Participation as an Obligation? Rethinking Investment Practices Through the Right to Development

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Abstract

This article explores how the Right to Development can serve as a normative and procedural framework for reorienting International Investment Law (IIL) toward greater human rights compliance. Focusing on the foundational principle of the Right to Development, i. e. public participation, it proposes a Right to Development-based impact assessment model aimed at reshaping investment practices to better reflect the interests and agency of affected communities. Drawing on legal instruments from international environmental law, particularly the Aarhus Convention and the Escazú Agreement, the article highlights how existing procedural guarantees

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can inform and strengthen participatory obligations in the investment context. The proposed framework elevates non-binding concepts such as the Social License to Operate into enforceable obligations grounded in international law. The framework is particularly relevant in high-risk, resource-intensive sectors, where the lack of community participation has exacerbated rights violations.

Keywords

Business and Human Rights – Human Rights Law – Investment Law and Human Rights – Public Participation – Right to Development

I. Introduction

Economic development and human rights are often portrayed as competing objectives. In international economic governance, development has frequently equated with economic growth, foreign investment and the expansion of markets, whereas human rights are viewed as external constraints capable of limiting these objectives. This tension is particularly evident in IIL, where state measures adopted to protect the environment or the rights of affected communities have often been viewed as constraints on investor protection and economic development.[1] This opposition is neither inevitable nor conceptually necessary. Economic development ultimately aims to promote human well-being, while the effective enjoyment of human rights often depends upon a certain degree of economic security and material prosperity. As *Franklin Roosevelt* aptly noted 'true individual freedom cannot exist without economic security and independence. Necessitous men are not free men'.[2] However, while economic development remains a vital component of human development, it is not, by itself, a sufficient condition. Economic

1 See Pierre-Marie Dupuy, Ernst-Ulrich Petersmann and Francesco Francioni (eds), *Human Rights in International Investment Law and Arbitration* (Oxford University Press 2009); Lorenzo Cotula, *Human Rights, Natural Resource and Investment Law in a Globalised World: Shades of Grey in the Shadow of the Law* (Routledge 2012); Surya Deva and Tara Van Ho, 'Addressing (In)Equality in Redress: Human Rights-Led Reform of the Investor-State Dispute Settlement Mechanism', The Journal of World Investment & Trade 24 (2023), 398-436; See also ICSID, *Bear Creek Mining Corporation v. Peru*, award of 30 November 2017, case no. ARB/14/21, concerning community opposition to a mining project.

2 Franklin Delano Roosevelt, Message to Congress on the State of the Union (11 January 1944), <https://www.fdrlibrary.org/fr/address-text?utm>, last access 23 June 2026.

development that is not aligned with human rights standards fails to protect the basic freedoms of individuals.[3] Therefore, development must be understood as a multidimensional process encompassing economic, social, political, and cultural dimensions, all of which should respect and promote human rights.

The Declaration on the Right to Development and the Draft Covenant on the Right to Development (Draft Covenant) adopted by the Human Rights Council provide a normative framework for this multidimensional understanding of development.[4] Although the Draft Covenant is not a binding instrument, it draws heavily upon existing obligations under international human rights and environmental law, including the right to self-determination, and seeks to provide greater procedural clarity for the implementation of these obligations in development processes. In this setting, the Draft Covenant offers a possible starting point for aligning IIL more closely with International Human Rights Law (IHRL). Building on this premise, the article explores how public participation, one of the procedural guarantees embedded within the Right to Development framework, can reshape and inform investment practices (mainly stakeholder consultations) in order to strengthen human rights compliance in transnational economic activity. In particular, Article 21 of the Draft Covenant calls for the establishment and implementation of legal frameworks for human rights and environmental impact assessments. Building on this provision, the article proposes the integration of public participation into impact assessment, due diligence and project approval processes, thereby giving greater normative content to, and complementing, existing non-binding concepts such as the Social License to Operate.[5]

Although concepts such as the Social License to Operate have gained prominence in investment practice, they remain largely non-binding and lack a coherent legal foundation within International Investment Law.[6] This arti-

3 See Amartya Sen, *Development as Freedom* (Oxford University Press 1999).

4 UNGA Res 41/128 of 4 December 1986, A/RES/41/128; United Nations Human Rights Council, Draft International Covenant on the Right to Development of 4 September 2023, with commentaries A/HRC/54/50/Add.1. The draft covenant is currently debated at the UN General Assembly.

5 See e. g. Temple Stoellinger, Steven Smutko and Jessica M. Western, 'Collaboration Through NEPA: Achieving a Social License to Operate on Federal Public Lands', Public Land and Resources Law Review 39 (2018), 203-252 (203, 210); Karin Buhmann, 'Public Regulators and CSR: The Social Licence to Operate', Journal of Business and Ethics 136 (2016), 699-714 (699).

6 Leila Choukroune and Lorenzo Cotula, '"Local Communities" and the Development Conundrum: Where International Investment Law Meets Human Rights and Businesses', Business & Human Rights Journal 9 (2024), 270-293.

cle does not contend that contemporary IIL already imposes a general obligation of public participation derived from the Right to Development. Rather, it proceeds from the observation that participatory rights and procedural guarantees are recognised across human rights and environmental regimes in specific contexts. Building upon these developments, as well as the Declaration on the Right to Development and the Draft Covenant, the article argues that participation should assume a more central role in development processes and examines how this understanding may inform future investment practices and impact assessment processes.

Against this backdrop, the article proposes a Right to Development-based impact assessment framework, anchored primarily in one of its core principles, i. e. public participation. This component is selected not only for its centrality to the Right to Development, but also for its procedural specificity and direct applicability to investment-related decision-making. Public participation emphasises the active, free, and meaningful involvement of affected communities – particularly those that are structurally vulnerable, such as indigenous populations and informal workers in sectors like mining and industrial agriculture.[7] While other Right to Development principles – such as equality, equitable resource distribution, and self-determination – remain foundational, public participation offers a concrete procedural mechanism through which development outcomes can be shaped by those most impacted. This approach also directly addresses one of the most persistent shortcomings of contemporary investment governance, i. e. the exclusion of rightsholders from substantive engagement. By legally grounding public participation within a Right to Development framework, the proposed model gives normative weight to the currently non-binding practise of Social License to Operate. In doing so, it helps translate community legitimacy from a discretionary business practice into a rights-based practise, aligned with the state responsibility to protect and corporate responsibility to respect human rights.[8] Ultimately, the integration of this component offers a targeted and actionable pathway for reconciling development imperatives with human rights protection in the context of foreign investment.

Given that the Draft Covenant is currently under consideration by the United Nations General Assembly and has not yet acquired binding force, this article explores how its participatory framework could inform invest-

[7] Choukroune and Cotula (n. 6).

[8] See, Human Rights Council Report of 21 March 2011, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', A/HRC/17/31 [Hereinafter UNGPs].

ment governance if eventually adopted. In doing so, it draws upon established practices of public participation developed under international environmental law, particularly the Aarhus Convention and the Escazú Agreement, to examine their application in the investment context.[9] The framework proposed here does not seek to provide an exhaustive model of implementation. Rather, it offers a conceptual basis for incorporating public participation into investment law, drawing upon existing legal standards, state practice, and scholarly literature. In doing so, it also seeks to provide greater normative content to existing non-binding concepts such as the Social License to Operate by linking them to rights-based approaches recognised in international law.[10]

The article is structured in two main parts. Part II outlines the normative foundations of the Right to Development and explains its relevance for rethinking investment law beyond traditional human rights approaches. Part III advances a participatory impact assessment framework grounded in the Right to Development, demonstrating how public participation – both as a procedural right and a development principle – can be operationalised to enhance the legitimacy, accountability, and human rights alignment of international investment practices. Part IV offers a conclusion.

