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Understanding Investor–State Dispute Settlement in the Mining Sector

Consent, rules, and recent trends

Disclaimer: This policy brief is intended for policy-makers at ministries of mining as an introductory overview of investor–state dispute settlement (ISDS). It is designed to inform policy discussions and does not constitute legal advice. The brief is not intended to be comprehensive and should not be relied upon as a substitute for professional legal consultation.

Around the world, mining ministries, often in coordination with environmental, investment, and regulatory agencies, are being asked to do more, faster: secure investment, meet rising demand for minerals and metals, and protect people and the environment. As governments update mining codes, tighten environmental and social standards, seek to secure fair revenues, and steer the sector toward a low-carbon future, they increasingly encounter investor–state dispute settlement (ISDS), a mechanism that allows certain foreign investors to bring claims directly against a state before an international arbitral tribunal (Columbia Center on

Sustainable Investment [CCSI], 2022; Ostřanský et al., 2025).

Mining is among the sectors that most frequently face such claims. Awards can be large, proceedings are often lengthy, and outcomes can significantly affect public budgets and the pace of regulatory reform (Hodgson et al., 2021; UN Trade and Development [UNCTAD], 2024, 2025c). Decisions that mining ministries take on a regular basis are frequently tested in ISDS, for example,

- licensing and Environmental and Social Impact Assessment (ESIA) outcomes (e.g., *Gabriel Resources Ltd. and Gabriel Resources (Jersey) v. Romania (I)*, ICSID Case No. ARB/15/31),
- changes to royalty and tax regimes (e.g., *South32 SA Investments Limited V. Republic of Colombia*, ICSID Case No. ARB/20/9),
- land and water restrictions (e.g., *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41),
- tailings and closure requirements (e.g., *Glamis Gold, Ltd. v. The United States of America*, UNCITRAL), and
- measures to respect Indigenous consultation and consent (e.g., *Bear Creek Mining Corporation v. Republic of Peru*, ICSID Case No. ARB/14/21) can and have been challenged.

Claims can seek hundreds of millions in U.S. dollars, awards are enforceable abroad, and cases can delay projects for years (UNCTAD, 2024, 2025c); even the threat of a case can slow needed reforms. Yet many officials first address ISDS only when a dispute threatens, not when designing policies, negotiating contracts, or issuing licences.

This brief is prepared for policy-makers. It introduces ISDS and explains how it operates in the mining sector. Understanding ISDS helps governments design and implement clearer rules, issue permitting, negotiate coherent and fair contracts, keep defensible records, coordinate across agencies, and communicate credibly with investors and local communities. As mining projects accelerate in particular to meet growing demand for critical minerals, this legal literacy is core to protecting fiscal and policy space while delivering a responsible, predictable investment climate.

What is ISDS?

Simply put, ISDS is an international arbitration process that allows certain foreign investors to bring claims directly against the state where they have invested (also called the "host state") before an international arbitral tribunal. These claims usually address the resolution of alleged breaches of investment protection standards. Most frequently, the host state gives consent to the ISDS process in an investment treaty signed between two or more states, and sometimes in national investment laws, mining codes, or in an investor–state contract (CCSI, 2022; Ostřanský et al., 2025).

What are investment treaties?

Investment treaties are agreements between two or more states that establish legal standards for the treatment and protection of foreign investments made by investors from one state in the other state's territory. They generally seek to protect and promote foreign investments and encourage the overall development objectives of the state parties to the treaty.

Investment treaties are not mining-specific instruments; they apply across sectors and typically extend protections to any qualifying foreign investment, with mining projects typically falling within their scope. Globally, more than 2,800 investment treaties have been concluded, with roughly 2,230 still in force and hundreds more terminated—many of them "legacy" texts from the 1990s and early 2000s that combine broad substantive protection standards with open consent to ISDS (UNCTAD, 2025b). These legacy treaties continue to ground dozens of ISDS claims every year, and so-called survival clauses can keep protections alive for 10–20 years after termination.

Investment treaties are evolving, with states seeking to revise or replace old investment treaties by, among other things, carving out sensitive policy areas (e.g., climate measures, human rights, public health and safety, and sustainable development generally). Also, states are seeking to narrow their consent to ISDS or withdraw consent altogether and are engaging in multilateral processes, such as the United Nations Commission on International Trade Law (UNCITRAL) Working Group III on ISDS reform. Future briefs will further discuss these reforms and their implications for the balance of investment protection and states' right to regulate in the public interest.

