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MONTHLY NEWSLETTER

Centre for Trade and Investment Law

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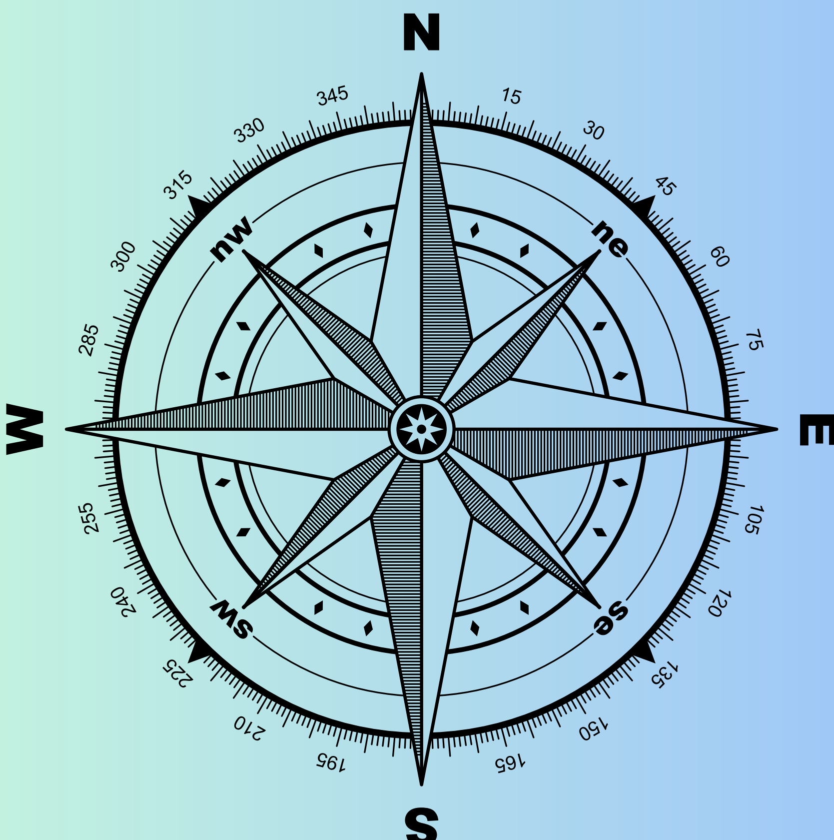

navigating through

GLOBAL INVESTMENT FRAMEWORK

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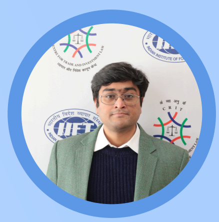
The Investment Law Compass is CTIL's monthly newsletter on the global investment framework and developments. Our vision is to inform professionals and policy makers on topics related to investment laws and treaty arbitration, thereby fostering informed decision-making.

Editor-in-Chief's Note



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RISING INVESTMENT SCREENING MECHANISMS: ANALYZING IN THE BACKDROP OF PROPOSED NEW EU FDI SCREENING REGULATIONS

The rise of investment screening globally reflects a decisive shift from open-market liberalization toward state-led control of foreign investment. Since the 2008 financial crisis and accelerating during COVID-19, governments have increasingly scrutinized FDI, particularly in sensitive and strategic sectors. This is largely driven by national security concerns, competition over critical technologies, and the geopolitical impact of rising outbound investment from emerging powers.

Key elements of the trend include broader sectoral coverage, intensified regulatory activity (especially in Europe), and rapid growth in the number of screening regimes. The landscape is now more fragmented, as states balance openness with strategic autonomy.

For international investment law, this marks a break from decades of liberalisation and signals the need for clearer governance frameworks. While some jurisdictions pursue harmonization, global approaches remain uneven, creating uncertainty and compliance challenges for investors. It is in this background that the new EU FDI Screening Regulation, coming into force next year, becomes relevant.

The Proposal and Core Changes

The proposed New FDI Screening Regulation aims to convert the EU's current, loosely coordinated framework into a more harmonised regime built on common minimum standards, while still leaving final decision-making authority with individual Member States. It would require every EU country to establish a national screening system and broaden coverage to include indirect acquisitions of EU-based entities, and possibly greenfield investments as well. The sectoral scope would expand significantly, covering defence, space, emerging critical technologies such as AI and quantum computing, critical medicines, financial infrastructure, and other programmes of strategic EU interest. Importantly, the reform would introduce a unified substantive test for determining whether an investment poses risks to security or public order, replacing the divergent criteria used today. Procedurally, it would also streamline filings through standardised information requirements, aligned review timelines, and harmonised procedural rules, reducing uncertainty for investors operating across multiple jurisdictions.

