

Editorial

On Sovereignty, Transition and the New Grammar of Investment

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Abstract

This editorial examines the increasingly evident interdependence between international investment law, sustainable development and the transformations brought about by digitalisation and contemporary geopolitical instability. Traditional investment governance, focused on capital protection and dispute resolution, must now also be assessed in relation to its contribution to achieving the Sustainable Development Goals and strengthening the resilience of strategic sectors. Particular attention is paid to the need for more coherent legislation, designed to reconcile investor protection, states' regulatory autonomy, social responsibility and long-term public interests. The editorial highlights the fact that current investment policies are increasingly interfering with the energy transition, technological innovation, critical infrastructure and economically sensitive sectors from a security perspective, which in some ways calls for a more proactive and multidimensional legal approach. Today is a time and a place where legal instruments, methods of interpretation and institutional priorities should be reformed so that international investment law can be more effective.

Keywords: *international investment law, sustainable development, digitalisation, geopolitical instability, regulatory autonomy, investor protection, adaptive governance, resilience.*

JEL Classification: K22, K33

DOI: 10.62768/IILJ/2026/6/1/01

Please cite this article as:

Popa Tache, Cristina Elena, 'Editorial. On Sovereignty, Transition and the New Grammar of Investment', *International Investment Law Journal* 6, issue 1 (February 2026): 5-13.

1. Introduction: Why This Issue Matters Now

In international investment law, 'interesting times' have moved from a rhetorical phrase to a reality. Even where stability appears to prevail, fragility lies beneath the surface, given that foreign direct investment has stagnated at around USD 1.3 trillion in 2023, and investment in sectors relevant to the SDGs (Sustainable Development Goals) has declined in value terms, including in developing economies². The outlook for 2025

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² United Nations Conference on Trade and Development (UNCTAD), *World Investment Report 2024: Investment Facilitation and Digital Government. Overview* (Geneva: United Nations, 2024), accessed 21 February 2026, <https://unctad.org/system/files/official-document/wir2024overviewen.pdf>.

indicates an estimated increase in global flows to USD 1.6 trillion, but with a disproportionate rise fuelled by conduit flows and persistent weakness in real investment when looking at project finance and greenfield projects, particularly those with a sustainable development footprint³.

The discrepancies between macro-narratives and micro-realities are compounded by certain regulatory aspects, with nearly a fifth of known investment disputes relating to fossil fuels – 235 cases recorded by the end of 2023 – whilst the renewable energy sector, for its part, generates a distinct volume of proceedings, amounting to at least 123⁴. This is a statistic worth reading not merely as an inventory of disputes, but as a diagnosis of the transition in which we see how energy investments remain, simultaneously, the infrastructure of the future and the archives of the past.

In this context, the investment regime must fulfil its role, rather than merely being a doctrinal reflex. ISDS reform can be viewed as a technical dossier that has become a debate on what trust means in this field. The International Law Association recently summarised the stakes in terms of the rule of law, highlighting access to justice, predictability, transparency, proportionality, respect for rights and non-discrimination, including within and through investment dispute settlement mechanisms⁵. At the same time, reform under the auspices of UNCITRAL is producing ethical and governance tools, such as codes of conduct for arbitrators, precisely to address criticisms regarding independence and impartiality.

This issue of the *International Investment Law Journal* puts these key themes into practice, without reducing complexity to mere slogans. From the climate transition in post-conflict regions to tariffs imposed in the name of an economic emergency, from the role of due diligence in shaping the FET standard, to criminal law as mechanisms for structural correction, and right through to the interpretation of a national investment policy, the contributions in this issue describe the same shift in perspective, whereby investment is situated between capital protection and the governance of risk, legitimacy and accountability⁶.

2. Special Purpose Vehicle, Climate and Functional Sovereignty in Post-Conflict Zones

The article by Chamundeeswari Kuppuswamy represents a bold conceptual intervention. If the climate finance system is built on a state-centric logic, what happens

³ United Nations Conference on Trade and Development (UNCTAD), 'Global Investment Trends Monitor, No. 50: Global FDI up 14% in 2025 – Growth Limited to Developed Economies,' *Global Investment Trends Monitor*, no. 50, UNCTAD/DIAE/IA/INF/2026/1, 20 January 2026, accessed 21 February 2026, <https://unctad.org/publication/global-investment-trends-monitor-no-50>.