In investment treaties, how does a state give consent to ISDS—and how do investors accept it?

In most investment treaties, the state's consent is drafted as a standing offer to all qualifying foreign investors; an arbitration agreement is formed when an investor accepts that offer by filing a claim after a dispute arises. Unlike in many other international systems, investors are rarely required to exhaust remedies in the domestic courts first.[1] Claims usually allege that government conduct breached treaty standards, such as protection against expropriation (direct or indirect), fair and equitable treatment (including due process and legitimate expectations), and non-discrimination. In most investment treaties, states do not typically impose corresponding obligations on investors, which limits the scope for governments to counterclaim unless a specific instrument or rule allows it (CCSI, 2022; Ostřanský et al., 2025; UNCTAD, 2024). However, this trend is changing slowly in newer investment treaties, as many states are seeking more legal and policy space to regulate in the public interest without fear of ISDS claims. Specifically, states are now beginning to include express provisions for investors as they relate to environmental protection, labour rights, public health and safety, corporate social responsibility, and human rights protection (Lahlou & Willard, 2021).

[1] The ICSID Convention does not require exhaustion of local remedies by default, but states may require it as a condition of consent (see ICSID Convention, Art. 26). https://icsid.worldbank.org/sites/default/files/ICSID%20Convention%20English.pdf). However, states rarely do so in their investment treaties (see Brauch, 2017).

Can consent also be found in domestic investment or mining laws?

Beyond investment treaties, some countries' investment laws or mining codes also contain advance consent to arbitration. These provisions can be broad, extending to "any dispute arising from this law"[2] and allowing investors to choose arbitration under the rules of the International Centre for Settlement of Investment Disputes (ICSID) or UNCITRAL arbitration, or they can be narrow, limited to contract disputes with a designated state entity. Some domestic laws require prior administrative review or a cooling-off/mediation phase (e.g., s. 33(2) of the Ghana Investment Promotion Centre Act 2013),[3] but many do not (e.g., Art. 28(2) of the Guinea Investment Code 1995).[4] Because statutory consent can function like a blanket offer to all qualifying foreign investors (much like consent in investment treaties), it may open the door to claims about routine public-law decisions—for example, licensing outcomes, ESIAs and permitting conditions, or enforcement measures—unless carefully drafted.

For mining ministries, it helps to see national investment laws as framework statutes that sit alongside the mining code and general administrative, environmental, and tax laws, as well any other relevant laws applicable to the mining sector. While these statutes can also cover admission screening, incentives, facilitation, or investor obligations, the part that matters for ISDS is the dispute-settlement clause. A significant minority of investment laws give general advance consent in the law itself: UNCTAD counts roughly 55 laws in this higher-risk category (Bonnitcha et al., 2023). Poorly drafted advance consent clauses can replicate the risks of old-generation treaties and expose everyday administrative acts (e.g., permits, inspections, or sanctions) to arbitration.

How do arbitration clauses in mining contracts change the host state's risk?

Investor–state contracts—such as mining development agreements, concession, or licence agreements; joint-venture agreements with state-owned enterprises; and offtake-linked development agreements—often include their own arbitration clauses. These typically specify the rules applicable to the procedure, the so-called seat of the arbitration (i.e., the jurisdiction whose laws govern the procedural aspects of the arbitration), the governing law of the arbitration, the venue of the arbitration (i.e., the jurisdiction where the proceedings will take place), and sometimes rules on transparency and available remedies. Many contracts in the mining sector also include stabilization clauses (freezing or economic equilibrium clauses) that shift regulatory risk to the host state; when paired with a broad arbitration clause, these provisions can magnify exposure by converting regulatory updates (e.g., on tailings, water, royalties, or closure financial assurance) into compensable claims.

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[2] For example, Art. 28(2) of the Investment Code of Guinea (1995) provides that "disputes arising from the interpretation or application of this Code" may be submitted to international arbitration, including ICSID. See: https://icsid.worldbank.org/sites/default/files/parties_publications/C3765/Request%20for%20Arbitration%20of%20BSG%20Resources%20Limited/Legal%20Exhibits/CL-1%20Guinean%20Investment%20Code%20%28English%29.pdf

[3] Ghana Investment Promotion Centre Act 2013: https://www.gipc.gov.gh/wp-content/uploads/2023/04/ghana-investment-promotion-centre-gipc-act-865.pdf

[4] Guinea Investment Code 1995: https://icsid.worldbank.org/sites/default/files/parties_publications/C3765/Request%20for%20Arbitration%20of%20BSG%20Resources%20Limited/Legal%20Exhibits/CL-1%20Guinean%20Investment%20Code%20%28English%29.pdf

Which rules and institutions usually govern ISDS cases in mining?

