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Try Before You Trust: Is Investment Arbitration an Appropriate Forum for Climate-Related Investor-State Dispute Settlement (ISDS)?

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Try Before You Trust: Is Investment Arbitration an Appropriate Forum for Climate-Related Investor-State Dispute Settlement (ISDS)?

Experimente Antes de Confiar: A Arbitragem de Investimento é um Foro Adequado para a Resolução de Litígios Investidor-Estado Relacionados com o Clima (ISDS)?

Duc Tam NGUYEN THE[1]
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ABSTRACT: Climate-related Investor-State Dispute Settlement (ISDS) has moved from an occasional by-product of energy regulation to a recurring constraint on climate governance. This article asks a pragmatic institutional question: is international investment arbitration an appropriate forum for resolving climate-related investor-State disputes—and, if it is not fully appropriate, what procedural reforms could make it more legitimate and workable during the green transition? Methodologically, the paper adopts a qualitative doctrinal–policy design in three stages—mapping, evaluation, and reform design—to assess "institutional fitness" without relying on revisions to substantive investment standards. It first maps arbitration's expanding footprint in climate-related ISDS, including high-profile disputes and "regulatory wave" dynamics. It then evaluates arbitration's structural strengths for climate disputes against its deficits where public-interest regulation is at stake. The central finding is that arbitration is a flawed but improvable forum: technical competence alone cannot resolve the deeper misalignment between a system designed to protect private capital and disputes shaped by public-interest regulation, scientific uncertainty, and distributive choices. Accordingly, the article proposes a procedural reform package grounded in "try before you trust": default transparency, structured stakeholder participation, speed-and-cost tools, and access-to-justice measures.
KEYWORDS: Investment Arbitration; Investor-State Dispute Settlement; Climate Disputes; Energy Transition; ICSID; Procedural Reform; Sustainability.

RESUMO: A arbitragem entre investidores e Estados relacionada com o clima (Investor-State Dispute Settlement – ISDS) deixou de ser um subproduto ocasional da regulação do setor energético para se tornar uma limitação recorrente à governação climática. Este artigo coloca uma questão institucional pragmática: será a arbitragem internacional de investimento um foro adequado para resolver litígios entre investidores e Estados relacionados com o clima? E, caso não seja plenamente adequada, que reformas processuais poderiam torná-la mais legítima e funcional durante a transição ecológica? Do ponto de vista metodológico, o estudo adota um desenho qualitativo de natureza doutrinária e de políticas públicas, estruturado em três etapas — mapeamento, avaliação e formulação de reformas — com o objetivo de analisar

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a “adequação institucional” sem depender de revisões aos padrões substantivos de proteção do investimento. Em primeiro lugar, o artigo mapeia a expansão da arbitragem no contexto do ISDS relacionado com o clima, incluindo litígios de grande destaque e a dinâmica das chamadas “ondas regulatórias”. Em seguida, avalia os pontos fortes estruturais da arbitragem para este tipo de disputas, bem como as suas limitações quando estão em causa medidas regulatórias de interesse público. A principal conclusão é que a arbitragem constitui um foro imperfeito, mas passível de aperfeiçoamento: a competência técnica, por si só, não é suficiente para resolver o desalinhamento mais profundo entre um sistema concebido para proteger o capital privado e litígios moldados por regulação de interesse público, incerteza científica e escolhas distributivas. Assim, o artigo propõe um conjunto de reformas processuais assente na lógica de “experimentar antes de confiar” (*try before you trust*): transparência por defeito, participação estruturada das partes interessadas, mecanismos para reduzir custos e acelerar procedimentos, e medidas destinadas a promover o acesso à justiça.
PALAVRAS-CHAVE: Arbitragem de Investimentos; Resolução de Litígios Investidor-Estado; Litígios Climáticos; Transição Energética; ICSID; Reforma Processual; Sustentabilidade.

1. Introduction

The growing intersection between foreign direct investment protection and sovereign environmental regulation has ignited a debate: is international investment arbitration an appropriate mechanism for resolving climate-related disputes? The inherently private and commercial origins of arbitration render it fundamentally ill-suited to adjudicate matters of profound global public interest.[4] The opacity of the proceedings and the threat of multi-billion-dollar compensatory awards cause a “regulatory chill,” deterring governments from enacting ambitious climate legislation.[5] Others maintain that domestic courts are often constrained by political biases, nationalistic deference, or a lack of the specialized technical and economic expertise needed to handle such complex, transnational financial disputes.[6] From this perspective, arbitration remains the only viable, neutral forum capable of upholding the international rule of law and protecting legitimate investments during a turbulent green transition.

Against the backdrop of this “try before you trust” dilemma, this article seeks to critically evaluate the institutional fitness of investment arbitration for climate disputes. Specifically, the study pursues three primary objectives. First, it aims to clarify the growing footprint and systemic role of investment arbitration in adjudicating climate-related ISDS. Second, it seeks to provide a balanced, critical analysis of both the

[4] VAN HARTEN, Gus. *Investment treaty arbitration and public law*. Oxford: Oxford University Press, 2007.
[5] TIENHAARA, Kyla. Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement. *Transnational Environmental Law*. 2018, vol. 7, no. 2. DOI: 10.1017/S2047102517000309.
[6] SCHILL, S. W. Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review. *Journal of International Dispute Settlement*. 2012, vol. 3, no. 3. DOI: 10.1093/jnlids/ids010.

structural strengths of this mechanism and the democratic weaknesses it exposes when applied to high-stakes, public-interest environmental disputes. Third, acknowledging that investment arbitration is unlikely to be entirely replaced in the near term, the article endeavors to propose actionable procedural reforms that can improve the system's suitability, transparency, and legitimacy in the era of climate change.

To achieve these objectives, the article proceeds as follows. Section 2 maps the escalating role of investment arbitration, highlighting the rising volume, high-profile nature, and massive financial stakes of climate-related claims, alongside the unique "regulatory wave" dynamics they trigger. Section 3 examines the inherent institutional qualities that make arbitration structurally suited to handle these complex disputes, notably its capacity to harness professional expertise, its procedural flexibility, judicial neutrality, and the global enforceability of its awards. However, Section 4 confronts the profound tensions these private arbitral features create when intersecting with public climate interests, focusing on critical deficits in confidentiality versus transparency, stakeholder participation, public legitimacy, and access to justice. Finally, Section 5 outlines a comprehensive framework for adapting investment arbitration to address climate-related disputes. By proposing systemic adjustments, such as default transparency, structured stakeholder engagement, specialized management for regulatory wave disputes, and overarching integrity reforms, this article provides a roadmap for forging a more balanced, legitimate, and effective forum for climate-related ISDS.

2. The Increasing Role of Investment Arbitration in Climate-Related Investor-State Dispute Settlement

Investment arbitration has shifted from isolated investor complaints toward systematic challenges to State climate and energy measures, and scholars expect the number of climate-related claims to grow as States adopt supply-side and phase-out measures.[7] As States adopt climate mitigation and adaptation measures, investment arbitration has emerged as a prominent forum for resolving resulting conflicts.[8]

[7] ZHU, Ying. A quasi-normative conflict: Resolving the tension between investment treaties and climate action. *Review of European, Comparative & International Environmental Law*. 2024, vol. 33, no. 2. DOI: 10.1111/reel.12565

[8] HE, Lingling and Xiaobo ZHAO. Resolving Investor Protection in Climate-Related Disputes: Some Legal Reflections. *Environmental Policy and Law*. 2025, vol. 55, no. 6. DOI: 10.1177/18785395251385826

Arbitration forums such as the International Centre for Settlement of Investment Disputes (ICSID) remain central to these disputes, while debates about ISDS legitimacy and treaty compatibility with climate policy have intensified.[9]

As the global push for the energy transition and climate change mitigation accelerates, international investment arbitration is playing an increasingly central role in climate-related disputes. This growing prominence is not merely a theoretical legal trend but is demonstrably escalating across three primary dimensions. First, in terms of volume, there is a significant surge in the number of ISDS cases initiated by investors, driven by both the phase-out of fossil fuels and the rollback of renewable energy incentives. Second, regarding financial scale, the monetary value of these claims is reaching unprecedented levels, posing severe fiscal risks to host States. Finally, and most crucially, the strategic and systemic importance of these disputes is increasing: arbitral tribunals are now actively navigating the delicate boundary between a State's sovereign right to regulate for environmental protection and the protection of foreign investments. The following subsections will dissect this growing role across each of these three facets, illustrating how investment arbitration is profoundly shaping the landscape of global climate governance.