⁴ United Nations Conference on Trade and Development (UNCTAD), *IIA Issues Note, No. 3: International Investment Agreements – Facts and Figures on Investor – State Dispute Settlement Cases* (Geneva: United Nations, November 2024), accessed 21 February 2026, https://unctad.org/system/files/official-document/diaepcbinf2024d5_en.pdf.

⁵ International Law Association. *Rule of Law and International Investment Law: Resolution 04/2024*. Adopted at the 81st Conference of the International Law Association, Athens, Greece, 25–28 June 2024. Accessed 21 February 2026. <https://www.ila-hq.org/en/documents/ila-rol-committee-resolution-athens-2024-final-1024>.

⁶ Ivana Damjanovic, 'The Reform of International Investment Law: Whose Rule of Law?' *European Journal of Risk Regulation* 15, no. 3 (2024): 524–540, <https://doi.org/10.1017/err.2024.28>.

where the state is not recognised or cannot function as a gateway? The issue essentially highlights how today's law creates vulnerability through institutional design, even as it promises climate salvation.

The UNFCCC text explicitly emphasises that financial flows must be aligned with a low-emission and climate-resilient trajectory (Art. 2) and that the temperature objective includes the effort to limit warming to 1.5 °C⁷. Following the same logic, the UNFCCC's official explanations define climate finance as resources mobilised from public and private sources for mitigation and adaptation, and reaffirm the idea of support for more vulnerable states, within a framework guided by country-driven strategies. However, operational mechanisms may discreetly reaffirm a criterion of formal sovereignty; for example, the Green Climate Fund requires that all funding proposals be accompanied by a letter of no objection issued by the National Designated Authority (NDA)/focal point, as a sign of alignment with national strategies⁸.

This highlights the scope of the argument regarding functional sovereignty, since, if access to funds depends on an administrative channel established within the state, regions with *de facto* authorities – such as the Kurdistan Region of Iraq or territories in Northern Syria, as mentioned in the article – risk being effectively excluded from funding, regardless of their urgent needs. In this vein, the proposal to use Special Purpose Vehicles (SPVs) emerges as a financial solution and a legal technique for creating investment capacity where legal subjectivity is contested or incomplete.

It is worth noting how this technique resonates with recent debates on the codification of corporate plans into law. Andrew Larkin, in a 2026 study, describes the dynamics through which the investment regime can reconfigure business plans into rights that take precedence over state objectives, precisely through its protection and adjudication mechanisms⁹. Interestingly, the article on SPVs turns the mirror around in the sense that it is not the investor who recodes the plan, but rather the sub-state community/authority seeks to build a legal interface to mobilise climate capital and small-scale projects into an investable structure.

From a financing perspective, the language of SPVs intersects with the blended finance toolkit. Although the classic definitions are older, they remain operative, and the OECD describes blended finance as the strategic use of development finance to mobilise additional capital towards development objectives in developing countries¹⁰. More recently, the OECD notes that direct investments in companies and in project finance special purpose vehicles (SPVs) have been major mechanisms for mobilising private finance (in a dataset for 2018–2020), alongside guarantees¹¹. In practice, this supports

⁷ United Nations Framework Convention on Climate Change (UNFCCC), *Paris Agreement*, adopted 12 December 2015, accessed 21 February 2026, https://unfccc.int/sites/default/files/english_paris_agreement.pdf.

⁸ Green Climate Fund, *No Objection Letter Template*, template document, dated 20 February 2025, accessed 21 February 2026, <https://www.greenclimate.fund/document/no-objection-letter-template>.

⁹ Andrew Larkin, 'From Business Plans to International Rights,' *Harvard International Law Journal* 67, no. 1 (Winter 2026): 61–128, accessed 21 February 2026, https://journals.law.harvard.edu/ilj/wp-content/uploads/sites/84/Vol.-67.1_Larkin_From-Business-Plans-to-International-Rights.pdf.

¹⁰ Organisation for Economic Co-operation and Development (OECD), *Making Blended Finance Work for the Sustainable Development Goals* (Paris: OECD Publishing, 2018), accessed 21 February 2026, <https://doi.org/10.1787/9789264288768-en>.