II. Reframing Development in International Investment Law

International Investment Agreements (IIAs) are not inherently designed to uphold human rights of individuals and communities affected by investment activities or to ensure environmental protection.[11] Instead, their architecture is primarily geared toward protecting foreign investors. Contemporary IIAs emphasise guarantees such as protection against expropriation,[12] Fair and Equitable Treatment (FET), non-discrimination, and Most-Favoured-Nation (MFN) treatment – often backed by Investor-State Dispute Settlement

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9 Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters of 25 June 1998, 2161 UNTS 447, 38 ILM 517 (entered into force 30 October 2001) (Aarhus Convention); Regional Agreement on Access to Information, Participation and Justice in Environmental Matters in Latin America and the Caribbean of 4 March 2018 (entered into force 21 April 2021) (Escazú Agreement).

10 See UNGPs (n. 8).

11 See Ilias Bantekas, 'The Human Rights and Development Dimension', Fla. J. Int'l. L. 31 (2020), 339-361.

12 See Kenneth Vandevelde, 'The Political Economy of a Bilateral Investment Treaty', AJIL 92 (1998), 621-641 (631).

(ISDS) mechanisms. These investor protections are reinforced by features of domestic legal systems that favour foreign investors, such as corporate restructuring,[13] and the principle of separate corporate legal personality.[14] The latter is further strengthened by private international law rules, which generally recognise and protect the separate corporate personality conferred under the law of incorporation, thereby compounding the legal asymmetries between investors and host communities.

While IIAs are often justified on the grounds that they promote economic development – particularly through attracting Foreign Direct Investment (FDI),[15] there is no conclusive empirical evidence demonstrating a causal relationship between IIAs and increased FDI, let alone improvements in domestic governance or human rights protection.[16] The investment law regime has not even demonstrated a positive impact on domestic governance within developing countries.[17] In fact, the concept of development within the investment law regime has been largely marginalised, often overlooked by states, arbitral tribunals, and national legal systems.[18] Even where arbitral tribunals have acknowledged development, such as requiring a contribution to economic development for an investment to qualify

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13 Xuan Shao, 'Environmental and Human Rights Counterclaims in International Investment Arbitration: at the Crossroads of Domestic and International Law', JIEL 24 (2021), 157-179 (174). Corporate restructuring refers to the legal reorganisation of a corporate entity, for example, by creating separate subsidiary companies for different projects or moving assets between jurisdictions. By confining high-risk projects to legally distinct, asset-poor subsidiaries, parent companies can exploit the 'corporate veil' to insulate themselves from the financial and legal consequences of human rights or environmental harms.

14 Shao (n. 13), 173-174. 'The principle of separate corporate legal personality is a foundational legal concept that treats a company (e. g., a subsidiary or parent corporation) as a distinct "person" in the eyes of the law, separate from its owners, shareholders, and other companies in its corporate group. This legal separation, often referred to as the "corporate veil", allows complex corporate structures to shield ultimate owners and decision-makers from liability for harms caused by their overseas operations.

15 See e. g. Rudolf Dolzer, Ursula Kriebaum and Christoph Schreuer, *Principles of International Investment Law* (3rd edn, Oxford University Press 2022); See also Muthucumaraswamy Sornarajah, *The International Law on Foreign Investment* (5th edn, Cambridge University Press 2021).

16 See e. g. Surbhi Gupta, Arun Kumar Attree, Ranjana Thakur and Vishal Garg, 'Interlinkages Between Bilateral Investment Treaties and FDI Flows to Emerging Economies: Evidence from BRICS', Journal of Advances in Management Research 21 (2024), 667-687; Josef C. Brada, Zdenek Drabek, Ichiro Iwasaki, 'Does Investor Protection Increase Foreign Direct Investment? A Meta-Analysis', Journal of Economic Surveys 35 (2021), 34-70; Eric Neumayer and Laura Spess, 'Do Bilateral Investment Treaties Increase Foreign Direct Investment to Developing Countries?', World Development 3 (2005), 1567-1585.

17 Jonathan Bonnitcha and Zoe P. Williams, 'The Impact of Investment Treaties on Domestic Governance in Developing Countries', L. & Pol'y 46 (2024), 140-169.

18 See Sonia E. Rolland, 'Considering Development in the Implementation of Panel and Appellate Body Reports', Trade, Law and Development 4 (2012), 150-199 (150).

under an IIA,[19] the focus remains narrowly economic, ignoring the broader social, environmental, and cultural dimensions.[20] This reductionist approach not only undermines holistic conceptions of development but also facilitates the so-called 'race to the bottom', where states dilute labour, health, and environmental regulations to attract investment.[21] The result is often social harm without legal remedy, especially in Global South states, where communities are frequently excluded from investment decision-making and bear the brunt of resulting disruptions.[22]

Recent developments in ISDS have shown tentative recognition of human rights concerns. In *Urbaser v. Argentina*,[23] the tribunal affirmed that investment treaties must be interpreted in harmony with IHRL and admitted a counterclaim based on the state's duty to ensure access to water.[24] In *Bear Creek v. Peru*, the tribunal acknowledged the investor's failure to secure a Social License to Operate and reduced compensation accordingly.[25] Yet in both cases, these considerations were possible only due to discretionary procedural elements, such as the breadth of the treaty clause[26] or the state's willingness to raise a counterclaim,[27] and remain exceptions rather than the rule. Moreover, Social License to Operate, while a welcome reference to community legitimacy, lacks a clear legal definition or enforceable standards in current arbitral practice. Without a coherent framework, it risks becoming a fluid or tokenistic gesture rather than a tool for substantive accountability. If investment tribunals are to integrate concepts like Social License to Operate into legal reasoning, they must do so with reference to normative standards that ensure legal precision and procedural legitimacy.

This is where the Right to Development becomes critical. As reaffirmed in the Draft Covenant, the Right to Development provides a robust legal and normative foundation for reframing investment governance. It links development to the rights of affected populations – particularly their right to active,

19 ICSID, *Salini Costruttori S.p.A and Italstrade S.p.A v Kingdom of Morocco*, decision on jurisdiction of 31 July 2001, case no. ARB/00/4, para. 52 (Salini).

20 Rudolf Dolzer and Christoph Schreuer, *Principles of International Investment Law* (2nd edn, Oxford University Press 2012), 66-67.

21 José Manuel Álvarez Zárate, ALCA y TLC con Estados Unidos: La Agenda de Negociacion sus Costos y Beneficios Frente a los Intereses Nacionales (Universidad Externado de Colombia 2004), 257.

22 Deva and Van Ho (n. 1), 401.

23 ICSID, *Urbaser S.A. v. The Argentine Republic*, award of 8 December 2016, case no. ARB/07/26, para. 1200.

24 ICSID, *Urbaser* (n. 23).

25 ICSID, *Bear Creek* (n. 1).

26 ICSID, *Bear Creek* (n. 1).

27 ICSID, *Bear Creek* (n. 1).

free, and meaningful participation.[28] Unlike isolated invocations of human rights in arbitral awards, the Right to Development offers a comprehensive framework that treats participation not as a policy preference but as a legal obligation.[29] The following section outlines the key features of the Right to Development framework and argues that it provides the most coherent legal pathway to integrate public participation – and by extension, concepts like Social License to Operate – into the normative core of IIL.

