
Introduction

Is an Ounce of Prevention Worth a Pound of Cure? Assessing the Development of Dispute Prevention Mechanisms in Infrastructure Financing

While infrastructure development has long been associated with social progress, economic development and advanced living standards, it has likewise given rise to challenges including disruption, environmental harm and inequity. On the one hand, infrastructure development has been described as presenting both ‘immaterial ideals and material notions necessary to change the world’.¹ It speaks to both ‘physical forms and social supports’² that are necessary to the functioning of an orderly and healthy society. On the other hand, ‘ill-conceived infrastructure stifles and suppresses human development and produces inequitable social and economic systems’.³

Much of how infrastructure is viewed, the aspirations it fulfils and the values it reflects are determined by the processes that give rise to its conceptualisation and implementation. Whether it is established through corruption, greed and indifference or through a process that responds to the aspirations of those for whom the infrastructure serves determines the extent to which it advances social good. A key element of responsive infrastructure development is driven by the attention placed on pre-project community–investor consultation and communication channels.

This book explores the emergent development and challenges in implementing community–investor consultation, dispute prevention and facilitation mechanisms amongst multilateral and national development banks operating in the Asia Pacific region. In the several decades since the

¹ Mahmoudi, H., Roe, J., & Seaman, K. (Eds.). (2022). *Infrastructure, Wellbeing and the Measurement of Happiness*. Abingdon: Taylor & Francis, p. 1.

² *Ibid*, p. 1.

³ *Ibid*, p. 1.

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development of the first multilateral community–investor dispute resolution and accountability mechanisms (AMs), much has been learned about public facilitation, community engagement and dispute prevention during the early stages of major infrastructure development programs.

Drawing on a qualitative triangulating approach that compares public facilitation policy design with case-based practice, the book analyses the International Finance Corporation (IFC), Asian Development Bank (ADB) and Asian Infrastructure Investment Bank (AIIB) community–investor dispute resolution policy design. Case studies, surveys and interviews of select private non-state actors in the Asia Pacific region address the question of whether, and if so how, multi-stakeholder community–investor public facilitation methods contribute to the prevention and early resolution of infrastructure disputes and advance sustainable development objectives.

When considering this question, it is important to ask what is meant by prevention. Does prevention imply the minimisation, diminishment and abatement of community concerns in order to advance project implementation, or rather does it imply genuine consultative design of project aims in a way that benefits community and project stakeholders? The aim of the book is to examine mechanisms that support the latter objective.

Public Facilitation for Major Infrastructure Projects

With the passage of several decades since the introduction of AMs, including the first Compliance Advisor Ombudsman (CAO) office at the IFC/World Bank (WB), significant learning has been gained regarding community facilitation mechanisms.

As a general matter, community–investor public facilitation mechanisms are formal, legal or non-legal processes that can be used by parties affected by investment activities and operations. The approaches include pre-project consultation and post-project grievance mechanisms as well as mediation, recommendations or impact studies.⁴ These mechanisms that have been developed in response to a global learning process following challenges and identification of shared norms includes the United Nations (UN) Guiding Principles on Business and Human Rights, which expects companies to establish ‘operational-level . . . mechanisms for individuals and communities’

⁴ Centre for Research on Multinational Corporations (SOMO). (n.d.). What are grievance mechanisms? <https://shorturl.at/c99cS>.

to arrive at shared understanding and agreement (Guiding Principle 29) regarding resolution of community–investor issues.⁵ The Organisation for Economic Co-operation and Development’s (OECD’s) ‘Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector’ provides for principles of engagement in the context of mining, and oil and gas enterprises. It calls for multinational enterprises to carry out risk-based due diligence to identify, prevent and mitigate actual and potential adverse impacts, and to engage in decision-making with stakeholders regarding project impacts.⁶

Amongst the earliest established multilateral community–investor public facilitation mechanism was the CAO, established under the IFC and Multilateral Investment Guarantee Agency (MIGA) of the WB Group in 1999. The CAO engages project-affected communities in dialogue on the social and environmental impacts of IFC/MIGA projects and helps affected parties identify alternatives for resolving issues of concern, which may include multi-stakeholder problem solving. The CAO is an independent office⁷ that reports directly to the President of the WB Group.⁸

Research Approach

In examining the question under study – namely whether, and if so how, multi-stakeholder community–investor public facilitation contributes to the prevention of disputes and advancement of sustainable development objectives in the Asia Pacific region – the research methodology relies on a qualitative, triangulating approach to analyse public facilitation policy design alongside case-based implementation in order to answer the overarching question of whether ‘an ounce of prevention is worth a pound of cure’ in community–investor dispute resolution.

