

DEVELOPING A NEW ACCOUNTABILITY AND DISPUTE SETTLEMENT MECHANISM ON INVESTMENT: LESSONS FROM INTERNATIONAL ACCOUNTABILITY MECHANISMS (IAMs)

Expert Meeting

The American University Washington College of Law
4300 Nebraska Ave., NW, Room YT16
April 11, 2017 – 12 noon to 5 pm

The [International Institute for Sustainable Development \(IISD\)](#) and the American University Washington College of Law's [Program on International and Comparative Environmental Law](#) will host an expert roundtable discussion on “Developing a new accountability and dispute settlement mechanism on investment: Lessons from International Accountability Mechanisms” at the American University Washington College of Law, in Washington, D.C., United States, on April 11, 2017 from 1 to 5 pm, with lunch and registration beginning at 12 noon.

The purpose of the meeting is to explore lessons from the international accountability mechanisms at development finance institutions that could be helpful in designing alternative dispute mechanisms in the investment context.

Background

Investment-related dispute settlement is in flux. In the past two decades, investor–state dispute settlement (ISDS) has developed at an unprecedented pace. Invoking investment treaties and investor–state contracts, transnational companies and other investors have been able to sue states challenging a wide range of measures, including public health and environmental measures, and measures involving projects with significant impact on local communities. With public policy issues at stake and with governments often facing the potential for multimillion dollar awards, public awareness and opposition against investor–state arbitration has increased significantly over the past few years.

Desiring to preserve the ISDS model to resolve treaty-based investment disputes, but feeling the public pressure for reform by citizens, academia and civil society organizations, the European Commission (EC) has acknowledged the procedural flaws of the system, which is based on a commercial arbitration model. Accordingly, the EC is proposing to move away from arbitration and to create an investment court system that would be more independent, transparent and professional, and that would include an appeals mechanism. The EC's approach not only leaves unaddressed public concerns about allowing foreign investors to circumvent domestic courts but also further strengthens and expands an ISDS system in which only one group of stakeholders (the

foreign investors) can bring claims, and where the host state is always respondent. It does not allow for other stakeholders to intervene or bring claims.

In 2014 IISD initiated a process with experts to discuss what an investment-related dispute settlement mechanism at the international level would like if it were to be built anew. [A consensus emerged among the experts](#) convened by IISD on the necessity to address the need of people who are negatively affected or harmed by investment operations to access justice. Experts found this was especially important given the comparatively strong mechanisms available to investors under current rules.

Acknowledging that the efficacy and value of any mechanism is dependent on the substantive law governing the dispute, and recognizing the importance of strong domestic courts and the principle of exhaustion of local remedies, the experts suggested that any new international mechanism to address investment-related conflicts should:¹

- a. Be inclusive, allowing access to justice for all stakeholders, including governments, communities, individuals and investors.
- b. Address the variety of legal and actual relationships involved in transnational investment—including multi-stakeholder relationships—between:
 - i. Government–Investor
 - ii. Investor–Community/Citizen)
 - iii. Government–Citizen/Community)
- c. Have a broad base of law, including:
 - i. International law, relating to obligations of governments and corporations in the context of national and international investments, including for example human rights, business and human rights, environmental and investment treaties.
 - ii. Contractual obligations that establish rights in favour of communities and individuals, as well as the type of direct agreements between investors and communities that are becoming increasingly utilized today.
 - iii. Domestic law, relating to the investment and the rights of potentially impacted individuals, including labour law, environmental law and others.
 - iv. Applicable standards established by or for the private sector, such as the IFC Performance Standards, Equator Principles for banks or OECD Guidelines.
- d. Find its jurisdictional bases in the instruments listed above, though the new dispute settlement mechanism could also consider the possibility of some form of compulsory jurisdiction.

¹ These suggestions are adapted from IISD. (2016). *Investment-related dispute settlement: Towards an inclusive multilateral approach* (pp. 1–2). Retrieved from <https://www.iisd.org/sites/default/files/publications/investment-related-dispute-settlement-montreux-expert-meeting.pdf>

- e. Integrate a variety of conflict resolution and avoidance options, including approaches to lowering confrontation, mediation and fact-finding.
- f. Be disciplined, rule-based, transparent, unbiased and free of conflicts of interest, etc.
- g. Be enforceable and linked to existing mechanisms.
- h. Be financially accessible for different stakeholders.

The Washington meeting

The conclusions summarized above converge with the proposal to build a New Foreign Investor Accountability Mechanism advanced by Professor David Hunter and Natalie Bridgeman Fields in their article published in 2008 entitled “[Narrowing the Accountability Gap: Toward a New Foreign Investor Accountability Mechanism](#).”² In that article, they propose a mechanism that would address the accountability gap in foreign investment projects and ensure that multinational enterprises may be held accountable to the social and environmental standards to which they have agreed.

In contrast to the mechanism emerging from the IISD-led expert meetings, which includes mediation, fact-finding and dispute settlement functions, the accountability mechanism proposed by Hunter and Bridgeman focused exclusively on the fact-finding function. Here, the mechanism’s primary function would be to investigate and report publicly on concerns raised by locally-affected individuals that projects are not meeting applicable environmental and social standards and norms.

Both proposals are intended to address the lack of access to remedy by communities in the context of foreign investments. This same focus motivated the creation of international accountability mechanisms (IAMs) in the development finance context, beginning in 1993 with the establishment of the World Bank Inspection Panel. IAMs are now established at nearly all multilateral development finance institutions. The IAMs are accessible to communities negatively affected by development-financed projects, including in some cases projects implemented by private investors.

This meeting is intended to draw on the extensive expertise of the Washington-based community with the IAMs to inform discussions of a new investment-related dispute settlement mechanism, given the current ferment as reflected in the European Union’s proposal on a multilateral investment court system. We thus hope to draw generalized lessons from the over two-decades of experience with the IAMs, with a view to building a new international mechanism for resolving investment-related conflicts and ensuring compliance with applicable principles and laws.

² Bridgeman, N.L. & Hunter, D.B. (2008). Narrowing the accountability gap: Toward a new foreign investor accountability mechanism. *Georgetown International Environmental Law Review*, 20(2), 187–236. Retrieved from http://digitalcommons.wcl.american.edu/cgi/viewcontent.cgi?article=1066&context=facsch_lawrev