1. Participation as an Obligation?

The Right to Development emerged as a legal and political response to the structural imbalances of the international economic order. Initially conceived during the push for a New International Economic Order (NIEO) in the 1970s,[30] the Right to Development was a Global South-led initiative intended to secure greater control over economic resources and global economic decision-making.[31] Its original emphasis on state sovereignty – particularly over natural resources – reflected the broader post-colonial struggle for economic self-determination.[32] However, while state-centric at the outset, the Right to Development has evolved into a framework that prioritises people-centred development, anchored in the principles of active, free, and meaningful participation by rightsholders.[33]

The operational definition of the Right to Development, as articulated by Arjun Sengupta, aptly incapsulates development as the progressive realisation of all human rights, accompanied by economic growth that is consistent with human dignity and equality.[34] This definition shifts the original state-centric approach of the Right to Development toward a people-centred understand-

28 United Nations Human Rights Council, Draft Covenant (n. 4).

29 Human Rights Council, Right to Development in International Investment Law of 26 June 2023, A/HRC/54/82.

30 Margot E. Salomon, 'International Human Rights Obligations in Context: Structural Obstacles and the Demands of Global Justice' in: Bård A. Andreassen and Stephen P. Marks (eds), *Development as a Human Right: Legal, Political and Economic Dimensions* (2nd edn, Intersentia 2010), 121-148 (126).

31 Peter Uvin, 'From the Right to Development to the Rights-Based Approach: How "Human Rights" Entered Development', Development in Practice 17 (2007), 597-606.

32 Margot E. Salomon, 'From NIEO to Now and the Unfinishable Story of Economic Justice', ICLQ 62 (2013), 31-54 (33).

33 Salomon, 'From NIEO', (n. 32).

34 Study on the Current State of Progress in the Implementation of the Right to Development submitted by Mr. Arjun K. Sengupta, independent expert, pursuant to Commission Resolution 1998/72 and General Assembly Resolution 53/155 of 27 July 1999, E/CN.4/1999/WG.18/2, para 47.

ing in which individuals and communities are both agents and beneficiaries of development. Economic progress, while important, is legitimate only insofar as it enhances the capabilities and freedoms of rightsholders.

Participation is central to this reformulated understanding. The UN Declaration on the Right to Development explicitly identifies 'active, free and meaningful participation' as a constituent element of development itself, not merely as an ancillary procedural safeguard.[35] The Draft Covenant on the Right to Development reinforces this principle by making it a substantive part of the document. Article 4(1) affirms the Right to Development as a distinct human right covering civil, political, economic, social, cultural, and environmental dimensions, and conditions development on respect for the full spectrum of human rights. Crucially, the Draft Covenant clarifies that participation is not discretionary, it is a legal requirement shaping both the process and outcomes of development.[36] The recognition of participation as both a right and a duty under the United Nations (UN) Declaration and the Draft Covenant reflects a shift from state-centric sovereignty towards a more participatory and community-oriented conception of development governance.[37]

Beyond its recognition in specific instruments, ensuring participation acquires binding force for states through their broader human rights obligations. Where states have committed to norms such as Free Prior and Informed Consent (FPIC) under International Labour Organization (ILO) Convention No. 169,[38] public participation under the Aarhus and Escazú Agreements,[39] and the protection of the right to self-determination under common Article 1 of the International Covenant on Civil and Political Rights (ICCPR) and International Covenant on Economic, Social and Cultural Rights (ICESCR), the obligations in these instruments collectively demonstrate a broader recognition that procedural engagement with affected communities is an essential means of protecting human rights and environmental interests in development contexts. Especially, investment projects routinely affect land, livelihoods, cultural rights, and environmental integrity; the failure to secure meaningful participation systematically increases the risk of rights violations. The United Nations Guiding Principles on

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35 UN Declaration on the Right to Development (n. 4).

36 See Preamble and Articles 3(b), 3(f), 4(2), 5, and 16(2)(b) of the United Nations Human Rights Council, Draft Covenant (n. 4).

37 See e. g. Nicolaas Schrijver, 'Self-Determination of Peoples and Sovereignty Over Natural Wealth and Resources' in: United Nations, *Realizing the Right to Development* (United Nations 2013), 95-102.

38 International Labour Organization (ILO), C169 – Indigenous and Tribal Peoples Convention of 27 June1989, No.169.

39 Aarhus Convention (n. 9); Escazú Agreement (n. 9).

Business and Human Rights (UNGPs) acknowledge this reality by operationalising participation narrowly through 'consultation' as part of the corporate Human Rights Due Diligence (HRDD) process, to be enforced by the states.[40] Against this backdrop, the Right to Development framework, offers a more comprehensive procedural model by treating participation as a foundational element of development processes. Because investment practices form part of broader development processes and investment-related decisions frequently affect rights protected under existing human rights and environmental regimes, states cannot discharge their obligation to protect human rights without embedding effective participation into investment governance. Participation thus emerges not as a voluntary best practice, but as a procedural obligation for states to reconcile investment governance with IHRL.

A clear jurisprudential illustration of meaningful participation can be explained through the landmark decision of the African Commission on human and people's rights in *Endorois v. Kenya*.[41] The case concerned a tourism and conservation project in which the Endorois community was evicted from its ancestral lands without being informed, consulted, or involved in decision-making. The Commission held that Kenya had violated Article 22 of the African Charter, which explicitly protects the Right to Development, precisely because the project proceeded without the community's 'active, free, and meaningful participation'.[42] Crucially, the Commission articulated the procedural content of participation, it stated that the affected communities must be engaged early, provided with full, accessible, and culturally appropriate information, consulted in good faith, and afforded real influence over project design, implementation, and benefit-sharing.[43] This decision demonstrates that, under the Right to Development, participation is not equivalent to passive consultation but constitutes a structured, enforceable procedural obligation, which is comprised of encompassing prior engagement, informed decision-making, and the substantive ability to shape outcomes. As such, *Endorois* provides an operational blueprint that participation must be a procedural part of any development or investment projects. Admittedly, the *Endorois* decision arose within the specific framework of

40 Human Rights Council, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework', (2011) A/HRC/17/31. See particularly principle 18.

41 Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v. Kenya, 276/2003, African Commission on Human and Peoples' Rights, 4 February 2010, <https://www.refworld.org/jurisprudence/caselaw/achpr/2010/71724>, last access 15 July 2026.

42 *Centre for Minority Rights Development (Kenya)*, (n. 41), para. 283.

43 *Centre for Minority Rights Development (Kenya)*, (n. 41), para. 290.

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Article 22 of the African Charter, which expressly protects the right to development. Its findings cannot therefore be mechanically generalised beyond that context. Nevertheless, the decision is instructive because it illustrates how the broad requirement of 'active, free, and meaningful participation' can be translated into concrete procedural obligations.

2. From Protection to Participation: Embedding Participation in Investment Governance

While there is a substantial body of scholarly literature advocating for a Human Rights-Based Approach (HRBA) to investment law,[44] this discourse has largely been ineffective in achieving meaningful integration of human rights within the investment law framework.[45] Traditional HRBAs – grounded in the language of individual entitlements and state obligations – have often been reactive in nature,[46] addressing violations only after they occur, rather than proactively embedding rights into the legal architecture of development and investment governance.[47] As a result, these approaches have often amounted to external critiques of investment law rather than internal constraints that shape its design, approval processes, and dispute-resolution mechanisms.

In contrast, the Right to Development framework offers a more comprehensive and potentially effective paradigm, one in which public participation

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44 A human rights-based approach to investment law requires the systematic integration of IHRL norms into the interpretation, application, and adjudication of investment obligations. It entails ensuring that investment decisions, whether made by states, arbitral tribunals, or corporate actors, are assessed in light of their human rights impacts, and that human rights considerations form part of the legal reasoning in investment disputes. See e. g. Pierre-Marie Dupuy, Petersmann and Francioni (n. 1); Ursula Kriebaum, 'Foreign Investments & Human Rights – The Actors and Their Different Roles', Transnational Dispute Management 10 (2013), 1-18.