⁵ United Nations. (2011). *Guiding Principles on Business and Human Rights*. Geneva: United Nations. www.ohchr.org/sites/default/files/documents/publications/guidingprinciplesbusinesshr_en.pdf.

⁶ OECD. (2017). *OECD Due Diligence Guidance for Meaningful Stakeholder Engagement in the Extractive Sector*. Paris: OECD Publishing. <https://doi.org/10.1787/9789264252462-en>.

⁷ Balaton-Chrimes, S., & Haines, F. (2015). The depoliticisation of accountability processes for land-based grievances, and the IFC CAO. *Global Policy*, 6(4), 446–454. <https://doi.org/10.1111/1758-5899.12275>.

⁸ Office of the Compliance Advisor Ombudsman. (2016). *Annual Report 2016*. www.cao-ombudsman.org/publications/documents/CAOAnnualReport2016_English_web.pdf.

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The book draws on a comparative and socio-legal policy-oriented approach⁹ through an inductive review of secondary sources and analysis of ADB, AIIB and IFC community–investor dispute resolution policy ‘in the books’. Followed by surveys of select dispute resolution actors, neutrals and legal professionals working with project-affected communities in key Belt and Road Initiative (BRI) ‘legal hubs’¹⁰ ‘in action’ in order to identify conditions for successful community engagement and assess potential relevance for project implementation.¹¹

The key principles underlying the selected methodology include a participatory framework and triangulating approach,¹² ensuring that those directly affected by the study’s potential outcomes are given a voice in refining the questions under study.¹³ The use of multiple techniques can help compensate for deficiencies of a single method.¹⁴

In recent times, growing outbound financing, particularly from major Asia Pacific economies including China, are increasingly understood as having not only significant economic but also governance, geopolitical and environmental implications. In relation to environmental impacts, efforts are underway to develop more robust frameworks for sustainable development and community facilitation mechanisms. While progress has been made in introducing accountability and consultation mechanisms in some sectors, challenges remain in some cases pertaining to land use rights, water and air pollution, deforestation and Indigenous cultural preservation.¹⁵ Given the wide-scale impact of multi-jurisdictional development initiatives with

⁹ See e.g. Feldman, E. A. (2015). Compensating the victims of Japan’s 3-11 Fukushima disaster. *Asian-Pacific Law & Policy*, 16, 127.

¹⁰ Erie, M. (2018). Dispute resolution, law and development, and legal elites in China’s outbound investment. Law and Society Association talk on Panel ‘China, International Law, and Development’, CRN 33.

¹¹ Ali, S. (2023). Advancing research and practice in the governance of dispute resolution institutions through inclusive devolved reflection. In S. Ali (Ed.). *Comparative and Transnational Dispute Resolution* (pp. 59–79). Abingdon: Routledge.

¹² Denzin, N. K. (1978). *The Research Act: A Theoretical Introduction to Sociological Methods*. New York: McGraw-Hill.

¹³ Diessner, R. (2020). Action research. *Converging Realities*, 1(1). Retrieved from https://bahai-library.com/diessner_action_research.

¹⁴ Shaffer, G., & Ginsburg, T. (2012). The empirical turn in international legal scholarship. *American*, 106(1), 1–46.

¹⁵ Bloomberg News. (2020, 21 December). What it’s like living next to a Belt and Road project. *Bloomberg*. www.bloomberg.com/news/articles/2020-12-21/what-it-s-like-living-next-to-a-belt-and-road-project?embedded-checkout=true.

outbound financing within the greater Asia Pacific region, understanding how best to coordinate with local communities is necessary in order to realise the benefits of sustainable growth.

Public Facilitation Process

Research concerning best practices in public facilitation highlights the importance of early intervention, substantive engagement and training.¹⁶ Early engagement with affected groups¹⁷ in balancing health, environmental and financial priorities and interests¹⁸ has been identified as key to the prevention of lawsuits, project relocation, indefinite postponement, price escalation, cost overruns and even cancellation of projects.¹⁹ Stakeholder engagement was critical to a water supply project in Guwahati, India,²⁰ a public–private partnership scheme in Hong Kong²¹ and pollution remediation in Guangdong Province.²²

Substantive engagement is likewise a critical factor in meaningful outcomes. Avoiding tokenistic passive engagement²³ while supporting functional interactive participation leads to long-term socio-economic success.²⁴ Successive steps beginning with education and advancing to feedback, consultation, joint planning, mediation, litigation and finally

¹⁶ Ali, S. F. (2016). *Governing Disasters: Engaging Local Populations in Humanitarian Relief*. Cambridge: Cambridge University Press.