Procedurally, most treaty-based mining cases are conducted under the ICSID or UNCITRAL Arbitration Rules, while others use institutional rules of the International Chamber of Commerce's International Court of Arbitration or the Arbitration Institute of the Stockholm Chamber of Commerce. Tribunals typically consist of three arbitrators appointed on an ad hoc basis (one arbitrator chosen by each party and a chair agreed or appointed). ISDS proceedings under the ICSID arbitration rules are treaty-based and largely self-contained, with annulment before ad hoc committees and automatic recognition and enforcement by ICSID Convention states. Under UNCITRAL or other non-ICSID arbitration rules, the arbitration is anchored in a jurisdictional seat of the arbitration (see Art. 18 of the 2021 UNCITRAL Arbitration Rules). Local courts at the seat can hear set-aside applications (see Art. 34 of the 2006 UNCITRAL Model Law on International Commercial Arbitration as implemented in many domestic legal systems).

Hearings and documents may be confidential or public, depending on the rules and any treaty or party agreements. The UNCITRAL Rules on Transparency apply by default to investment treaties concluded after April 1, 2014 (and can be extended to older treaties via the 2014 United Nations Convention on Transparency in Treaty-based Investor-State Arbitration, also called the Mauritius Convention); however, ICSID and several institutions have strengthened publication and disclosure practices in recent rule updates. Common procedural features in mining disputes include bifurcation (jurisdiction/merits), provisional measures, and detailed quantum phases; tribunals can order security for costs and allocate costs based on outcome and conduct.

Can awards be appealed, and how are awards enforced?

Awards are binding and widely enforceable: ICSID awards must be recognized and enforced by all ICSID Convention states, and non-ICSID awards are generally enforceable under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (New York Convention). There is no appeal on the merits (CCSI, 2022; ICSID, 1965; New York Convention, 1958), and set-aside or annulment is possible only on narrow procedural grounds. Remedies are typically monetary damages (sometimes very large[5]), with occasional awards of declaratory or injunctive relief. Proceedings often last years, and legal costs for both sides can be significant (Hodgson et al., 2021; UNCTAD, 2024).

How has ISDS been used in the mining industry?[6]

The global mining industry is no stranger to investor–state arbitrations. Recourse to arbitration in the mining industry has gained popularity over time. With the continued growth of the sector and increased attention on critical minerals as a means of securing a low-carbon future, dependence on this form of dispute resolution method within the global mining sector is likely to continue expanding. For instance, while fewer than 20 mining arbitrations were filed in a year up

[5] See e.g., *Tethyan Copper Company Pty Limited v. Islamic Republic of Pakistan*, ICSID Case No. ARB/12/1, where the tribunal ordered Pakistan to pay more than USD 5.9 billion in compensation, interest, and legal costs.

