

Greening the Forum: International Arbitration as a Pathway for Enforcing ESG Standards in Climate Adaptation Commitments in Latin America

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As climate change vulnerability challenges in Latin America become more urgent, the enforcement of environmental, social, and governance (ESG) obligations—particularly those related to climate adaptation—is an emerging issue in arbitration in investor-State dispute settlement (ISDS). This article explores how arbitral tribunals are addressing ESG-related claims involving climate adaptation obligations in Latin America, assessing the extent to which climate adaptation measures are enforceable in ISDS frameworks. Following the introduction, Part I describes the applicable international and domestic climate change law frameworks and addresses contractual obligations that foreign investors have for ESG and climate adaptation in these projects. Part II addresses case studies in Peru, Colombia, and Ecuador to illustrate the tension between protecting investors’ interests and the State’s authority to enforce climate adaptation measures. Part III explores procedural challenges in ESG arbitration that threaten to limit the effectiveness of arbitration in the ISDS context. Part IV proposes substantive and procedural reforms to promote arbitration as a viable mechanism for enforcing climate adaptation standards in Latin America while balancing investor rights and public policy objectives.

Introduction	172
I. ESG and Climate Adaptation Commitments in Latin America	175
A. ESG Overview	176
B. International Law Sources of ESG and Climate Adaptation Commitments	178

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1.	<i>The Paris Agreement</i>	179
2.	<i>Multilateral Development Banks' ESG Standards: Guidelines on Climate Adaptation and Sustainable Infrastructure</i>	181
C.	"Climate Adaptation Relevant" Initiatives in Peru, Colombia, and Ecuador	183
1.	<i>Peru's Climate Change Framework Law</i>	184
2.	<i>Colombia's Climate Change Act</i>	185
3.	<i>Ecuador's Constitution of 2008</i>	186
II.	Case Studies in Arbitration as a Forum for ESG Disputes in Latin America	187
A.	<i>Bear Creek Mining Corp. v. Peru</i>	187
B.	<i>Eco Oro Minerals Corp. v. Colombia</i>	188
C.	<i>Perenco Ecuador Limited v. Ecuador</i>	189
III.	Procedural Challenges in ESG Arbitration	191
A.	<i>Quantifying ESG Impacts</i>	191
B.	<i>Transparency and Access to Justice</i>	193
C.	<i>Enforceability and Implementation of ESG Awards</i>	196
IV.	Enhancing ESG and Climate Adaptation Considerations in ISDS Arbitration	198
A.	<i>Substantive Measures to Align ESG Standards in Investment Decision-Making and Contractual Practice</i>	199
1.	<i>Clarifying Regulatory Expectations through ESG-Oriented Legal Frameworks</i>	199
2.	<i>Embedding Climate Adaptation Obligations in Standardized Contractual Tools</i>	200
B.	<i>Procedural Measures to Strengthen ESG Legitimacy and Effectiveness in ESG Arbitration</i>	202
1.	<i>Improving Evidentiary Rigor and ESG Impact Assessment through Independent Expertise</i>	203
2.	<i>Enhancing Transparency and Stakeholder Participation</i>	204
3.	<i>Strengthening the Enforceability and Implementation of ESG-Related Awards</i>	205
	Conclusion	206

Introduction

The investor-State dispute settlement (ISDS) mechanism has been criticized for many reasons, including its failure to properly balance consideration of States' regulatory authority and protection of foreign direct investment (FDI).¹ In many instances, States assert their right to regulate as a defense to

1. Berfu Beysulen Angin, *The Right to Regulate vs. Investment Protection: Unveiling the Causes of Imbalance and the Limits of Current Reform Efforts in International Investment Law*, 40 ICSID REV.–FOREIGN INV. L.J. 11, 11 (2025); Federico Ortino, *ISDS and Its Transformations*, 26 J. INT'L ECON. L. 177, 178 (2023); Crina Baltag et al., *Recent Trends in Investment Arbitration on the Right to Regulate, Environment, Health and Corporate Social Responsibility: Too Much or Too Little?*, 38 ICSID REV.–FOREIGN INV. L.J. 381, 382 (2023).