45 See e. g. Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (Cambridge University Press 2003). Rajagopal argues that while there is a substantial body of literature advocating for a human rights-based approach to investment law, it has not been effective in practice due to entrenched power structures and the prioritisation of economic over social justice; For more recent approaches see Cotula, (n. 1); and Sonia E. Rolland, 'Are Investment Agreements Human Rights-Compatible? Toward Systemic Reconciliation', YHRDLJ 18 (2016), 181-217.

46 See Máire Braniff and Paul Hainsworth, 'A Human Rights Based Approach to Development' in: Gerard McCann and Stephen McCloskey (eds), *From the Local to the Global: Key Issues in Development Studies* (3rd edn, Pluto Press 2015), 39-56.

47 Philip Alston, 'Ships Passing in the Night: The Current State of the Human Rights and Development Debate Seen Through the Lens of the Millennium Development Goals', HRQ 27 (2005), 755-829.

is not merely a procedural add-on but a constitutive component of lawful development. It positions human rights not as external limitations on development, but as constitutive elements of development itself – shaping both its processes and outcomes.[48]

This paradigm shift is evident in the Right to Development's insistence that development be understood as a comprehensive process that is indivisibly linked to the realisation of all human rights.[49] Scholars such as *Arjun Sengupta* have argued that the Right to Development-based approach challenges the status quo by pushing for a reorientation of development priorities.[50] Rather than viewing development purely through an economic lens, the Right to Development-based framework insists that development must be assessed on its impact on human rights and human dignity.[51] This approach demands a normative shift, where the success of development initiatives is measured not just by economic growth but by their ability to enhance the realisation of human rights.[52] Within this model, public participation emerges as the procedural mechanism through which development decisions must be made, ensuring that communities are not only informed of investment projects but are able to influence their design, implementation, and benefit sharing.

Moreover, the Right to Development-based approach addresses the limitations of traditional human rights approaches in dealing with the complexities of global development. As Uvin has pointed out, while human rights frameworks are crucial, they often lack the capacity to address systemic inequalities embedded in global economic structures.[53] The Right to Development-based approach, by contrast, tends to confront these structural issues directly, advocating for the equitable distribution of the benefits of development and the dismantling of barriers that perpetuate inequality.[54] This is particularly relevant in the context of IIL, where investment agreements often prioritise economic interests or investor protection over social justice and human

48 See particularly Articles 10-12 of the United Nations Human Rights Council, Draft Covenant (n. 4).

49 Arjun Sengupta, 'The Right to Development as a Human Right', Economic and Political Weekly 27 (2001), 2527-2536.

50 See e. g. Arjun Sengupta, 'The Human Right to Development', Oxford Development Studies 32 (2004), 179-203.

51 Sengupta, 'Human Right' (n. 50).

52 Stephen P. Marks, 'The Human Right to Development: Between Rhetoric and Reality', Harvard Human Rights Journal 17 (2004), 137-168.

53 Peter Uvin, *Human Rights and Development* (Kumarian 2004).

54 Bhupinder S. Chimni, 'The Sen Conception of Development and Contemporary International Law Discourse: Some Parallels', The Law and Development Review 1 (2008), Article 2, doi: 10.2202/1943-3867.1007.

rights.[55] Participation is therefore not a subsidiary safeguard but the central procedural requirement through which development can be assessed as rights-enhancing. This procedural centrality of participation is particularly significant for international investment law, which has historically privileged investor interests and economic efficiency over distributive justice and community agency.

3. From Consultation to Participation: Embedding the Right to Development in Impact Assessments

As established in the previous sections, the Right to Development offers a holistic and participatory approach that can reorient IIL toward human rights and inclusive development. A key mechanism for embedding such a framework into investment governance is the Human Rights Impact Assessment (HRIA). However, existing HRIA practices – particularly those conducted by business entities, as a corporate responsibility to respect human rights under the UNGPs – remain procedurally and substantively inadequate. This subsection critically evaluates these shortcomings and argues that the Right to Development-based approach provides a more effective and rights-consistent model for reforming impact assessments in the investment context.

Under Principle 18 of the UNGPs, businesses are expected to conduct HRDD processes, including 'meaningful consultation with potentially affected groups and other relevant stakeholders'.[56] This requirement implicitly acknowledges the participatory element of development, yet in practice, the application has been limited and inconsistent. According to the 2023 Corporate Human Rights Benchmark (CHRB), only 27 % of assessed companies demonstrated any engagement with rights-holders in their HRDD processes.[57] Furthermore, as noted by the UN Special Rapporteur on the Right to Development, Surya Deva, consultation alone cannot be equated with meaningful participation – particularly when such processes are unidirectional, lack accountability, and fail to shape substantive outcomes.[58] It is

55 Olivier De Schutter, 'The Role of Human Rights in Shaping International Regulatory Regimes', Social Research 79 (2012), 785-818.

56 Human Rights Council Report of 21 March 2011 (n. 8).

57 Corporate Human Rights Benchmark, 'Most companies fail to include rightsholders in their human rights due diligence processes', available at <https://www.worldbenchmarkingalliance.org/publication/chrb/findings/most-companies-fail-to-include-rightsholders-in-their-human-rights-due-diligence-processes/>, last access 1 January 2025.

58 Surya Deva, 'Role of Business in Realizing the Right to Development', Report of the Special Rapporteur on the Right to Development, A/78/160 (12 July 2023), A_78_160.

therefore not surprising that most businesses are not ensuring the meaningful participation of 'peoples'.[59] This disconnect highlights the inadequacies of many corporate human rights practices, where even minimal consultations may not fulfil the criteria of meaningful participation, particularly in relation to 'peoples' whose rights are most directly impacted.[60] Consequently, this lack of substantive engagement calls into question the effectiveness and legitimacy of the HRIA as part of the HRDD processes adopted by business entities. Although, ensuring meaningful participation not only supports development objectives but also offers strategic value for businesses by promoting trust, mitigating risks, and fostering long-term sustainability.[61]

The Draft Covenant is ground-breaking in the sense that it imposes direct responsibilities on non-state actors, including corporations, aligning with the evolving discourse on corporate accountability in international law. Article 7 underscores the duty of both natural and legal persons to avoid participation in any action that undermines the right to development.[62] This provision amplifies the growing recognition that businesses are not merely economic actors but also key stakeholders in realising sustainable and inclusive development. For instance, the UNGPs impose a 'responsibility to respect' human rights on business entities,[63] whereas the Right to Development-based approach is a step forward and offers a robust tool for business entities to fulfil their HRDD obligations under 'responsibility to respect' as foreign investors, along with being an active stakeholder in the process of participatory development. Through the Right to Development-based approach, the responsibility of businesses extends beyond human rights compliance to actively fostering environments where the rights and aspirations of affected communities are respected and upheld.

59 Deva (n. 58).

60 Corporate Human Rights Benchmark (n. 57).

61 See Tensie Whelan and Carly Fink, 'The Comprehensive Business Case for Sustainability', Harvard Business Review, 21 October 2016, <https://hbr.org/2016/10/the-comprehensive-business-case-for-sustainability>, last access 1 January 2025.

62 The section provides that, 'Nothing in the present Convention may be interpreted as implying for any natural or legal person, people, group or State any right to engage in any activity or perform any act aimed at the destruction, nullification or impairment of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention. To that end, States Parties agree that all natural and legal persons, peoples, groups and States have the general duty under international law to refrain from participating in the violation of the right to development.' Revised Draft Convention on the Right to Development, Human Rights Council, Working Group on the Right to Development, 23rd session, 16-20 May 2022, A/HRC/WG.2/23/2.

