Embedding Community Participation in Investment Governance Frameworks

Beyond Procedural ISDS Reforms

Executive Summary

International investment governance largely functions on a bilateral basis, prioritising the investor-State relationship while often neglecting the communities affected by land, extractive, infrastructure, and agribusiness projects. Although reform efforts at UNCITRAL Working Group III have proposed improvements in transparency and procedural legitimacy, they do not adequately address the deeper democratic deficits in existing treaty structures. This policy brief argues that community participation should not be viewed as an activist addition but as a vital strategy for reducing risks. By integrating transparency, mandatory consultations, participatory standing, and conditional investment protections into treaties and domestic laws, we can reduce the occurrence of disputes, protect public resources, and align investments with sustainable development goals. Reforms should aim to fundamentally reshape the foundations of investment governance, extending beyond the Investor-State Dispute Settlement (ISDS) system.

1.0 The Structural Democratic Deficit in Investment Governance

The architecture of contemporary investment law emerged from a conscious effort to remove political considerations from dispute resolution and to protect foreign investments from domestic unrest. The ICSID Convention exemplifies this approach, as it provides investors with direct rights to challenge host states while effectively excluding these disputes from domestic judicial systems.[1] While this framework has bolstered investor confidence, it has simultaneously marginalised affected communities, denying them a voice in both pre-decision deliberations and post-dispute resolutions. This marginalisation underscores a significant democratic shortcoming. As Sornarajah has noted, early bilateral investment treaties (BITs) have prioritised the protection of investors, often at the expense of competing public interests.[2]

Arbitral procedures under ICSID have not been designed to recognise the interests of third parties substantively.[3] Consequently, the governance framework has become disconnected from the social and environmental contexts from which many disputes arise. Reform initiatives within UNCITRAL Working Group III have acknowledged issues related to legitimacy and independence, as well as the need for structural changes in the Investor-State Dispute Settlement (ISDS) system.[4] Nevertheless, these discussions have primarily focused on procedural adjustments rather than on the meaningful inclusion of affected populations in the investment governance process.

2.0 *Exclusion* as Risk Amplification

The lack of participatory safeguards is not only a matter of normative concern but also one of economic inefficiency. According to UNCTAD's 2024 World Investment Report, there is a clear correlation between social conflict, regulatory instability, and weak consultation mechanisms, all

[1] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (opened for signature 18 March 1965, entered into force 14 October 1966) 575 UNTS 159 (ICSID Convention) arts 25–27.
[2] M Sornarajah, *The International Law on Foreign Investment* (5th edn, CUP 2021) 120–145
[3] ICSID Convention (n 1) arts 36, 44.
[4] UNCITRAL, *Report of Working Group III (Investor–State Dispute Settlement Reform) on the work of its resumed forty-seventh session* UN Doc A/CN.9/1194 (2024) paras 12–35.

of which increase exposure to disputes.[5] A pertinent example is *Biwater Gauff (Tanzania) Ltd v. United Republic of Tanzania*, which highlights a significant structural issue. [6] This dispute centred around a water and sewerage concession that impacted essential public services. Despite the public interest dimensions being crucial to the case, affected communities were excluded from formal participation in the arbitration process. Although the tribunal recognised broader governance issues, the procedural framework in place severely restricted direct engagement from these communities.[7]

Similarly, *in Methanex v. United States*[8] *and Philip Morris v. Uruguay,*[9] tribunals addressed disputes involving critical aspects of environmental and public health regulation. While these cases acknowledged the importance of regulatory space, public interest considerations were addressed only indirectly, primarily through the State's arguments. Incorporating ex ante participation through structured consultations and transparency initiatives could significantly reduce the likelihood that these disputes escalate into expensive arbitration proceedings.

3.0 Transparency as Foundational Institutional Design

Transparency in international arbitration has undergone significant changes in recent years. The UNCITRAL Rules on Transparency now mandate the publication of relevant documents and the holding of open hearings and allow third-party submissions in applicable treaty-based arbitrations.[10] The Mauritius Convention further extends these transparency rules to existing treaties once they are ratified.[11] In line with this progress, the 2022 Arbitration Rules established by ICSID have amplified disclosure requirements, including mandates for the publication of

[5] UNCTAD, *World Investment Report 2024: Investment Facilitation and Sustainable Development* (United Nations 2024) 152–170.
[6] *Biwater Gauff (Tanzania) Ltd v United Republic of Tanzania* (Award) ICSID Case No ARB/05/22 (24 July 2008).
[7] ibid paras 378–392.
[8] *Methanex Corporation v United States of America* (Final Award) UNCITRAL (3 August 2005) pt IV, ch B, para 7.
[9] *Philip Morris Brands Sàrl v Oriental Republic of Uruguay* (Award) ICSID Case No ARB/10/7 (8 July 2016) paras 287–306.
[10] UNCITRAL, *UNCITRAL Rules on Transparency in Treaty-based Investor–State Arbitration* (2014) arts 2–5.
[11] Mauritius Convention on Transparency in Treaty-based Investor–State Arbitration (adopted 10 December 2014, entered into force 18 October 2017) arts 2–3.

awards and increased accessibility of documents.[12] Despite these advancements, the implementation of transparency measures remains inconsistent. Many legacy Bilateral Investment Treaties (BITs) from the 1990s and early 2000s lack clear transparency provisions.[13]

As highlighted in UNCTAD's 2025 update, the approach to openness varies widely across different treaty networks.[14] Therefore, it is crucial that transparency not only covers arbitral proceedings but also extends to investment contracts, environmental and social impact assessments, and stabilisation clauses. Emphasising structured transparency improves accountability, reduces the risk of corruption, and bolsters the legitimacy of regulatory frameworks.