2.1 Rising Number of Cases and Increasing Share within Total ISDS

The international investment framework enables private actors to initiate claims under international law, thereby expanding the range of potential claimants. By the end of 2024, ISDS cases accounted for 35% of the database, largely due to the addition of previously unrecorded cases. At the same time, new claims continue to be filed, as corporations increasingly resort to arbitral tribunals to contest governmental measures impacting fossil fuel investments. In the past 10 years, the number of treaty-based ISDS cases has more than doubled. The total count of ISDS cases brought based on investment treaties reached 1,332, with 60 new arbitrations initiated in 2023.[10] In 2025, approximately 50% of known cases relate to extractive industries, including disputes over precious metals and stones, as well as cases involving critical minerals such as

[9] MEE, Rebecca and Jack BOWNES. Ditch or Fix? The Role of International Investment Agreements in Reconciling ISDS with the Climate Emergency (2nd Essay Competition Prize Winners 2024). *European Investment Law and Arbitration Review*. 2024, vol. 9, no. 2. DOI: 10.54648/EILA2024047

[10] *Facts and Figures on Investor-State Dispute Settlement Cases* [online]. UNCTAD, 2024 [accessed 26.04.2026]. Available at: https://unctad.org/system/files/official-document/diaepcbinf2024d5_en.pdf

manganese and rare earth elements.

Compared with other forums (domestic courts, human rights bodies), climate-related ISDS is still a small but growing slice of global climate litigation, yet its share is rising over time.[11] ISDS now appears in graphics tracking "climate-related ISDS cases within total ISDS" and within total climate cases (1994–2023), showing a visible upward trajectory.

2.2. Increasing Prevalence of High-Profile Climate-Related ISDS Cases

The role of investment arbitration is magnified by the rising prevalence of high-profile, heavily scrutinized cases. Climate-related ISDS is no longer a niche area of commercial arbitration; it has entered the mainstream political and public discourse.

Landmark cases such as RWE v. Netherlands and Uniper v. Netherlands, where energy giants sued the Dutch government over its 2030 coal phase-out law, have generated unprecedented public interest. Similarly, the Rockhopper v. Italy case, in which a British oil and gas company successfully sued Italy over a ban on offshore drilling within a 12-mile coastal zone, sparked international outcry from environmental groups.[12]

2.3. "Regulatory Wave" Dynamics Triggered by Climate Measures

The interaction between climate policy and ISDS has given rise to a "regulatory wave" dynamic, where the implementation of necessary environmental measures triggers a surge in investor claims. This phenomenon is a direct consequence of the mismatch between the 21st-century imperative for rapid decarbonization and the 20th-century legal framework designed to protect capital from political risk.

Due to recent investment arbitration cases contesting States' fossil fuel phase-out policies as violations of investment treaty obligations, the conflict between investment treaties and climate action is escalating.[13] As countries continue to implement climate mitigation and adaptation measures across various industries, this

[11] MARTINI, Camille. From Fact to Applicable Law: What Role for the International Climate Change Regime in Investor-State Arbitration? *Canadian Yearbook of International Law/Annuaire canadien de droit international*. 2024, vol. 61. DOI: 10.1017/cyl.2024.2

[12] JOHNSON, Lise, Lisa SACHS and Ella MERRILL. Investor-State Dispute Prevention: A Critical Reflection. *Disp. Resol. J.* 2021, vol. 75, no. 4.

[13] *Treaty-based Investor-State Dispute Settlement Cases and Climate Action* [online]. UNCTAD, [accessed 26.04.2026]. Available at: https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf

tension is expected to result in a rise in climate-related investment arbitration claims. Evidence indicates a growing incidence of investor claims tied to fossil fuel phase-outs and energy regulatory changes, generating concern about a regulatory chill on climate action. Fossil fuel-related cases account for 16% of all investment law-based arbitrations.[14] Major companies, such as Shell, BP, Exxon, and Chevron, have utilized ISDS to claim hundreds of millions, and sometimes billions, in taxpayer-funded compensation.[15]

2.4. Rising Monetary Stakes in Climate-Related ISDS

The final, and perhaps most concerning, dimension of the growing role of climate-related ISDS is the staggering escalation in monetary stakes. The quantum (amount of damages) sought by investors in climate cases frequently reaches the billions, driven by the capital-intensive nature of energy infrastructure and the use of sophisticated valuation methods. UNCTAD data show that 60% of all ISDS cases now involve claims above USD 100 million, and 143 cases exceed USD 1 billion.[16]

Modeled exposure suggests that effective global climate action (e.g., canceling 1.5 °C-incompatible oil and gas projects) could generate up to US$340 billion in ISDS claims from oil and gas investors.[17] These risks are heavily concentrated in low- and middle-income countries where most treaty-protected, 1.5 °C-incompatible upstream assets are located.

These rising stakes have systemic implications. First, they reallocate climate risk from investors to States: public budgets must either defend against or pay for claims, diverting scarce resources away from mitigation and adaptation, especially in the Global South.[18] Second, they create powerful regulatory-chill incentives: the mere threat of multibillion-dollar claims can deter or delay ambitious supply-side measures

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[14] HÉBIÉ, Mamadou. Climate Change Clauses in International Investment Agreements: An Analytical Survey. *ICSID Review*. 2026, vol. 40, no. 2, pp. 239–294. DOI: 10.1093/icsidreview/siaf016

[15] DI SALVATORE, Lea. *Investor-State Disputes in the Fossil Fuel Industry*. 2021. DOI: 10.13140/RG.2.2.29949.08168

[16] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT. *Recent trends in investor-State arbitration cases* [online]. United Nations Conference on Trade and Development, 2025 [accessed 26.04.2026]. Available at: https://unctad.org/system/files/official-document/diaepcbinf2025d4_en.pdf

[17] TIENHAARA, Kyla et al. Investor-state disputes threaten the global green energy transition. *Science*. 2022, vol. 376, no. 6594, pp. 701–703. DOI: 10.1126/science.abo4637

[18] ARCURI, Alessandra, Kyla TIENHAARA and Lorenzo PELLEGRINI. Investment law v. supply-side climate policies: insights from Rockhopper v. Italy and Lone Pine v. Canada. *International Environmental Agreements: Politics, Law and Economics*. 2024, vol. 24, no. 1, pp. 193–216. DOI: 10.1007/s10784-023-09622-w

such as production bans, phase-outs, or licensing moratoria. Third, awards themselves can fuel capital accumulation for further fossil expansion, as in Rockhopper's stated intention to use compensation to finance new exploration.[19]

3. Qualities of Investment Arbitration Suited to Climate-Related Investor-State Disputes

Climate-related disputes arising from foreign investment increasingly sit at the intersection of environmental regulation, economic policy, and international law.[20] Several intrinsic qualities of investment arbitration explain its particular suitability for such disputes.[21] Its structural suitability for climate-related disputes is fundamentally underpinned by four interconnected qualities: the capacity to harness specialized professional expertise, procedural flexibility, the guarantee of judicial neutrality, and the unparalleled global enforceability of its awards.

3.1. Professional Expertise

The first defining quality that makes investment arbitration suitable for these disputes is its capacity to harness highly specialized professional expertise. Climate-related investment disputes are characterized by profound scientific, technical, and economic complexity. Unlike conventional commercial disputes, the intricate nature of climate-related disputes often demands in-depth and specialized knowledge that goes beyond general legal principles.[22] Climate change is polycentric, as causes and impacts arise from countless activities across sectors, States, and scales, with many interdependent actors and feedbacks.[23] Accordingly, climate-related disputes cut across various levels (e.g., local permitting versus Paris Agreement duties), making it

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[19] SIDENKO, Svitlana. Modern Trends in the Development of International Financial Centers. *International Economic Policy*. 2022, no. 37, pp. 77–92. DOI: 10.33111/iep.eng.2022.37.04

[20] ZHANG, Sheng and Ni LI. Addressing Climate Change through International Investment Agreements: Obstacles and Reform Options. *Sustainability*. 2024, vol. 16, no. 4, p. 1471. DOI: 10.3390/su16041471

[21] KAHL, Wolfgang and Marc-Philippe WELLER, eds. IV. Suitability of arbitration proceedings for climate change disputes. In: KAHL, Wolfgang and Marc-Philippe WELLER, eds. *Climate Change Litigation*. Verlag C.H.BECK oHG, 2021, pp. 105–114. DOI: 10.17104/9783406779237-105

[22] VIÑUALES, Jorge E. *Foreign Investment and the Environment in International Law*. Cambridge University Press, 2012. DOI: 10.1017/CBO9780511902567

[23] LEDDIN, Desmond. The Impact of Climate Change, Pollution, and Biodiversity Loss on Digestive Health and Disease. *Gastro Hep Advances*. 2024, vol. 3, no. 4, pp. 519–534. DOI: 10.1016/j.gastha.2024.01.018

hard to locate responsibility and the right forum.[24] This includes assessing the technical feasibility of renewable energy infrastructure, analyzing the mechanics of carbon pricing and emissions trading systems, and determining the validity of the State's scientific justification for phasing out fossil fuels.