63 Human Rights Council Report of 21 March 2011 (n. 8).

Given the consistent non-compliance of business entities with the 'meaningful consultation' requirement under the UNGPs, the Right to Development-based approach offers a twofold solution, first, as an alternative tool for states, and second, as a more effective mechanism for integrating HRDD within corporate practices. The Draft Covenant reaffirms the established principle of international law that states have a duty to regulate the conduct of non-state actors, particularly transnational corporations, even without their explicit consent.[64] Thus, the Right to Development framework could be embedded within investment treaties, contracts and laws to ensure compliance with IHRL. However, despite the existence of state laws regulating extraterritorial corporate conduct, such laws rarely require incorporation of public participation.[65] In some cases certain national legislations do mandate public participation in environmental matters,[66] but they fall short of encompassing all the critical elements necessary for robust public engagement.[67] The Right to Development-based approach addresses these gaps by embedding participation within a broader procedural framework tied to development. Accordingly, the following section will propose a reconceptualised impact assessment model, grounded in the importance of public participation, capable of advancing both the legitimacy and the effectiveness of investment governance.

III. Reorienting Investment Law Through Public Participation: A Participatory Impact Assessment Model

As discussed in the previous sections, the traditional human rights approach has failed to create binding procedural safeguards for the communities

64 Article 11(c), United Nations Human Rights Council, Draft Covenant (n. 4).

65 See for example the German Due Diligence Legislation or the Modern Slavery Act in Australia. The recent Corporate Sustainability Directive for Due Diligence (CSDDD) by the European Union also does not mention any public participation. See also Global Justice Clinic at Erfurt University, 'Strengthening Stakeholder Engagement in the EU Corporate Sustainability Due Diligence Directive', Policy Briefing Paper, 12 June 2023.

66 See Dinah Shelton, Sylvia Bankobeza and Barbara Ruis, 'Information, Public Participation, and Access to Justice in Environmental Matters', in: Lal Kurukulasuriya and Nicholas A. Robinson (eds), *UN Environment Program Training Manual on International Environmental Law* (UNEP 2006), 79-86; See also David Banisar, Sejal Parmar, Lalanath de Silvia and Carole Excell, 'Moving from Principles to Rights: Rio 2012 and Access to Information, Public Participation, and Justice', Sustainable Development Law & Policy 12 (2012), 8-14.

67 Elena Petkova et al., Closing the Gap: Information, Participation, and Justice in Decision-Making for the Environment, (World Resource Institute 2002), 6.

affected by transnational investment projects. The Right to Development-based approach, by contrast, operationalises human rights through participatory development principles.[68] These principles, if embedded into the legal design of investment law, can bridge the legitimacy gap in foreign investment governance and mitigate the structural imbalances that marginalise affected communities. Section III, now develops this argument by proposing a normative and operational model for Right to Development-based investment impact assessment, centred on public participation.

Participation generally refers to the involvement of the public and stakeholders in decisions that affect them.[69] In other words it enables the public to be heard and to affect decisions.[70] The principle of public participation has long been a cornerstone of public international law. Key human rights instruments, such as the International Covenant on Civil and Political Rights[71] and the American Convention on Human Rights,[72] underscore the importance of involving individuals in decisions that impact their rights and livelihoods. This principle has recently gained prominence in the context of sustainable development, where it is increasingly recognised as essential for ensuring that development processes are equitable and inclusive.[73] Public participation is not merely a procedural formality but a substantive requirement that can enhance the legitimacy and effectiveness of development and investment policies. It is a step forward from the connotation of 'meaningful consultations' as part of the HRDD processes mentioned in the UNGPs. Unlike the

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68 Article 4(2) of the United Nations Human Rights Council, Draft Covenant (n. 4); See also OHCHR, *Principles and Guidelines for a Human Rights Approach to Poverty Reduction Strategies* (2006), <https://www.ohchr.org/sites/default/files/Documents/Publications/PovertyStrategiesen.pdf>, last access 24 June 2026. The guidelines highlight the role of public participation in development as essential for the realisation of human rights. It states that the principle of participation is the cornerstone of a human rights-based approach to development.; Sen (n. 3). Sen emphasises the significance of participation in decision-making processes as a fundamental component of freedom and development.

69 I. B. Osae et al., 'Access to Information and Public Participation: Evaluating the Implementation of the Aarhus Convention in Europe', European Planning Studies 32 (2024), 2449-2472.

70 See Dinah Shelton, Makane Moïse Mbengue, Elena Cima and Brian McGarry (eds), *International Environmental Law* (4th edn, Brill/Nijhoff 2004), 674.

71 International Covenant on Civil and Political Rights of 16 December 1966 (entered into force 23 March 1976), 999 UNTS 123, Art. 25(a).

72 American Convention on Human Rights of 22 November 1969 (entered into force 18 July 1978), 1144 UNTS 123, Art. 3.

73 See Nico Schrijver, *The Evolution of Sustainable Development in International Law: Inception, Meaning and Status* (Brill/Nijhoff 2008), 198; See also International Law Association, 'New Delhi Declaration of Principles of International Law Relating to Sustainable Development', in: *Report of the Seventieth Conference: New Delhi*, 2-6 April 2002 (International Law Association 2002), Principle 5.

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more limited notion of consultation, participation within the Right to Development framework emphasises 'meaningful participation', which goes beyond merely seeking input from stakeholders.[74] It is the 'recognition of the agency of people and the co-sharing of power with them to take decisions'.[75] In this sense, it offers a pathway to operationalise the concept of a Social License to Operate, transforming it from a voluntary, often ambiguous corporate practice into a rights-based practice. Properly embedded in law and policy, the Social License to Operate can thus serve both as a duty incumbent on corporations and states, and as an enforceable right of affected communities, thereby anchoring development projects in a more accountable and participatory framework.

This shift from voluntary consultation to enforceable participation finds further normative support in modern democratic theory and IHRL. Democratic governance principles assert that citizens are not merely passive recipients of laws and policies, but active participants in shaping them at every level.[76] This principle is explicitly endorsed in the Draft Covenant, which emphasises the need to include individuals and communities in the processes that determine development outcomes and the distribution of its benefits.[77] According to the Draft Covenant, participation must be 'active, free, and meaningful' to be effective.[78] In the context of investment law, this implies that individuals affected by investment agreements should not only be consulted but should have a substantive role in decision-making processes. Although the Draft Covenant does not specify the exact extent of individual inclusion, it is crucial that public participation be designed to genuinely influence decision-making to achieve its intended goals. Without such influence, participation risks becoming a token gesture rather than a transformative element of the development process.[79]

To substantiate how public participation can serve as a core principle of IIL and formalise the Social License to Operate, we may look to existing legal frameworks such as the 2001 Aarhus Convention,[80] and the 2021 Escazú

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74 Article 4(2), United Nations Human Rights Council, Draft Covenant (n. 4).

75 Deva (n. 58).

76 Jutta Brunnée and Stephen J. Toope, *Legitimacy and Legality in International Law: An Interactional Account* (Cambridge University Press 2010), 55.

77 Article 4(2), United Nations Human Rights Council, Draft Covenant (n. 4).

78 See commentary to Article 4(2) of the United Nations Human Rights Council, Draft Covenant (n. 4).

79 Roman Girma Teshome, 'The Draft Convention on the Right to Development: A New Dawn to the Recognition of the Right to Development as a Human Right?', HRLR 22 (2022), 1-24.

80 Aarhus Convention (n. 9).

Agreement.[81] These conventions enshrine public participation as an essential component of effective decision-making, providing an operational framework that emphasises transparency, inclusiveness, and accountability. This approach draws its foundation from Principle 10 of the Rio Declaration on Environment and Development,[82] which establishes three key pillars for meaningful public participation: (i) access to relevant information through disclosure; (ii) the opportunity to participate in decision-making processes; and (iii) access to effective judicial or administrative remedies. These pillars identify public participation as a process rather than a singular isolated event.[83] By framing public participation as a right and a procedural requirement, this model offers a comprehensive approach that can be adapted to other areas of law, including international investment law. Based on practises from these conventions, a public participation evaluation tool can be derived which can be used for Right to Development-based impact assessment by states and investors.