¹⁷ Ibid.

¹⁸ Min, J. H., Jang, W., Han, S. H., Kim, D., & Kwak, Y. H. (2018). How conflict occurs and what causes conflict: Conflict analysis framework for public infrastructure projects. *Journal of Management in Engineering*, 34(4). [https://doi.org/10.1061/\(ASCE\)ME.1943-5479.0000625](https://doi.org/10.1061/(ASCE)ME.1943-5479.0000625); Ng, S. T., Wong, J. M. W., & Wong, K. K. W. (2010). Public participation in public private partnership projects: The way forward. *WIT Transactions on Ecology and the Environment*, 142, 79–87. <https://doi.org/10.2495/SW100081>.

¹⁹ Das, R., Laishram, B., & Mohammad, J. (2019). Public participation in urban water supply projects: The case of south-west Guwahati, India. *Water Research*, 165, 114989. <https://doi.org/10.1016/j.watres.2019.114989>.

²⁰ Ibid. See also Cuppen, E., Bosch-Rekveltdt, M. G., Pikaar, E., & Mehos, D. C. (2016). Stakeholder engagement in large scale energy infrastructure projects: Revealing perspectives using Q methodology. *International Journal of Project Management*, 34(7), 1347–1359.

²¹ Ng et al., Public participation in public private partnership projects.

²² Lo, C. W., & Tang, S. (2014). *Institutions, Regulatory Styles, Society, and Environmental Governance in China*. Abingdon: Routledge.

²³ Pretty, J. N., Guijt, I., Thompson, J., & Scoones, I. (1995). *Participatory Learning and Action: A Trainer's Guide*. London: International Institute for Environment and Development.

²⁴ See Ali, *Governing Disasters*.

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resolution²⁵ are envisioned in the context of a multidimensional process involving planning, action, reflection, learning and change.²⁶ Facilitators work to find agreement between stakeholders and decision makers with diverse backgrounds, values, beliefs and needs.²⁷

Conversely, predetermined decisions are antithetical to the spirit of the facilitation process.²⁸ During early phases of project development, communities should have access to relevant information regarding proposed plans and a commitment should be in place to address concerns and identify interests.²⁹ A concept of ‘shared infrastructure’, which involves acknowledging the social value derived from infrastructure including both associated rights and obligations, has been recommended.³⁰ Training of community members in consultation skills has contributed to building trust and cohesion, overcoming power asymmetries and fostering participatory dialogue.³¹ Participatory learning and action, characterised by a process of dialogue, action, analysis and change,³² and participatory mapping and modelling have facilitated the bridging of interests.³³ Likewise, supporting the development of spaces for joint

²⁵ Connor, D. M. (1988). A new ladder of citizen participation. *National Civic Review*, 77(3), 249–257. <https://doi.org/10.1002/ncr.4100770309>; Constitutional and Mainland Affairs Bureau. (25 November 2011). 深圳市人民政府 香港特別行政區律政司法律合作安排 [Shenzhen Municipal People’s Government and the Department of Justice of the Hong Kong Special Administrative Region Legal Cooperation Arrangement]. chrome-extension://efaidnbnmnnibpcajpcglclefindmkaj/https://www.doj.gov.hk/tc/mainland_and_macao/pdf/HK_SZ_Coop_Agt_tc.pdf.

²⁶ Chambers, R. (2002). *Participatory Workshops: A Sourcebook of 21 Sets of Ideas and Activities*. London: Earthscan.

²⁷ Nandago, M. (2007). Training and facilitation: The propellers of participatory methodologies. In K. Brock & J. Pettit (Eds.). *Springs of Participation: Creating and Evolving Methods for Participatory Development* (pp. 29–39). Brighton: Institute of Development Studies, as cited in Sirajuddin, Z., & Grudens-Schuck, N. (2017). Public participation in agriculture and natural resource management projects in south and southeast Asia: A literature review. *Asian Journal of Agriculture and Development*, 14(1), 107–118.

²⁸ Buckley, A. (2012). Best practice community engagement for infrastructure projects: Building community ties that dig deeper. *Public Infrastructure Bulletin*, 1(8), 1–2.

²⁹ Erkul, M., Yitmen, I., & Çelik, T. (2016). Stakeholder engagement in mega transport infrastructure projects. *Procedia Engineering*, 161, 704–710. <https://doi.org/10.1016/j.proeng.2016.08.745>.