Furthermore, the calculation of damages in these cases, particularly concerning "stranded assets," often demands the application of sophisticated economic modeling, such as complex discounted cash flow (DCF) analyses projecting energy market volatility decades into the future.[25]

3.2. Procedural Flexibility

The core strength of investment arbitration for climate-related disputes lies in its inherent procedural flexibility, which stands in stark contrast to rigid and standardized rules governing court litigation. Flexibility allows for the integration of international and domestic climate norms as applicable law or interpretive context.[26] ISDS routinely applies both domestic and international law, which can open space to rely on climate treaties, ESG clauses, and national climate legislation as grounds for claims or counterclaims.[27] Climate cases typically involve enormous volumes of technical data, span multiple jurisdictions, and concern complex relationships extending over decades.[28] Arbitration's autonomy allows tribunals and parties to deploy advanced case-management techniques to ensure efficient resolution, a necessity given the potential for sprawling litigation. Investment arbitration rules let parties tailor procedures and even adopt expedited timelines.[29]

Moreover, tribunals have the authority to appoint independent scientific and

[24] SETZER, Joana and Lisa C. VANHALA. Climate change litigation: A review of research on courts and litigants in climate governance. *WIREs Climate Change*. 2019, vol. 10, no. 3, p. e580. DOI: 10.1002/wcc.580

[25] TIENHAARA, Kyla and Lorenzo COTULA. *Raising the cost of climate action? Investor-state dispute settlement and compensation for stranded fossil fuel assets* [online]. London: IIED, [accessed 27.04.2026]. Available at: https://www.iied.org/17660iied

[26] MEJÍA-LEMOS, Diego. The suitability of investor-State dispute settlement and host State counterclaims for implementing climate change international responsibility. *Review of European, Comparative & International Environmental Law*. 2023, vol. 32, no. 2, pp. 334–347. DOI: 10.1111/reel.12482

[27] GOUIFFÈS, Laurent and Melissa ORDONEZ. Climate change in international arbitration, the next big thing? *Journal of Energy & Natural Resources Law*. 2022, vol. 40, no. 2, pp. 203–224. DOI: 10.1080/02646811.2021.1959158

[28] ZHANG, Yedong. Developing a Climate Litigation Framework: China's Contribution to International Environmental Law. *Ecological Civilization*. 2025, vol. 2, no. 1. DOI: 10.70322/ecolciviliz.2024.10017

[29] ALLEN, Richard and Leng Sun CHAN. Comparative Chart of International Investment Arbitration Rules. In: *Global Arbitration News* [online]. 12. 1. 2017 [accessed 26.01.2026]. Available at: https://www.globalarbitrationnews.com/2017/01/12/3168-2-20170112/

technical experts to evaluate conflicting environmental impact assessments, ensuring that legal determinations regarding a State's "right to regulate" are grounded in robust empirical and scientific realities rather than mere legal formalism.[30] Critically, the need for urgency is paramount in resolving climate disputes, where the consequences of inaction, especially irreversible environmental impacts, can adversely affect millions of lives. Arbitration addresses this time sensitivity through mechanisms for seeking urgent interim or conservatory measures. Most leading arbitration institutions have incorporated provisions on emergency arbitration over the past 15 years.[31]

3.3. Judicial Neutrality

Given the likely presence of States and State entities as parties, the neutrality of international arbitration enhances its suitability. The neutrality of the arbitral tribunal is one of the fundamental features of fair arbitration proceedings.

Foreign investors are often highly reluctant to litigate against a host State in that State's domestic courts due to perceived bias, procedural disadvantages, or the influence of national politics.[32] In this context, an independent and neutral tribunal, removed from the host State's judiciary and from that of the investor, is crucial for resolving climate change-related disputes. By providing a forum where neither party holds a sovereign home-court advantage, international arbitration maintains a sufficient level of perceived social and legal acceptability for all stakeholders.[33] ISDS provides investors with a minimum safety net that enables them to hold States to their commitments to act in good faith, not to discriminate against foreign investors, and not to expropriate their private property without fair compensation. This neutrality is foundational to third-generation investment treaties that seek to balance investor

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[30] BUCHAN, Russell, Daniel FRANCHINI and Nicholas TSAGOURIAS, eds. Effectiveness, Authority, and Legitimacy of the Current System of International Dispute Settlement and Possible Reforms: In: BUCHAN, Russell, Daniel FRANCHINI and Nicholas TSAGOURIAS, eds. *The Changing Character of International Dispute Settlement*. Cambridge University Press, 2023, pp. 135–364. DOI: 10.1017/9781009076296.011

[31] ACERIS LAW. Emergency Arbitration: Balancing Urgency and Fairness. In: *Aceris Law* [online]. 11. 11. 2024 [accessed 26.04.2026]. Available at: https://www.acerislaw.com/emergency-arbitration-balancing-urgency-and-fairness/.

[32] FINIZIO, Steven and Matteo ANGELINI. Climate-Related Disputes and International Arbitration. In: *Global Arbitration Review* [online]. 30. 9. 2024 [accessed 29.04.2026]. Available at: https://globalarbitrationreview.com/guide/the-guide-climate-change-and-related-disputes/first-edition/article/climate-related-disputes-and-international-arbitration

[33] CAMANNA, Mirko. Climate Change or Change of Climate? In: *Kluwer Arbitration Blog* [online]. 15. 5. 2024 [accessed 29.04.2026]. Available at: https://legalblogs.wolterskluwer.com/arbitration-blog/climate-change-or-change-of-climate/

protections with the State's right to regulate for climate action.

3.4. Enforceability of Awards

Ultimately, the efficacy of any legal mechanism designed to adjudicate these disputes relies on the robust enforceability of its judgments, which represents the fourth and perhaps most potent quality of investment arbitration. Climate-related ISDS cases routinely involve staggering monetary stakes. It is estimated that global legal liabilities from stranded fossil fuel assets protected by ISDS could reach up to $340 billion, while the average amount claimed in a fossil fuel ISDS case is an astounding $1.4 billion, more than quadruple the median claim in general non-energy ISDS cases.

In this regard, international investment arbitration possesses a global enforcement architecture that is entirely unparalleled. This enforceability is anchored in two foundational treaties. For disputes administered under the ICSID Convention, which boasts 158 Contracting States, Article 54 imposes an absolute obligation to recognize an arbitral award as binding and to enforce the pecuniary obligations "as if it were a final judgment of a court in that State." For non-ICSID arbitrations, the 1958 New York Convention ensures that arbitral awards can be swiftly enforced across its 172 State Parties, subject only to extremely narrow grounds for refusal. In contrast, attempting to enforce a domestic court judgment across international borders is fraught with legal hurdles and sovereign immunity defenses. This formidable, near-universal enforceability guarantees that investment arbitration is a highly potent mechanism capable of delivering definitive, actionable resolutions to the world's most costly climate disputes.

4. Tension between Public Interest and Private Arbitration in Climate-Related Disputes

Despite its benefits, investment arbitration's structural conflicts of interest can harm parties' commercial interests and host States' environmental welfare. When a State arbitrates, the rights implicated extend beyond its private patrimony to include broader public and regulatory interests.[34] Investor-State disputes inevitably involve the

[34] MASHAW, Jerry L. The Challenge of Positive Political Theory. In: *Greed, Chaos, and Governance* [online]. Yale University Press, 1997, pp. 1–29 [accessed 26.01.2026]. Available at: http://www.jstor.org/stable/j.ctt32br16.4

public interest.[35] Thus, any contractual dispute involving a public body that implicates economic or social policy raises public-interest considerations.[36] These tensions are intensified by the treaty-based nature of investment arbitration.[37]

The principal tensions in climate-related disputes concern confidentiality and transparency, stakeholder participation, and the legitimacy of arbitration.