Key Debates and Implementation Questions

Despite broad support, the reform continues to face several points of contention. One unresolved issue is the treatment of greenfield investments: some EU institutions favour mandatory screening, particularly for projects exceeding €250 million, while others prefer that national authorities retain discretion. There is also disagreement over how wide the list of sensitive sectors should be. The Commission and . Parliament support a broad coverage of critical and emerging technologies, whereas the Council favours a more limited scope focused on traditional security-linked industries to avoid excessive regulatory burden. Another sensitive question concerns the role of the European Commission, which currently issues only non-binding recommendations; the new regulation could grant it enhanced "call-in" powers or even binding authority in narrow circumstances, a prospect several Member States resist, given national security sensitivities

Sources:

- *Ludovica Pizzetti Et all, Europe's New Foreign Investment Screening Proposals: A Patchwork Quilt Emerges With Some Loose Threads, November 5, 2025, available at https://www.arnoldporter.com/en/perspectives/advisories/2025/11/europes-new-screening-tool-for-foreign-investment.*
- *Gabriele Accardo, Steven Vaz, Giulia Carnazza, 'New EU FDI Regulation: striking the right balance?', 27 June 2025, available at https://www.ashurst.com/en/insights/new-eu-fdi-regulation-striking-the-right-balance/*

REASSESSING CONTRACT-BASED ISDS: PROMISE AND PERILS IN THE NEW INVESTMENT LANDSCAPE

From Treaty Fatigue to Contractual Promises

The global backlash against treaty-based investor–state dispute settlement (ISDS) is growing, driven by concerns from huge damage awards, climate pressures, evolving public-policy priorities, and a shifting view of what constitutes fair, sustainable development. As treaties increasingly fall out of favour with the European Union, the United Kingdom's withdrawal from the Energy Charter Treaty (ECT), and judicial bodies like the Ecuadorian Constitutional Court invalidating treaty-based ISDS access, many actors are turning to contract-based arbitration as a potential refuge.

Advocates argue that contracts negotiated directly between investors and host States may restore stability and predictability. The joint project by UNIDROIT and the ICC Institute of World Business Law (IIC Project) aimed at drafting model instruments called International Investment Contracts (IICs) underscores this shift. However, a recent analysis warns that this resurgence carries serious risks: contract-based ISDS may inadvertently "internationalize" investor–state relations in ways that diminish state sovereignty and elevate international law over municipal law.

What the IIC Project Seeks to Achieve

The IIC Project, through its Revised Issues Paper (the Paper),*[1]* maps out a framework intended to govern long-term, cross-border investments by embedding key provisions into contracts. The instrument aims to provide a common baseline through principles, model clauses, and commentary usable across jurisdictions. It also aims to regulate aspects typically left to treaties, such as stability mechanisms, change-of-circumstances adaptation, ESG and public-interest commitments, transfer/assignment rules, and dispute-settlement pathways. Additionally, it seeks to offer flexibility for parties to choose applicable law, remedies, and dispute resolution mechanisms, thus balancing investor protection with states' regulatory space. The goal is to reflect real-world investment relationships, moving beyond the abstract realm of treaty law.

The Attraction of Contract-Based Arbitration

Proponents of contract-based ISDS highlight several advantages. Firstly, it offers flexibility and adaptability to national laws, regulatory priorities, and evolving public-policy objectives. Secondly, it offers clarity and predictability for investors and states through standardized clauses, mitigating legal uncertainty, especially in long-term projects. Thirdly, it helps in the integration of sustainability and public-interest commitments directly into contracts, enabling binding obligations on environmental, social, or governance fronts, rather than leaving them to vague treaty interpretations. Fourthly, it reduced reliance on controversial treaty-based ISDS mechanisms, potentially easing political and societal resistance to foreign investment protection regimes. In a time when treaty-based models are under scrutiny, this contract-level modality appears to be a pragmatic and modern alternative.

Defining International Investment Contracts: Setting the Boundary

A preliminary challenge is defining the scope of "International Investment Contracts." The Paper stresses the need to distinguish IICs from short-term commercial contracts or purely domestic arrangements. The instrument is intended to address long-term, cross-border investments involving public interests or State counterparties, operating alongside rather than replacing IIAs or BITs. This clarity is essential to ensure the framework governs the practical implementation of major investment projects: energy, natural resources, infrastructure, and development, rather than generic commercial dealings.