³⁰ Dialogue by Design and UCL Transport Institute. (2015). *Infrastructure and the Citizen* (pp. 1–19). Thornton Heath: Dialogue by Design.

³¹ Ali, S., Davis, W. E., & Lee, J. (2011). Multi-stakeholder dispute resolution: Building social capital through access to justice at the community level. *Pepperdine Dispute Resolution Law Journal*, 11(2), 181–206.

³² See Pretty et al., *Participatory Learning and Action*.

³³ Sirajuddin & Grudens-Schuck, Public participation in agriculture.

knowledge generation at the community level has been found essential for systematic learning.³⁴

While public facilitation literature has provided important insights into community engagement for major infrastructure projects in Western development banks, this book extends findings to include examination of contributions by banking institutions operating in the Asia Pacific.

Devolved Collaboration

Beginning in the early 1990s, international declarations have increasingly encouraged the use of consultative ‘devolved collaboration’ as a means of regulation of public resources.³⁵ This encouragement largely arises from a view that public resource decision-making is ‘best handled with the participation of all concerned citizens, at the relevant level’.³⁶ In many respects, this emphasis on localised decision-making reflects an aspiration towards ‘develop[ing] new institutional methods for gauging social needs and devise[ing] sensible, politically feasible, and socially acceptable legal remedies’.³⁷

Devolved collaboration can be described as a method of localised decision-making that encourages ‘widespread, independent participation by local groups to craft comprehensive solutions to difficult [resource] concerns on a geographically-focused scale’.³⁸ On the basis of this approach, ‘public and private stakeholders collaborate to identify concerns, establish priorities, and design and implement holistic solutions’ to a broad spectrum of natural resource problems within a specific community.³⁹ Successful collaboration identifies ‘common interests and values . . . and social capital among its participants’.⁴⁰

³⁴ Ali, S. (2018). The power of reflection: Advancing governance and dispute resolution systems through devolved reflection and shared knowledge generation. *The Journal of Baha’i Studies*, 28(4), 23–89.

³⁵ *Agenda 21: Programme of Action for Sustainable Development; Rio Declaration on Environment and Development; Statement of Forest Principles: The Final Text of Agreements Negotiated by Governments at the United Nations Conference on Environment and Development (UNCED)*, 3–14 June 1992, Rio de Janeiro, Brazil. Geneva: United Nations.

³⁶ *Ibid.*

³⁷ Nonet, P., & Selznick, P. (1978). *Law and Society in Transition: Toward Responsive Law* (1st ed.). Piscataway, NJ: Transaction Publishers.

³⁸ Foster, S. R. (2002). Environmental justice in an era of devolved collaboration. *The Harvard Environmental Law Review*, 26, 459–498.

³⁹ *Ibid.*

⁴⁰ Nickelsburg, S. M. (1998). Mere volunteers? The promise and limits of community-based environmental protection. *Virginia Law Review*, 84(7), 1371–1409. <https://doi.org/10.2307/1073675>.

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When successful, devolved community-based resource management efforts respond to the aspiration for broad-based input into policies and decision-making.⁴¹ Yet, when implemented without regard to issues of universal representation and disparate access to resources, the process has the potential of replicating and possibly exacerbating existing representation problems.⁴² Therefore examining the gap between public facilitation policy as written and as practiced is imperative for continued progress.

At the outset, it is useful to distinguish between approaches to devolved collaboration as developed within multilateral development banks (MDBs) including stakeholder engagement, grievance mechanisms, post-conflict mediation, arbitration and litigation.

Stakeholder engagement generally refers to a process of group decision-making conducted throughout a project life cycle. Where properly designed and implemented, it supports the development of constructive and responsive relationships that are important for the management of a project's environmental and social risks. Stakeholder engagement is most effective when initiated at an early stage of the project development process,⁴³ and is an important component of early-stage decision-making, assessment, management and monitoring of a project's environmental and social risks and impacts.⁴⁴

Project-level grievance mechanisms provide avenues for borrowers to respond to concerns and grievances of project-affected parties in relation to the environmental and social performance of a project. Grievance mechanisms are expected to address concerns promptly and effectively, in a transparent manner that is culturally appropriate and readily accessible to all project-affected parties, at no cost and without retribution and should not prevent access to judicial or administrative remedies.⁴⁵ When disputes cannot be addressed through grievance processes, or compliance review, mediation, arbitration and litigation are available to parties.

⁴¹ See Nonet & Selznick, *Law and Society in Transition*.

⁴² See Foster, Environmental justice in an era of devolved collaboration.

⁴³ See Ali et al., Multi-stakeholder dispute resolution.