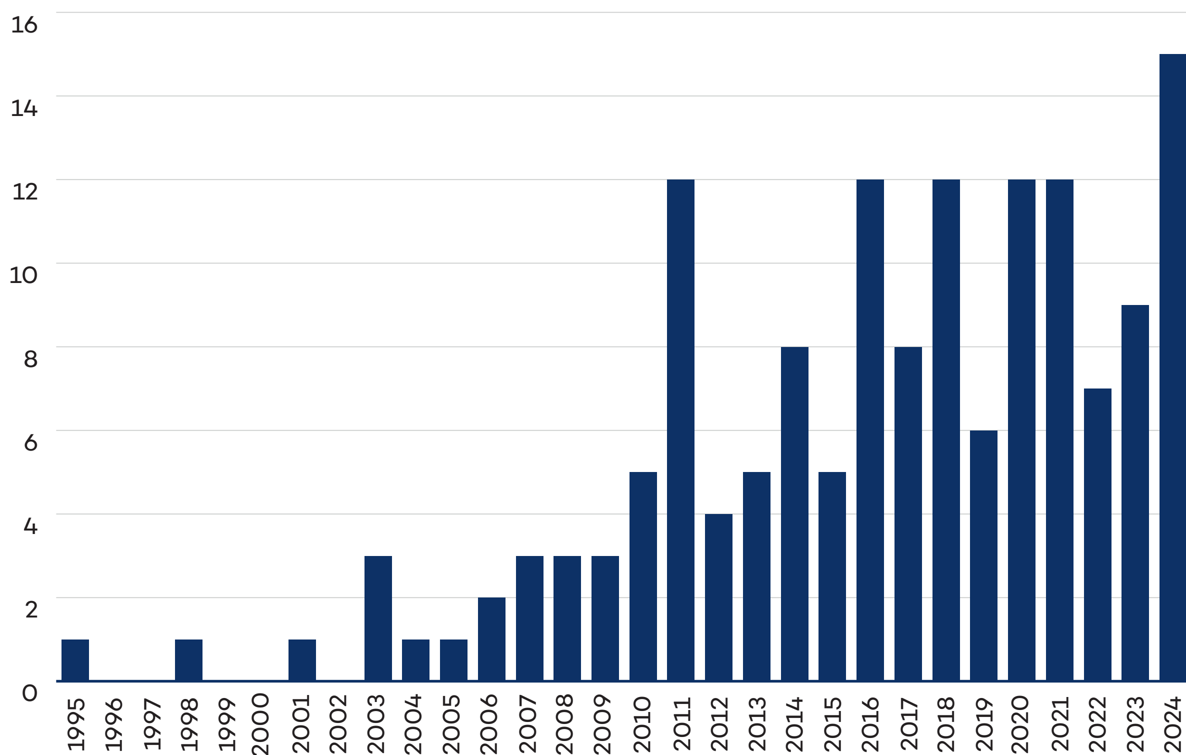
[6] It is worth disclaiming here that the survey in this section does not purport to provide a complete representation of all the investor–state arbitrations in the mining sector, nor does it give a comprehensive breakdown of these recorded cases. This survey is prepared solely on the basis of the information that has been made publicly available about these cases. It aims to provide the reader with a general understanding of the observable features of these claims.

to 2012, this ceiling has been surpassed and broken several times since 2013, with the most significant jump witnessed following the COVID-19 pandemic (UNCTAD, 2025c, pp. 4–5). Overall, ISDS maintains its presence in the mining industry and has continued to grow in recent years.

What do recent numbers show about ISDS filings in the mining sector?

UNCTAD identifies the mining sector as one of the largest sectoral users of ISDS for resolving disputes. In 2024, 15 of the 58 cases recorded by UNCTAD as having been initiated that year were from the mining sector, making it the largest sectoral user of investor–state arbitrations (along with the electricity, gas, steam, and air conditioning supply sectors) (UNCTAD, 2025a). Furthermore, the latest edition of ICSID's Caseload Statistics corroborates this point. It notes that in the 2025 fiscal year, the vast majority of the ICSID cases registered (43%) related to the oil, gas, and mining sectors. From this number, the majority of the cases (15 in total) were from the mining sector specifically (ICSID, 2025b). This number is likely much higher, given that some claims may not be captured in the UNCTAD and ICSID databases, particularly those based on investment contracts, rather than investment treaties.

FIGURE 1. Number of treaty-based ISDS in mining, filed per year



Source: UNCTAD, 2025a.[7]

[7] Counts reflect only treaty-based ISDS recorded in UNCTAD's Investment Dispute Settlement Navigator and use the site's Advanced Search sector filters. We applied the primary sector "mining and quarrying" and ticked the following subsectors: "mining of coal and lignite"; "mining of metal ores"; "other mining and quarrying"; and "mining support service activities". We did not tick "extraction of crude petroleum and natural gas," which are excluded. The year shown is the filing/registration year reported by UNCTAD. Because the Navigator includes only publicly known cases and sector tags may be updated over time, figures are indicative and may change with future updates.

In 2025, several new investor–state arbitrations have been threatened or commenced in the mining sector. For instance, Ngondo Mining SARL filed a claim against the Democratic Republic of the Congo in January 2025 arising from the termination of a mining concession (ICSID, 2025a). Recently, the United Kingdom was hit by its first-ever ICSID claim, brought by Woodhouse Investment and West Cumbria Mining, arising from the government's treatment of a deep coal mine in Whitehaven, Cumbria (ICSID, 2025c).

Which regions feature most often in ISDS disputes arising in the mining sector?

African, Latin American, and Caribbean states find themselves on the receiving end of most investor–state claims, including those arising from the mining sector and covering various commodities, such as copper, zinc, aluminum, lithium, and iron ore. According to UNCTAD, out of 19 investor–state arbitration claims instituted in 2024 in the mining sector, nine have an African or Latin American state as a respondent, such as Burkina Faso, Colombia, Mozambique, Panama, and Tunisia. Other state respondents outside the African, Latin American, and Caribbean regions include Australia, Canada, Croatia, India, Russia, Spain, and the Netherlands (UNCTAD, 2025a).

