



Observatoire ARGA

ARGA Atlas

INVESTMENT ARBITRATION AS A TOOL OF PROTECTION AGAINST EXPROPRIATION

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Purpose of the document:

To explain systematically why investment arbitration remains one of the principal international legal instruments for protecting investors against expropriation, how direct and indirect expropriation differ, how treaty protection interacts with arbitral consent, damages, and enforcement, and why, in contemporary disputes, the struggle is not only over compensation but also over the characterization of state interference itself as either lawful regulation or an unlawful taking. The basic international framework is built around the ICSID Convention, UNCITRAL mechanisms for treaty-based investor-State arbitration, international investment agreement standards on expropriation, and UNCTAD's official approach to expropriation clauses. (icsid.worldbank.org)

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1. EXECUTIVE SUMMARY

Investment arbitration remains one of the main international legal mechanisms through which a foreign investor may protect itself against expropriation, nationalization, loss of control over an asset, or other state measures that effectively destroy the value of an investment. The ICSID Convention expressly provides facilities for conciliation and arbitration of investment disputes between Contracting States and nationals of other Contracting States, and Article 25 makes the written consent of the parties the basis of jurisdiction in the individual case. That means investment arbitration does not arise merely because an investor is unhappy. It exists where the state has already consented, usually through a treaty, an investment law, or a contract. (icsid.worldbank.org)

From the standpoint of protection against expropriation, this matters because international investment law protects not only against classic direct takings of title, but also against measures that do not formally look like nationalization and yet, in substance, permanently destroy the economic value of the investment or deprive the owner of the ability to manage, use, or control it in a meaningful way. UNCTAD's official publication on expropriation describes the modern problem in exactly those terms. Accordingly, in a real dispute the question is almost never simply "was the asset taken or not."

The real question is whether state interference crossed the point at which regulation became a compensable taking. ([UN Trade and Development \(UNCTAD\)](#))

That is the special value of investment arbitration. It allows the dispute to be removed from the national system that forms part of the conflict and recast before an international adjudicative forum. At the same time, it is not a universal weapon. Not every loss of value amounts to expropriation, not every investor may bring a claim, not every business structure falls within the treaty definition of investor, and not every injury crosses the threshold of indirect expropriation. That is why serious protection begins not with the dramatic word “expropriation,” but with a careful analysis of whether treaty coverage exists, whether consent exists, what the character of the interference was, and whether it can be characterized as a compensable taking rather than ordinary regulatory action. ([icsid.worldbank.org](#))

2. WHY INVESTMENT ARBITRATION REMAINS A CENTRAL MEANS OF PROTECTION AGAINST EXPROPRIATION

The classic problem of expropriation is that the dispute arises between an investor and a state, in other words between a private actor and the subject that also controls its own administrative environment and often much of the judicial one. That is why the international investment system historically developed as a mechanism of depolitization and external resolution of disputes. UNCTAD defines treaty-based investor-State dispute settlement as a mechanism under which investors initiate international arbitral proceedings against states pursuant to international investment agreements. ICSID, for its part, provides an institutional framework precisely for such disputes between a state and a foreign investor. ([UNCTAD Investment Policy Hub](#))

For protection against expropriation, this is decisive. If an investor is forced to challenge an allegedly expropriatory measure only before the courts of the same state that adopted or tolerated that measure, the independence and effectiveness of the remedy become systemic problems. Investment arbitration is intended to create an alternative forum in which the dispute is treated not as an internal administrative disagreement, but as an alleged violation of international treaty obligations. Its strategic force lies in translating the conflict from the internal language of “the authorities decided this” into the international language of “the state breached a standard of protection.” ([icsid.worldbank.org](#))

3. WHAT COUNTS AS EXPROPRIATION IN INTERNATIONAL INVESTMENT LAW

UNCTAD states that the protection of foreign investors from uncompensated expropriations has traditionally been one of the main guarantees found in international investment agreements. It further explains that direct takings involve the transfer of title and/or the outright physical seizure of property, while some measures short of physical takings may also amount to takings if they permanently destroy the economic value of the investment or deprive the owner of its ability to manage, use, or control the property in a meaningful way. This gives the basic division between direct and indirect expropriation. ([UNCTAD Investment Policy Hub](#))