⁴⁴ World Bank. (2016). *Environmental and Social Framework: Setting Environmental and Social Standards for Investment Project Financing* (p. 131). Washington, DC: World Bank. https://consultations.worldbank.org/content/dam/sites/consultations/doc/migration/the_esf_clean_final_for_public_disclosure_post_board_august_4.pdf.

⁴⁵ Ibid, p. 136.

Key Findings of the Study

Drawing on a mixed-method triangulating approach that compares public facilitation policy with case-based practice, the book draws on project statistics, case studies, interviews with and surveys of dispute resolution professionals to better understand the dynamics of community investor dispute prevention and resolution in practice and conditions for successful community engagement, leading to both empirical and theoretical insights.

The key empirical findings of this study confirm the adage that an ounce of prevention is in fact worth a pound of cure in the context of infrastructure development. At the same time, challenges remain in facilitating effective preventative measures. Project data, survey findings and comparative case studies suggest that the introduction of increasingly rigorous pre-project community consultation and grievance mechanisms within global MDBs in the mid 2010–2020s have corresponded with a drop in the percentage of grievances per project from 15.4% in 2019 to 7.1% in 2021.⁴⁶ While this downward trend has been followed by a slight resurgence,⁴⁷ after 2021, the lack of consultation, disclosure or due diligence was no longer the single most cited cause of grievances amongst project-affected communities.⁴⁸ Greater attention to pre-project due diligence and community awareness of grievance channels appear to account for these findings. Survey findings of fifty-five practitioners engaged in infrastructure-related dispute prevention in the Asia Pacific region likewise found that prior community consultation was considered the most effective approach to preventing infrastructure disputes, and that overall, most disputes arose because of lack of adequate consultation with members of the community. Similarly, the twelve community–investor dispute case studies show that in circumstances of increasingly heightened standards for community consultation compared with ad hoc discretionary consultation practices, the number of stalled/cancelled and litigated cases declined by 33%, the percentages of cases referred to local courts declined by 16%, and the number of cases pursuing party agreement through mediation or negotiation increased by 50%. Overall, these findings provide measured evidence supporting the

⁴⁶ Ali, S. (2024). The seeming paradox of prevention: Dispute mitigation by multilateral development banks. *Civil Justice Quarterly*, 43, 142–168.

⁴⁷ See Araabi, S. (n.d.). A new decade of complaints. *Accountability Console*. www.accountabilityconsole.com/newsletter/articles/a-new-decade-of-complaints/.

⁴⁸ Ibid.

development of increasingly robust community consultative engagement channels, particularly for multilateral and national banks that have not yet implemented such policies. Such engagement channels, far from aggregating complaints, conversely correlate with a reduction in the overall proportion of project disputes.

The findings of this study have theoretical significance demonstrating the importance of community consultation in the Asia Pacific infrastructure development context. While infrastructure development theory has largely moved beyond an emphasis on top down approaches to planning and implementation with growing recognition of the importance of community engagement in decision-making for project sustainability, legitimacy and responsiveness,⁴⁹ limited evidence of impacts of community-based consultation in dispute prevention is available in the Asia Pacific region.⁵⁰ This study demonstrates that where attention to consultation, information sharing, grievance mechanisms and accountability are robust, a higher rate of project completion and dispute avoidance is reported. These findings confirm prior research the efficiency gains of cohesive, inclusive and meaningful local co-ownership in project design.⁵¹

In addition, the findings demonstrate the important role of independent accountability professionals within multilateral and national banking institutions, non-governmental organisations (NGOs) and community groups in contributing to increasingly harmonised legal and policy innovations for expanded community access and accountability.⁵²

Structure of the Book

The book is divided into three parts. Following an introduction outlining the global context and development of community engagement practices in infrastructure development in Part I, Part II explores community engagement case studies and survey findings in the Asia Pacific region before 2013 when pre-project community engagement practices were

⁴⁹ Ali, S. (2023). Decentralized global legal ordering. *Michigan State Law Review*, 2023(2), 319–376. <https://ssrn.com/abstract=4047456>.

⁵⁰ Ali, S. (2024). Comparative international arbitration law. In *Cambridge Handbook of Comparative Law* (pp. 610–624). Cambridge: Cambridge University Press.

⁵¹ See Ali, *Governing Disasters*.

⁵² Ali, S. (2021). *Forming Transnational Dispute Settlement Norms: Soft Law and the Role of UNCITRAL's Regional Centre for Asia and the Pacific*. Cheltenham and Northampton, MA: Edward Elgar Publishing.