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CENTRE FOR TRADE AND INVESTMENT LAW
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Investment Law compass



COMMEMORATING CTIL's ANNIVERSARY

Navigating Through
GLOBAL INVESTMENT FRAMEWORK

ABOUT
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"The Investment Law Compass is CTIL's monthly newsletter on the global investment framework and developments. Our vision is to inform professionals and policy makers on topics related to investment law and treaty arbitration, thereby fostering informed decision-making.

Investment contract-based disputes are becoming an increasing feature of international dispute settlement. As pointed out by ICSID, while treaty-based dispute resolution currently dominates the ICSID caseload, contract-based proceedings continue to grow in absolute terms.

This anniversary issue of CTIL Compass is published with a special focus on investment contracts for creating awareness within the legal community and among policymakers."



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Rise of international investment contracts

by Tathagata Choudhury



Image Source: Serka Law

The decline of investor-State dispute settlement (ISDS) under bilateral investment treaties (BITs) has been discussed for some time.[1] The ISDS regime has recently suffered multiple blows, first from the EU and UK's exit from the Energy Charter;[2] then from EU's attempt at removing its sanctions regime from the jurisdiction of investment tribunals.[3] Countries have terminated older BITs (including India) with a perceived pro-investor bias;[4] excluded dispute settlement clauses from newly negotiated BITs and withdrawn from the Convention on the Settlement of Investment Disputes between States and Nationals of Other States (the "ICSID Convention" or the "Convention") to block foreign enforcement actions.[5]

Additionally, deep dissatisfaction has been expressed about the restriction of State's regulatory power, due to the "regulatory chill effect". High compensations, fragmented governance due to myriad treaties,[6] lack of consistency in interpreting investor obligations, limited opportunities for State counterclaims and concerns with independence in the *ad hoc* arbitrator appointment process, have been flagged as major concerns.

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Furthermore, sovereigns also must deal with backlash from the civil society who claim that the loss of a State's public policy space is not offset by the volume of foreign direct investment which enters the country.

The reform attempts under the aegis of the UNCITRAL Working Group III have only given incremental procedural reforms with deep structural reforms remaining elusive. These developments have prompted many to declare that the idea of ISDS has been politically defeated and has lost the battle of legitimacy.[7] It is in this background that discussions for a call for a return to contractual protection of investments have emerged.[8] The reliance on investment contracts is however not novel. An ICSID background paper published in June 2026 (ICSID Paper) has mapped how, from 1972 till the mid-1980's, all ICSID based disputes were contract based. Even today, 16% of ICSID's caseload is contract-based.[9]

An ICC Institute of World Business Lawand UNIDROIT project (the "IIC Project") is attempting to develop an international framework for guiding the contractual relationship between the host States and private investors, with its rooting in transnational law – a mixture of soft law, domestic law and international law principles. It is intended to be a solution in response to the dissatisfactions expressed with international investment law.[10]

In particular, the ICC Project seeks to develop providing contractual guidance on aspects of international investment law treaty standard, while balancing investor concerns.[11] Similarly, the ICSID Paper states that the ICSID framework of contract-based investment dispute resolution provides a degree of legal certainty and predictability to both investors and States,[12] and highlights the trends including outcomes, settlement rates and track records of compliance with awards.

It is also important to clarify why dispute resolution is sought under ICSID or under applicable transnational laws over commercial arbitration for contract-based investment disputes. Investment contracts are generally long-term contracts between the State in whose territory the investment is made or with its entities or agencies, and foreign investors. These contracts often have long gestation periods, which means that the investment only starts yielding profits in the future and this introduces significant risks for the investor.

There are also significant sovereign risks. Commercial arbitration aims to resolve dispute between private parties (including State entities operating in a commercial capacity). This contrasts with investment-based arbitrations where the State operates in a "dual-capacity" as a sovereign entity and a contractual party. Unlike commercial arbitrations, in an international investment contract (IIC), a State is both a party to the contract as well as a sovereign in whose territory the investment operates. The State is vested with regulatory and administrative powers that can influence or benefit from institutional bias. However, the State is still subject to its international obligations. This dual role brings a sovereign risk into the relationship which is not addressed merely by a contractual breach of performance clause.

Further, while the consent mechanism is the contract for both; an ICSID clause in the contract activates the exclusive jurisdiction of Art. 25 of ICSID, which is to be interpreted in line with the Vienna Convention of Law of Treaties (VCLT). This includes the interpretation of investment and where there are multiple related contracts, a tribunal exercising combined jurisdiction under the unity of investment doctrine.[13]

Additionally, while consent under commercial arbitration operates as a domestic private-law mechanism, consent under ICSID is tethered to public international law and cannot be modified using domestic actions. Therefore, consent is irrevocable; once given it cannot be unilaterally withdrawn.[14]

Art. 42 of the Convention applies to the law applicable to the merits, and this includes domestic law and international law. In the absence of parties' choice of law, the tribunal can choose a host State's law, supplemented by the applicable rules of international law. International law wields a dual role in such cases. It can address any lacuna in the domestic law, stepping in where domestic law is silent. This becomes relevant because Art. 42(2) prevents a tribunal from bringing a finding of *non-liquet*, i.e., refusing to judge a case on grounds that the law is silent.

International law can also play a corrective role, operating as a benchmark where domestic law does not conform on all points to the principles of international law.[15] In some cases, arbitral tribunals have even

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gone beyond the parties' express agreement on the sole application of national law and resorted to international law for example, in Autopista *Concesionada de Venezuela CA v. Venezuela*, despite the parties' incorporation of Venezuelan law into the Concession Agreement.[16] Other tribunals have followed similar lines of reasoning, stressing the regulatory role of international law.[17] In other words, in contract-based investment arbitration, there appears to be a general reluctance to abandon international law.[18] This supplementary role for international law is however not seen in commercial arbitration.

Additionally, the law governing the procedures in commercial arbitration is the law of the seat or the *lex arbitri*. However, arbitration governed by the Convention is delocalised, i.e., proceedings are governed by ICSID. The other differences between a contract-based investment arbitration and commercial arbitration include safeguards such as insulation from political interference;[19] immunity from review by domestic courts;[20] and mandatory enforceability of awards in all 158 Contracting States with limited grounds for denying enforcement.[21] The enforcement mechanism deserves special attention. Art. 54(1) of the Convention requires each Contracting State to "recognize an award rendered pursuant to the Convention as binding and enforce the pecuniary obligations imposed by that award within its territories as if it were a final judgment of a court in that State."[22]

Unlike the United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention), under which enforcement may be refused by domestic courts on specified grounds, the ICSID Convention establishes a self-contained enforcement regime, with challenges to an award confined principally to the limited annulment grounds under Art. 52, which are considered by an *ad hoc* Committee constituted under the Convention. Enforcement under ICSID only requires the relevant party to present a copy of the award certified by the Secretary-General for courts to verify its authenticity.[23]

This is opposed to enforcement under the New York Convention which is subject to exceptions set out in Article V (including the invalidity of the arbitration agreement and violation of public policy, which are not in the ICSID Convention). Therefore, the ICSID

enforcement regime avoids the need for parallel proceedings in multiple fora.

Nevertheless, there are also certain risks associated with such contract-based investment arbitrations which also need to be highlighted. Tribunals often tend to elevate a transaction subject to dispute to the international plane and marginalising the applicable municipal law governing the contractual relationship.

The IIC Project has further stated that international law provides a protection mechanism to such contractual disputes and hence should not be excluded from such contractual settings.[24] In *Cambodia Power Company v. Kingdom of Cambodia*, an ICSID tribunal deriving jurisdiction from contractual agreements governed by English law also found itself competent to decide claims for breach of customary international law.[25]

As per the tribunal, the choice of English law had the effect of including customary international law through the doctrine of incorporation, in the absence of explicit exclusion of customary international law by the parties.[26] This however undermines the principle of sovereign consent for submission of disputes to any international judicial forum.

Additional concerns would include how such contractual frameworks balance the right to regulate with predictable investment environment and how to contractualise international law standards like legitimate expectations and fair and equitable treatment (FET), considering States' right to regulate in public interest.

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Rethinking applicable law in ISDS

by Tanvi Praveen



Discussions on reforming ISDS, largely channelled through UNCITRAL Working Group III, have focused on procedural architecture.