foreign investors' claims seeking investment protection.² The tension between these objectives often leads to investor-State disputes and may cause harm to the public interest.³

Foreign investment plays a vital role in the economic development of Latin America by supporting infrastructure modernization, technological innovation, and job creation across key sectors such as mining, energy, and transportation.⁴ In an era of global decarbonization and urgency in addressing the climate crisis, foreign capital can also serve as a catalyst for sustainable transitions, particularly when guided by ESG standards.⁵ If not properly aligned with domestic and international climate adaptation goals, however, foreign investment projects can exacerbate environmental vulnerabilities in the region.⁶

Latin America is one of the world's most climate-vulnerable regions.⁷ It faces increasing exposure to sea-level rise, prolonged droughts, water stress, and intensified extreme weather events, all of which disproportionately affect low-income communities, Indigenous peoples, and ecologically fragile zones.⁸ In this context, large-scale foreign investment projects have sometimes aggravated these risks, as projects in extractive industries, energy development, and land-intensive infrastructure often intersect with climate-sensitive ecosystems.⁹ For example, open-pit mining in the Peruvian highlands has contributed to water contamination and reduced glacial water flow—a key source of irrigation

2. Angin, *supra* note 1, at 12; Andrew D. Mitchell, *The Right to Regulate and the Interpretation of the WTO Agreement*, 26 J. INT'L ECON. L. 462, 480 (2023); Vera Korzun, *The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs*, 50 VAND. J. TRANSNAT'L L. 355, 356–358 (2017).

3. See Angin, *supra* note 1.

4. Gonzalo Hernandez Soto, *The Role of Foreign Direct Investment and Green Technologies in Facilitating the Transition Toward Green Economies in Latin America*, 288 ENERGY (2024), <https://doi.org/10.1016/j.energy.2023.129933>; Mikael Herrera, *Foreign Direct Investment (FDI) in Latin America and Caribbean*, FIRST CITIZENS (May 29, 2023), <https://www.firstcitizensgroup.com/tt/news-insights/foreign-direct-investment-fdi-in-latin-america-and-caribbean-2/> [<https://perma.cc/B9ZH-XGCT>]; see Rafael Alvarado et al., *Foreign Direct Investment and Economic Growth in Latin America*, 56 ECON. ANALYSIS & POL'Y 176 (2017), <https://doi.org/10.1016/j.eap.2017.09.006>.

5. See Yamin Xie, *The Interactive Impact of Green Finance, ESG Performance, and Carbon Neutrality*, 456 J. CLEANER PRODUCTION 142269 (2024), <https://doi.org/10.1016/j.jclepro.2024.142269>; Julia Swart et al., *Foreign Direct Investment and Environment in Latin America: Sustainable Development Goals, SDGs in the Americas and Caribbean Region* (Sept. 1, 2023), https://doi.org/10.1007/978-3-031-16017-2_25.

6. See Gonzalo Hernandez Soto, *The Effects of Foreign Direct Investment on Environmentally Related Technologies in Latin America*, 90 RESOURCES POL'Y 104711 (2024), <https://doi.org/10.1016/j.resourpol.2024.104711>.

7. *Climate Risks in Latin America and the Caribbean*, 9 LANCET PLANETARY HEALTH e245 (2025), [https://doi.org/10.1016/S2542-5196\(25\)00090-7](https://doi.org/10.1016/S2542-5196(25)00090-7); *Extreme Weather and Climate Impacts Bite Latin America and Caribbean*, WORLD METEOROLOGICAL ORGANIZATION, (Mar. 28, 2025), <https://wmo.int/news/media-centre/extreme-weather-and-climate-impacts-bite-latin-america-and-caribbean> [<https://perma.cc/6NAC-LRYN>].