4.1. Confidentiality versus Transparency

Lack of transparency is widely criticized as undermining the legitimacy and accountability of investor-State arbitration.[38] Although parties may agree to increase transparency, such voluntary disclosure remains uncommon.[39]

ICSID is the most trusted go-to arbitration center for ISDS, and it is the dispute-resolution mechanism for more than 2,500 investment treaties.[40] ICSID has faced substantial criticism for using a predominantly private dispute-resolution system to adjudicate matters involving clear public-interest concerns.[41] Although ICSID has revised its rules, publication of awards still requires party consent, and either party may prevent hearings from being public.[42]

4.2. Participation of Stakeholders

Investor-State disputes, particularly climate-related disputes, affect non-parties, including subnational governments, indigenous authorities, affected communities, and

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[35] TIENHAARA, Kyla. Third Party Participation in Investment-Environment Disputes: Recent Developments. *Review of European Community & International Environmental Law*. 2007, vol. 16, no. 2. DOI: 10.1111/j.1467-9388.2007.00557.x; CENTER FOR INTERNATIONAL ENVIRONMENTAL LAW and INTERNATIONAL INSTITUTE FOR SUSTAINABLE DEVELOPMENT. Revising the UNCITRAL Arbitration Rules to Address Investor-State Arbitrations [online]. Geneva: CIEL, December 2007 [viewed 2026-01-23]. Available from: https://www.ciel.org/wp-content/uploads/2015/03/CIEL_IISD_RevisingUNCITRAL_Dec07.pdf.
[36] BREKOULAKIS, Stavros and Margaret DEVANEY. Public-Private Arbitration and the Public Interest under English Law. *The Modern Law Review* [JSTOR]. [Modern Law Review, Wiley], 2017, vol. 80, no. 1, p. 13.
[37] FERIA-TINTA, Monica. 'Public Interest in Investment Arbitration: The Rapid Ascent of Human Rights, Labour Law and Environmental Law.' 2023. DOI: 10.4324/9781003388821-24
[38] BJORKLUND, Andrea K. *Yearbook on International Investment Law & Policy, 2013-2014*. Oxford: Oxford University Press, 2015, pp. 59-64.
[39] MAGRAW, Daniel and Niranjali AMERASINGHE. Transparency And Public Participation In Investor-State Arbitration. *ILSA Journal of International & Comparative Law*. 2009, vol. 15, no. 2.
[40] About ICSID | ICSID. In: [accessed 23.01.2026]. Available at: https://icsid.worldbank.org/About/ICSID
[41] BONNITCHA, Jonathan, Lauge N SKOVGAARD POULSEN and Michael WAIBEL. *The Political Economy of the Investment Treaty Regime*. Oxford University Press, 2017. DOI: 10.1093/law/9780198719540.001.0001
[42] Overview of an Arbitration - ICSID Convention Arbitration (2022 Rules) | ICSID. In: [accessed 26.01.2026]. Available at: https://icsid.worldbank.org/procedures/arbitration/convention/overview/2022

users of regulated natural resource services. In response to pressure to subject Investor-State arbitration to public scrutiny, third-party participation has increased substantially. Non-disputing actors, including the investor's home State, subnational authorities, international organizations, and NGOs, may submit expert opinions to the tribunal where appropriate.[43] The ICSID Arbitration Rules have provisions permitting *amicus curiae* submissions.[44]

Current ISDS rules tend not to provide for effective or meaningful participation of third parties in investment disputes.[45] Arbitral tribunals have discretion to admit *amicus curiae* submissions, and such participation is often refused.[46] Even when admitted, *amicus curiae* participation is limited both in its impact on the tribunal's assessment and in the scope of the *amici*'s participation before the tribunal. This is because these third parties often have little to no access to the case files needed to make *amicus curiae* submissions.[47]

Therefore, *amici curiae* remain an imperfect mechanism for third-party participation.[48] Tribunals have noted that acceptance of third-party submissions grants no procedural or substantive rights to such participants.[49] *Amicus* participation criteria, particularly neutrality requirements, may be difficult or impossible for third parties whose own rights or interests are directly affected by ISDS proceedings.[50]

4.3. Legitimacy

As investor-State claims increase, public scrutiny has intensified, leading

[43] UNITED NATIONS. Commission on International Trade Law (UNCITRAL). *Report of Working Group III (Investor-State Dispute Settlement Reform) on the work of its thirty-seventh session (New York, 1–5 April 2019)*. A/CN.9/970. Vienna: UNCITRAL, 2019, paras. 31–39; IIED, CCSI and IISD, 'Shaping the Reform Agenda: Concerns Identified and Cross-Cutting Aspects' (Submission to UNCITRAL Working Group III on Investor-State Dispute Settlement Reform, 15 July 2019).
[44] ICSID Arbitration Rules, Rule 67
[45] COTULA, Lorenzo and Nicolás M. PERRONE. Reforming investor-state dispute settlement: what about third-party rights? In: [accessed 26.01.2026]. Available at: https://www.iied.org/17638iied
[46] MEHRANVAR, Ladan et al. How the International Investment Law Regime Undermines Access to Justice for Investment-Affected Stakeholders. *SSRN Electronic Journal*. 2024. DOI: 10.2139/ssrn.4702705
[47] TIENHAARA, Kyla. Reconsidering ICSID in the Context of Global Just Transitions. *Global Environmental Politics*. 2025, vol. 25, no. 4, p. 23–43. DOI: 10.1162/GLEP.a.8
[48] BUTLER, Nicolette. Non-Disputing Party Participation in ICSID Disputes: Faux Amici? *Netherlands International Law Review*. 2019, vol. 66, no. 1, pp. 143–178. DOI: 10.1007/s40802-019-00132-8
[49] EL-HOSSENY, Farouk. *Civil society in investment treaty arbitration: status and prospects*. Leiden: Brill Nijhoff, 2018, p. 103, p. 105, p. 252. DOI: 10.1163/9789004349131
[50] COLEMAN, Jesse et al. Third-Party Rights in Investor-State Dispute Settlement: Options for Reform. *Columbia Center on Sustainable Investment Staff Publications* [online]. 2019. Available at: https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/150

commentators to talk of a "legitimacy crisis."[51] The constant use of investment arbitration to circumvent environmental regulation delegitimizes arbitration.[52] This stems from the use of ISDS to circumvent the jurisdiction of national courts,[53] which would consider broader environmental obligations beyond purely commercial norms.

Investment arbitration emerged primarily to protect private investors.[54] Empirical studies of ISDS merits awards (1987–2017) indicate that roughly 61% favored investors.[55] Canadian investors in coal and mining industries have prevailed in approximately 59% of their ISDS claims, frequently against lower-income States.[56]

This has brought about skepticism among developing countries, where arbitration circumvents domestic jurisdiction and unduly favors investors.[57] The reassertion of sovereign authority has followed.[58]

Arbitration is often perceived as primarily safeguarding the commercial interests of the parties, particularly in climate-related disputes.[59] This perception has undermined the legitimacy of investment arbitration and heightened the risk of resistance to the recognition and enforcement of arbitral awards.[60]

5. Adapting ISDS to Address Climate-Related Disputes

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[51] PEEL, Jacqueline. Issues in Climate Change Litigation. *Carbon & Climate Law Review*. 2012, vol. 5. DOI: 10.21552/CCLR/2011/1/162

[52] BROWER, Charles, Charles BROWER and Jeremy SHARPE. The Coming Crisis in the Global Adjudication System. *Arbitration International*. 2003, vol. 19. DOI: 10.1093/arbitration/19.4.415

[53] FARRINGTON, Francesca and Nevena JEVREMOVIĆ. Between a rock and a hard place: the impact of replacing or abolishing ISDS on investment-affected parties. *Journal of International Dispute Settlement*. 2025, vol. 16, no. 3, pp. 1–17. ISSN: 2040-3593. DOI: 10.1093/jnlids/idaf023

[54] MANN, Howard et al. *IISD Model International Agreement on Investment for Sustainable Development: Negotiators' Handbook* [online]. International Institute for Sustainable Development, 2005. Available at: https://www.iisd.org/system/files/publications/investment_model_int_handbook.pdf

[55] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT. *Investor-State Dispute Settlement: Review of Developments in 2017* [online]. United Nations Conference on Trade and Development, 2018 [accessed 26.04.2026]. Available at: http://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf

[56] MERTINS-KIRKWOOD, Hadrian. *On the offensive: how Canadian companies use trade and investment agreements to bully foreign governments for billions*. Ottawa, ON: Canadian Centre for Policy Alternatives, 2022.