Which mining measures are typically challenged?

In most cases, investors challenge the government's termination of a mining concession or changes to the licensing regime (Songy & Brauch, 2024). For instance, Tara Resources, a Swiss mining company, recently filed an ICSID claim against Montenegro for the government's decision to terminate its concession agreement for mineral exploration at the Brskovo zinc mine on environmental grounds (Ballantyne, 2025). On the other hand, Emirates Global Aluminium, a state-owned aluminum company, has initiated an investor–state claim against Guinea for revoking its bauxite concession, citing a violation of the mining code (Jones, 2025). In addition, two arbitration cases were filed against Australia in 2024 (*Zeph Investment Pte. Ltd. v. Australia (III) (PCA Case No. 2024-23) and Zeph Investments Pte. Ltd. v. Australia (IV) (PCA Case No. 2024-48)*) regarding the Queensland Government's decision to deny permits for a coal project linked to a coal-fired power plant (UNCTAD, 2025c).

What remedies do claimants seek, and how are cases resolved?

According to a recent UNCTAD study, ISDS tribunals made at least 78 decisions in ISDS cases in 2024, of which, 39 are available to the public. Seventeen of these decisions focused on jurisdictional issues. In 13 of these decisions, tribunals agreed to the state's objections and stopped the proceedings, while in four cases, they allowed the proceedings to continue. There were 19 decisions on the merits, with 11 finding the state responsible for violations and ordering payment of compensation; eight decisions rejected all claims from investors (UNCTAD, 2025c).

In most ISDS claims in the mining sector, investors have claimed monetary compensation, restitution or return of property, punitive damages (i.e., an assessment of damages against the state designed not to compensate the investor for harms suffered, but to punish the state for wrongful conduct), declaratory relief (i.e., a declaration deciding a particular

issue in dispute), and injunctive relief (i.e., an order telling the government to take, or refrain from taking, certain actions) (Bernasconi-Osterwalder et al., 2012). In practice, enforcement and execution are usually limited to monetary compensation or amicable settlement. That said, it has been argued that arbitral awards do not always lead directly to compliance. Instead, they often serve as bargaining tools during post-award negotiations between states and investors regarding how the underlying disputes will be ultimately resolved after the tribunal's decision (St. John et al., 2024).

Conclusion

ISDS is no longer a niche legal issue. It touches upon many of the day-to-day decisions mining ministries make when they issue, monitor, amend, or revoke rights and when they tighten environmental, social, or fiscal rules. This first brief sets out the basics of what ISDS is, where consent typically sits (in investment treaties, domestic laws, and contracts), which rules and institutions usually govern cases, and how claims have arisen in the mining sector. As demand for critical minerals accelerates, understanding these building blocks helps officials preserve policy space while offering a predictable investment climate.

This is the first in a series of IGF Policy briefs on ISDS and mining. Upcoming issues will look more closely at (1) the different sources of consent and their implications for mining administration and (2) practical options to manage exposure, prevent and manage disputes, and support responsible sector governance, among other issues.

Basic Elements for Consideration by Policy-Makers and Regulators in Managing ISDS Risks in the Mining Sector

- **Assess exposure to ISDS claims**: Take stock of exposure. List applicable treaties, statutory consents in investment and mining laws, and arbitration, as well as stabilization clauses in current mining contracts.
- **Establish inter-agency coordination:** Set up coordination. Identify a cross-government focal team (including mining, environment, attorney-general/justice, foreign affairs) to receive notices, manage records, and speak with one voice.
- **Ensure legal and policy coherence:** Align and document. Check that the mining code, licences, and contracts are consistent—especially on dispute settlement and environmental and social obligations.
- **Maintain thorough and reasoned documentation:** Keep well-documented and justified records for key administrative decisions, including permits, ESIAs, inspections, and any enforcement actions or sanctions.
- **Strengthen recordkeeping and data sharing:** Keep records of monitoring, inspections, data management, and the exchange of documents between governmental agencies.
- **Prevent and manage disputes.** Establish an early-warning system and mediation options for foreseeable disputes and log substantive communications with investors and communities.
- **Build internal capacity on ISDS: Invest in training** to gain expertise in ISDS. Such technical knowledge is increasingly essential due to the complexity, high stakes, and evolving nature of international investment law.

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