8. IPCC, *Climate Change 2022: Impacts, Adaptation and Vulnerability*, Contribution of Working Group II to the Sixth Assessment Report, ch. 12: Central and South America (2022), at 1689–1763.

9. See *Climate Change Vicious Cycle Spirals in Latin America and Caribbean*, UNITED NATIONS IN THE CARIBBEAN, (July 5, 2023), <https://caribbean.un.org/en/239005-climate-change-vicious-cycle-spirals-latin-america-and-caribbean> [<https://perma.cc/CJ2G-LLGL>].

and drinking water in a warming climate.¹⁰ Likewise, in the Amazon basin, transnational infrastructure and agricultural investment have accelerated deforestation, diminishing one of the region's most essential climate regulation systems.¹¹

Recognizing these challenges, the international community has established climate adaptation requirements in international law agreements such as the Paris Agreement, particularly Article 7 on adaptation, and in climate finance and ESG standards issued by multilateral development banks like the World Bank and Inter-American Development Bank.¹² Peru, Colombia, and Ecuador have adopted ambitious legal frameworks to implement climate adaptation commitments.¹³ These laws integrate resilience objectives into national development and infrastructure planning and establish enforceable obligations for both public and private actors.¹⁴

Peru's Climate Change Framework Law mandates the integration of adaptation measures across all levels of government and prioritizes climate-resilient infrastructure and disaster risk reduction.¹⁵ Colombia's Law 1931 of 2018 similarly mandates climate adaptation planning at both sectoral and territorial levels, creating binding planning instruments that address vulnerabilities in agriculture, water systems, and infrastructure.¹⁶ Though it lacks a climate change-focused law, Ecuador incorporates adaptation commitments into its 2008 Constitution.¹⁷

10. Anthony Bebbington et al., *Mining and Social Movements: Struggles Over Livelihood and Rural Territorial Development in the Andes*, 36 *WORLD DEV.* 2888, 2891 (2008).

11. Kathleen Baragwanath & Elle Bayi, *Collective Property Rights Reduce Deforestation in the Brazilian Amazon*, 117 *PROCEEDINGS OF THE NAT'L ACAD. OF SCI.* 20495 (2020).

12. World Bank Group, *Environmental and Social Framework* (2018), [https://perma.cc/47SS-3FA9]; Inter-American Development Bank, *Environmental and Social Policy Framework* (2020), [https://www.iadb.org/document.cfm?id=EZIDB0000073-1327742410-167] [https://perma.cc/NGB3-QWWC]; Paris Agreement to the United Nations Framework Convention, Dec. 12, 2015, 3156 *U.N.T.S.* 107 [hereinafter Paris Agreement]. For a discussion of the challenging intersection between climate change compliance and ISDS disputes, see generally Claudia Baro Huelmo & Robert Kovacs, *Climate Change and Investment Treaty Arbitration: A Balancing Act for States*, *DAILY JUS* (Nov. 8, 2021), [https://dailyjus.com/legal-insights/2021/11/climate-change-and-investment-treaty-arbitration-a-balancing-act-for-states#:~:text=However%2C%20unlike%20the%20cases%20concerning,breach%20of%20an%20international%20obligation] [https://perma.cc/MVL5-XVQD]; Maria Jose Alarcón, *2023 in Review: Climate Change and ISDS—Reshaping Investment Arbitration to Achieve Climate Goals*, *KLUWER ARB. BLOG* (Jan. 31, 2024), [https://legalblogs.wolterskluwer.com/arbitration-blog/2023-in-review-climate-change-and-isds-reshaping-investment-arbitration-to-achieve-climate-goals/] [https://perma.cc/W644-7QUS].