At the same time, international investment agreements do not usually protect investors through the simplistic formula that “the state may never touch anything.” They are structured around the more

complex idea of lawful expropriation. Official treaty materials and UNCTAD's work consistently reflect the classic conditions of lawful expropriation: public purpose, non-discrimination, due process, and compensation. International law therefore does not prohibit expropriation absolutely. It makes it conditional and potentially very expensive for the state if it wishes to maintain the legality of its conduct. ([UN Trade and Development \(UNCTAD\)](#))

This is why arbitration over expropriation almost always revolves around two questions at once. First, did the measure reach the level of expropriation at all? Second, even if it did, were the conditions of lawful expropriation satisfied, above all the requirement of adequate compensation? In practice, this means that the same state action may be described by the investor as unlawful expropriation and by the state as lawful regulation or permissible public intervention. The whole weight of the dispute is then shifted onto the characterization of the measure and its effect on the investment. ([UNCTAD Investment Policy Hub](#))

4. DIRECT AND INDIRECT EXPROPRIATION: THE LINE BETWEEN TAKING AND REGULATION

Direct expropriation is relatively easy to understand in investment law. The state takes title, nationalizes the asset, or carries out outright seizure or a formal transfer of ownership. Such cases are legally simpler to describe because the interference is formalized and usually obvious. The more difficult and contentious zone is indirect expropriation, where title remains with the investor but the real economic meaning of ownership disappears. UNCTAD expressly explains that indirect forms may exist where state action does not involve physical taking but still destroys economic value or meaningful control. ([UNCTAD Investment Policy Hub](#))

This is where one of the central fault lines of modern investment jurisprudence lies. States insist that they retain police powers and regulatory space, particularly in the fields of public health, environment, taxation, public order, or financial stability. Investors, by contrast, argue that under the guise of regulation the state in fact neutralized the investment. International law does not resolve that conflict through an automatic formula. It requires analysis of the nature of the measure, the intensity of the interference, its duration, its economic effect, its foreseeability, and whether the investor retained a meaningful ability to use, manage, or dispose of the investment. Indirect expropriation is therefore almost always a dispute about degree rather than label. ([UNCTAD Investment Policy Hub](#))

5. ARBITRAL JURISDICTION: CONSENT, INVESTMENT, INVESTOR, AND TREATY BASIS

No investment arbitration begins merely with the sentence "we were expropriated." A jurisdictional basis is required. Article 25 of the ICSID Convention provides that the jurisdiction of the Centre extends to legal disputes arising directly out of an investment between a Contracting State and a national of another Contracting State, provided the parties have consented in writing. That makes consent, investment, and foreign nationality the core prerequisites of the arbitral process. (icsid.worldbank.org)

In practice, state consent is most commonly found in a bilateral investment treaty, a free trade agreement with an investment chapter, a domestic investment law, or a specific investment contract. The first strategic question for an investor is therefore not the amount of damages, but the route into arbitration: which treaty applies, who counts as a protected investor, whether the asset falls within

the relevant definition of investment, whether there are carve-outs or jurisdictional exclusions, and whether the corporate structure undermines the claimant's standing. A large number of potentially dramatic "expropriation" cases end here before they begin. International law, true to form, prefers to spend a long time examining the door before letting anyone into the room. (icsid.worldbank.org)

ICSID remains one of the principal institutional fora, but it is not the only one. UNCITRAL Rules and ad hoc treaty-based arbitration continue to play a major role, and the UNCITRAL Rules on Transparency together with the Mauritius Convention create a separate public-access regime for treaty-based investor-State arbitration. UNCITRAL states that the Rules on Transparency, effective from 1 April 2014, establish procedural rules for making publicly available information on such arbitrations, and official UN materials confirm that the European Union approved the Mauritius Convention in 2025 and that it enters into force for the EU on 25 March 2026. This shows that modern investment arbitration is evolving not only along the axis of investor protection, but also along the axis of procedural legitimacy and transparency. ([UNCITRAL](#))

6. COMPENSATION, ENFORCEMENT, AND THE PRACTICAL VALUE OF AN ARBITRAL AWARD

In expropriation cases, the central practical issue is not only whether the investor proves a breach, but whether that victory can be turned into real compensation. Here ICSID provides an important structural advantage. Article 54 requires each Contracting State to recognize an award as binding and enforce the pecuniary obligations imposed by that award as if it were a final judgment of a court in that State. This gives ICSID awards particular value from the standpoint of enforceability, although Article 55 expressly preserves the law relating to State immunity from execution. Recognition and enforcement therefore do not mean that states are left wholly defenseless against execution measures. (icsid.worldbank.org)