[57] Wesley, The Procedural Malaise of Foreign Investment Disputes in Latin America: From Local Tribunals to Fact Finding, 7 LAW & PoL'Y INT'L Bus. 813 (1975); Abbott, Latin America and International Arbitration Conventions: The Quandary of Non-Ratification, 17 HARV. INT'L L.J. 131 (1976); Tiewul & Tsegah, Arbitration and the Settlement of Commercial Disputes: A Selective Survey of African Practice, 24 INT'L & COMP. L.Q. 393, 398 (1975).

[58] UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, ed. *Trade and development report. 2010*. New York: United Nations, 2010.

[59] VADI, Valentina. Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals? *Vanderbilt Journal of Transnational Law*. 2015, vol. 48, no. 5.

[60] SÖNMEZ, Esma Yağmur. *From Divergent Paths to the Same Trap: The Legitimacy Crisis of the Investor-State Dispute Settlement System*. 2024, PhD Thesis, Middle East Technical University.

In response to criticisms of the ISDS regime, an UNCITRAL working group has been discussing a number of reforms since 2017.[61] This process offers a crucial opportunity to address the shortcomings of the current system and develop solutions that better balance investor protection with the need for effective climate action. The Special Rapporteur on the human right to a clean, healthy, and sustainable environment has also laid out many solutions to address the shortcomings of ISDS.[62]

Overall, reform proposals in investment arbitration focus on institutionalizing mandatory transparency in climate-related ISDS; normalizing structured third-party participation; developing case-management mechanisms for “regulatory wave” litigation; introducing technical reforms to improve cost and efficiency; and strengthening access to justice and procedural integrity.

5.1. Transparency by Default

We propose that an ISDS arbitration rule should have an opt-out rule for publication so that, apart from awards, procedural orders and the parties’ written submissions are published automatically unless a party objects within a strictly limited window and only narrowly protected material is redacted. Automatic publication should be extended to interlocutory orders that resolve matters of public relevance.

Such an opt-out default will (i) restore public access to the arbitral record in matters of genuine public interest, (ii) reduce strategic secrecy that frustrates democratic oversight of climate measures, and (iii) preserve legitimate confidentiality through targeted redactions rather than wholesale non-publication.

The UNCITRAL Rules on Transparency should be adopted as the procedural baseline for climate-related ISDS. The Rules operationalize public access to case files, subject only to limited exceptions for legitimately confidential or protected information.[63] In addition, States should ratify the United Nations Mauritius Convention on Transparency so that the standards in the Rules apply to disputes arising under pre-2014 treaties.

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[61] UNCITRAL, ‘Report of the United Nations Commission on International Trade Law, Fiftieth Session (3–21 July 2017)’, UN Doc A/72/17, 46–47 (para 264).
[62] BOYD, David R. *Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights: note / by the Secretary-General*. New York: United Nations, 13 July 2023. A/78/168.
[63] *UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration* [online]. 2014 [accessed 29.04.2026]. Available at: https://uncitral.un.org/sites/default/files/media-documents/uncitral/en/transparency-convention-e.pdf

Public availability of awards, orders, and evidentiary materials allows for scientific and regulatory scrutiny of the factual and normative premises that underlie disputes (for example, the technical bases for challenged environmental measures), reduces misinformation about energy-transition policies, and makes arbitral reasoning usable for public accountability and future policymaking.

5.2. Structured Stakeholder Participation

Reform must either institutionalize the prerequisites in the Rules or strip away the tribunal's exclusive power to admit third-party stakeholders.[64] We propose that a climate-suitable regime should replace ad hoc admission with a participation protocol that sets out minimum procedural standards, such as deadlines and word limits for submissions, mandatory disclosure of funding and affiliations by third-party participants, and rules for evidentiary annexes specifically for third parties. It must also be recognized that amici should have conditional access to procedural documents and expert reports necessary to prepare meaningful submissions.[65]

Tribunals should operate under a presumption that public-interest *amicus* briefs are *de facto* admissible, that is, briefs that (i) address environmental or climate impacts germane to the dispute; (ii) contribute specialized expertise or first-hand evidence from affected communities; and (iii) do not prejudice the parties' right to be heard or otherwise undermine due process.[66]

Free, prior, and informed consent (FPIC) should also be utilized to justify these affected groups' right to participate.[67] ISDS arbitration rules should incorporate this principle to serve as an indirect mechanism to allow certain stakeholders to participate at will, without unnecessary procedural barriers.[68] In some ISDS proceedings, ICSID

[64] ALI, Nilfat. Backlash Against ISDS: A Case for a Sustainable Development Approach to Investment Arbitration for Developing Countries. *African Journal of Commercial Law*. 2021, vol. 1, no. 1, pp. 73–74. DOI: 10.58216/ajcl.v1i1.139

[65] CHAN, Michelle and Kanika GUPTA. Impacts of the International Investment Regime on Access to Justice. Columbia University, 2017. DOI: 10.7916/D8-67WM-AT55.

[66] RIDI, Niccolò. What are amicus interventions for? Some provocations on non-disputing party submissions in international investment arbitration. In: *QIL QDI* [online]. 30. 7. 2023 [accessed 26.01.2026]. Available at: https://www.qil-qdi.org/what-are-amicus-interventions-for-some-provocations-on-non-disputing-party-submissions-in-international-investment-arbitration/

[67] Free, Prior and Informed Consent: Protecting Indigenous Peoples' rights to self-determination, participation, and decision-making. In: *Cultural Survival* [online]. 27. 11. 2012 [accessed 26.04.2026]. Available at: https://www.culturalsurvival.org/publications/cultural-survival-quarterly/free-prior-and-informed-consent-protecting-indigenous.

[68] WANG, Chao, Jing NING and Xiaohan ZHANG. International Investment and Indigenous Peoples' Environment: A Survey of ISDS Cases from 2000 to 2020. *International Journal of Environmental Research and Public Health*. 2021, vol. 18, no. 15, p. 7798. DOI: 10.3390/ijerph18157798

tribunals have already recognized third parties' "right to be consulted with respect to any project that may affect them."[69]

Structured participation helps reconcile the procedural tension between public interest and party-centered arbitration by providing affected and expert voices with a defined mechanism to assist the tribunal, improving the tribunal's factual understanding of complex environmental and technical questions and increasing the institutional legitimacy and public accountability of awards. Codifying participation rules will reduce the risk that amici simply repeat party submissions or unduly prolong proceedings, while improving the tribunal's capacity to assess public-interest harms.

5.3. Speed and Cost Reforms

Tribunals should be empowered to dispose quickly of claims (or, where appropriate, defenses) that are manifestly without legal merit. Fast-track dismissal reduces both the litigation burden on States and the chilling effect of protracted proceedings on regulatory action.[70]

An early-dismissal mechanism should apply a narrow standard, permitting dismissal only where a claim manifestly lacks legal merit.[71] It should also provide that an unsuccessful early-dismissal application does not prejudice subsequent, fuller adjudication of jurisdiction or the merits. The finality of the awards should also be limited, as narrow review mechanisms for abuse of the expedited process (e.g., limited supervisory review on procedural fairness grounds) must be included in the Expedited Rules to ensure procedural justice in cases of abuse.

A climate-fast track should also incorporate, *inter alia,* a predefined maximum period for each procedural stage and the mandatory early exchange of core expert reports and disclosure of key datasets. Limited, time-boxed expert conferences or tribunal-supervised evidentiary panels to resolve technical disagreements should also be considered to expedite the proceedings. These safeguards ensure that expedited

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[69] *Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities* [online]. Rome, Italy: FAO, 2016 [accessed 25.04.2026]. Available at: https://openknowledge.fao.org/handle/20.500.14283/i6190e

[70] ROBERTS, Anthea. UNCITRAL and ISDS Reforms: Concerns about Costs, Transparency, Third Party Funding and Counterclaims. In: *EJIL: Talk!* [online]. 6. 6. 2018 [accessed 24.02.2026]. Available at: https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-costs-transparency-third-party-funding-and-counterclaims/

[71] ACERIS LAW. Frivolous Claims in Arbitration: ICSID Rule 41(5) and Rule 41. In: *Aceris Law* [online]. 8. 12. 2024 [accessed 26.04.2026]. Available at: https://www.acerislaw.com/frivolous-claims-in-arbitration-icsid-rule-415-and-rule-41/.

procedures do not compromise the fact-finding process.

