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INVESTMENT CONTRACTS AND BITS: BEING READY WHEN THE BALANCE IS SHIFTING

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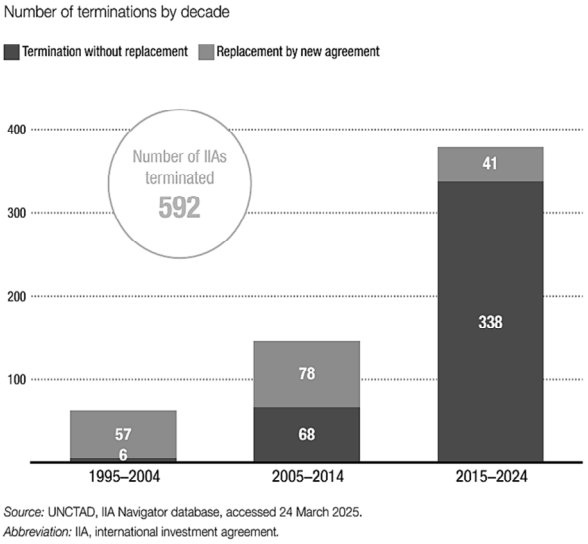
In recent years, as States become increasingly protective of their regulatory powers, a growing number of BITs have been terminated, renegotiated, or replaced by more restrictive instruments. At the same time, investment contracts are steadily reclaiming their place – not as a perfect substitute for BITs, but as a potentially powerful contractual layer of protection. In this changing landscape, the ability to anticipate the legal and practical challenges and to shape a contract tailored to each specific project can make all the difference.

I. BITs under pressure: when States reclaim regulatory space

On 26 March 2026, Colombia's President Gustavo Petro announced his intention for Colombia to withdraw from the international investment arbitration system,[1] as over 200 economists and legal scholars have criticised investor-state dispute settlement (ISDS) mechanisms for their perceived adverse impact on the State's regulatory sovereignty, particularly when it comes to climate change mitigation measures.[2]

It remains to be seen whether this political declaration will translate into concrete legal steps, but it undeniably fuels an ongoing global debate: in recent years, not only have many European States stepped away from BITs[3] and the ECT framework,[4] but countries from other regions increasingly view BITs as constraints on their ability to regulate – and are following suit. Ecuador, for instance, terminated 26 BITs from 2008 to 2018; Indonesia – 23 BITs from 2004 to 2017; and South Africa – 12 BITs from 2013 to 2021.[5] If not terminated, many BITs are renegotiated.[6]



Source: UNCTAD, IIA Navigator database, accessed 24 March 2025.
Abbreviation: IIA, international investment agreement.

UNCTAD World Investment Report 2025, p. 106

[1] E. Brouwer, 'Colombia renews threat to quit investor-state arbitration, while Bolivia and Venezuela go the opposite way', IA Reporter, 26 March 2026 (available here: link); see also K. Tienhaara, 'Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement' in *Transnational Environmental Law,* 2018, pp. 229-250.

[2] Letter from D. Bertossa (Secretary General, Public Services International) to Mr. Gustavo Petro Urrego, President of the Republic of Colombia, 30 March 2026 (available here: link).

[3] As a reminder, following the judgment of the CJEU in Case C-284/16 *Achmea,* a large majority of EU Member States signed the 2020 Agreement for the Termination of Bilateral Investment Treaties between the Member States of the European Union, designed to bring an end to more than a hundred intra-EU BITs between the signatory Member States (available here: link).

[4] To date, the EU and Euratom have withdrawn from the ECT, and a significant number of EU Member States have either withdrawn, or notified their withdrawal, from the Treaty (see here: link). In January 2026, the European Commission sent letters of formal notice to Member States that remained contracting parties to the ECT, calling on them to withdraw without undue delay (see here: link).

[5] UNCTAD International Investment Agreements Navigator (available here: link).

[6] For example, in March 2023, the Indian government issued 68 notices of termination of its existing BITs, all of which were accompanied by requests for renegotiation based on the 2015 Indian BIT model (see here: link).