In practical terms, that means investment arbitration over expropriation is not merely a declaratory forum. It creates a real route toward monetary recovery, while leaving the investor with a second battle over enforcement and sovereign immunity. A serious strategy should therefore think about enforcement before the award is issued. Where are attachable assets located? In which jurisdictions does the state or its instrumentalities hold commercial property? What are the local rules of sovereign immunity? Are there treaty or public-policy complications? Winning the arbitration without an enforcement plan is, as usual, a very expensive moral victory. (icsid.worldbank.org)

7. TRANSPARENCY, CRITICISM OF ISDS, AND THE MODERN EVOLUTION OF PROCEDURE

Investment arbitration has long been criticized for alleged asymmetry, policy chill, confidentiality, and legitimacy concerns. The international system has responded not only by defending the status quo, but also through procedural evolution. The UNCITRAL Rules on Transparency were introduced precisely as a set of procedural rules to provide public accessibility and transparency in treaty-based investor-State arbitration, and the Mauritius Convention enables that transparency regime to be applied to earlier treaties where states consent. The EU's approval of the Convention in 2025 and its entry into force for the EU on 25 March 2026 show that transparency is no longer treated as an eccentric add-on. ([UNCITRAL](#))

ICSID, for its part, modernized its rules in 2022. Its official materials state that the 2022 ICSID Rules and Regulations comprise modernized rules for arbitration, conciliation, and fact-finding, and also introduce mediation rules. This matters for more than bureaucratic housekeeping. It means that modern investment arbitration no longer exists only in the older image of a closed elite dispute at any cost. It is being pushed to respond to demands for speed, transparency, cost control, and procedural legitimacy. That does not make life easier for the investor, but it does make the procedural environment somewhat more predictable and somewhat less antique. A rare concession from international procedure to the present century. (icsid.worldbank.org)

8. A PRACTICAL MODEL OF INVESTOR PROTECTION

A serious defense against expropriation begins well before the arbitration itself. The first layer is treaty mapping: is there an applicable treaty, who qualifies as the investor, what counts as the investment, is there consent to arbitration, and are there fork-in-the-road, timing, or other jurisdictional obstacles? The second layer is expropriation qualification: was there a direct taking or an economic neutralization, did meaningful control remain, was the measure temporary or permanent, and can the severity of deprivation be shown? The third layer is evidence architecture: documents showing the ownership structure, value, state measures, chronology of interference, attempts at settlement, and economic-loss modelling. Without this, the word “expropriation” remains merely an expensive synonym for grievance. (icsid.worldbank.org)

The fourth layer is damages and enforcement planning. The investor must know what exactly is being pursued: restitution, compensation based on fair market value, interest, a declaratory finding, or treaty leverage for settlement. The fifth layer is procedural strategy: ICSID or UNCITRAL, transparency implications, confidentiality exposure, timing, cost, and parallel settlement possibilities. The sixth layer is political-regulatory discipline: in expropriation cases, emotional escalation too early often does more harm than good. Investment arbitration is not merely a loud international scandal. It is a highly structured attack on a state measure through the language of treaty breach. The sooner the investor understands that, the less often strategy later has to be replaced by panic. (icsid.worldbank.org)

9. CONCLUSION

Investment arbitration remains one of the principal international legal tools for protection against expropriation because it allows the investor to confront the state not within the same apparatus that produced the dispute, but in an international procedure based on treaty consent and neutral adjudication. Protection against expropriation is one of the oldest and most central guarantees of international investment agreements, and the dispute usually turns on whether the measure is direct or indirect expropriation, lawful regulation, or a compensable taking. ([UNCTAD Investment Policy Hub](https://unctad.org/investment-policy-hub))

But the effectiveness of this tool depends not on the dramatic force of the phrase “we were expropriated,” but on the precision of the legal construction. Is there jurisdiction? Is there an investment? Is there a protected investor? Is there a provable degree of deprivation of control or economic value? Is there a damages model? Is there an enforcement plan? That is why investment arbitration is not a universal insurance policy against every conflict with a state. It is a high-precision instrument. In skilled hands it can become very expensive for the state. In unskilled hands it remains simply expensive. Which, regrettably, is entirely in character for international law. (icsid.worldbank.org)