Speed-and-cost reforms are not merely efficiency goals; they are material safeguards for democratic policymaking. Rapid, affordable procedures reduce the tactical use of arbitration to deter regulatory interventions, limit the fiscal exposure of vulnerable States, and enable tribunals to adjudicate on an accurate scientific record while the underlying policy remains current.

Costs may arise from redacting information to which the parties object and from parties' opting out of public disclosure of case information. Mere publication of this information might also be insufficient, as the public might have a hard time compiling the published documents to connect and systematize the tribunal's reasoning in issuing its awards. Thus, there is a need to build an indexed database, which will be costly.

The cost of these processes should be borne by supranational entities or by economically privileged parties, for example, through higher fees charged by arbitral institutions to parties satisfying a cost threshold. From this perspective, the increase in fees should be kept reasonable.[72]

5.4. Access to Justice and Integrity

Rules governing third-party funding (TPF) should require early and continuing disclosure of the identity of funders, the nature of support provided to parties in litigation, and any material changes. There should also be a strict mandate requiring conflict-of-interest checks for arbitrators against disclosed funders and related entities. Disclosure rules reduce hidden influence by financial entities over the composition or functioning of the arbitral tribunal, inform challenge and recusal decisions by the parties and the tribunal, and increase public confidence in arbitral outcomes. Transparent TPF regimes reduce conflicts of interest and facilitate proportionate regulatory responses.[73]

There should also be a conflict-of-interest mechanism that allows tribunals to deny investors access to ISDS where they have violated domestic or international obligations by providing procedural rules that allow the arbitral tribunal to dismiss cases on grounds of inadmissibility relating to the integrity of the parties, even in the face of

[72] ZHAO, Yun and Yanru CHEN. The evolving *lex mercatoria*: a game-changer for transparency in international commercial arbitration. *Journal of International Dispute Settlement*. 2025, vol. 16, no. 3, p. 18. DOI: 10.1093/jnlids/idaf029

[73] Third-Party Funding in ISDS. In: *Columbia Center on Sustainable Investment* [online]. 27. 10. 2025 [accessed 24.02.2026]. Available at: https://ccsi.columbia.edu/project/third-party-funding-in-isds/

the parties' agreements.[74]

Institutions administering investment arbitration, such as ICSID and the ICC, should create predictable security-for-costs procedures and require reasonable cost allocations so that respondent States are protected from insolvent claimants or frivolous, funding-driven litigation, and public budgets of these States are not unduly exposed to contingent litigation liabilities. To preserve access to justice for bona fide claimants and avoid chilling meritorious claims, cost orders should be guided by transparent criteria and, where appropriate, include mechanisms for staged or capped security that reflect the respondent State's fiscal vulnerability.

Procedure can be made fairer without changing substantive law by reducing representation requirements and alleviating resource constraints. This concept is under active consideration in the UNCITRAL Working Group III reform agenda, which has discussed a multilateral advisory center to support States in ISDS processes.[75]

6. Conclusion

For many, investment arbitration symbolizes the economic injustice imposed by the developed world on the developing world. It has also been associated with ecological destruction disproportionately affecting the poorest corners of the world. Nevertheless, investment arbitration has contributed to creating an environment conducive to investment in many developing countries, thereby supporting their economic prospects and living standards.

This paper has therefore asked a pragmatic question with high stakes: can investment arbitration legitimately adjudicate climate-related investor-State disputes? The tentative answer advanced here is that arbitration is a flawed but improvable forum. Despite the criticisms directed at it, investment arbitration has become part of litigation strategies and the predominant mechanism for investment disputes all over the world. Its role must therefore be acknowledged to assess its usefulness, its impact on the environment, and what can be done to mitigate its adverse environmental impacts.

This paper has demonstrated that, despite its flaws, investment arbitration has

[74] DAMJANOVIC, Ivana. The Reform of International Investment Law: Whose Rule of Law? *European Journal of Risk Regulation*. 2024, vol. 15, no. 3, pp. 524–540. DOI: 10.1017/err.2024.28

[75] UNCITRAL Working Group III concludes its work on the draft statute of an advisory centre on international investment dispute resolution. In: *United Nations: Information Service Vienna* [online] [accessed 24.02.2026]. Available at: https://unis.unvienna.org/unis/en/pressrels/2024/unisl355.html

merits. Through mechanisms for selecting arbitrators with appropriate qualifications, it allows professional experts to adjudicate disputes involving complex technical issues, including climate-related matters. Party autonomy in arbitration also allows for procedural flexibility, which may reduce the parties' response time when environmental concerns arise. Detached from national courts, arbitration may also serve as a more neutral forum for investor-State disputes than domestic courts. Finally, the international framework for investment arbitration allows arbitral rulings to be respected and enforced across jurisdictions.

However, these technical competencies do not by themselves resolve the deeper problem: a structural misalignment between a dispute system designed to protect private capital and controversies that turn on public-interest regulation, scientific facts, and distributive choices. The paper therefore does not shy away from the fundamental flaws of investment arbitration. The threat of backroom dealings, unaccountable to the public, remains a real concern, particularly where the State appears to forfeit its responsibility to the public it is constitutionally obliged to serve. Together with the lack of an adequate mechanism for third-party participation, this has damaged the legitimacy of investment arbitration and made States and communities distrustful of its authority to adjudicate climate-related disputes.

If one accepts the reality that ISDS will continue to intersect with climate governance, the appropriate approach is incremental institutional reform: "try before you trust." The paper has attempted to offer remedies to these flaws, ranging from greater transparency in proceedings and a framework for formally including third parties to speed-and-cost reforms that allow justice to be served even for the most impoverished States and communities affected by climate-change-induced harm arising from foreign investment.

This reformist posture yields four priorities. First, disclosure should become the baseline in climate cases, so that arbitral reasoning, evidentiary materials, and dispositive orders enter the public domain, except where narrowly justified redactions are necessary. Second, structured stakeholder participation should be normalized. Third, delay and cost should be limited through early-dismissal powers and modular "climate-fast track" options for threshold and technical issues. Expedited procedures must not come at the expense of rigor; faster procedures must still preserve transparent, competent records and reasoned rulings. Fourth, access to justice and procedural integrity should be secured by mandating third-party funding disclosure, instituting conflict checks, and calibrating security-for-costs rules.

These measures do not change treaty substance. Rather, they correct the procedural deficiencies that most directly delegitimize arbitral outcomes. The authors acknowledge that these solutions may not be complete, but they can serve as the basis for change in investment arbitration, improving its standing and longevity. If States and institutions are willing to implement, pilot, and evaluate a package of procedural reforms, arbitration can be re-anchored in public-interest accountability and become a more legitimate and practicable forum for resolving the hard trade-offs between attracting foreign investment for economic development and safeguarding the environment.

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REFERENCES

ACERIS LAW. Emergency Arbitration: Balancing Urgency and Fairness. In: *Aceris Law* [online]. 11. 11. 2024 [accessed 26.04.2026]. Available at: https://www.acerislaw.com/emergency-arbitration-balancing-urgency-and-fairness/

ACERIS LAW. Frivolous Claims in Arbitration: ICSID Rule 41(5) and Rule 41. In: *Aceris Law* [online]. 8. 12. 2024 [accessed 26.04.2026]. Available at: https://www.acerislaw.com/frivolous-claims-in-arbitration-icsid-rule-415-and-rule-41/

ALI, Nilfat. Backlash Against ISDS: A Case for a Sustainable Development Approach to Investment Arbitration for Developing Countries. *African Journal of Commercial Law*. 2021, vol. 1, no. 1, pp. 49–76. ISSN 2789-9179, 2706-7661. DOI: 10.58216/ajcl.v1i1.139

ALLEN, Richard and Leng Sun CHAN. Comparative Chart of International Investment Arbitration Rules. In: *Global Arbitration News* [online]. 12. 1. 2017 [accessed 26.04.2026]. Available at: https://www.globalarbitrationnews.com/2017/01/12/3168-2-20170112/

ARCURI, Alessandra, Kyla TIENHAARA and Lorenzo PELLEGRINI. Investment law v. supply-side climate policies: insights from Rockhopper v. Italy and Lone Pine v. Canada. *International Environmental Agreements: Politics, Law and Economics*. 2024, vol. 24, no. 1, pp. 193–216. ISSN 1567-9764, 1573-1553. DOI: 10.1007/s10784-023-09622-w

BJORKLUND, Andrea K. *Yearbook on International Investment Law & Policy, 2013-2014*. Oxford: Oxford University Press, 2015. Yearbook on International Investment Law and Policy. ISBN 978-0-19-026577-9.