Yet an equally important dimension of reform lies in a more foundational question: what law should govern an investment dispute?

Under a BIT, the governing framework is primarily public international law, whereas under an investment contract, it is rooted in the law designated by the parties, typically the host State's law.[1]

Party Autonomy and Article 42 of the ICSID Convention

Art. 42(1) of the ICSID Convention starts with party autonomy, i.e., tribunals apply the rules of law agreed by the parties. Absent agreement, the tribunal applies the host State's domestic law, including its conflict-of-laws rules, together with applicable international law.[2] While parties may subject different issues to distinct legal systems or select transnational instruments such as the UNIDROIT Principles,[3] most parties choose host-State law, either alone or with general principles of international law.[4]

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When the ICSID Convention was drafted, the investment contracts were the principal legal vehicle for protecting foreign investment.[5]

From Klöckner to treaty claims

In *Klöckner vs. Cameroon*, the *ad hoc* Annulment Committee treated international law as: (1) complementary to the chosen domestic law by the parties to fill any lacuna in the law of the State; or (2) corrective, where the domestic law departs from the principles of international law, but the basis of the arbitrator's decision cannot be solely on the principles of international law.[6] *Amco vs. Indonesia* (Resubmitted case) subsequently broadened the role of international law where the arbitral tribunal disagreed with framing international law as a mere supplemental role or corrective mechanism.[7] This divide persists as to whether international law is supplementary or may operate issue by issue alongside municipal law.[8]

Treaties changed the landscape. Where the cause of action is a BIT, the treaty supplies the investor substantive rights. In *Wena Hotels vs. Egypt*,[9] the Annulment Committee accepted that since the cause of action was under the United Kingdom-Egypt BIT, the applicable law governing the dispute is international law.

*LG&E vs. Argenti*na[10] confirmed that a State cannot justify non-compliance with international obligations by asserting the provisions of its domestic law. *AAPL vs. Sri Lanka*[11] nevertheless demonstrated that a treaty is not a closed legal system.

Scholars stress interplay rather than hierarchy. As George Bermann explains, the terms of the applicable treaty or contract normally govern the merits of an investor-State dispute, while the gaps in those instruments make recourse to international law unavoidable; the national law governs the ancillary questions of the lawfulness of the investment.[12]

The demarcation is critical when the same conduct triggers both contractual and treaty claims. In *SGS vs. Philippines*, the Tribunal observed that a contractual obligation by itself is not a breach of international law and is subject to the governing law of the contract, although an umbrella clause may create a separate treaty obligation.[13]

James Crawford identified when contractual jurisdiction can be invoked in treaty proceedings – the contract must: (1) relate to an investment, (2) be

with the State itself, and (3) lack its own dispute resolution clause.[14] A tribunal should therefore identify the source of each claim and the law applicable to each issue. That prevents the broad treaty standards from overriding the choice of law agreed by the parties.

The categories are also less distinct than they appear. Charles N. Brower has argued that contract-based disputes involving States or state-owned entities are closer in kind to treaty arbitrations than to commercial arbitrations. He described them as "investomercial arbitrations" because plain "commercial arbitration" is an inadequate label for them.[15] Laurence Boisson de Chazournes has noted a blurring of the lines on applicable law in private-public arbitration.[16] Hugo Perezcano, however, disagrees with both Brower and Chazournes since causes of action and applicable law differ.[17]

A reform agenda

A boilerplate clause incorporated without much deliberation stating that the contract is governed by host-State law leaves open regulatory change, stabilisation and interaction of contract and treaty claims. Reform should therefore begin before a dispute reaches the tribunal. Four measures merit consideration.

First, adopt a structured hierarchy establishing the legal system that would govern the rights and obligations of the parties; and express conflict-of-law rules stating whether international law operates cumulatively, supplementarily or correctively.

Second, address stabilisation expressly: the ICSID Paper distinguishes freezing clauses from economic-equilibrium clauses that preserve project balance through renegotiation or compensation.[18]

Third, tribunals should provide issue-wise, reasoned decision on applicable law, which would improve predictability.

Finally, parties should use emerging transnational tools deliberately, such as ICSID's revised Model Clauses and the 2026 UNIDROIT/ICC work on Principles and Model Clauses for International Investment Contracts.[19]

"Applicable law" clauses deserve to be treated not as boilerplate clauses, but as central instruments of investment governance and dispute settlement.

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Why contract-based disputes still sit within investment law: a caseload analysis

by Sneha Karthikeyan

As of 31 December 2025, 175 of 1,085 ICSID registered cases were founded upon a contract as the basis of the parties' consent to arbitration or conciliation. Of those, 83% used a contract as the sole basis of consent, with no treaty involved.

Under Art. 25 of the ICSID Convention, ICSID has jurisdiction over "any legal dispute arising directly out of an investment" between a Contracting State (or its constituent subdivision or agency) and a national of another Contracting State, provided the parties consent in writing. This consent can be established through a contract containing an ICSID arbitration clause, without reliance on BITs.

Once a dispute falls within this framework, the arbitration is delocalised, immune from review by domestic courts, subject to annulment only on the limited grounds set out in Art. 52, and enforceable under Art. 54 in all 158 Contracting States as if the award were a final judgment of a domestic court in that State, a regime distinct from ordinary commercial arbitration.

Art. 25(2)(b) of the Convention, which allows a locally incorporated company to be treated as a foreign national where it is under foreign control, was invoked in 79 of the 175 contract-based cases (45%). Separately, a constituent subdivision or agency of a State (such as a State-owned company or municipality) was a party in 29 of the 175 cases (17%), 26 as respondent or co-respondent, and 3 as claimant or co-claimant.

The ICSID caseload at a glance

Of the total cases registered with ICSID by December 2025, 175 cases were based upon a contract between the parties (16.1%), while 629 cases (58%) are based upon a BIT. Of those that are based upon a contract, 83% of those cases are based solely upon that contract as the basis for the agreement between the two parties; there is no treaty involved in those cases.

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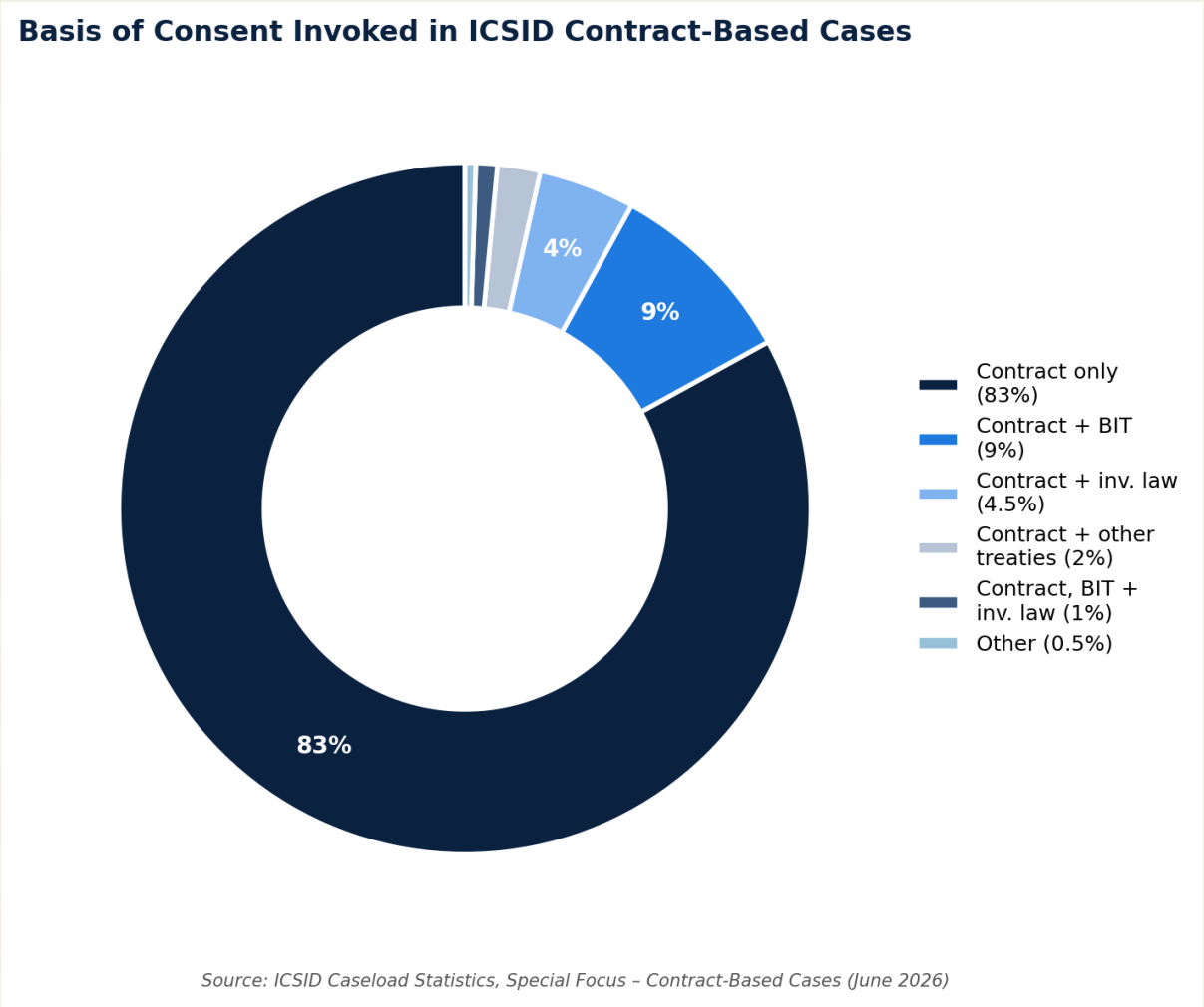