¹¹ Organisation for Economic Co-operation and Development (OECD), *Private Finance Mobilised by Official Development Finance Interventions: Opportunities and Challenges to Increase Its Contribution*

the hypothesis that the SPV, far from being a marginal device, is a standard vehicle for project financing, and the legal issue is who can set it up, with what legal status, what political risk and what protection?

Finally, this discussion also has a knock-on effect on the investment regime, in the sense that the contextual climate is a criterion for designing protections. A recent, high-impact doctrinal example is Oliver Hailes' analysis of environmental clauses in treaties and arbitral practices, which rejects the simplistic narrative of conflict and proposes a framework in which the right to regulate the environment operates under a manifest disproportion test, within an integrated reading of international law¹². It provides the perfect backdrop for understanding why, in post-conflict zones, the investment ecosystem cannot be built solely on contractual guarantees, but through a reasonable legal mechanism of sovereignty, recognition and accountability.

3. Tariffs, Emergencies and the Red Lines of Executive Power

Paulo de Brito's contribution is, perhaps, the most up-to-date illustration of how investment law is, in fact, a mirror of constitutional and geopolitical crises. The dispute over the tariffs imposed by Donald Trump under the guise of emergency, like a debate on competences within U.S. domestic law, inevitably casts a shadow over what the treaties refer to as fair treatment, non-discrimination, indirect expropriation and arbitrary measures.

The facts themselves represent a turning point. In February 2026, the Supreme Court of the United States ruled in *Learning Resources, Inc. v. Trump*, that the International Emergency Economic Powers Act (IEEPA) does not authorise the President to impose tariffs, and the reasoning is explicitly based on the constitutional architecture of the power to impose taxes and duties as a prerogative of the United States Congress¹³. This dividing line between emergency and delegation, between the executive and the legislature, represents a textbook case for the question raised by the article, namely when does regulatory autonomy become economic coercion incompatible with investment obligations?

Conceptually, this situation lies squarely within the debate over who shapes the system: states, through treaties and authoritative interpretations, or tribunals, through the incremental development of case law. Iulia Damjanovic observes that the options for reforming ISDS – are, in essence, choices regarding the control of power in matters of public interest and the divergent meanings of the rule of law in international investment law¹⁴. For her part, Catharine Titi shows that the public/private dispute in investment arbitration, beyond being merely an academic classification, is in fact a critique of the

towards the SDGs in Developing Countries (Paris: OECD Publishing, Development Co-operation Directorate, 2023), accessed 21 February 2026, https://www.oecd.org/content/dam/oecd/en/publications/reports/2023/01/private-finance-mobilised-by-official-development-finance-interventions_b2e9927e/c5fb4a6c-en.pdf.

¹² Oliver Hailes, *Environmental Clauses in Investment Arbitration: Deep Roots, Green Shoots and Dead Wood*, *ICSID Review – Foreign Investment Law Journal*, Volume 40, Issue 2, Spring 2025: 399–440, <https://doi.org/10.1093/icsidreview/siaf003>.

¹³ *Learning Resources, Inc. et al. v. Trump, President of the United States et al.*, No. 24–1287, 607 U.S. (U.S. 20 Feb. 2026), accessed 21 February 2026, https://www.supremecourt.gov/opinions/25pdf/24-1287_4gcj.pdf.

¹⁴ Damjanovic, 'The Reform of International Investment Law,' 524.

fact that disputes of public interest are decided by a private justice system, and the solution lies not in a label, but in what states build institutionally¹⁵.

What makes the contribution on tariffs truly valuable for the investment community is precisely this shift whereby the tariff appears as a public policy measure with massive distributional effects, and the investor – or the investor – supplier – beneficiary chain – can invoke the treaty as an instrument of recalibration or challenge. In a climate of economic fragmentation and trade tensions, this issue is no longer peripheral. UNCTAD explicitly notes that trade and geopolitical tensions, industrial policies and the diversification of supply chains are reshaping investment¹⁶. For this reason, analysing tariffs through an investment lens is both a necessary extension of the field and an adaptation of the law to the reality of mixed measures, be they trade, fiscal, security or industrial.

4. Diligence, FET and the State as Architect of Trust

The article by Makda Gebru Hayle (Xiamen University) returns to the core of the regime: the Fair and Equitable Treatment standard. The figures justify this choice, given that UNCTAD shows that FET is invoked in around 85% of ISDS cases for which information on the alleged breaches is available and is, at the same time, the standard most frequently found to have been breached in cases won by investors¹⁷.