13. See *infra* Part I.C.

14. *Id.*

15. Climate Change Framework Law, No. 30754 (2018) (Peru); *Climate Change Framework*, *INT'L ENERGY AGENCY* (Dec. 23, 2020), [https://www.iea.org/policies/11975-climate-change-framework-law?country=Peru] [https://perma.cc/2RPT-CLB3].

16. L. 50/667, julio 27, 2018, *DIARIO OFICIAL [D.O.]* (Colom.).

17. Constitución de la República del Ecuador, arts. 71-74, 414 (2008); Maria Akchurin, *Constructing the Rights of Nature: Constitutional Reform, Mobilization, and Environmental Protection in Ecuador*, 40 *L. & SOC. INQUIRY* 937 (2015), [https://law.unimelb.edu.au/_data/assets/pdf_file/0004/3300295/7.2-Maria-Ackchurin,-Constructing-the-Rights-of-Nature-Constitutional-Reform,-Mobilization,-and-Environmental-Protection-in-Ecuador-2015.pdf] [https://perma.cc/9QCS-5H3G].

The implementation of these domestic adaptation measures has triggered legal disputes under investment treaties.¹⁸ These disputes often arise when foreign investors perceive that adaptation-related regulations—such as environmental zoning, project suspensions, or heightened consultation duties—violate protections afforded under bilateral investment treaties (BITs) or free trade agreements (FTAs), including fair and equitable treatment or protection against indirect expropriation.¹⁹ This tension is evident in recent arbitration cases in Peru, Colombia, and Ecuador.²⁰

This growing interface between ESG obligations and investment protection regimes underscores the need for coherence. Latin American States must preserve their regulatory autonomy to enforce climate adaptation obligations while continuing to attract and retain responsible foreign investment. Rather than framing these interests as inherently in conflict, this article explores how arbitration and contract design can be leveraged to harmonize investor protections with public policy goals on climate adaptation.

Following the introduction, Part I describes the relevant international and domestic climate change law frameworks, along with contractual obligations that foreign investors may assume regarding ESG and adaptation measures. Part II examines case studies from Peru, Colombia, and Ecuador to illustrate how climate-sensitive disputes have tested the balance between investment protection and State regulatory authority. Part III reviews procedural challenges in ESG arbitration, such as evidentiary burdens, transparency, and enforceability, which may hinder effective application of adaptation standards. Part IV offers recommendations to align ESG transparency standards in investment decision-making with procedural reforms to enhance the legitimacy and effectiveness of ESG arbitration, thereby promoting investment that is both economically beneficial and environmentally sustainable.

I. ESG and Climate Adaptation Commitments in Latin America

Part I first summarizes environmental, social and governance (ESG) principles and how noncompliance with these principles may trigger arbitration as a dispute resolution mechanism. It then addresses public international law sources of ESG and climate adaptation commitments, including Article 7 of the Paris Agreement and nationally determined commitments (NDCs), as evidence of parties' regulatory expectations. It also addresses private sources of international law to supplement the public international law foundations, including multilateral development bank (MDB) guidelines and their relationship to ESG standards, climate adaptation, and sustainable infrastructure.

18. See Joshua Paine & Elizabeth Sheargold, *A Climate Change Carve-Out for Investment Treaties*, 26 J. INT'L ECON. L. 285 (2023), <https://doi.org/10.1093/jiel/jgad011>.

19. See *id.*

20. See discussion *infra* Part II.

A. ESG Overview

Environmental, social, and governance (ESG) standards seek to promote accountability for the impacts that businesses have on the environment, society, and corporate governance practice.²¹ ESG is a legal framework that has been used in four contexts: (1) investment analysis, (2) risk management, (3) as a synonym for corporate social responsibility, and (4) as an ideological preference.²² Often seen as a tool rather than legal or contractual commitments, ESG principles can be considered independently when evaluating investment risks and opportunities.²³ ESG concerns also can be used to manage risks identified by stakeholders involved in an investment.²⁴ In some instances, ESG represents moral or ethical commitments businesses undertake as part of a contract, conditions of an investment, or legal responsibilities under local, regional, or international laws.²⁵ ESG also may involve a company's effort to align its business or investment with certain collective values, serving more as an ideological goal rather than a responsibility or contractual commitment.²⁶ In this capacity, ESG standards would merely serve as guidelines for a financial decision.