Chart 1: Basis of consent invoked in ICSID contract-based cases.

Sectoral distribution is where contract-based cases diverge most from the wider caseload. Oil, gas and mining are the largest sectors in both, however, far more concentrated among contract-based cases (47%) than across all ICSID cases (26%). By contrast, sectors such as construction, finance, and information and communication are comparatively more prominent in the ICSID caseload as a whole than within contract-based arbitration specifically; the contract-based caseload is more heavily weighted toward extractive and energy-related projects, which are inherently reliant upon long-term contracts with the government of that country.

Additionally, contract-based arbitrations are somewhat more likely to settle than ICSID arbitrations generally. Of the 140

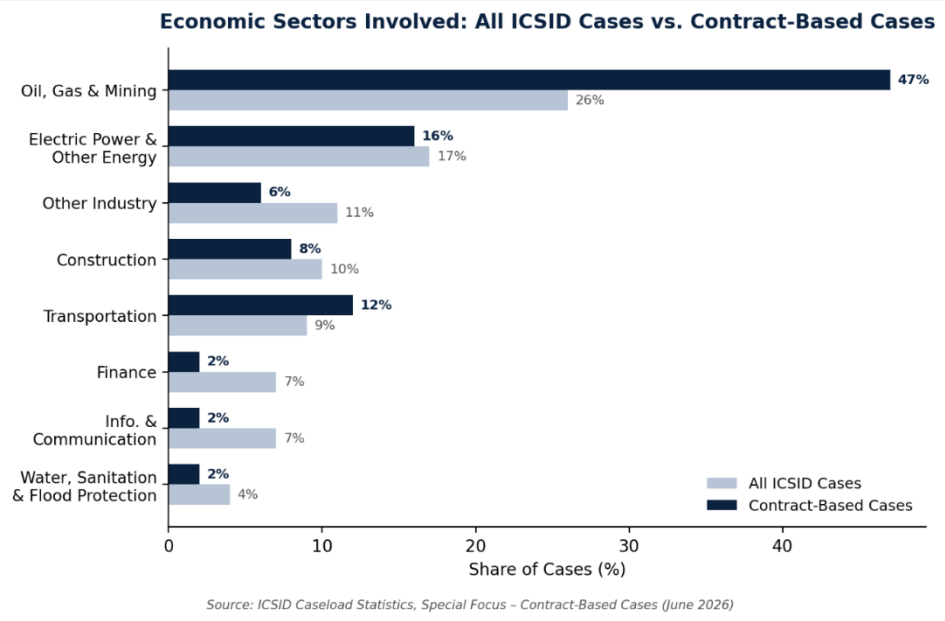


Chart 2: Economic sectors involved- all ICSID cases vs. contract-based cases.

concluded contract-based arbitrations, 43% ended in settlement or discontinuance, compared to 34% across all concluded ICSID arbitrations. Consequently, only 57% of contract-based arbitrations were decided by the tribunal, compared to 66% for the caseload as a whole.

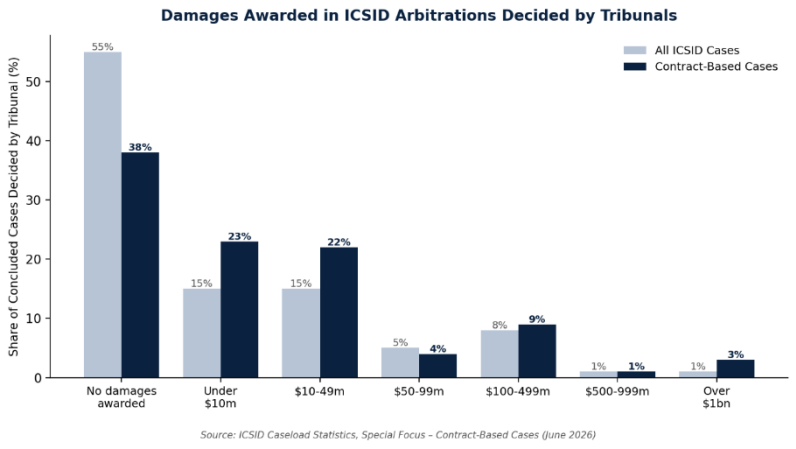
The geographical distribution of contract-based cases is as follows: Africa accounts for 49% of contract-based cases (46% Sub-Saharan, 3% North African), compared to only 21% of the overall ICSID caseload (15% Sub-Saharan, 6% North African). South America accounts for 21% of both datasets equally, while South & East Asia and the Pacific accounts for 11% of contract-based cases versus 6.9% of the overall caseload. By investor nationality, Western Europe accounts for 32% of contract-based cases and North America accounts for 17%.

Compensation outcomes in contract-based ICSID arbitrations

Of cases that concluded and were decided by the tribunals, only 38% of cases based upon a contract resulted in the awarding of no damages to the claimant, compared to 55% of the cases decided by a tribunal across the overall ICSID caseload. Additionally, 3% of cases based upon a contract awarded damages of over $1 billion to the claimant, compared to only 1% of the tribunal's caseload.

Of 88 ICSID Convention awards rendered in contract-based cases, 28 annulment proceedings have concluded, with only 7 resulting in the award being annulled in whole or in part. Among contract-based awards ordering *Chart 3:*

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Damages awarded in concluded ICSID arbitrations decided by tribunals.

payment of damages with a known outcome, 92% were voluntarily complied with or settled, and a further 3% were successfully enforced, for a combined satisfaction rate of 95%.

Counterclaims are also more common in contract-based disputes than in treaty-based arbitration, reflecting the reciprocal nature of investment contracts.

Respondents raised counterclaims in 42 of the 175 contract-based arbitrations (26%). Of the 35 of these cases that have concluded, tribunals accepted jurisdiction over the counterclaims in 26 cases and upheld them in whole or in part in 11 cases – a 31% success rate.

In cases in which the claimants did recover from the tribunals, those awards were actually higher relative to the claimants' initial claims than in the caseload overall. Of contract-based ICSID arbitrations with awarded monetary amounts, 34% resulted in the claimants recovering between 76-100% of their claimed amount, compared to only 21% across all ICSID arbitrations.

Contract-based cases also tend to resolve in less time than the overall ICSID caseload, with an average period of 40 months to conclude contract-based cases versus 47 months for all cases in the tribunal's caseload.

This pattern holds using either duration measure: from tribunal constitution to conclusion, contract-based arbitrations average 36 months, compared to 43 months across the overall ICSID caseload.