BONNITCHA, Jonathan, Lauge N SKOVGAARD POULSEN and Michael WAIBEL. *The Political Economy of the Investment Treaty Regime*. 1. ed. Oxford University Press, 2017. ISBN 978-0-19-871954-0. DOI: 10.1093/law/9780198719540.001.0001

BREKOULAKIS, Stavros and Margaret DEVANEY. Public-Private Arbitration and the Public Interest under English Law. *The Modern Law Review* [JSTOR]. [Modern Law Review, Wiley], 2017, vol. 80, no. 1, pp. 22–56. ISSN 00267961, 14682230.

BROWER, Charles, Charles BROWER and Jeremy SHARPE. The Coming Crisis in the Global Adjudication System. *Arbitration International*. 2003, vol. 19. DOI: 10.1093/arbitration/19.4.415

BUCHAN, Russell, Daniel FRANCHINI and Nicholas TSAGOURIAS, eds. Effectiveness, Authority, and Legitimacy of the Current System of International Dispute Settlement and Possible Reforms: In: BUCHAN, Russell, Daniel FRANCHINI and Nicholas TSAGOURIAS, eds. *The Changing Character of International Dispute Settlement*. 1. ed. Cambridge University Press, 2023, pp. 135–364. ISBN 978-1-009-07629-6. DOI: 10.1017/9781009076296.011

BUTLER, Nicolette. Non-Disputing Party Participation in ICSID Disputes: Faux Amici? *Netherlands International Law Review*. 2019, vol. 66, no. 1, pp. 143–178. ISSN 0165-070X, 1741-6191. DOI: 10.1007/s40802-019-00132-8

CAMANNA, Mirko. Climate Change or Change of Climate? In: *Kluwer Arbitration Blog* [online]. 15. 5. 2024 [accessed 29.04.2026]. Available at: https://legalblogs.wolterskluwer.com/arbitration-blog/climate-change-or-change-of-climate/

CHAN, Michelle and Kanika GUPTA. Impacts of the International Investment Regime on Access to Justice. Columbia University, 2017. DOI: 10.7916/D8-67WM-AT55

COLEMAN, Jesse et al. Third-Party Rights in Investor-State Dispute Settlement: Options for Reform. *Columbia Center on Sustainable Investment Staff Publications* [online]. 2019. Available at: https://scholarship.law.columbia.edu/sustainable_investment_staffpubs/150

COTULA, Lorenzo and Nicolás M. PERRONE. Reforming investor-state dispute settlement: what about third-party rights? In: [accessed 26.04.2026]. Available at: https://www.iied.org/17638iied

DAMJANOVIC, Ivana. The Reform of International Investment Law: Whose Rule of Law? *European Journal of Risk Regulation*. 2024, vol. 15, no. 3, pp. 524–540. ISSN 1867-299X, 2190-8249. DOI: 10.1017/err.2024.28

DI SALVATORE, Lea. *Investor–State Disputes in the Fossil Fuel Industry*. 2021. DOI: 10.13140/RG.2.2.29949.08168

EL-HOSSENY, Farouk. *Civil society in investment treaty arbitration: status and prospects*. Leiden: Brill Nijhoff, 2018. Nijhoff international investment law series 10. ISBN 978-90-04-34913-1. DOI: 10.1163/9789004349131

FARRINGTON, Francesca and Nevena JEVREMOVIĆ. Between a rock and a hard place: the impact of replacing or abolishing ISDS on investment-affected parties. *Journal of International Dispute Settlement*. 2025, vol. 16, no. 3, pp. 1–17. ISSN: 2040-3593. DOI: 10.1093/jnlids/idaf023

FERIA-TINTA, Monica. 'Public Interest in Investment Arbitration: The Rapid Ascent of Human Rights, Labour Law and Environmental Law.' 2023. ISBN 9781032469331. DOI: 10.4324/9781003388821-24

FINIZIO, Steven and Matteo ANGELINI. Climate-Related Disputes and International Arbitration. In: *Global Arbitration Review* [online]. 30. 9. 2024 [accessed 29.04.2026]. Available at: https://globalarbitrationreview.com/guide/the-guide-climate-change-and-related-disputes/first-edition/article/climate-related-disputes-and-international-arbitration

GOUIFFÈS, Laurent and Melissa ORDONEZ. Climate change in international arbitration, the next big thing? *Journal of Energy & Natural Resources Law*. 2022, vol. 40, no. 2, pp. 203–224. ISSN 0264-6811, 2376-4538. DOI: 10.1080/02646811.2021.1959158

HE, Lingling and Xiaobo ZHAO. Resolving Investor Protection in Climate-Related Disputes: Some Legal Reflections. *Environmental Policy and Law*. 2025, vol. 55, no. 6, pp. 230–243. ISSN 0378-777X, 1878-5395. DOI: 10.1177/18785395251385826

HÉBIÉ, Mamadou. Climate Change Clauses in International Investment Agreements: An Analytical Survey. *ICSID Review*. 2026, vol. 40, no. 2, pp. 239–294. ISSN 0258-3690, 2049-1999. DOI: 10.1093/icsidreview/siaf016

JOHNSON, Lise, Lisa SACHS and Ella MERRILL. Investor-State Dispute Prevention: A Critical Reflection. *Disp. Resol. J.* 2021, vol. 75, no. 4, p. 107.

KAHL, Wolfgang and Marc-Philippe WELLER, eds. IV. Suitability of arbitration proceedings for climate change disputes. In: KAHL, Wolfgang and Marc-Philippe WELLER, eds. *Climate Change Litigation*. Verlag C.H.BECK oHG, 2021, pp. 105–114. ISBN 978-3-406-77923-7. DOI: 10.17104/9783406779237-105

LEDDIN, Desmond. The Impact of Climate Change, Pollution, and Biodiversity Loss on Digestive Health and Disease. *Gastro Hep Advances*. 2024, vol. 3, no. 4, pp. 519–534. ISSN 27725723. DOI: 10.1016/j.gastha.2024.01.018

MAGRAW, Daniel and Niranjali AMERASINGHE. Transparency And Public Participation In Investor-State Arbitration. *ILSA Journal of International & Comparative Law*. 2009, vol. 15, no. 2, pp. 337–360. ISSN 1082-944X.

MANN, Howard et al. *IISD Model International Agreement on Investment for Sustainable Development: Negotiators' Handbook* [online]. International Institute for Sustainable Development, 2005. ISBN 1-895536-89-8. Available at: https://www.iisd.org/system/files/publications/investment_model_int_handbook.pdf

MARTINI, Camille. From Fact to Applicable Law: What Role for the International Climate Change Regime in Investor-State Arbitration? *Canadian Yearbook of International Law/Annuaire canadien de droit international*. 2024, vol. 61, pp. 1–36. ISSN 0069-0058, 1925-0169. DOI: 10.1017/cyl.2024.2

MASHAW, Jerry L. The Challenge of Positive Political Theory. In: *Greed, Chaos, and Governance* [online]. Yale University Press, 1997, pp. 1–29 [accessed 26.04.2026]. Using Public Choice to Improve Public Law. ISBN 978-0-300-06677-7. Available at: http://www.jstor.org/stable/j.ctt32br16.4

MEE, Rebecca and Jack BOWNES. Ditch or Fix? The Role of International Investment Agreements in Reconciling ISDS with the Climate Emergency (2nd Essay Competition Prize Winners 2024). *European Investment Law and Arbitration Review*. 2024, vol. 9, no. 2, pp. 389–418. ISSN 2468-7413. DOI: 10.54648/EILA2024047

MEHRANVAR, Ladan et al. How the International Investment Law Regime Undermines Access to Justice for Investment-Affected Stakeholders. *SSRN Electronic Journal*. 2024. ISSN 1556-5068. DOI: 10.2139/ssrn.4702705

MEJÍA-LEMOS, Diego. The suitability of investor-State dispute settlement and host State counterclaims for implementing climate change international responsibility. *Review of European, Comparative & International Environmental Law*. 2023, vol. 32, no. 2, pp. 334–347. ISSN 2050-0386, 2050-0394. DOI: 10.1111/reel.12482

MERTINS-KIRKWOOD, Hadrian. *On the offensive: how Canadian companies use trade and investment agreements to bully foreign governments for billions*. Ottawa, ON: Canadian Centre for Policy Alternatives, 2022. ISBN 978-1-77125-601-8.