The solution proposed by the article, namely the integration of the host state's due diligence into the interpretation of FET, is currently doubly relevant. Firstly, because due diligence is one of the few concepts that translates behavioural obligations into verifiable requirements and does not promise the absence of risk, but rather the reasonable standard of prevention and response. Secondly, because diligence restores the link between FET and the rule of law in a technical sense through transparency, legality, non-arbitrariness, due process, proportionality, and¹⁸. This link has also recently been reaffirmed in institutional language. The 2024 resolution of the International Law Association explicitly includes the finding that the FET standard can be understood as an expression of the rule of law and lists elements such as legal certainty, the predictability of rules, the absence of arbitrariness and proportionality. In the same vein, the volume edited by August Reinisch and Stephan Schill discusses precisely this shift: protection standards are reinterpreted as ‘‘ of the rule of law and, at the same time, as areas of friction when they become too expansive¹⁹.

Furthermore, the contemporary debate on legitimacy is pushing towards a ‘thinning’ of the investment rule of law, in the sense that it is no longer a matter of courts administering public policy, but rather of verifying the limits of arbitrariness. Christian

¹⁵ Catharine Titi, ‘Investment Treaty Arbitration Caught in the Public-Private Law Divide,’ *Michigan Journal of International Law* 45, no. 3 (2024): 441–508, accessed 21 February 2026, <https://doi.org/10.3664/2/mjil.45.3.investment>.

¹⁶ UNCTAD, *World Investment Report 2024: Investment Facilitation and Digital Government. Overview*.

¹⁷ UNCTAD, *IIA Issues Note, No. 3: International Investment Agreements – Facts and Figures on Investor – State Dispute Settlement Cases*.

¹⁸ International Law Association, *Rule of Law and International Investment Law*.

¹⁹ August Reinisch and Stephan W. Schill (eds.), *Investment Protection Standards and the Rule of Law* (Oxford: Oxford University Press, 2023; online ed., Oxford Academic, 23 February 2023), accessed 18 February 2026, <https://doi.org/10.1093/oso/9780192864581.001.0001>.

Riffel explicitly proposes this revision, warning that a ‘thick’ reading of the rule of law, combined with strong doctrines of legitimate expectations and strict proportionality control, may clash with democracy and the legitimate scope of regulation²⁰.

Here we see the specific contribution of the article on diligence, as it suggests a method of interpretation which, rather than absolutising either protection or autonomy, seeks criteria. Diligence can function as a contextual standard for FET, not to reject protection, but to anchor it in verifiable state behaviour and reasonable expectations under conditions of risk, including in post-conflict situations, during energy transitions, or in trade disputes.

5. Criminal Law, ESG and the Clean Investment Standard

The article by Radu Ștefănuț, Tomáš Peráček and Ľubica Bajžíková offers an insightful analysis in which criminal law no longer stands outside investment law as a tool for subsequent enforcement, but rather forms part of the structure of treaties and arbitration as a corrective mechanism against corruption, money laundering, transnational fraud, or ESG violations. This observation corresponds to a consistent doctrinal development according to which the aim is both to protect the investment and, above all, to ensure the legitimate protection of the investment.

Even without turning investment arbitration into a criminal court, recent practices and literature reinforce two ideas: (i) illicitness may affect jurisdiction or admissibility; (ii) the integrity of the adjudicators and the process is part of the legitimacy of ISDS. In leading literature, the ICSID Review – Foreign Investment Law Journal recently hosted an explicit discussion on corruption and the (un)clean hands doctrine, highlighting definitional difficulties and issues of reciprocity in application²¹.

On the institutional front, the doctrinal response is also a normative one. The codes of conduct adopted under the auspices of UNCITRAL start from the premise that the perception of a lack of independence and impartiality among some adjudicators has fuelled criticism of the system’s legitimacy and recommends clear standards regarding impartiality, the limitation of multiple roles, *ex parte* communications, confidentiality and disclosure obligations.