1. Access to Information as a Right and a Precondition for Participation

The disclosure of information regarding investments that may affect the public is fundamental to ensuring transparency and accountability in international investment law. In practice, however, investment treaty negotiations often occur behind closed doors, with minimal opportunities for public engagement.[84] Beyond the treaties themselves, the negotiation of investment contracts typically involves corporate executives, government officials, and a select group of lawyers, excluding broader public participation.[85] This lack of transparency is particularly problematic in developing countries, where both

81 Escazú Agreement (n. 9).

82 Rio Declaration, Report of the United Nations Conference on Environment and Development (Rio de Janeiro, 3-14 June 1992) (1993), A/CONF.151/26.

83 See e. g. United States Environmental Protection Agency (USEPA), 'Public Participation Guide: Introduction to Public Participation', 6 February 2026, <www.epa.gov/international-cooperation/public-participation-guide-introduction-public-participation>, last access 1 January 2025.

84 Lorenzo Cotula, 'Public Participation and Investment Treaties: Towards a New Settlement?' in: Eric de Brabandere, Tarcisio Gazzini and Avidan Kent (eds), *Public Participation and Investment Law* (Brill/Nijhoff 2021), 36-52.

85 Lorenzo Cotula, 'Strengthening Citizens Oversight of Foreign Investment: Investment Law and Sustainable Development', Sustainable Markets Investments Briefings, International Institute for Environment and Development (2007), 1-2.

citizens and even elected representatives frequently play a minimal role in the treaty and contract making process. Developing states have historically been 'rule takers' rather than 'rule makers' in international investment agreements,[86] participating in negotiations that are frequently asymmetric in favour of more powerful states or multinational corporations. This process is typically driven by government officials without a transparent or participatory mechanism, raising concerns about the competency and awareness of negotiators.[87] As a result, the public, which is most directly affected by these treaties and contracts, is often unaware of the terms of these agreements until after projects become operational.[88] These structural deficiencies emphasise the critical need for access to information as a key element in achieving fair and equitable development outcomes in the sphere of international investment, aligning with the core objectives of the Right to Development approach.

The lack of transparency in investment treaty-making and contract negotiations, particularly in developing countries, underscores the critical need for access to information as a cornerstone for equitable development. Recent practice within the European Union (EU) illustrates a noticeable shift toward greater transparency in investment treaty negotiations. As Marceddu shows, however, this development did not arise from a newfound commitment to public participation but from the activation of pre-existing EU legal obligations on access to information.[89] The controversies surrounding Comprehensive Economic and Trade Agreement (CETA) and Transatlantic Trade and Investment Partnership (TTIP) merely exposed the incompatibility between secretive negotiation practices and the Union's constitutional duties of openness, compelling the Commission to release negotiating directives and textual proposals.[90] In this sense, the EU's move toward transparency reflects a legal obligation rather than a voluntary participatory turn.

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86 Eyal Benvenisti, 'Democracy Captured: The Mega-Regional Agreements and the Future of Global Public Law', Constellations 23 (2016), 58-70. On the link between rule making/taking and GDP levels, see Wolfgang Alschner and Dmitriy Skougarevskiy, 'Mapping the Universe of International Investment Agreements', JIEL 19 (2016), 561-588.

87 Lauge N. Skovegaard Poulsen, Bounded Rationality and Economic Diplomacy: The Politics of Investment Treaties in Developing Countries (Cambridge University Press 2015), 182-183.

88 Nicolás Perrone, 'The International Investment Regime and Local Populations: Are the Weakest Voices Unheard?', Transnational Legal Theory 7 (2016), 383-405.

89 Maria Laura Marceddu, 'Rethinking Public Participation in Investment Decision-Making' in: Maria Laura Marceddu, *EU Values in Investment Law and Policy: Promises of Democracy and Rule of Law?* (Oxford University Press 2025), 87-119.

90 Marceddu (n. 89), 109-114.

This evolution within the EU reinforces a broader principle that lies at the core of the Right to Development-based approach, meaningful public participation is impossible without reliable, timely, and accessible information. The Right to Development-based approach therefore places transparency at the heart of public participatory development process. In this context, the Aarhus Convention emphasises the critical role of information disclosure, mandating both active[91] and passive[92] access to information. Active access requires governments to proactively provide information about environmental matters, while passive access ensures the public's right to request and receive information held by the state. This approach has been reinforced by human rights bodies. For instance, the Inter-American Court of Human Rights has affirmed the public's right to request and access government-held information, barring specific grounds for refusal.[93] Similarly, the European Court of Human Rights (ECtHR) has acknowledged that access to information is inherent in Article 10 (freedom of expression) of the European Convention on Human Rights (ECHR).[94] Furthermore, the United Nations Human Rights Committee (UNHRC) reinforced this principle in General Comment No. 34 on Article 19 of the ICCPR, stating that the right to freedom of expression includes a general right of access to government-held information.[95] These decisions affirm the necessity for transparency and information accessibility as a means of empowering the public to participate meaningfully in investment-related decisions.

Apart from acceptance of the access to information as a basic requirement for realisation of different rights, the Aarhus Convention and Escazú Agreement also clarifies three distinct requirements for meaningful access to information i. e. Accessibility, Comprehensibility, and Timeliness.[96] Accessibility involves both active and passive forms of access, as outlined in the United Nations Economic Commission for Europe (UNECE) Aarhus Convention Implementation Guide. This entails proactive dissemination of information via accessible channels like online platforms, physical public records, and public consultations, ensuring inclusivity by addressing potential barriers

91 Aarhus Convention (n. 9), Article 5.

92 Aarhus Convention (n. 9), Article 4.

93 IACtHR, Case of *Claude-Reyes et al v. Chile*, judgment of 19 September 2006 (merits, reparations and costs), Series C No. 151 (2006).

94 ECHR, *Szabadságjogokért v. Hungary*, judgment of 14 April 2009, Application no. 37374/05; ECtHR, *Kenedi v. Hungary*, judgment of 26 May 2009, Application no. 31475/05.

95 United Nations Human Rights Committee, General Comment No. 34 of 12 September 2011, CCPR/C/GC/34.

96 See Escazú Agreement (n. 9), Article 5(1)-5(4); Aarhus Convention (n. 9), Articles 4 and 5.

such as digital divides and language accessibility.[97] In the investment context, information about treaties and contracts must be made accessible to all stakeholders, regardless of socio-economic or geographic limitations.

Secondly, Comprehensibility necessitates that the information be presented in a manner that is intelligible to the public, particularly to those directly affected by the investment.[98] Legal and technical jargon should be minimised to facilitate a clear understanding of the implications for individuals, communities, and the environment. The capacity of the public to comprehend and engage with this information is critical to fostering effective participation.

Finally, timeliness is indispensable for meaningful public participation. The Aarhus Convention and Escazú Agreement emphasise that delays in access to information undermine participatory processes by depriving stakeholders of the opportunity to influence decision-making.[99] In the realm of investment law, information must be made available at the earliest stages of decision-making, allowing stakeholders adequate time to evaluate and respond before irreversible decisions are made. The Aarhus convention implementation guide provides that a minimum time of 30 days must be provided between public notice and start of public consultations.[100] By adhering to these criteria, access to information can serve its intended purpose of enhancing transparency and accountability in investment-related decisions.

2. Embedding Community Consent in Investment Decision-Making

Participation, in its truest sense, implies not merely the provision of information but the capacity of stakeholders to exert significant influence over the decision-making process.[101] Genuine participation extends beyond

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97 United Nations Economic Commission for Europe (UNECE), *The Aarhus Convention: An Implementation Guide* (2nd edn, United Nations 2014).