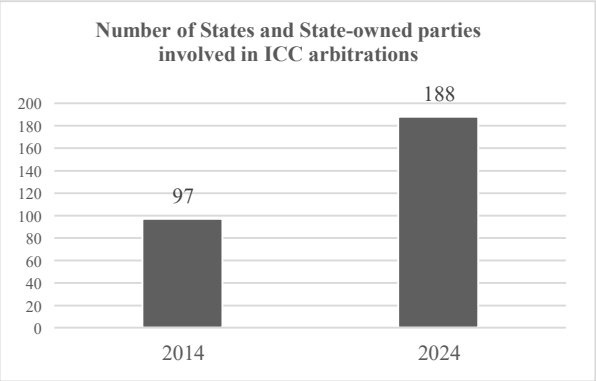
This is not just anecdotal – it seems to reflect a structural shift. According to UNCTAD, the total number of International Investment Agreement (IIA) terminations had reached at least 592 by the end of 2024, with about 70% of those terminations taking place in the last decade.[7] The question is no longer whether the system is evolving, but how – and in which direction. Importantly, this evolution does not necessarily signal the end of investment protection. Rather, it points to a reconfiguration of the instruments through which such protection is structured and enforced.

II. Investment contracts are back in the spotlight

Prior to President Gustavo Petro's announcement, at an event held in Bogotá, panellists reportedly identified investment contracts governed by national law as a possible alternative to BITs[8] – a proposition that comes as little surprise.

Interestingly, investment contracts (also known as foreign investment contracts or State contracts) have historically been regarded as one of the safest means of protecting foreign investment.[9] They reflect a private-public relationship between a foreign investor and the host State (or one of its entities), whereby the investor undertakes to make or operate an investment and receives, in return, substantive and procedural rights,[10] which may be comparable to those found in BITs.[11] Such rights will therefore be contractually enforceable against the host State where the State is itself a party to the contract or has otherwise assumed the relevant obligations. Such contracts are typically characterised by an inherent public-law dimension and are particularly common in sectors such as natural resource exploitation and large-scale infrastructure projects.

With oil, gas and mining disputes accounting for 45% of newly registered ICSID cases in 2025[12] – more than double the 21% recorded in FY2018[13] – the continued centrality of investment contracts is hardly surprising. These are precisely the sectors in which foreign investment is often structured through concessions, production-sharing agreements, licences, public-private partnerships, or other State-linked contractual instruments.[14] The same trend is reflected in the growing participation of States and State entities in contract-based commercial arbitration. According to the ICC's latest statistics, the number of States and State-owned parties nearly doubled over the past decade, rising from 97 in 2014[15] to 188 in 2024.[16] In 2024 alone, 19% of new ICC cases involved a State or



[7] UNCTAD, World Investment Report 2025, *'International investment in the digital economy'* (2025), Chapter II, p. 105.
[8] See PSI, 'Colombia leads global south countries' exit from ISDS', 9 April 2026, reporting on the Bogotá event "Investment Arbitration and the Just Energy Transition" held at Universidad del Rosario (available here: link).
[9] Charles N. Brower, 'State Parties in Contract-based arbitration: Origins, Problems and Prospects of Private-Public Arbitration', ITA in Review: The Journal of the Institute for Transnational Arbitration, Vol. 1, Issue 2, 2019, PDF p. 110.
[10] For instance, such rights can be found in certain petroleum and mining contracts available on the *ResourceContracts.org* database.
[11] S. Pahis, 'Are Investment Treaties Redundant? Evidence from Investor-State Disputes', in M. Kinnear and C. McLachlan (eds), ICSID Review - Foreign Investment Law Journal, Vol. 40, Issue 1, 2025, p. 84: "*Contracts between States and investors can be written to provide the same substantive and procedural norms as investment treaties.*"
[12] ICSID Caseload Statistics, Issue 2026-1, 2026, p. 12.
[13] ICSID Annual Report, 2018, p. 30, showing that 21% of cases registered in 2018 under the ICSID Convention concerned the oil, gas and mining sectors.
[14] S. Pahis, 'Are Investment Treaties Redundant? Evidence from Investor-State Disputes', in M. Kinnear and C. McLachlan (eds), ICSID Review - Foreign Investment Law Journal, Vol. 40, Issue 1, 2025, p. 111: "*Investments in the mining and utilities subsector gave rise to 125 out of the 318 disputes in the data set - or almost 40 %. And of those 125 disputes, 80 (64 %) were made pursuant to State contract.*"
[15] ICC Dispute Resolution 2018 Statistics, 2019, p. 9.
[16] ICC Dispute Resolution 2024 Statistics, 2025, p. 8.

State entity[17] – confirming the continued relevance of contractual arbitration as a forum for disputes involving public actors.[18]

In reality, investment contracts with States are far more common than is often assumed. Yet, they remain comparatively under the radar, a perception largely explained by their confidential nature.[19] That said, even a review limited to publicly available sources is revealing. According to ICSID's 2026 statistics, contracts were invoked as the basis of consent in 15% of cases registered in 2025,[20] making them the second most frequently invoked basis of consent after BITs.