Furthermore, the development of investor obligations – whether through explicit clauses, interpretation, or soft standards that become hard through litigation – is reshaping the classic asymmetry. A joint South Centre – Geneva Graduate Institute report highlights that, against a backdrop of criticism of ISDS and intensifying demands for corporate accountability, there is growing discussion of investor obligations in investment law²². In the same area of convergence, Sarah L. Karamanian analyses the

²⁰ Christian Riffel, ‘International Investment Law, Rule of Law, and Democracy: When the Solution Is Part of the Problem,’ *German Law Journal* 26, no. 4 (2025): 613–635, <https://doi.org/10.1017/glj.2025.23>.

²¹ Yueming Yan, Corruption and the (Un)Clean Hands Doctrine in Investor-State Arbitration: Definitional and Reciprocity Challenges, *ICSID Review – Foreign Investment Law Journal*, Volume 39, Issue 1, Winter 2024: 61–73, <https://doi.org/10.1093/icsidreview/siae006>.

²² David Cheng, Jai Abhijit Unde, and James Casey Ryan, *Investor Obligations in International Investment Law*, prepared for the South Centre as part of the Geneva Graduate Institute’s LL.M. Legal Clinic Programme (Geneva: Geneva Graduate Institute and South Centre, 2024), accessed 21 February 2026, https://www.southcentre.int/wp-content/uploads/2024/11/Investor-Obligations-Geneva-Graduate-Institute-South-Centre-Report_December-2024.pdf.

role of corporate codes and private commitments in reconciling investment treaties, human rights and the net-zero objective, showing that the corporate code itself is becoming a disputable legal object in arbitration²³.

Last but not least, the ESG dimension can no longer be treated as a mere ornament. Oliver Hailes' analysis of environmental clauses in treaties shows that these clauses are already being interpreted, that they give rise to operational typologies such as jurisdiction, funds and exceptions, and that the energy transition generates both anti-transition and pro-transition disputes, with budgetary costs and implications for future investment²⁴. Here, the article on criminal law acts as a balancing factor because, if the transition requires capital, it also requires criteria for the integrity of that capital.

6. Nigeria and the Return to Politics: Investment as a Development Project

Finally, the review by Bayo Adaralegbe (University of Ibadan) of Emmanuel I. Kachikwu's work on the law and politics of foreign investment in Nigeria brings back to the fore a theme that the ISDS debate may overshadow, namely that investment is, before it becomes a dispute, a matter of domestic law, and domestic regulation is, before being a technical matter, public policy in the strictest sense.

The global context justifies this repositioning. UNCTAD observes both a polarisation of flows and a tendency for developed economies to adopt more restrictive measures – for example, on grounds of national security – whilst developing economies remain predominantly focused on facilitating and attracting investment²⁵. At the same time, UNCTAD shows that investment in infrastructure projects and international project finance has weakened, which affects precisely the areas most important for development²⁶.

In this context, investment policy, as a set of safeguards, has evolved into a governance package through facilitation, digitalisation, procedural transparency and administrative predictability. UNCTAD notes that investment facilitation measures have become central to attracting FDI and that digitalisation, such as portals and single windows, is a key area of implementation²⁷. In other words, the host state has moved away from being a potential respondent and has moved closer to being a creator of the investment environment and the primary judge of its own credibility.

7. Conclusion

For this reason, this issue serves as a bridge from the lack of sovereignty in climate finance to the excessive or contested sovereignty in emergency tariffs; from widely contested standards such as the FET to new standards such as clean investment; from investment law as a form of protection to investment law as a development project subject to democratic constraints. If there is a common thread, it is, perhaps, the shift

²³ Susan L. Karamanian, 'International Investment Agreements, Human Rights, and the Path to Net-Zero: What Role for Corporate Codes?' *Business and Human Rights Journal* 10, no. 1 (2025): 98–121, <https://doi.org/10.1017/bhj.2024.31>.

²⁴ Hailes, 'Environmental Clauses in Investment Arbitration,' 399.

²⁵ UNCTAD, *World Investment Report 2024: Investment Facilitation and Digital Government. Overview*.

²⁶ *Ibid.*

²⁷ *Ibid.*

from the abstract promise of stability to the concrete techniques of legitimacy through procedures, due diligence, integrity, transparency and institutions that can simultaneously support capital and the public interest.

Perhaps the true stake of international investment law has moved away from certainty, and has instead turned towards learning to dwell lucidly amidst the contradictions and difficulties associated with different periods and crises, where capital, power, vulnerability and the future are still seeking a common measure. However, until then, international investment law must adapt to survival on the basis of an ethics of limitation.

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