98 See Sherry R. Arnstein, 'A Ladder of Citizen Participation', Journal of the American Institute of Planners 35 (1969), 216-224. Arnstein's classic model of citizen participation emphasises that without comprehensible information, public participation becomes superficial, as people cannot contribute meaningfully if they do not fully understand the information.

99 See Aarhus Convention (n. 9), Articles 4(2) and 5; Escazú agreement (n. 9), Articles 5 and 6.

100 UNECE (n. 97), 137.

101 Ross Hughes, 'Environmental Impact Assessment and Stakeholder Involvement', Environmental Planning Issues 11 (1998), available at: <https://www.iied.org/7789iied>, last access 15 July 2026.

passive consultation; it requires that affected communities are integral to shaping decisions that directly impact their lives, particularly in contexts where their livelihoods are at stake. In the realm of international investment law, states and their representatives bear a duty to ensure the meaningful engagement of those impacted by investment projects, making public participation a necessary precondition for legitimate governance.[102] Investment contracts, often negotiated behind closed doors, are particularly vulnerable to the exclusion of public input, leading to outcomes that may lack both transparency and social legitimacy.[103] The inclusion of public participation in the early stages of law-making, including during contract negotiations, offers not only a pathway to more equitable agreements[104] but also a means of fostering greater legitimacy in the investment process.[105] From a liberal economic standpoint, such as that of F. A. Hayek, decision-making in a free market is more likely to yield superior outcomes when undertaken by decentralised, independent actors rather than government experts.[106] This is particularly true in complex situations where a small group of bureaucrats may struggle to fully comprehend the intricate variables at play. The dispersed knowledge and individual choices of numerous decision-makers are better equipped to address such complexities, as they can incorporate localised and real-time information that may otherwise be inaccessible to a central authority. The surge in transparency and inclusivity at this stage significantly reduce the potential for disputes and promote more balanced, well-negotiated contracts. Conversely, at the dispute settlement stage, the absence of public participation is a recurring flaw, where affected communities frequently have little or no input, even in cases where the stakes are high.[107] This demon-

[102] Carla García Zendejas and Layla Hughes, 'Submission to the Office of the United Nations High Commissioner for Human Rights on the Draft Guidelines on Effective Implementation of the Right to Participate in Public Affairs by the Center for International Environmental Law', Center for International Environmental Law (CIEL), 11 February 2018, available at: <https://www.ohchr.org/sites/default/files/Documents/Issues/EqualParticipation/DraftGuidelines/CIEL.pdf>, last access 1 January 2025.

[103] Youseph Farah and Valentine Olusola Kuniji, 'Contractualisation of Human Rights and Public Participation: Challenges and Prospects' in: Eric de Brabandere, Tarcisio Gazzini and Avidan Kent (eds), *Public Participation and Investment Law* (Brill/Nijhoff 2021), 122-147.

[104] Cotula (n. 1), 86.

[105] International Institute for Sustainable Development, 'A Sustainability Toolkit for Trade Negotiators: Trade and Investment as Vehicles for achieving the 2030 Sustainable Development Agenda' (2016), <www.iisd.org/toolkits/sustainability-toolkit-for-trade-negotiators/6-process/6-3-public-participation>, last access 1 January 2025.

[106] Bruce Caldwell, *The Collected Works of F. A. Hayek: The Road to Serfdom – Definitive Edition* (The University of Chicago Press 2007), 94-96.

[107] See Ladan Mehranvar, *How the International Investment Law Regime Undermines Access to Justice for Investment Affected Stakeholders* (Columbia Center on Sustainable Investment (CCSI) 2024), 8-16.

strates the imperative of embedding participatory mechanisms from the outset to avoid disenfranchisement and ensure that the decision-making process is truly democratic and inclusive.

A structured framework for public participation in decision-making within the context of investment law-making is largely absent in current practices. To ensure meaningful engagement, it is essential to establish such a framework, one that integrates the active involvement of relevant 'rights holders' throughout the law-making process. According to Hayek's principle, the allocation of societal resources should be informed by the input of broad, decentralised groups, ensuring a more equitable and efficient distribution of resources.[108] In this regard the Aarhus Convention and Escazú Agreement offer valuable guidance by outlining three core principles for environmental law, which can be adapted to the investment law-making process, i. e. public consultation periods, gathering public feedback mechanisms, and ensuring that public input influences the final decisions.

Public consultation periods can be defined as timeframes during which government entities and corporate actors gather input from stakeholders affected by potential decisions. These periods offer structured opportunities for stakeholders to raise concerns or support proposals before finalisation, ensuring that decisions are informed by diverse perspectives. Both the Aarhus Convention and Escazú Agreement emphasise the need for public authorities to offer 'early and effective opportunities' for participation when all options remain open, fostering more inclusive decision-making processes.[109]

Secondly, mechanisms for gathering public feedback must be tailored to the social, political, and environmental context of the activity. Methods such as public hearings, surveys, and town hall meetings provide essential avenues for structured engagement. A widely inclusive system for public participation can face significant issues, particularly regarding the self-selection bias of commenters, where only a narrow segment of the population actively participates. To address this, regulators may need to take steps to ensure that the entities providing input are representative of the broader demographic impacted by a proposed regulation.[110] For instance, the EU reaches out to diverse stakeholders (including industry representatives, unions, civil society organisations) during a policy proposal.[111]

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108 Caldwell (n. 106), 94-96.

109 Aarhus Convention (n. 9), Article 6; Escazu Agreement (n. 9), Article 7.

110 Reeve T. Bull, 'Public Participation and the Transatlantic Trade and Investment Partnership', The George Washington Law Review 83 (2015), 1262-1293 (1269).

111 See Stakeholder Consultation Guidelines, (2014), <http://ec.europa.eu/smart-regulation/impact/docs/scgl_pc_questionnaire_en.pdf>, last access 1 January 2025, 29.

Finally, the influence of public input on final decisions is what defines meaningful participation. Arnstein's *Ladder of Citizen Participation* distinguishes between different levels of engagement, with 'citizen control' at the highest level, indicating significant public influence over outcomes.[112] Lower levels, such as 'consultation' without genuine impact, are seen as less meaningful. Article 6(8) of the Aarhus Convention also mandates that decision-makers take 'due account [...] of the outcome of the public participation' process, reinforcing the need for public input to meaningfully shape final decisions.

3. Legal Remedies for Denied Participation

In the context of participatory development, access to an effective remedy refers to the right of individuals and communities to challenge decisions that impede their participation in public processes or restrict access to relevant information, particularly where such decisions affect their rights or livelihoods. Article 15(1) of the Draft Covenant affirms public participation not only as a procedural obligation but also as a remedial measure for violations of the Right to Development. These remedial measures would involve both judicial and administrative mechanisms, allowing individuals to seek redress when their participatory rights are violated. The Aarhus Convention provides a model for this by ensuring that individuals have a right to challenge public decisions that contravene their participatory rights, particularly in environmental matters. Article 9 of the Aarhus Convention focuses on access to justice, ensuring that members of the public have access to review procedures before courts or other independent bodies when their rights to information and participation are denied. This includes both procedural and substantive remedies, ensuring transparency, accountability, and fairness in decision-making processes.

In the context of participatory development through investment, ensuring access to effective remedies means allowing affected individuals or communities to contest decisions related to the denial of public participation or the withholding of critical information. As seen in *Claude Reyes v. Chile*[113] and *ClientEarth v. European Investment Bank*[114], *Endorois Welfare Council*

[112] Arnstein (n. 98), 216.
[113] IACtHR, *Reyes et al.* (n. 93).
[114] EU General Court, *ClientEarth v. European Investment Bank*, judgment of 27 January 2021, case no. T-9/19.

v. Kenya[115], and *Saramaka People v. Suriname*[116], domestic and regional courts have upheld the public's right to information and participation, setting strong precedents for transparency in environmental and investment-related decisions.