Observations

Ultimately, the ICSID caseload analysis demonstrates that contract-based dispute resolution is not an outdated precursor, but a vital, self-contained pillar of international investment law. By accounting for 16.1% of ICSID's overall caseload, with 83% relying exclusively on the contract as the sole basis of consent, it is observed that, contractual mechanism provides a distinctively

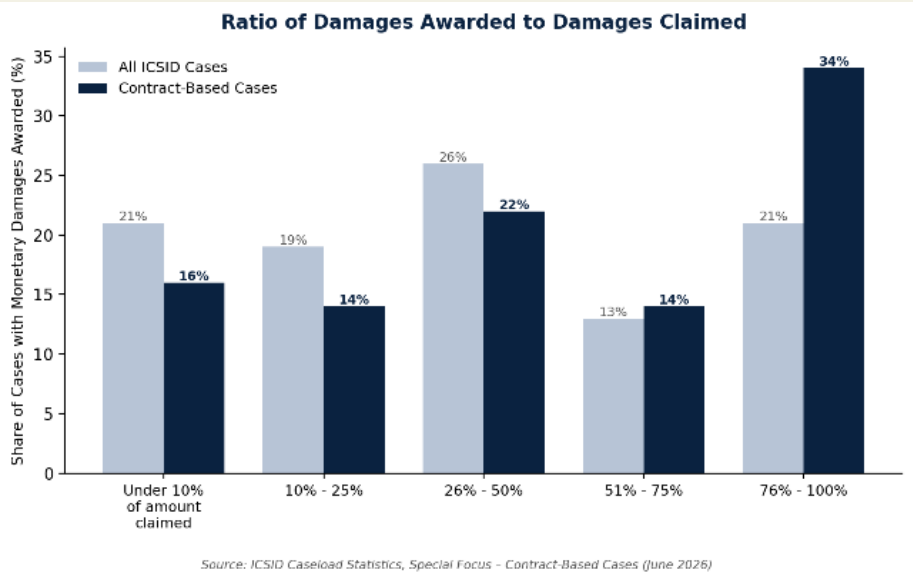


Chart 4: Ratio of damages awarded to damages claimed.

commercial and pragmatic model of legal protection.

As negotiated investment contracts establish explicit and specific commitments rather than open-ended treaty standards like FET, tribunals render higher investor success rates (62% awarded damages vs. 45% overall) and higher recovery ratios (34% recovering 76–100% of claims vs. 21% overall).

The contractual route encourages higher settlement rates (43% vs. 34%), faster proceedings (40 vs. 47 months), effective award compliance (a 95% satisfaction rate), and a meaningful forum for State counterclaims (raised in 26% of cases and upheld in 31%).

Concentrated heavily in long-term extractive projects (47%) and in Sub-Saharan Africa (46%), contract-based dispute resolution shows that binding contractual commitments offer host States and foreign investors a balanced, predictable, and mutually accountable alternative to international investment treaties. The analysis reflects that contract-based arbitration occupies a vital position within the ICSID framework and that contract-based investment arbitration offers distinct structural and procedural advantages over traditional treaty-based arbitration.

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The best-laid plans of mice and men: change of circumstances and investment protection

by Shagnik Mukherjea



Introduction

The UNCITRAL Working Group III has spent nearly a decade developing proposals to reform the procedural framework of ISDS. These include an appellate process, an investment court, procedural and cross-cutting reforms, an advisory centre, and a code of conduct for adjudicators.[1] However, all of these proposals leave the substantive standards of investment protection untouched. This is partly a consequence of UNCITRAL Working Group III's mandate, but it also reflects the fact that substantive reform ultimately requires States themselves to renegotiate their investment treaties. Thus, even a substantially reformed ISDS system would still have to confront broad standards such as FET, indirect expropriation, most-favoured-nation (MFN) treatment and full protection and security.

The UNIDROIT-ICC Working Group on International Investment Contracts has taken a different approach. Its 2026 draft Model Clauses (the "UNIDROIT Draft Clauses"), subject to adoption in October 2026, suggest that at least some investment protection could be built into the investment contract itself.[2] Instead of relying on general standards contained in treaties, the parties to a particular project could negotiate the allocation of regulatory and commercial risk directly.

The case for this approach is straightforward. Treaty-based investment protection is a broad instrument for protecting what is ultimately a specific, long-term and capital-intensive relationship. BITs apply across investments that a State may host, using standards drafted without a particular project in mind and interpreted by tribunals years after the particular investment was made. In contrast, an IIC is negotiated for a particular investment and can address its specific risks and circumstances. Contractualisation would therefore not eliminate investor protection but would only move its structure from an inter-State treaty to an agreement negotiated by the parties to the investment itself.

Of particular relevance in this approach is the example of change of circumstances. It exposes a structural weakness often found in investment treaties. International law provides numerous mechanisms for exceptional circumstances, but very few for allocating the ordinary risk of regulatory change. The UNIDROIT Draft Clauses thus seek to fill this gap through stabilisation, renegotiation and adaptation mechanisms rather than through an open-ended substantive standard.

Change of circumstances and the limits of existing options

Treaty law offers States only a limited means of escaping obligations when circumstances change. Art. 62 of the VCLT,[3] reflecting customary international law,[4] permits a State to invoke a fundamental change only where the original circumstances constituted an essential basis of consent and the change radically transforms the extent of obligations still to be performed. The change must also have been unforeseen and cannot result from the invoking State's own breach. Given the underlying principle of *pacta sunt servanda*, Art. 62 is generally regarded as an exceptional remedy.[5] It is thus entirely ill-suited to the ordinary

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problem confronting long-term investments of whether unforeseen regulation has materially altered the economic bargain underlying an investment.

Consequently, it leaves States and investors to rely on two principal options:

First, police powers may prevent a bona fide, non-discriminatory and appropriately justified exercise of regulatory authority from constituting an indirect expropriation. But they do not provide a general mechanism for changed circumstances. They only determine whether a measure amounts to expropriation and do not necessarily address FET, specific commitments, or the broader economic equilibrium of the investment. Moreover, their precise content, including the role of proportionality, also remains unsettled.[6]

Second, essential security interests (ESI) clauses may protect measures taken to safeguard a State's security interests. But a treaty ESI clause is quite distinct from the customary defence of necessity under Art. 25 of the ILC Articles on State Responsibility.[7] The starting point must therefore be the particular treaty and its interpretation under Arts. 31 and 32 of the VCLT.[8] Unlike necessity under Art. 25, which operates as a circumstance precluding wrongfulness, an ESI clause may operate as an exception to the substantive treaty obligation itself. Its scope thus depends on the precise language agreed by the parties, including whether and to what extent the clause is self-judging. Thus, different treaty language may produce entirely different outcomes.

Ultimately, these doctrines perform different functions. Police powers delimit the scope of compensable expropriation, while ESI clauses and necessity address whether particular State conduct is protected in exceptional circumstances. None provides a general mechanism for allocating the *ex-ante* risk of regulatory change. A State, for instance, may successfully defend a claim under either of these options without answering the distinct, and perhaps more important, question of who should bear the economic consequences of regulation that was foreseeable as a possibility but impossible to account for when the investment was made.

UNIDROIT Draft Clauses' alternative of contractualisation

The UNIDROIT Draft Clauses address this gap more directly. Principle 23(1)

permits parties, where appropriate, to adopt stabilisation and renegotiation mechanisms.[9] It contemplates economic-equilibrium, fiscal-stabilisation and hybrid approaches rather than traditional freezing clauses. In this regard, an economic-equilibrium mechanism can require renegotiation where a State measure materially affects the investor's expected economic position, while a fiscal-stabilisation mechanism can preserve specified tax or customs treatment for an agreed period and provide compensation where that treatment changes.

More importantly, the UNIDROIT Draft Clauses also define the limits of stabilisation. Specified measures adopted in good faith, on a non-discriminatory basis and in the public interest, including measures protecting human rights, public health and the environment, addressing climate change or upholding labour standards, are excluded.[10] The relevant question therefore becomes not simply whether the State was entitled to regulate, but whether the parties had already accounted for the costs of such regulation when the investment was made.

This also helps make contractualisation more precise than treaty protection. An IIC can specify the measures covered by stabilisation, the threshold for renegotiation as well as the consequences of a failed renegotiation. The tribunal is thus less likely to (re-)construct the parties' allocation of risk from broad standards and more likely to enforce the bargain they actually agreed.

Principle 24 applies the same logic to force majeure.[11] Rather than creating an investment-specific doctrine, it largely relies on Art. 7.1.7 of the UNIDROIT Principles, while recognising that parties to long-term investments may prefer suspension or renegotiation to termination.