4.0 From Discretionary Amicus Curiae Practice to Participatory Right

Under ICSID Arbitration Rule 67, tribunals have the discretion to allow submissions from non-disputing parties,[15] but procedural constraints often limit the scope for such participation. In contrast, while the transparency instruments developed by UNCITRAL offer a broader framework for third-party involvement, their effectiveness depends on the consent and ratification of the relevant treaties. [16] Schill's comparative public law analysis highlights that the legitimacy of adjudicatory processes is enhanced when broader public interests are formally acknowledged within the system.[17]

Unfortunately, current arbitral practices do not consistently uphold this principle. For instance, in the notable case of *Urbaser v Argentina*, although the tribunal discussed corporate human rights responsibilities, the directly affected communities were not allowed to participate in the proceedings.[18]To address these shortcomings, reform should introduce a presumptive right for

[12] ICSID, *ICSID Arbitration Rules 2022* (entered into force 1 July 2022) rr 62–63.
[13] UNCTAD, *Reform of Investor–State Dispute Settlement: Facts and Figures 2025 Update* (United Nations 2025) 8–15.
[14] ibid.
[15] ICSID Arbitration Rules 2022 (n 12) r 67.
[16] Mauritius Convention (n 11) art 3.
[17] S W Schill (ed), *International Investment Law and Comparative Public Law* (OUP 2010) 3–38.
[18] *Urbaser SA and Consorcio de Aguas Bilbao Bizkaia v Argentine Republic* (Award) ICSID Case No ARB/07/26 (8 December 2016) paras 1193–1210.

affected communities to submit written observations. Furthermore, any denial of participation should be accompanied by a reasoned decision. This change would transform the role of amicus curiae engagement from a mere discretionary option into a crucial safeguard for legitimacy in the arbitral process.

5.0 Mandatory Stakeholder Consultation and Conditional Protections

Many disputes arise from poorly structured contracts rather than the treaty text itself. Incorporating mandatory stakeholder consultation, in line with environmental and land governance frameworks, can minimise the risk of regulatory backlash and contract termination. The theoretical foundation for conditionality is gaining recognition. Scholar Jorge Viñuales suggests that environmental compliance should be integrated into investment protection regimes to avoid normative fragmentation.[19]

Moreover, tribunals have also held that regulatory measures implemented in good faith for the sake of public welfare are within the State's legitimate authority.[20] As a result, treaty provisions can make access to substantial protections contingent upon adherence to domestic laws concerning the environment, labour, and stakeholder consultation during both the establishment and operational phases of an investment. Such clauses effectively integrate the idea of a social license within binding legal agreements.

6.0 Domestic Legal Integration and Institutional Capacity

Participation in international dispute-resolution mechanisms should not hinge solely on reforming existing treaties. Domestic legal frameworks must empower affected communities by granting them standing in judicial review proceedings. Additionally, these frameworks should establish accessible grievance mechanisms to resolve disputes before arbitration. By strengthening the capacities of domestic adjudication, we can significantly reduce reliance on Investor-State Dispute Settlement (ISDS) systems. This approach not only fosters a more equitable legal environment but

[19] JE Viñuales, *Foreign Investment and the Environment in International Law* (2nd edn, CUP 2018) 250–275.
[20] *Philip Morris* (n 9) paras 287–306.

also enhances the constitutional coherence between international obligations and domestic governance structures.

The reports produced by the UNCITRAL Working Group III for 2024 to 2025 recognise the critical importance of dispute prevention and the integration of alternative dispute resolution mechanisms alongside the necessary structural reforms to ISDS.[21] In light of this, embedding participatory safeguards within domestic legal systems is not merely beneficial but aligns seamlessly with the broader preventive objectives outlined in these reports. By prioritising the inclusion of affected communities in the decision-making processes, we can create a more just and responsive legal framework that effectively addresses concerns before they escalate into formal arbitration.

7.0 Conclusion

Institutionalising community participation is a pivotal step in transforming investment governance from a narrow bilateral regime into a pluralistic framework that is firmly rooted in democratic legitimacy. This shift is crucial for addressing the complexities of modern investment landscapes, as it creates opportunities for diverse stakeholder engagement, enabling voices from marginalised communities to be heard in decision-making processes that directly impact their lives and environments.

The introduction of transparency, enforceable consultation mechanisms, and conditional treaty protections significantly reduces the incidence of disputes between investors and states. By fostering open dialogue and mutual respect, these measures not only safeguard fiscal space but also help align investment flows with sustainable development objectives. When investments adhere to principles of accountability and empowerment, they can effectively contribute to poverty alleviation, environmental sustainability, and social equity.

However, to view reform merely as a procedural adjustment would undermine its broader implications. Instead, reform beyond the Investor-State Dispute Settlement (ISDS) framework

[21] UNCITRAL, *Report of Working Group III on the work of its forty-eighth session* UN Doc A/CN.9/1200 (2024) paras 45–78.

must be recognised as fundamentally constitutional. The process of embedding community participation within the design of treaties, the architecture of contracts, and the fabric of domestic law represents a transformative evolution in the philosophy of investment governance.

This next generation of reform insists on integrating participatory frameworks that inherently prioritise the interests and rights of local communities. It moves beyond a transactional view of investment, recognising that sustainable governance necessitates the inclusion of diverse perspectives. By doing so, we can foster systems that not only protect investors but also empower citizens and ensure that economic activities contribute positively to society at large. As we navigate the complexities of global capital flows, the imperative of meaningful community involvement in investment governance cannot be overstated; it is essential for achieving not only economic efficiency but also long-term societal well-being.

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