Against this backdrop, UNIDROIT's Working Group on International Investment Contracts (IICs) has been meeting regularly, since October 2023, to explore how such contracts could be modernised and standardised.[21] With the 9th Working Group Meeting scheduled for October 2026, the outcome of this important initiative remains to be seen – and certainly merits close attention.

This renewed attention should not, however, obscure the limits of contract-based protection. Investment contracts are not a panacea. Their effectiveness depends on the identity and authority of the public counterparty, the validity of the contract under domestic law, the precise wording of the arbitration agreement, the extent to which mandatory rules of public law may prevail over negotiated terms, and of course the negotiated terms themselves. Unlike BITs, investment contracts do not automatically extend protection to non-signatory shareholders, affiliates or ultimate investors, nor do they necessarily incorporate standards such as fair and equitable treatment, full protection and security, or protection against indirect expropriation, unless such protections are expressly drafted into the contract. More fundamentally, contract-based protection is less suited to investments that do not naturally involve contractual privity with the State. It is precisely for this reason that entering into an investment contract requires a number of essential reflexes.

Why Investment Contracts Matter

- ***Effectiveness***. Unlike the standardised "one-size-fits-all" protections typically found in BITs, investment contracts can be tailored to the specific industry, project, investment structure, and the parties' expectations. They allow the parties to define, with greater precision, the protected investment, the economic equilibrium of the project, the investor's obligations, and the consequences of regulatory, fiscal or political change.

- ***Flexibility***. A contract-based investment framework is more capable of reflecting current political and economic sensitivities, precisely because it is negotiated and, where necessary, renegotiated, in light of the specific project. This flexibility is particularly valuable in long-term projects exposed to evolving fiscal, environmental, social, or regulatory conditions.

- ***Explicit contract-based consent***. Although disputes under investment contracts may be submitted to the same arbitral institutions and under the same rules as BIT-based arbitrations, a host State may find it more difficult to avoid a properly perfected contract-based consent to arbitration. However, the effectiveness of such consent will depend on the validity of the contract, the authority of the signatory, the identity and legal capacity of the public counterparty, and compliance with mandatory domestic law.

[17] ICC Dispute Resolution 2024 Statistics, 2025, p. 8.

[18] A similar pattern can be observed at the LCIA, where cases involving a State or a State entity accounted for 14% of the caseload in 2024 (LCIA Annual Casework Report 2024 p. 5: "*The LCIA administered proportionally more cases involving states and state-owned entities in 2024 than in 2023 (14% in 2024, and 11% in 2023")*.

[19] This is not to say that such contracts are invariably confidential: in recent years, there has been a marked shift toward greater transparency, particularly in the extractive sector. Transparency may be mandated by domestic legislation (see, for example, the Tanzania's Extractive Industries (Transparency and Accountability) Act of 2015) or promoted through non-governmental initiatives aimed at making resource contracts publicly accessible, such as the database *ResourceContracts.org*.

[20] ICSID Caseload Statistics, Issue 2026-1, 2026, p. 8.

[21] UNIDROIT, *Study L-IIC - International Investment Contracts* (official website available here: link).

III. Entering into an investment contract: essential reflexes

From the State's perspective, an investment contract may offer a more controlled and project-specific framework for investor protection, while preserving its ability to address public needs and pursue sustainable development objectives. Moreover, under the investment contract paradigm, dispute settlement is not necessarily one-sided: the State may also enforce, through arbitration, the obligations undertaken by the investor, including performance obligations, local content commitments, environmental obligations, reporting duties, and other project-specific undertakings.

At the same time, the inherent divergence between the interests of the State and those of the private investor, combined with the degree of governmental discretion involved in the negotiation and performance of such contracts, may understandably give rise to concerns for investors who, for their part, seek the highest possible level of protection. Contracting with a State inevitably entails a greater degree of complexity: such contracts may be subject to public policy rules, procurement requirements, sector-specific legislation, fiscal regimes, environmental regulation, anti-corruption rules, and other mandatory provisions of domestic public law. This is particularly so in light of the risk of changes in the State's own legislation or other unforeseen developments that may affect the performance of contractual obligations, especially where shifting socio-economic conditions or political dynamics call for adjustments in government policies and regulatory intervention by the State.[22] Ultimately, a delicate balance must be struck between the State's need to attract foreign investments and its duty to protect the public interests at stake.