Conclusion

Contractualisation cannot replace the institutional reforms pursued by UNCITRAL Working Group III, nor can it resolve the broader legitimacy concerns surrounding treaty-based ISDS. IICs govern only specific projects and may even reproduce bargaining inequalities between States and investors. They may also help fragment investment protection, with similarly situated investors receiving different protections depending on the terms of their contracts.

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These limitations, however, do not diminish the significance of the IIC Project. Its value lies in addressing a gap that treaty-based protection struggles to fill: the *ex-ante* allocation of project-specific regulatory risk. Art. 62 of the VCLT is too exceptional to address ordinary regulatory change, while police powers, security exceptions and necessity each address narrower questions of State responsibility. Contractual stabilisation and renegotiation mechanisms can instead determine, before a dispute arises, how the economic consequences of regulatory change are to be shared.

The more useful approach is therefore complementary. A reformed ISDS framework can provide the procedural architecture, while IICs can provide a more precise allocation of substantive rights, regulatory freedom and risk. Such a complementary framework deserves greater attention in the broader ISDS reform debate.

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Critical minerals and investor accountability: using investor-State contracts to resolve the sustainability paradox

by Sujaya Sanjay



Future historians seeking to document the twenties of this century, unlike their predecessors, would not be likely to use the word 'roaring' in their descriptions of the current era. The geopolitical uncertainty and cynicism that set in following the COVID-19 outbreak has now become an inescapable part of the global economic landscape.

As a result, global supply chains continue to remain under severe strain, causing a cascading impact on prices and the cost of living. Further, the ongoing transition to green energy has acquired greater momentum from soaring oil prices.

In the midst of this turmoil is the race to secure the supply of critical minerals. This select group of minerals, identified varyingly by each nation based on the criteria of supply risk and economic importance,[1] is now increasingly viewed through the prism of national security and economic resilience.[2]

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This creates an odd sort of paradox, where accelerating the green energy transition leads to unfettered extraction of critical minerals, which in turn causes ecological imbalance.

Mineral-scarce States are clamouring to secure access to mining blocks for these minerals to secure energy independence and boost advanced manufacturing, while mineral-rich States are seeking to leverage their sovereignty over these resources as a gateway to development and prosperity, and in some extreme cases, their independence.[3]

At this moment, the ISDS system appears to be having its moment of reckoning. With the ISDS reforms process at an advanced stage at UNCITRAL Working Group III and a general shift away from the neoliberal principles that underpinned old-generation BITs, there is a greater appetite for a balanced regime that does not eschew public interest in favour of a private foreign enterprise.

However, ISDS remains the preferred tool for investors in the business of resource extraction, and resource extraction remains the sector most exposed to ISDS claims. Data indicates that vast majority of ISDS cases registered at ICSID pertain to the oil, gas, and mining sector.[4] Interestingly, contract-based claims significantly outstrip the treaty-based claims in this sector.[5]

Generally, traditional BITs contain broad standards of protection that appear to have a pro-investor tilt. When concerned with critical minerals, this overall refers to technologically advanced capital-exporting countries that birth multinational mining and resource extraction enterprises.

For mineral-rich geographies, which tend to be capital importers, the traditional investment treaty framework presents no incentive due to the high costs and invisible benefits.[6] Additionally, the causation between BITs and attracting foreign investment has increasingly been called into question by States.[7]

Investor accountability is therefore a serious issue to contend with when contemplating the framework for cooperation in critical minerals. This is particularly true where profiting from resource extraction clashes with sustainability policies and environmental, social and governance (ESG) objectives.

Modern BITs have sought to correct this by introducing investor obligations. For

instance, Art. 13 of the India-UAE BIT contains obligations on corporate social responsibility.[8]

More and more BITs today contain chapters and provisions on investor obligations with a focus on non-investment considerations like ESG, responsible business practices, anti-corruption and anti-bribery, human rights, and labour protections.

However, their enforcement outside the paradigm of the host State's domestic law remains elusive. Currently, the only mechanism of enforcing these obligations under the treaty is through counterclaims.[9]

Enforcing sustainability obligations through counterclaims

The high procedural standards for admitting counterclaims (under Art. 46 of the ICSID Convention, for instance) has rendered counterclaims a rarity in treaty-based arbitrations, despite some limited success.[10]

Nonetheless, as Crawford observed, allowing counterclaims "*seems desirable as a matter of policy as well as law. Despite the inherently asymmetrical character of a BIT, BIT tribunals should be able to hear closely connected investment counterclaims under the investment contract. Otherwise, the maxim pacta sunt servanda operates in only one direction.*"[11]

The UNIDROIT/ICC Principles also embody the rights of both parties to bring a claim against each other, thereby addressing the underlying asymmetry in treaty-based arbitrations.[12]

The growing importance of critical minerals provides an impetus to States to adopt as many measures as they consider feasible to mitigate risk. In addition to risks arising out of the host State's exercise of political authority, States also have to contend with modern regulatory risks to deal with like emergency crises, public health measures and so on.

The uncertainties of today's geopolitical climate create external risks for the investor that are beyond the State's control, which may arrive unexpectedly in the form of armed conflicts, economic sanctions, and other such measures.[13]

From the perspective of creating supply chain security for critical minerals, such will only serve to dampen investor confidence. This, in turn, will not benefit the State that is looking to generate economic growth and employment from resource extraction that it is seeking to fulfil its national security and economic resilience needs, as pointed out above.

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Both the investor and the State would therefore benefit from a planned and mutually beneficial strategy for investment that preserves the State's regulatory space while also mitigating sovereign risk to raise investor confidence to infuse large sums into the host State's territory.

Currently, long-term offtake agreements are the most commonly deployed instrument for critical minerals extraction.[14] Offtake agreements are important components of project financing contracts which seek to mitigate long-term risk and offer stable cash flow through fixed or contractually adjusted prices for ten or more years in the future.[15]

Thus, an offtake agreement between a mining company and a State for extraction of, say, lithium would involve long-term commitments by the State to purchase the lithium extracted by the mining company at fixed terms and prices as per the contract. Such contracts generally contain stabilisation clauses which when taken to dispute could have an impact on the strategic autonomy of States. However, properly negotiated stabilisation clauses that set expectations regarding non-investment concerns at the outset may provide protections to the investor without compromising on the State's right to regulate. [16]

Furthermore, unlike in a BIT which is negotiated between States, investors would have direct control over the negotiating process and the obligations that they would sign up for. In this regard, the UNIDROIT/ICC Principles may serve as a benchmark for investment protection standards offered to foreign investors.[17]

Lastly, an effective counterclaims regime is necessary to correct the perception of "pro-investor" bias that has crept into the ISDS system. A contract regime like the one described above achieves this easily, without running into the types of jurisdiction and admissibility hurdles faced in treaty-based arbitrations, and without resorting to the legal fiction of the investor as a legal person in international law, capable of consenting to treaty obligations and which may have unintended consequences for the State itself.[18]

Conclusion

In uncertain times like these, investors and States face the unenviable task of managing risk allocation with an ever-growing list of competing considerations such as energy transition, public interest

and the right to regulate, increasing investor confidence and attracting foreign investment, while simultaneously putting in place a regime to ensure responsible and sustainable extraction of critical minerals, all in the backdrop of armed conflict and the throttling of supply chains.

Under such circumstances, the treaty-based model of investment protection might not suffice to meet the needs of both the investor and the State. A sound, consensus-based global governance framework grounded in sustainable development might be decades in the making. In the meantime, while national security interests rule the roost, investment contracts may well be the best way forward to promote investment activity in critical minerals while preserving policy space to ensure their responsible extraction.

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Reforms in international investment law

by Kailas Surendran



Image Source: Google Images

International Investment Agreements (IIAs) carry the promise of protection to foreign investors and their investments (non-discrimination, FET, protection against unlawful expropriation, and free transfer of funds).

At present, based on UNCTAD Data, there are more than 3000 IIAs and well over 1,400 known treaty-based ISDS cases.

Yet, IIAs and international investment law face a "legitimacy crisis". This legitimacy crisis is attributed to a plethora of reasons such as regulatory chill because of IIAs, lack of independence and impartiality of arbitral tribunals, cost of the proceedings, and hefty compensations imposed on States, among others.

To this end, reform in international investment law has three parallel roads: 1) substantive reform in international investment law; 2) reform in ISDS; and 3) multilateralisation in international investment law.