Why Contract-Based Governance Matters

The shift toward contract-level governance responds to longstanding structural deficiencies in treaty-based ISDS, with the proposed IIC instrument positioned to deliver greater certainty and predictability through standardized clauses, while also preserving flexibility and regulatory sovereignty in contrast to rigid treaty commitments. By embedding sustainability, public-policy and ESG-based obligations directly into binding contractual terms, it enables a more integrated and development-aligned investment framework, supported by renegotiation tools and risk-management clauses that enhance resilience in long-term projects. Importantly, the model seeks to harmonize practice across legal traditions without eroding jurisdictional diversity, offering a more balanced relationship between investors and States and potentially reducing dependence on conventional, and often contentious, treaty-driven arbitration.

The Risk of “Internationalizing” Investor–State Relations

However, this shift to contract-based ISDS might not neutralize internationalization. It could deepen it.*[2]* Key concerns include*[3]*:

a)Jurisdictional Overreach: International arbitral tribunals may lean toward applying not just the municipal (domestic) law chosen by parties but also customary international law (CIL) or general international law norms. This transforms a municipal contract into an international instrument, potentially subjecting host states to scrutiny under broad and generalized legal norms.
b)Undermined State consent: Consent to arbitration must be explicit and limited, but tribunals invoking doctrines like incorporation of CIL may claim jurisdiction over issues parties never agreed to arbitrate, undermining foundational principles of consent and sovereign equality.
c)Questionable reliance on the doctrine of incorporation: The doctrine’s acceptance is contested in many jurisdictions; applying it to import international law into domestic-law contracts is neither consistent nor reliable.
d)Historical and normative concerns: Given the colonial origins and contested legacy of CIL and international investment law, applying them through contractual arbitration risks perpetuating power imbalances and limiting host states’ regulatory autonomy — especially in developing countries.

In short, rather than delivering a clean break from treaty-based ISDS, contract-based arbitration may replicate, or even amplify, the same structural issues, albeit in a new legal guise

Navigating the Trade-off: Autonomy vs. Legal Harmony

The case for contract-based ISDS rests on the assumption that parties’ consent and choice of law will anchor disputes within agreed parameters. The IIC framework aspires to embed public-interest safeguards and contextual flexibility. Yet, scepticism remains valid. Will arbitral tribunals respect the boundaries of consent? Will they avoid reading international obligations (such as human rights, environmental norms or broad CIL obligations) into contracts unless explicitly provided? The dangers lie in transforming specific investment contracts into open-ended instruments that transcend their commercial or project-specific purpose, effectively subjecting host states to international adjudication of domestic policy.

Conclusion: A Cautious Path Forward

The push toward contract-based investment protection remains compelling: it promises to reconcile investor security, host-State regulatory space, and evolving sustainability goals. The IIC Project's work is a prominent and timely effort in that direction. However, the recent analysis underscores the urgency of safeguards and clarity. If not carefully designed, contract-based ISDS could replicate the core flaws of treaty-based arbitration, including erosion of consent, over-legalization of political decisions, and undue internationalization of domestic law.

For stakeholders, States, investors, and civil societies, the next steps should focus not simply on adopting contract-based instruments, but on ensuring that they preserve genuine contractual autonomy, limit arbitral overreach, and respect the primacy of municipal law where appropriate. As the investment regime evolves, balance not just innovation, must remain the guiding principle.