PEEL, Jacqueline. Issues in Climate Change Litigation. *Carbon & Climate Law Review*. 2012, vol. 5. DOI: 10.21552/CCLR/2011/1/162

RIDI, Niccolò. What are amicus interventions for? Some provocations on non-disputing party submissions in international investment arbitration. In: *QIL QDI* [online]. 30. 7. 2023 [accessed 26.04.2026]. Available at: https://www.qil-qdi.org/what-are-amicus-interventions-for-some-provocations-on-non-disputing-party-submissions-in-international-investment-arbitration/

ROBERTS, Anthea. UNCITRAL and ISDS Reforms: Concerns about Costs, Transparency, Third Party Funding and Counterclaims. In: *EJIL: Talk!* [online]. 6. 6. 2018 [accessed 26.04.2026]. Available at: https://www.ejiltalk.org/uncitral-and-isds-reforms-concerns-about-costs-transparency-third-party-funding-and-counterclaims/

SCHILL, S. W. Deference in Investment Treaty Arbitration: Re-conceptualizing the Standard of Review. *Journal of International Dispute Settlement*. 2012, vol. 3, no. 3, pp. 577–607. ISSN 2040-3585, 2040-3593. DOI: 10.1093/jnlids/ids010

SETZER, Joana and Lisa C. VANHALA. Climate change litigation: A review of research on courts and litigants in climate governance. *WIREs Climate Change*. 2019, vol. 10, no. 3, p. e580. ISSN 1757-7780, 1757-7799. DOI: 10.1002/wcc.580

SIDENKO, Svitlana. Modern Trends in the Development of International Financial Centers. *International Economic Policy*. 2022, no. 37, pp. 77–92. ISSN 1811-9832. DOI: 10.33111/iep.eng.2022.37.04

SÖNMEZ, Esma Yağmur. *From Divergent Paths to the Same Trap: The Legitimacy Crisis of the Investor-State Dispute Settlement System*. 2024, PhD Thesis, Middle East Technical University.

TIENHAARA, Kyla. Reconsidering ICSID in the Context of Global Just Transitions. *Global Environmental Politics*. 2025, vol. 25, no. 4, pp. 23–43. ISSN 1526-3800, 1536-0091. DOI: 10.1162/GLEP.a.8

TIENHAARA, Kyla. Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement. *Transnational Environmental Law*. 2018, vol. 7, no. 2, pp. 229–250. ISSN 2047-1025, 2047-1033. DOI: 10.1017/S2047102517000309

TIENHAARA, Kyla. Third Party Participation in Investment-Environment Disputes: Recent Developments. *Review of European Community & International Environmental Law*. 2007, vol. 16, no. 2, pp. 230–242. ISSN 0962-8797, 1467-9388. DOI: 10.1111/j.1467-9388.2007.00557.x

TIENHAARA, Kyla and Lorenzo COTULA. *Raising the cost of climate action? Investor-state dispute settlement and compensation for stranded fossil fuel assets* [online]. London: IIED, [accessed 27.04.2026]. ISBN 978-1-78431-834-5. Available at: https://www.iied.org/17660iied

TIENHAARA, Kyla et al. Investor-state disputes threaten the global green energy transition. *Science*. 2022, vol. 376, no. 6594, pp. 701–703. ISSN 0036-8075, 1095-9203. DOI: 10.1126/science.abo4637

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT. *Investor-State Dispute Settlement: Review of Developments in 2017* [online]. United Nations Conference on Trade and Development, 2018 [accessed 26.04.2026]. IIA Issues Note. Available at: http://unctad.org/en/PublicationsLibrary/diaepcbinf2018d2_en.pdf

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT. *Recent trends in Investor-State arbitration cases* [online]. United Nations Conference on Trade and Development, 2025 [accessed 26.04.2026]. IIA Issues Note. Available at: https://unctad.org/system/files/official-document/diaepcbinf2025d4_en.pdf

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT, ed. *Trade and development report. 2010.* New York: United Nations, 2010. Trade and development report 2010. ISBN 978-92-1-112807-9.

VADI, Valentina. Beyond Known Worlds: Climate Change Governance by Arbitral Tribunals? *Vanderbilt Journal of Transnational Law*. 2015, vol. 48, no. 5, p. 1285.

VAN HARTEN, Gus. *Investment treaty arbitration and public law*. 1. publ. ed. Oxford: Oxford University Press, 2007. Oxford monographs in international law. ISBN 978-0-19-921789-2.

VIÑUALES, Jorge E. *Foreign Investment and the Environment in International Law*. 1. ed. Cambridge University Press, 2012. ISBN 978-0-511-90256-7. DOI: 10.1017/CBO9780511902567

WANG, Chao, Jing NING and Xiaohan ZHANG. International Investment and Indigenous Peoples' Environment: A Survey of ISDS Cases from 2000 to 2020. *International Journal of Environmental Research and Public Health*. 2021, vol. 18, no. 15, p. 7798. ISSN 1660-4601. DOI: 10.3390/ijerph18157798

ZHANG, Sheng and Ni LI. Addressing Climate Change through International Investment Agreements: Obstacles and Reform Options. *Sustainability*. 2024, vol. 16, no. 4, p. 1471. ISSN 2071-1050. DOI: 10.3390/su16041471

ZHANG, Yedong. Developing a Climate Litigation Framework: China's Contribution to International Environmental Law. *Ecological Civilization*. 2025, vol. 2, no. 1. ISSN 2957-4455. DOI: 10.70322/ecolciviliz.2024.10017

ZHAO, Yun and Yanru CHEN. The evolving *lex mercatoria*: a game-changer for transparency in international commercial arbitration. *Journal of International Dispute Settlement*. 2025, vol. 16, no. 3, p. idaf029. ISSN 2040-3593. DOI: 10.1093/jnlids/idaf029

ZHU, Ying. A quasi-normative conflict: Resolving the tension between investment treaties and climate action. *Review of European, Comparative & International Environmental Law*. 2024, vol. 33, no. 2, pp. 183–193. ISSN 2050-0386, 2050-0394. DOI: 10.1111/reel.12565

About ICSID | ICSID. In: [accessed 23.04.2026]. Available at: https://icsid.worldbank.org/About/ICSID

Facts and Figures on Investor-State Dispute Settlement Cases [online]. UNCTAD, 2024 [accessed 26.04.2026]. IIA Issues Note. Available at: https://unctad.org/system/files/official-document/diaepcbinf2024d5_en.pdf

Free Prior and Informed Consent: An indigenous peoples' right and a good practice for local communities [online]. 1. ed. Rome, Italy: FAO, 2016 [accessed 25.04.2026]. Available at: https://openknowledge.fao.org/handle/20.500.14283/i6190e

Free, Prior and Informed Consent: Protecting Indigenous Peoples' rights to self-determination, participation, and decision-making. In: *Cultural Survival* [online]. 27. 11. 2012 [accessed 26.04.2026]. Available at: https://www.culturalsurvival.org/publications/cultural-survival-quarterly/free-prior-and-informed-consent-protecting-indigenous

Overview of an Arbitration - ICSID Convention Arbitration (2022 Rules) | ICSID. In: [accessed 26.04.2026]. Available at: https://icsid.worldbank.org/procedures/arbitration/convention/overview/2022

Third-Party Funding in ISDS. In: *Columbia Center on Sustainable Investment* [online]. 27. 10. 2025 [accessed 26.04.2026]. Available at: https://ccsi.columbia.edu/project/third-party-funding-in-isds/

Treaty-based Investor-State Dispute Settlement Cases and Climate Action [online]. UNCTAD, [accessed 26.04.2026]. Available at: https://unctad.org/system/files/official-document/diaepcbinf2022d7_en.pdf

UNCITRAL Working Group III concludes its work on the draft statute of an advisory centre on international investment dispute resolution. In: *United Nations: Information Service Vienna* [online] [accessed 26.04.2026]. Available at: https://unis.unvienna.org/unis/en/pressrels/2024/unisl355.html

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