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Fixing the asymmetry: giving governments access to arbitration through state contracts

by
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Governments sign contracts such as concessions, licenses, joint ventures, and long-term procurement deals with foreign investors. Yet, these agreements—which can last for decades and influence entire policy areas—often lack a clause allowing states to initiate arbitration if investors breach key obligations. This quietly tilts the procedural playing field. Most investment projects (e.g., in mining and infrastructure) are governed by contracts, not treaties, and these often include arbitration clauses that only allow investors to bring claims. When obligations are breached, states may have no direct route to international arbitration unless contracts explicitly provide for it.

This asymmetry is increasingly difficult to justify. While governments often have access to domestic enforcement tools (e.g., penalties, contract termination, bonds), these remedies may be politically sensitive, procedurally contested or inadequate where investors shield assets, resist local enforcement or seek to frame disputes as regulatory overreach. Arbitration offers a neutral, enforceable mechanism that complements rather than replaces these domestic options. This is also consistent with the International Centre for Settlement of Investment Disputes' (ICSID) original logic: in the 1960s, arbitration was intended to flow from direct agreements between states and foreign investors. The Report of the Executive Directors confirms that arbitration was reciprocal and contract-based, not designed solely for investor claims.

Thousands of investment treaties grant investors the unilateral right to initiate international arbitration. States are generally limited to counterclaims within investor-initiated proceedings. In some cases, umbrella clauses extend treaty protections to contractual obligations, but their legal effect remains uncertain and contested. By contrast, contract-based clauses allow states to define jurisdiction, standing and remedies with precision. As investment disputes increasingly implicate fiscal and

regulatory measures, the absence of equivalent recourse for states has become untenable.

Some governments have terminated or amended bilateral treaties to limit investors' leverage. Yet few have turned to contracts, where states hold full authority and can entrench equal procedural rights with a single clause. Several jurisdictions have already taken this route. In Colombia, contracts concluded by the *Agencia Nacional de Infraestructura* routinely include arbitration clauses governed by international rules. Ecuador has pursued similar terms in recent agreements, following its national referendum on arbitration. Bolivia provides a well-established example: in the extractive sector, its contracts include arbitration provisions that allow the government to initiate claims independently of treaty mechanisms. Many contracts contain clauses that appear even-handed, but few give governments a practical path to pursue claims. Where such provisions exist, they are often drafted without precision or enforced without resolve. States hold the pen, yet too often surrender the page. Colombia, Ecuador and Bolivia have shown that symmetry is not only possible but enforceable. The barrier is not law, but habit.

To give practical effect to this approach, the following model arbitration clause for state contracts draws on comparative legal practice and earlier analysis to provide a precise template.

Model arbitration clause for state contracts

"Any dispute under or in connection with this Contract, including claims arising from investor undertakings or regulatory obligations incorporated herein, shall be resolved by final and binding arbitration. The arbitration shall be administered by ICSID, the PCA or another named arbitral institution agreed at the time of signing. Either Party may commence arbitration with 30 days' written notice. The seat of arbitration shall be [City] and the language of proceedings shall be [Language]. Hearings and written submissions may be made public, subject to redaction of commercially sensitive or protected information. The final award shall be published.

Disputes concerning regulatory measures that significantly affect the performance, value or enforceability of the Contract and that give rise to alleged breaches of contractual obligations or the legitimate expectations of either Party may also be submitted to arbitration. The tribunal shall have the authority to determine liability and award appropriate remedies."

This clause should be standard in large-scale state contracts, promoting dispute resolution over performance, compliance and regulatory change without ISDS being based solely on treaties. It is also a conceptually modest reform: the clause stays within

contract law's four corners while restoring an essential but largely forgotten procedural tool.

For governments considering this approach, it is essential to ensure institutional support for contract negotiations by requiring ministries and public agencies to coordinate with counsel experienced in managing contract risk and international procedure. These are manageable steps, and as Bolivia's experience shows, states can rely on contract-based arbitration when the right institutional arrangements are in place or can be developed without major overhauls. Many emerging economies are already well-positioned to adopt similar models, particularly where arbitration is embedded in public procurement and concession law.

This is not a call to replace treaty-based arbitration. But too many contracts let investors bring claims while giving governments no path to do the same. This is commercially unsound and contrary to ICSID's founding purpose. No treaty reform is needed—just a clear clause in contracts to give governments equal standing.

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