Similarly, national courts have also recognised participation as an integral component of remedial justice in development-related disputes. For instance, a comparable approach was taken by the Supreme Court of India in *Orissa Mining Corporation v. Ministry of Environment and Forests* (2013).[117] In this case, the Court empowered the *Gram Sabha* (village assembly) to make the final determination on whether mining could proceed in the Niyamgiri Hills, sacred to the Dongria Kondh Indigenous community, and appointed a judicial officer to oversee the process to ensure independence and freedom from coercion.[118] Here, the participatory process itself was crafted as the central remedial measure, capable of reconciling development imperatives with the community's cultural and environmental rights.

Collectively, these judicial practices reveal a growing recognition that participation is not only a precondition for legitimate decision-making but also a form of remedy capable of addressing exclusion, restoring agency, and rebalancing power asymmetries. Within the Right to Development-based approach, this positions participation as both a corrective response to past violations and a forward-looking guarantee of non-repetition through inclusive governance. In this way, it formalises what has often been treated as a discretionary Social License to Operate, giving it normative shape through legal standards of participation, transparency, and remedy. The following graph visually represents the proposed Right to Development-based impact assessment tool and how it functions within investment agreements and contracts to ensure human rights compliance.

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115 African Commission on Human and People's Rights, *Endorois Welfare Council v. Kenya*, judgment of 25 November 2009, communication no. 276/2003.

116 IACtHR, *Saramaka People v. Suriname*, judgment of 28 November 2007, Series C No. 172.

117 Supreme Court of India, *Orissa Mining Corporation v. Ministry of Environment and Forest and Others*, Writ Petition (CIVIL) No. 180 of 2011, para. 60.

118 *Orissa Mining Corporation* (n. 117), para. 62.

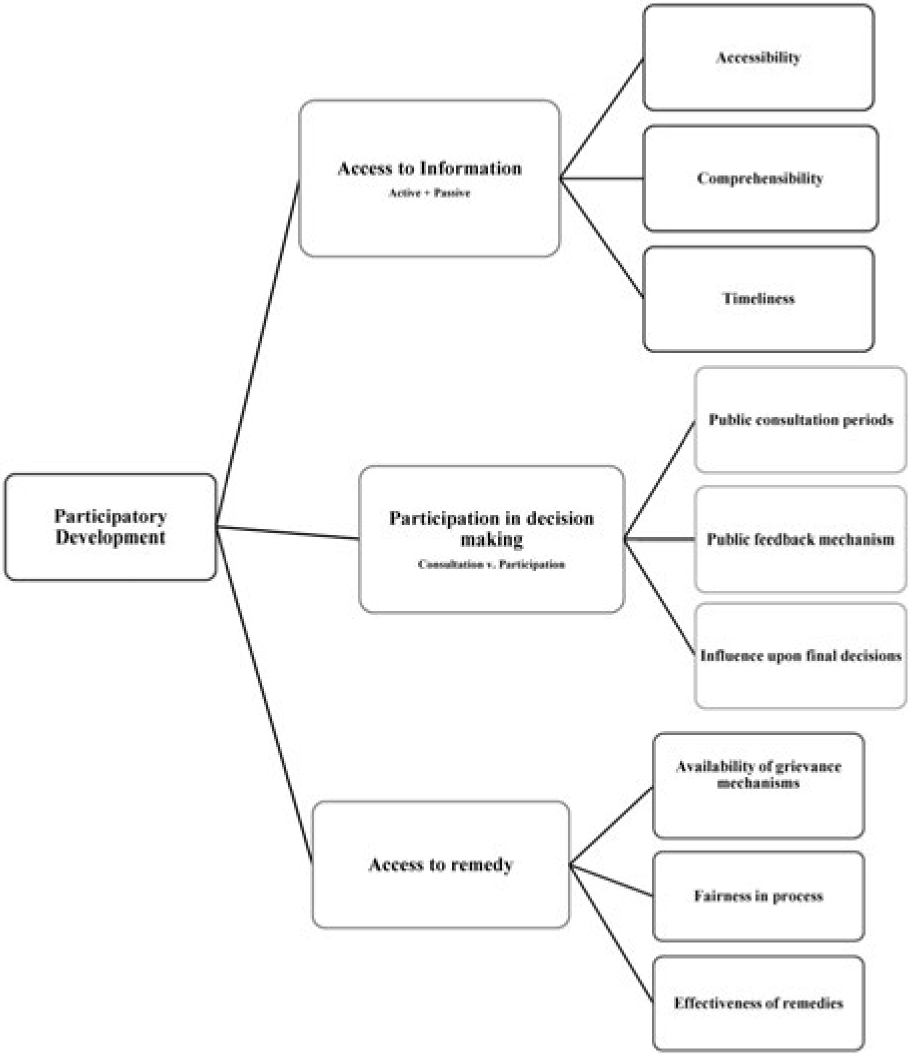

Figure 1: *Participatory Development Based Impact Assessment*

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IV. Conclusion

This article has proposed public participation, as articulated in the Draft Covenant, as a transformative and operational model for recalibrating investment practices towards a rightsholder-focused paradigm. The argument advanced here is not that either international investment law or the Draft Convention presently mandates such participatory obligations as a matter of *lex lata*. Rather, the article advances a primarily *lex ferenda* argument. It demonstrates that existing human rights and environmental regimes already recognise participatory rights and procedural guarantees in specific contexts and argues that, when read through the people-centred logic of the Right to Development, these developments support a reorientation of investment governance towards meaningful participation. In this sense, the framework proposed here seeks to provide greater normative content to investment practices and non-binding concepts such as the Social License to Operate, while offering a conceptual basis for the future integration of participatory obligations into investment governance.

By centring on the core principle of participatory development, the article introduces a reformed Right to Development-based impact assessment framework offering a normative and operational structure to align investment decision-making with international human rights standards. As demonstrated, this framework can be implemented by institutionalising transparent and inclusive practices – such as requiring the publication of draft investment agreements and facilitating open consultation with affected communities and civil society organisations as recommended by the Working Group on Human Rights and Transnational Corporations and Other Business Enterprises.[119] These mechanisms, already reflected in instruments like the Aarhus Convention and Escazú Agreement, affirm that public participation is emerging as a procedural human rights obligation even within sectors traditionally governed by private law or technocratic expertise.[120]

Moreover, the Right to Development framework elevates the role of business entities, moving beyond mere compliance to mandate active engagement in participatory mechanisms that respect and uphold the rights and aspirations of affected communities. This addresses significant gaps in current

119 United Nations General Assembly (UNGA), Report of the Working Group on the Issue of Human Rights and Transnational Corporations and Other Business Enterprises, 'Human Rights-Compatible International Investment Agreements' of 21 July 2021 A/76/238, para. 76(k).

120 UNECE (n. 97), 46.

HRDD practices, particularly in ensuring meaningful consultation, especially in sectors like natural resource exploitation.

Embedding this framework into international investment law not only advances corporate accountability but helps reconstitute investment governance as a vehicle for equitable, sustainable, and rights-respecting development. As Salomon aptly notes, much like the right to self-determination, the right to development is a foundational right – without which the realisation of other rights remains precarious.[121] In this spirit, the Right to Development-based impact assessment model should not be viewed as an aspirational ideal, it offers a coherent legal framework grounded in existing human rights norms and provides a practical roadmap for integrating participatory obligations into investment treaty-making and contractual practices. Properly implemented, it has the potential to rebalance the asymmetries of international investment law and restore human dignity to the core of development governance.

121 Margot E. Salomon, Legal Cosmopolitanism and the Normative Contribution of the Right to Development (September 23, 2008). London School of Economics (LSE) Working Paper on Law, Society and Economics No. 16/2008, 14, available at SSRN: https://ssrn.com/abstract=1272582.