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Substantive reform in international investment law

Substantive reform arose out of the concern that old-generation IIAs overly favoured investor protection over States' regulatory space, expansive interpretations of obligations such as FET and broad definitions of investment led to arbitral tribunals imposing millions (sometimes, billions) of dollars in damages against States for breach of IIAs. This ultimately led to "regulatory chill", where States became reluctant to regulate, for fear of incurring future breaches.

States eventually started terminating these old-generation treaties to negotiate more balanced IIAs. For instance, India terminated all its IIAs in 2016 and more recently, several European Union Member States withdrew from the Energy Charter Treaty to allow States to regulate in the non-renewable energy sector.

To avoid the negative perception that IIAs unduly favour investments and investors, States started imposing obligations on investors within their IIAs. To ensure positive impact of foreign investment, obligations relating to corporate social responsibility and environmental considerations are imposed on investors within IIAs.

States also enforce these obligations through counterclaims in ISDS disputes. For example, in *Burlington vs. Ecuador,* the tribunal held the investor liable for environmental damage through a counterclaim brought by Ecuador. More recently, India has incorporated detailed provisions for counterclaims in the India-Uzbekistan BIT.

Procedural reform in international investment law

Procedural reform refers to the reform of ISDS itself. Concerns within the ISDS mechanism has largely contributed to the legitimacy crisis in international investment law.

Mainly, issues such as impartiality within arbitral tribunals, double-hatting of arbitrators (where they act as arbitrators and counsel for investors), lack of diversity in the arbitrator pools, and third-party funding remain unaddressed and are also within the mandate of the UNCITRAL Working Group III reform process.

UNCITRAL Working Group III and States are working on procedural reforms relating to the conduct of arbitrators and to ensure the pool of arbitrators does not remain

homogeneous. Countries have been identifying procedural mechanisms to ensure that there is a diverse group of arbitrators and panellists, especially from developing countries and Global South, since these countries are respondents in a large number of ISDS disputes.

Third-party funding adds to the legitimacy crisis in international investment law, where third-party funders allow investors to bring frivolous claims against States in the hope of financial gain. To ensure that third-party funding can only be used for legitimate purposes, the UNCITRAL Working Group III has put forth draft text to regulate third-party funding in ISDS disputes through reporting requirements and other transparency requirements. In certain instances, the UNCITRAL Working Group III has also proposed to prohibit third-party funding as well.

States, along with UNCITRAL Working Group III, are also looking at how to reduce the number of ISDS disputes. For instance, the UNCITRAL has adopted the Toolkit on Prevention and Mitigation of International Investment Disputes (the "Toolkit"). The Toolkit is intended to assist States in identifying and implementing effective measures to prevent and mitigate investment disputes. Rather than prescribing specific solutions or promoting best practices, the Toolkit presents a range of approaches currently employed by States. It acknowledges that each State must develop its own approach based on its legal and institutional framework.

States have also been developing domestic frameworks to mitigate ISDS disputes or manage ISDS disputes. For instance, Brazil has historically followed a model BIT without an ISDS mechanism and largely relies on State-State Dispute Settlement (SSDS) or State-State cooperation.

On the other hand, Peru has created a domestic framework known as the Coordination and Response System for International Investment Disputes, also known as "SICRECI" for its acronym in Spanish, to manage the practical challenges of coordinating the State's defence in ISDS mechanisms.

States are also completely moving away from ISDS mechanisms. Australia has taken a policy decision not to include ISDS provisions in any future IIAs and only includes provisions for SSDS in its IIAs. At the same time, States are preserving their policy space to admit investments into their country from

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ISDS disputes. For example, countries like Canada, New Zealand and Australia completely carve out their investment screening mechanisms from ISDS mechanism and other dispute settlement mechanisms such as the Free Trade Agreement (FTA) dispute settlement.

This movement towards a structured/reformed dispute settlement mechanism, while retaining policy space for States, indicates that States want to legitimise the process of dispute settlement in international investment law by bringing in procedural reforms to the ISDS mechanism and revamping the system completely.

Multilateralisation of international investment law

At present, international investment law is governed by a network of bilateral IIAs. There is no multilateral agreement governing investment protection. There is also no permanent multilateral dispute settlement mechanism for investment law, similar to the Dispute Settlement Mechanism in the World Trade Organization (WTO).

To this end, States, including at UNCITRAL Working Group III, are planning to create a standing mechanism for investment disputes, including an appellate mechanism. This is largely undertaken by the European Union (India has not joined the initiative). This transforms the *ad hoc* nature of investment arbitration into an institutionalised dispute settlement mechanism, with a secretariat, a list of pre-selected arbitrators (who will be selected by the Member States), fixed procedures and a standing appellate tribunal to review the decisions of the tribunal.

Furthermore, in 2026, UNCITRAL Working Group III adopted the draft rules for the establishment of an Advisory Centre for Investment Disputes. Akin to the Advisory Centre for WTO Law, the proposed advisory centre aims to assist developing countries in ISDS disputes, especially with respect to legal issues.

The aim of the Centre is to provide capacity building to developing countries and provide legal assistance with respect to ISDS disputes. This can possibly reduce litigation costs for countries without compromising on the proceedings.

Going beyond international treaties – investment contracts

While foreign investment is largely regulated internationally through a

network of bilateral IIAs – domestic law also plays an important role in regulating investment, especially at the national and sub-national levels. This is achieved through investment contracts, which are legally binding agreements between a government, including its SOEs and a foreign investor.

These agreements generally take the form of concession agreements, public-private partnerships, leases and procurement contracts. They can set out fiscal arrangements, performance obligations, commitments not to change the regulatory environment, and dispute-settlement mechanisms.

In this context, it is important to have reform in investment contracts in parallel with reform of international investment law and ISDS mechanism. In particular, outdated provisions like the stabilisation clause–which provides a commitment to the investor not to change the regulatory environment–can bring back "regulatory chill" at the domestic level.

Even where treaties have been reformed to include modern safeguards against regulatory chill, such legacy clauses in commercial contracts can undermine or neutralise treaty reforms by binding governments to more restrictive obligations at the domestic level.

There is also growing exposure to ISDS mechanisms through investment contracts. In other words, there is a trend where ISDS disputes are based on domestic commercial contracts. To this extent, dispute settlement in investment contracts should be more flexible. For example, investment contracts should ideally prefer and promote Alternative Dispute Resolutionsuch as conciliation and mediation over long-drawn arbitration, which has significantly higher costs than the former. An example is the "Guidelines for Arbitration and Mediation in Contracts of Domestic Public Procurement" issued by the Department of Expenditure, Ministry of Finance, which encourage mediation and other ways of amicable dispute resolution in domestic procurement contracts.

Reforming treaty-based arbitration in isolation risks simply shifting disputes into contracts. Therefore, it is essential to integrate investment contracts into the wider reform agenda for a coherent and transparent investment governance framework.

Conclusion

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International investment law is in the middle of a profound transition. The legitimacy crisis surrounding investment treaties has pushed States to act on several fronts at once: rebalancing treaty obligations so that investor protection no longer comes at the expense of regulatory space, reforming ISDS mechanism and exploring multilateral solutions such as a standing investment court, an appellate mechanism, and an Advisory Centre for Investment Disputes. Together, these developments show that States are determined to make the system fairer, more transparent, and more accountable.

Yet reform at the international level will only go so far if the domestic layer of investment governance is left untouched. Investment contracts, with their outdated stabilisation clauses, can reintroduce the very regulatory chill that investment treaty reform seeks to remove.

A coherent reform agenda must therefore treat IIAs, domestic laws, and investment contracts as parts of a single framework. Only a coherent reform in investment law can ensure that foreign investment supports, rather than constrains, States' interests and supports development.

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Counterclaims in investment contracts: consent where it belongs

by Sarthak Raj



Image Source: Canva

In *Kappes v. Guatemala*, the investor argued that the tribunal lacked jurisdiction over a counterclaim under Dominican Republic-Central America FTA, as there was no consent by them. Therefore, the counterclaim could not proceed beyond the jurisdictional stage. The case exposed that the absence of clear consent rules for counterclaims remained a significant procedural challenge for the host State.