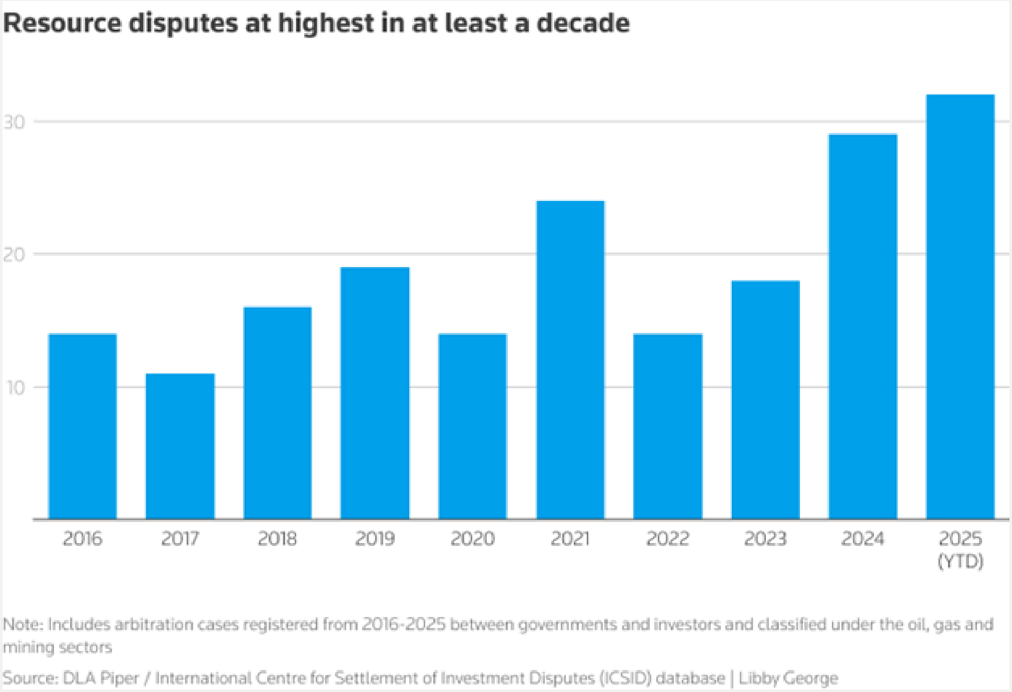
Footnotes

[1] UNIDROIT Working Group on International Investment Contracts, Fourth session (hybrid) Rome, 25-27 November 2024, REVISED ISSUES PAPER, UNIDROIT 2024, Study L-IIC – W.G. 4 – Doc. 2, November 2024
[2] Harshad Pathak, Resurgence of Contract-Based ISDS and the Risk of Internationalizing Investor–State Relations, APRIL 30, 2025, Investment Treaty News available at https://www.iisd.org/itn/2025/04/30/resurgence-contract-based-isds-risk-of-internationalizing-investor-state-relations-harshad-pathak/?utm_source=chatgpt.com.
[3] Ibid

SHARPEST RISE IN INVESTOR-STATE DISPUTES OVER RESOURCE NATIONALIZATION AND DEMAND FOR CRITICAL MINERALS

As per The ICSID Caseload – Statistics,*[1]* 2025 has seen the biggest surge in investment disputes in years. Specifically, the ICSID has administered 347 cases in FY 2025, the highest number of cases in a fiscal year in its history. In addition, ICSID provided services for 15 cases under non-ICSID rules, including 12 cases under the UNCITRAL Arbitration Rules.

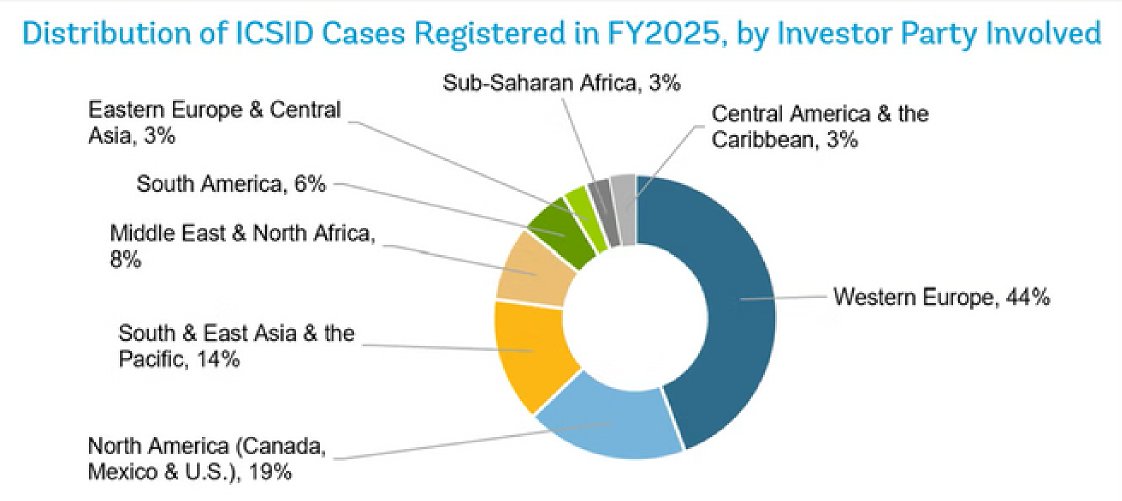
What explains this surge? As per the noted law firm DLA Piper, this surge is being driven by resource nationalism, with states increasingly feeling the need to exert greater control over deposits of minerals, especially critical minerals within their borders. Another critical factor for rising disputes is the growing competition between the U.S. and China for critical minerals. This has led to a scramble for minerals that will power everything from chips for the AI boom to electric vehicles, to the valuable oil and gas revenues critical to state coffers, particularly in emerging economies. 2025 has seen 32 resource-related claims covering a wide range of assets. These include oil and gas, gold, uranium and lithium.