These risks are not insurmountable, but they must be anticipated and mitigated from the outset. Several reflexes are therefore essential:

- ✓ **Choose wisely**. Before structuring an investment, it is essential to assess the treaty climate of the host State: does a BIT exist between the host State and the investor's home State? If so, what standards of protection does it offer, and how broad are they? Is there a foreseeable risk that such BIT may be denounced or renegotiated in the future? Such preliminary mapping allows the investor to determine whether treaty protection is sufficient, whether it can be preserved through corporate structuring, whether it is at risk of being narrowed or lost, or whether a contractual approach should be prioritised as an additional or alternative layer of protection.
- ✓ **Study the legal context**. Where the contract is the primary instrument of protection, it is crucial to assess the domestic legal framework carefully, including investment laws, sector-specific regulations, and any relevant public law and public policy constraints that may prevail over the contractual provisions. The objective is to negotiate an investment contract that incorporates robust protections while remaining fully coherent with the host State's legal order. This exercise is essential because contractual protections that are inconsistent with domestic public law may later be challenged on grounds of invalidity, lack of authority, *ultra vires* conduct or public policy.
- ✓ **Draft knowingly**. In practice, entering into an investment contract translates into bargaining for the inclusion of a number of essential contractual provisions and ensuring that each is enforceable under the applicable legal framework. Particular attention should be paid to: (i) the definition of the investment; (ii) the substantive standards of protection, especially where protections commonly found in BITs are not automatically included in contractual frameworks, such as fair and equitable treatment, full protection and security, non-discrimination, protection against unlawful

[22] For instance, in recent years, several African states have reformed their mining codes to strengthen sovereignty over mineral resources and regain control, particularly following military coups in Guinea, Mali, Burkina Faso, and Niger, which has led to a significant increase in the proportion of new investment arbitration cases involving Africa in the sector.

expropriation, compensation mechanisms, and guarantees of due process; (iii) stabilisation or economic equilibrium clauses aimed at protecting the economic balance of the contract against subsequent legislative or regulatory changes; (iv) review or renegotiation clauses, allowing the contract to adapt to evolving circumstances while maintaining a balance between the investor's expectations and the State's development policies; (v) the governing law clause, including whether international law, national law, or a combination of both should apply, while carefully assessing the extent to which mandatory domestic law may nevertheless prevail; (vi) balanced and detailed *force majeure,* hardship and termination provisions; (vii) a dispute resolution clause providing for a neutral and effective forum, with particular attention to the scope of consent, the parties covered by the clause, the seat of arbitration, the applicable rules, waiver of immunity where appropriate, and enforceability of the resulting award.

Particular care should also be taken where the contract is concluded with a State-owned entity rather than the State itself. In such cases, the investor should assess whether the entity has the capacity to bind itself, whether the State assumes any direct obligations, and whether the acts or omissions of the entity may be attributed to the State for purposes of international responsibility.

Ultimately, the issue is one of balance. Investment contracts seek to address the structural asymmetry between the parties by embedding safeguards for the investor while preserving the State's regulatory space. Their value lies precisely in their ability to translate that balance into project-specific, enforceable and commercially realistic obligations.

Conclusion

At the end of the day, is the era of BITs truly drawing to a close? Not quite. While the paradigm is undoubtedly shifting, BITs are not simply disappearing. In many cases, they are often being renegotiated. What we are witnessing is therefore less a disappearance than a transformation: BITs are being revisited in favour of a new generation of treaties that seek to better balance investor protection, on the one hand, with States' legitimate regulatory powers and broader public interest considerations, on the other hand.[23]

That said, new-generation BITs are not necessarily more protective of investors than investment contracts. As treaty standards become more carefully circumscribed, contract-based protections may, in certain circumstances, offer a more precise and predictable framework for the specific investment concerned.

Therefore, while BITs are far from extinct, investment contracts are likely to attract increasing attention in the years to come, with their importance and attractiveness set to grow as the treaty-based regime becomes more constrained. In that sense, the rise of investment contracts should not be understood as the end of investment protection, but as part of its displacement toward more contractual, project-specific and less publicly visible instruments. Properly designed, investment contracts could contribute to a more balanced and sustainable ISDS landscape in the long run. But this will only be possible if investment contracts are not treated as boilerplate instruments, but as carefully negotiated legal frameworks capable of accommodating both the investor's need for legal certainty and the State's legitimate regulatory objectives.

[23] UNCTAD World Investment Report 2025, '*International investment in the digital economy*' (2025), pp. 108-109: "[C]*lose to 50 per cent of the IIAs with protection standards signed in the past five years replace the FET standard with a closed list of obligations* […]. *More than 70 per cent provide a carveout from expropriation provisions for generally applicable regulatory measures.*"