Similarly, in *Iberdrola vs. Guatemala*, the State claimed for its legal costs and moral damages from an investor that had brought the same grievance before three different fora. The tribunal declined jurisdiction as the treaty provided for only disputes submitted by 'the investor'.[1] Subsequently, in *Goyne vs. Nicaragua*, an environmental counterclaim also failed, although the tribunal accepted that the treaty was broad enough in principle.[2]

Both States lost for one reason: that nothing in the treaty recorded the investor's consent to being sued back. Investment contracts begin from a different place and show a continuing imbalance within the ISDS framework that the ongoing UNCITRAL reform seeks to address.

Starting Point

In a contract, the arbitration clause is the source of consent for claimant and

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respondent alike, so the respondent's right to counterclaim follows from the bargain itself. UNIDROIT's draft Principle 33 notes the contrast with treaty cases, where the investor starts the case alone and the State's counterclaim depends on treaty text, institutional rules and interpretation.[3]

The ICSID record supports the same point.[4] As of 31 December 2025, respondents had filed counterclaims in 42 contract-based cases, 26% of the total.[5] Tribunals accepted jurisdiction over, or found admissible, counterclaims in 26 cases and upheld them in whole or part in 11 cases.

Among concluded cases, 31% succeeded, appearing higher than in treaty disputes.[6] For a State more used to defending than claiming, these are not small numbers.

Consent is necessary, not sufficient

Art. 46 of the ICSID Convention asks three questions, namely, (1) does the counterclaim arise "directly out of the subject-matter of the dispute", (2) is it within the parties' consent, and (3) is it within the Centre's jurisdiction?[7] The cases show that contract wording still decides outcomes.

Tribunals have turned away counterclaims for tax fraud because the duty comes from general law, not from the investment agreement; and a counterclaim about unsuitable vessels because the clause covered only performance of the contract.[8]

Even where jurisdiction was found, the merits closed the door. For instance, in *BSGR vs. Guinea*, counterclaims based on alleged corruption met the connection requirement, yet were held inadmissible under the principle that a party cannot profit from its own wrong. Similarly, in *Amco vs. Indonesia*, a State could not rely on breaches triggered by its own earlier non-performance.[9]

The practical lesson is simple that a counterclaim is only as strong as the obligation behind it. If environmental, labour or community duties are not in the contract, or incorporated into it, the State has little to plead. Where they are, the question becomes one of the clause's scope, not of treaty gateways of the kind that stopped Nicaragua.

Through the lens of UNCITRAL

UNCITRAL Working Group III now proposes that the submission of a claim "constitutes its consent" to counterclaims, provided the counterclaim is closely linked to the investor's claim and alleges breach of a treaty, domestic law, an investment

contract or another binding instrument.[10] Some States, Saudi Arabia among them, fear this stretches consent too far.[11]

UNIDROIT's model clause gives each party the right to counterclaim on all obligations arising out of or in connection with the contract, names sustainability obligations expressly, and States the aim of resolving everything in one proceeding.[12]

The forum still matters while the debate is still pending. UNIDROIT observes that Art. 6 of the ICC Rules does not confine counterclaims to the subject-matter of the dispute, whereas Art. 46 of the ICSID Convention does.

A wide clause under ICSID should therefore be tested against Art. 46 and the investment requirement of Art. 25 before it is relied upon.

Efficiency is not consent

The *Iberdrola* tribunal accepted that counterclaims promote efficiency but held that its role was to apply the treaty, since going further would mean making policy choices that belong to States, as also agreed by the *Goyne* tribunal.[13] That reasoning is a fair description of treaty arbitration. In a contract, States and investors make that policy choice themselves.

Conclusion

Counterclaims in investment contracts do not need reform, rather they need an articulated drafting. Against this context, three steps follow requiring to place the investor's public-interest duties in the contract; record, in terms, each party's consent to counterclaims on all matters connected with it; and check the chosen forum's connection test against that wording.

A State that does this will not meet the objection that sank *Guatemala* and *Nicaragua*, because the investor will have already agreed.

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[1] Iberdrola Energía SA vs. Republic of Guatemala (II), PCA Case No 2017-41, Final Award (24 August 2020) paras 363–366, 386–392; see Godwin Tan and Justin Tan, 'Counterclaims in Investor-State Arbitration: A Tale of Two Cases' (2025) 36(1) National Law School of India Review, art 3, section II.A.

[2] Lopez-Goyne Family Trust vs. Republic of Nicaragua, ICSID Case No ARB/17/44, Award (1 March 2023) paras 595–603; Tan and Tan (n 1) section II.B.

[3] UNIDROIT, UNIDROIT/ICC Principles and Model Clauses for International Investment Contract (2026) paras 645-646 (Principle 33 and commentary).

[4] Background Paper, Contract-Based ICSID Arbitration (June 2026). The paper was published on June 30, 2026 with data and statistics as of December 31, 2025.

[5] ICSID, Background Paper on Contract-Based ICSID Arbitration (2026) para 243.

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[6] Ibid, para 248.

[7] Convention on the Settlement of Investment Disputes between States and Nationals of Other States (adopted 18 March 1965, entered into force 14 October 1966) art 46; Background Paper (n 4) paras 244-245.

[8] Amco vs. Indonesia, Decision on Jurisdiction (Resubmission) (10 May 1988) paras 122-127; MMS vs. Central Africa, Award (12 May 2011) para 447; Atlantic Triton vs. Guinea, Award (21 April 1986) (1995) 3 ICSID Reports 39; all as discussed in Background Paper (n 4) pp. 360-361.

[9] BSGR vs. Guinea, Award (18 May 2022) paras 1093-1095, 1110; Amco vs. Indonesia, Award (Resubmission) (5 June 1990) paras 157-162; Background Paper (n 4) p. 365.

[10] UNCITRAL Working Group III, Draft Provisions on Procedural and Cross-Cutting Issues (2025), Draft Provision 10, as discussed in Li Yi, 'Reassessing Consent in Counterclaims: Rebalancing Investment Protection and Public Interest under the UNCITRAL ISDS Reform' (EJIL: Talk!, 27 November 2025).

[11] Li Yi (n 9).

[12] UNIDROIT (n 3) paras 647-650 and Model Clause.

[13] Iberdrola (n 1) para 392; Goyne (n 2) para 605.

Navigating the public law-private law divide in the UNIDROIT-ICC PMCIIC framework

by Radhika Bhakoo



Image Source: ICC headquarters in Paris, iccwbo.org

The international investment regime, largely constructed through a dense network of BITs and other IIAs concluded over the past several decades, is currently undergoing significant scrutiny and reform.

Given the dissatisfaction with international investment law and ISDS in the last decade, a number of States are opting out of the IIA/BIT system by terminating or withdrawing from treaties, or not renewing a treaty upon its expiration, and establishing new templates for future agreements. In some cases, not including arbitration provisions altogether[1] or providing for alternative mechanisms to settle disputes or promote and attract foreign investment.[2] Thus, UNIDROIT and the ICC have jointly developed the UNIDROIT/ICC Principles and Model Clauses for International Investment Contracts (as the "PMCIIC"), indicating a shift towards the use of contracts among the possible solution.

The PMCIIC presents how IICs, i.e., contracts between States, or their controlled entities, and private foreign

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investors, could be modernised, harmonised, and standardised, particularly in light of the Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts (the "UPICC")[3] and ICC standards, to address both investors' concerns and current public policy demands, at the contractual level and therefore mainly from a private law angle.

