes such as mediation can result in effective resolution of many problems faced by stakeholders, these international initiatives should be promoted in conjunction with the expansion of FDI into the developing world.

ADR may be a particularly effective means of dispute resolution in the context of international investment because of the often long-term nature of the relationship between investors and communities, the lack of resources of ordinary citizens to bring claims and their discomfort with formal legal processes. Uptake of ADR by investors and civil society groups may be achieved by the inclusion of provision for ADR facilities into the text of IIAs, as well as encouragement by lending institutions such as development banks.

Criticisms of ADR processes, such as those of the development banks and the OECD NCPs, which focus on the failure of these procedures to establish binding judgments that compel a certain course of action on the part of investors, are misplaced. This is because the voluntary, dialogue-based approach of mediation and other ADR techniques is attractive to stakeholders who cannot afford or who are intimidated by more formal procedures such as arbitration or the civil courts. Similarly, investors will be drawn to these processes because they do not entail establishing formal legal liability and can enhance good will with local communities, raising their reputation and possibly facilitating future FDI. Still, grievance mechanisms such as those of the development banks, the NCPs or sector specific home state mechanisms like the Canadian Office, can only provide part of the answer to addressing harms suffered by stakeholders. Mediation exercises such as those discussed herein will obviously not work in every situation. Broader engagement with communities on the part of foreign investors is needed involving relationship building and the establishment of trust, objectives which many of the ADR bodies discussed in this article also aim to achieve. In order to be effective in as many circumstances as possible, informal ADR mechanisms must emphasize the aim of reaching a mutually acceptable resolution to a shared problem between investors and other stakeholders, not apportioning liability or quantifying compensation. In many situations solutions will be available that satisfy the concerns of both parties, laying the foundation for cooperation in ongoing mutually beneficial relationships.