APPENDIX A. TERMINOLOGY

Investment arbitration / investor-State arbitration

An international arbitral procedure in which a foreign investor brings claims against a state on the basis of an international investment agreement, a domestic investment law, or a contract containing consent to arbitration. UNCTAD’s ISDS Navigator describes such disputes as arbitrations initiated by investors against states pursuant to international investment agreements. ([UNCTAD Investment Policy Hub](#))

Expropriation

A taking of an investment by the state that may be direct or indirect. UNCTAD explains that direct takings involve transfer of title or outright physical seizure, while some non-physical measures may also amount to takings if they permanently destroy economic value or meaningful control. ([UNCTAD Investment Policy Hub](#))

ICSID

jurisdiction

Under Article 25 of the ICSID Convention, the Centre’s jurisdiction extends to legal disputes arising directly out of an investment between a Contracting State and a national of another Contracting State, provided both sides have consented in writing. (icsid.worldbank.org)

Lawful

expropriation

Expropriation that complies with international legal conditions, typically including public purpose, non-discrimination, due process, and compensation. These elements are reflected in model treaty language and official investment-law materials. ([UN Trade and Development \(UNCTAD\)](#))

UNCITRAL

Transparency

Rules

/

Mauritius

Convention

The procedural transparency regime for treaty-based investor-State arbitration. UNCITRAL states that the Rules on Transparency, effective from 1 April 2014, provide for public accessibility of such proceedings, and the Mauritius Convention allows the regime to be extended to earlier treaties. Official UN materials confirm that the EU approved the Convention in 2025 and that it enters into force for the EU on 25 March 2026. ([UNCITRAL](#))

APPENDIX B. MATRIX FOR ASSESSING ARBITRAL PROTECTION AGAINST EXPROPRIATION

Criterion	How it appears	Legal significance
Existence of a treaty or other consent basis	There is a BIT, investment chapter, investment law, or contract containing arbitral consent	Without consent, arbitration is usually impossible
Status as protected investor	The claimant falls within the treaty definition of investor	Determines standing and personal jurisdiction
Existence of a covered investment	The asset falls within the relevant definition of investment	Determines subject-matter jurisdiction
Nature of state interference	Formal taking or measures destroying value/control	Key to characterizing direct or indirect expropriation
Degree of deprivation of control/value	Was the loss temporary, partial, or permanent; did meaningful use remain?	Separates ordinary regulation from a compensable taking

Conditions of lawful expropriation	Public purpose, non-discrimination, due process, compensation	Even lawful taking requires compensation analysis
Procedural platform	ICSID, UNCITRAL, or ad hoc regime, including transparency implications	Affects procedure, publicity, and enforcement route
Enforceability of award	Existence of a recognition, enforcement, and immunity-navigation strategy	Determines the real value of success

The legal significance of these criteria follows from the combined operation of the ICSID Convention, the UNCITRAL transparency framework, and UNCTAD's official materials on expropriation and ISDS. (icsid.worldbank.org)

OFFICIAL SOURCES

1. **ICSID Convention, Regulations and Rules** - the core institutional framework of ICSID, including Articles 25 and 54. (icsid.worldbank.org)
2. **ICSID Arbitration Rules (2022)** - the current procedural rules for ICSID arbitration. (icsid.worldbank.org)
3. **ICSID materials on the 2022 Rules and Regulations** - official resources on the modernization of the 2022 rules. (icsid.worldbank.org)
4. **UNCTAD, Expropriation: A Sequel** - official analytical publication on direct and indirect expropriation and lawful expropriation clauses. ([UN Trade and Development \(UNCTAD\)](https://unctad.org/publication/expropriation-a-sequel))
5. **UNCTAD ISDS Navigator** - official resource on treaty-based investor-State disputes. ([UNCTAD Investment Policy Hub](https://unctad.org/investment-policy-hub))
6. **UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration** - official text of the transparency rules, effective from 1 April 2014. ([UNCITRAL](https://uncitral.org))
7. **United Nations Convention on Transparency in Treaty-based Investor-State Arbitration (Mauritius Convention)** - official mechanism for extending the transparency rules to earlier treaties. ([UNCITRAL](https://uncitral.org))
8. **Official UN and EU materials on the EU approval of the Mauritius Convention** - confirmation that the EU approved the Convention in 2025 and that it enters into force for the EU on 25 March 2026. ([UNCITRAL](https://uncitral.org))