PMCIIC is framed as a "transnational body of principles", a new tool for investment protection striving to balance investor protection with State regulatory freedom through five main structural mechanisms:

(i) Shift from one-sided disputes to contractual mutuality:

Unlike traditional IIAs and BITs, which frequently grant foreign investors broad rights without enforceable correlative obligations, the PMCIIC embed all rights and duties directly within a contractual framework. Thus, in an IIC, by contrast,[1] both the State (or State-related entity) and the investor assume contractual obligations, and both have access to contractual remedies in the event of non-performance.[4] This includes the State's explicit right to initiate dispute resolution proceedings and file counterclaims against the investor for non-performance (such as breaches of sustainability or environmental commitments).[2]

(ii) From "freezing" clauses to "economic equilibrium":

Marking a distinction between stabilisation clauses, hardship and force majeure clauses, the PMCIIC explicitly move away from traditional, rigid "freezing" or "intangibility" clauses, which severely constrained State regulatory power by prohibiting legislative or administrative changes. Instead, the PMCIIC favour economic equilibrium clauses. When a State enacts new regulations that substantially reduce the investor's expected economic returns, the primary mechanism is not to block or invalidate the regulation, but to trigger good-faith renegotiation between the parties to restore the contract's financial balance. The text recommends economic equilibrium, fiscal, and hybrid stabilisation clauses, specifying that fiscal stabilisation applies only if the contracting party is the State itself or an authorised, State-controlled entity.[5]

(iii) Public interest carve-outs for essential regulations:

To prevent stabilisation provisions from freezing legitimate public policy,

Principle 23(3) creates a strict carve-out: economic equilibrium and fiscal stabilisation clauses do not apply to measures adopted by the State in good faith, in a non-discriminatory manner, and in the public interest to protect human rights, public health, environment and climate change mitigation/adaptation, and labour standards.[3]

When a State measure falls within these public interest categories, the investor cannot demand contract renegotiation or monetary compensation under stabilisation clauses, preserving the State's inherent sovereign prerogative to regulate.[6]

(iv) Defined protections paired with public policy exceptions:

Rather than relying on vague international treaty standards like FET or the protection of legitimate expectations, which have generated unpredictability in arbitral case law, investor protections are defined through clear contract terms paired with explicit exceptions. Expropriation or nationalisation is prohibited unless it is conducted for a public purpose, on a non-discriminatory basis, following due process of law, and accompanied by prompt, adequate, and effective compensation.[7]

Investors are guaranteed the right to freely transfer funds into and out of the host State without delay.[8] However, States retain the right to temporarily delay or restrict transfers through non-discriminatory laws relating to tax collection, bankruptcy, securities trading, criminal offences, or severe balance-of-payments difficulties.[9]

(v) Enforceable investor sustainability commitments:

The PMCIIC integrate environmental, social, human rights, anti-corruption, and local community protections (including the principle of Free, Prior, and Informed Consent) into the core of the contractual relationship rather than treat them as optional add-ons.

Principle 20 establishes the principle of cooperation between the parties in pursuit of the specific sustainability obligations included in their IIC. In particular, it sets out their general obligation to cooperate with each other in order to perform and abide by the specific sustainability obligations that they have jointly decided to include in their IIC, following the pre-contractual due diligence assessment[10] and considering relevant hard- and soft-law

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instruments in the field as agreed or identified as applicable by the parties.[11]

To balance the investor's rights, the State is provided with effective contractual tools, such as mandatory pre-contractual due diligence, continuous monitoring,[12] performance penalties, step-in rights, and contract termination as a last resort to enforce these investor commitments.

By shifting dispute management from the universe of public international law treaties to a disciplined, reciprocal architecture of private contract law, the PMCIIC introduces a dynamic model. The framework addresses the structural asymmetries of the past by the introduction of counterclaims, obligating foreign investors to answer directly for operational, environmental, or human rights failures, rejection of rigid freezing clauses in favour of "economic equilibrium" renegotiation and explicit public interest carve-outs.

Yet, this reliance on a transnational private law instrument to resolve a public law crisis creates an inescapable structural paradox. Is it appropriate to incorporate inherently treaty-level standards into the form of private contractual obligations? How can a clear, formal distinction between an SOE and the State itself survive the reality of an international dispute? Will it be justified, if a future tribunal uses an "economic equilibrium" clause to force a delegated, commercial SOE to financially insulate an investor from the legislative acts of the State?

Ultimately, this shift leaves open two competing possibilities. *First*, it could mark a move back to internationalisation of contracts which once faced stiff opposition[13] with developing States fighting against internationalisation, in the UN General Assembly by pressing for Resolutions that reaffirmed the primacy of host State law in the regulation of foreign investment.[14] *Second*, this instrument offers a practical solution to internationalisation when States amend domestic law to evade contractual duties, given that international law sanctions breaches of international obligations rather than contracts.

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[1] According to UNCTAD, there were 569 terminations between 1999 and 2022, with 70% of the terminations occurring in the last decade (World Investment Report 2023, p. 73). In 2022, UNCTAD recorded 84 terminations compared with 15 new IIAs, with terminations exceeding new treaties in force for the third consecutive year.

[2] Brazil (in its last BIT); the United States, Canada and Mexico in the 2019 USMCA; and recently the EU

(the EU-Japan Economic Partnership Agreement (EPA) and the EU-China Comprehensive Agreement on Investment) have all limited ISDS and opted, with different terms and limitations, for State-to-State Dispute Settlement (SSDS). Other trends include attributing a greater role to Governments in deciding on remedies and a greater use of intergovernmental committees to manage investment relationships, as well as a preference for non-pecuniary trade remedies rather than damages. See OECD, The Future of Investment Treaties: Possible Directions (2021), p. 15 et seq.; see also UNCTAD World Investment Report 2015, p. 108 et seq.

[3] See Model Clauses for the Use of the UNIDROIT Principles of International Commercial Contracts, available at https://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses/.

[4] Para 38 of Draft UNIDROIT/ICC Principles and Model Clauses for International Investment Contracts, "Where the investor fails to comply with its obligations – including sustainability obligations, construction milestones, or operational standards – the State may resort to a range of contractual remedies, from specific performance and the imposition of penalties, to the hiring of third parties at the defaulting party's expense, to the suspension or, ultimately, termination of the IIC in cases of fundamental non-performance."

[5] see Principle 12 on Legal capacity, *Supra* note 4.

[6] See Principle 23(3) on Exclusion of certain measures, *Supra* note 4.

[7] See Principle 17 on Expropriation, *Supra* note 4.

[8] See Principle 18(1) on Payments and Transfers

[9] See Principle 18(4), *Supra* note 4.

[10] See Principle 11 on Sustainability due diligence in the pre-contractual phase, *Supra* note 4.

[11] See Principle 6 on Sustainable investment, *Supra* note 4.

[12] See Principle 21 on Obligation to perform a continuous sustainability monitoring, *Supra* note 4.

[13] Jennings, 'State Contracts in International law', 165-168; Amerasinghe, 'State Breaches of Contracts', 897; Fatouros, 'International Law and the Internationalized Contract', 136; El-Kosheri and Riad, 'The Law Governing a New Generation of Petroleum Agreements', 259;Bowett, 'State Contracts with Aliens', 51.

[14] Permanent Sovereignty Over Natural resources, UNGA Res. 1803 (XVIII) (14 December 1962), GAOR Supp 17, 15; United Nations General Assembly Resolution on a Charter of Economic Rights and Duties of States, UNGA Res. A/Res/3281 (XXIX) (12 December 1974).

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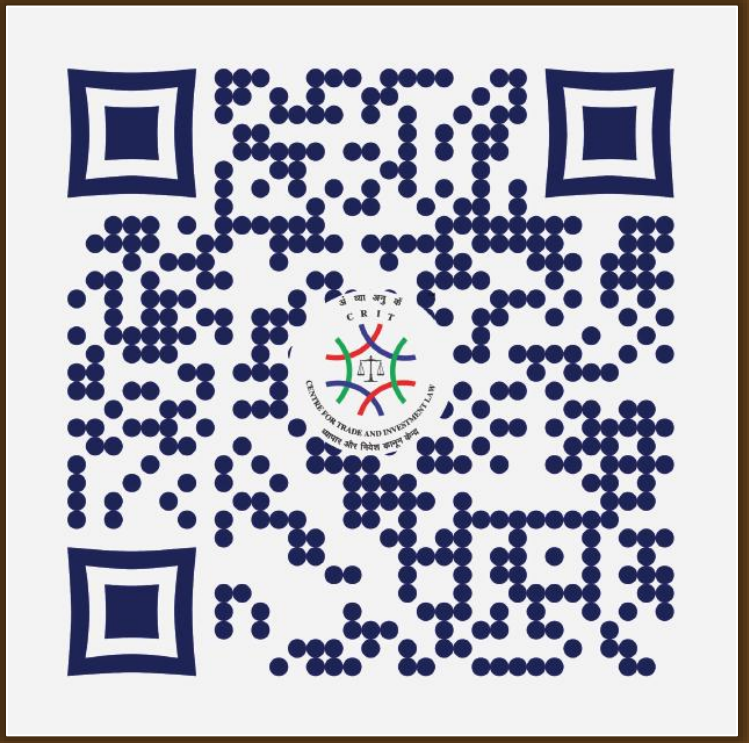
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