Sidelining the Lived Realities of Those Most Affected by Investment Projects and Disputes

By:

Ladan Mehranvar

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The opacity of the ISDS regime is not a mere oversight but rather a structural feature that prioritizes the investor-centric nature of its proceedings while giving limited consideration to the broader social, environmental, and economic impacts of investment disputes. Local communities often bear the brunt of disruptions caused by these projects, only to face the added burden of compensating the very investors responsible. Such payouts often divert public funds away from essential services, prioritizing corporate interests over the welfare of ordinary citizens. Arbitral tribunals reinforce this exclusivity by systematically excluding the voices of those most affected. While treaties and rules formally acknowledge the role of amicus curiae to lend a veneer of legitimacy, they actively stifle such participation by withholding key information and imposing procedural demands that resource-strapped local communities, academics, and civil society organizations are often unable to meet.

Despite Reforms, barriers to meaningful participation continue to plague ISDS proceedings

ISDS is known for its lack of transparency (among other deficiencies), often described as "secretive" at nearly every stage, from filing disputes to issuing decisions. Public access to hearings and case materials remains limited, while arbitral awards are shrouded in confidentiality. Over the past decade, calls for reform have intensified (and more recently, calls to overhaul the regime entirely, see here and here), demanding at a very minimum improved public engagement and scrutiny through greater public access, inclusion of amicus curiae, and disclosure of third-party funding arrangements. However, without access to basic information, such as the existence of a case, its procedural timelines, or submission requirements, potential amici are effectively barred from participating, reducing the entire amicus process to little more than a token gesture.

Efforts to address transparency issues have emerged through updates to arbitration rules and the language of newer-generation treaties. The 2014 UNCITRAL Mauritius Convention on Transparency, for example, promotes public access to arbitration documents, hearings, and amicus participation, though only about ten States have ratified it. Similarly, ICSID introduced the most extensive amendments to its rules in 2022, such as Rule 62 (automatic consent to award publication unless objected within 60 days of the award's issuance), Rule 63 (publication of procedural orders and decisions with agreed redactions within 60 days of issuance), and Rule 64 (conditional publication of written submissions and supporting documents with party consent, and with disputes over redactions resolved by the tribunal). However, ICSID transparency rules apply only in the absence of specific transparency provisions in party agreements or underlying treaties. For instance, Article 10.21 of CAFTA-DR mandates prompt public disclosure of ISDS documents, bypassing the need for party consent or delays before publication. Despite such improvements, the reality often diverges from these commitments.

In *Próspera v. Honduras*, an ICSID case demanding an extraordinary USD 11 billion—equivalent to nearly two-thirds of Honduras's 2022 national budget—essential information was inaccessible for months (or rather, years), despite the monumental implications for the Honduran people. This lack of

transparency persisted despite the explicit provisions of CAFTA-DR. The case arose as Honduras's new government, elected on a platform of reform and renewal, sought to undo the damage wrought by a deeply corrupt, narco-trafficking regime that held power for over a decade under Juan Orlando Hernández and the National Party. That regime left behind not only economic devastation but also entrenched graft and social disarray. The Próspera case, with its extraordinary financial demands, represents a direct challenge to these reform efforts, undermining the government's ability to chart a new course for the Honduran people.

For much of the case's early stages, the only substantive detail available was the Notice of Intent, registered with ICSID on September 16, 2022. No further information was released until December 6, 2024, after persistent email inquiries directed to the ICSID Secretariat. The implications of this delay are profound. Despite the clear transparency mandate in Article 10.21 of CAFTA-DR, the ICSID Secretariat and tribunal displayed a pattern of behavior that obstructed meaningful public engagement. Critical documents were withheld until just days before a critical hearing (December 16-17, 2024), and unrealistic deadlines were set for amicus submissions shortly after the holiday season (January 10, 2025), ensuring that any potential amici would face a prohibitive uphill battle.

The following flaws reveal the charade:

• **lack of notice**: potential amici only became aware of the call for applications after Procedural Order No. 1 (PO1), dated September 19, 2024, was published months after it was issued, following external pressure.

• **conflicting deadlines**: PO1 required concurrent filing of amicus applications and submissions, contradicting its annexed timeline, which suggested separate deadlines. (This inconsistency was clarified in Procedural Order No. 3 after an email to the tribunal requesting such clarification).

• **inaccessible documents**: key materials remained unavailable even after PO1's publication, leaving amici uninformed about the dispute's scope.

• **insufficient preparation time**: with final documents released on December 6, 2024, amici had less than a month—during the holiday season—to prepare

submissions.

• **pre-scheduled hearing**: the Respondent's Preliminary Objection hearing was set before the amicus application deadline, signaling a disregard for any potential contributions.

• **restricted "public" hearings**: CAFTA-DR's Article 10.21.2 and PO1's paragraph 21.4 mandate public hearings, but Procedural Order No. 2 limited real-time access to non-disputing CAFTA-DR parties only, relegating public access to a delayed audio-video recording on the ICSID website.

These procedural barriers highlight the performative nature of amicus invitations, designed to exclude under the guise of inclusivity. The disconnect between CAFTA-DR's stated commitment to transparency and the realities of its implementation in cases like *Próspera* raises serious concerns. Rather than fostering public engagement, ISDS tribunals, as demonstrated in this case, appear to actively suppress it by erecting barriers to meaningful participation of key affected stakeholders.

Stringent conditions imposed on amicus effectively bar their participation

The actions of the ICSID tribunal in the *Próspera* case illustrate the entrenched opacity and exclusivity of the ISDS framework. These issues are further compounded by the arduous conditions that amici must satisfy to have their submissions considered. Even when amici meet the rigorous criteria set by the treaty or the tribunal, their applications are often rejected on narrow or technical grounds. For example, in the ***Eco Oro v. Colombia*** case, an alliance of six organizations sought to file an amicus brief regarding Colombia's ban on mining in protected páramo ecosystems. In February 2019, the tribunal sided with the investor and rejected the application, stating that the petitioners failed to meet "even the most minim[al] requirements" linking human rights or environmental concerns to the scope of the dispute. According to the tribunal, the case simply involved an investor seeking compensation for breaches of a free trade agreement. Similarly, in ***KCA v. Guatemala***, communities affected by a controversial mining project submitted two amicus applications, citing environmental and health risks, particularly water contamination linked to the proposed mine. Both applications were denied (in November 2019 and February

2021), with the tribunal claiming the group failed to adequately identify its leadership structure (See *Procedural Order* No. 5, 5 Feb 2021, para 40). In ***Odyssey v. Mexico***, a fishing association opposed a seabed mining project that directly threatened their fishing concessions and livelihoods. Despite the clear overlap between the mining and fishing concessions, the tribunal dismissed the amicus request in December 2021, arguing that, since the claimant sought compensation rather than project restitution, the association lacked a "significant interest" in the dispute.

These rejections highlight how the invitation to apply for leave to file an amicus curiae submission often serves as little more than a performative gesture aimed at appeasing public outcry about transparency and inclusivity. In practice, it systematically excludes the perspectives of those directly affected by the underlying investments or disputes. Local individuals, communities, and civil society organizations often hold critical and relevant information that may be omitted—whether intentionally or inadvertently—by investors or the Respondent State, whose interests may diverge from those of potential amici.

Conclusion

By maintaining opacity and imposing systemic barriers, ISDS tribunals reveal a deep-seated disregard for public accountability and indifference to human rights, community welfare, and environmental protections. At its core, ISDS operates to insulate investor interests from scrutiny, reinforcing a regime that places corporate power above equity, meaningful public engagement, and accountability.

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