he largest number of disputes, 11 in total, have been in Latin America, while Colombia, with four of those cases, is the single largest. Africa, which has large reserves of critical minerals, has 10 disputes, which involve Niger, Tanzania, the Democratic Republic of Congo, Mali, Morocco and Senegal. Most of the remainder of the disputes identified by DLA Piper's research were in Europe and Central Asia. *[2]* Looking in another prism, 4% of new cases involved States in Sub-Saharan Africa. States in Central America and the Caribbean accounted for 19% of new cases, South America for 18%, and Eastern Europe and Central Asia for 12%. States in Western Europe represented 9% of new cases, North America 7%, South and East Asia and the Pacific 6%, and the Middle East and North Africa 5%.*[3]*

These disputes were initiated based on the exercise of economic nationalism of Global South countries. For example, Colombia has designated several mining areas as temporary natural reserves, banned fracking and threatened to block coal exports to Israel, creating tension with some investors. On the other hand, Mexico, Ecuador and Panama have nationalized lithium and other strategic minerals, leading to investor claims.

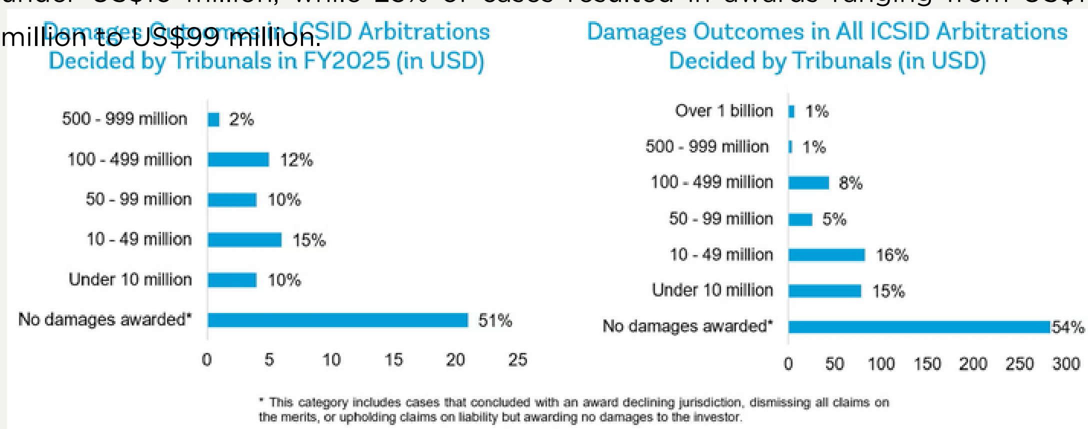
In terms of investor nationality, the largest share of investors are from: Western Europe (44%), followed by North America (19%), South and East Asia and the Pacific (14%), the Middle East and North Africa (8%), and South America (6%). Investors from Eastern Europe and Central Asia, Sub-Saharan Africa, and Central America and the Caribbean accounted for 3% of new cases each.



In terms of the sectors in which the claims were brought, 43% of new cases belonged to the oil, gas, and mining sectors, with most cases (19 cases) being in the mining industry. Additionally, the construction sector accounted for 15% of disputes.

Data on Damages Claimed and Awarded

The ICSID Caseload-Statistics also highlighted that in the FY 2025, 51% resulted in no damages awarded to investors. The grounds for awarding no damages were varied, including dismissal of claims on jurisdictional grounds, findings of no liability, or liability without damages. In 10% of cases, the damages awarded were under US$10 million, while 25% of cases resulted in awards ranging from US$10 million to US$99 million.



Foonotes

[1] The ICSID Caseload – Statistics,[1] 2025-2 available at https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics.

[2] Libby George, Resource disputes between investors and states hit 10-year high, November 3, 2025, available at https://www.reuters.com/business/autos-transportation/resource-disputes-between-investors-states-hit-10-year-high-2025-11-03/?utm_source=chatgpt.com.

[3] The ICSID Caseload – Statistics,[2] 2025-2 available at https://icsid.worldbank.org/resources/publications/icsid-caseload-statistics.

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Let's navigate the intricate world of investment law together. We look forward to your insightful contributions.

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