Businesses are writing ESG requirements into their contracts, and banks are adding them to their investment agreements on their own initiative or as required by local, regional, or international law.²⁷ Businesses' failure to uphold these standards or requirements can be considered breach of contract, prompting these disputes to be resolved in litigation, arbitration, or other forms of alternative dispute resolution.²⁸ Arbitration is a desirable dispute resolution method for many businesses due to: "(1) neutrality of forum and flexibility as to where an arbitration is hosted; (2) specialist expertise of the arbitral tribunal; (3) flexibility of procedure and availability of specialized procedural rules; (4) worldwide coverage of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards enabling cross-border recognition; and (5) accessibility by a broad range of actors such as states,

21. *Intro to ESG*, WASTE HARMONICS KETER, <https://www.wasteharmonics.com/resource/intro-to-esg> [https://perma.cc/BR6E-MY2D] (last visited Mar. 5, 2026).

22. Cornell Law School Securities Law Clinic, *Environmental, Social, and Governance (ESG)*, LEGAL INFO. INST. (Dec. 2024), https://www.law.cornell.edu/wex/environmental_social_governance_%28esg%29 [https://perma.cc/6DGE-3LWN].

23. *Id.*

24. *Id.*

25. *Id.*

26. *Id.*

27. Ajay Nimbalkar, *The Integral Role of Obligation Management in Boosting ESG Compliance with CLM*, ICERTIS (Sept. 18, 2024), <https://www.icertis.com/research/blog/obligation-management-to-boost-esg-compliance/#:~:text=Companies%20are%20writing%20ESG%20requirements,contract%20lifecycle%20management%20>[https://perma.cc/5RCQ-3QAN]; *ESG Banking: Integrating Sustainability into Finance*, THISROCK (June 10, 2024), <https://thisrockesg.com/esg/esg-banking/#:~:text=ESG%20Banking%20involves%20incorporating%20ESG,social%20contributions%2C%20and%20governance%20practices> [https://perma.cc/SKJ6-4FH7].

28. Nimbalkar, *supra* note 27; John P. Gaffney, *In Praise and Criticism of Arbitration as a Means of Resolving ESG Disputes*, KLUWER ARB. BLOG (Apr. 18, 2023), <https://arbitrationblog.kluwerarbitration.com/2023/04/18/in-praise-and-criticism-of-arbitration-as-a-means-of-resolving-esg-disputes/> [https://perma.cc/8GMM-CULF].

private parties and intergovernmental organizations.”²⁹ Where irreversible environmental damage or human rights violations are at issue, injunctions may be secured.³⁰

ESG standards operate in three contexts: environmental, social, and governance. The environmental element measures the impact a business may have on the environment, including issues like carbon footprint, resource usage, pollution levels, climate adaptation, and efforts to promote conservation.³¹ International law instruments like the Paris Agreement require businesses and States to adhere to regulations addressing climate change mitigation and adaptation.³²

The social element of ESG examines a business’s relationship with “its staff, customers, suppliers, and communities.”³³ This includes labor standards, human rights, diversity, equality, equity, inclusion, community engagement, and community rights.³⁴ The goal is to manage “people and suppliers ethically, ensuring fair employment, equal opportunities, work-life balance, and respect for human rights.”³⁵ A business with “poor social practices might face legal action and reputational damage.”³⁶ On the other hand, ESG standards help promote a more positive environment, elevate morale, and increase productivity.³⁷

Finally, governance refers to and seeks to assess a business’s leadership, customer satisfaction, transparency, inner workings, audits, shareholder rights, and anti-corruption policies.³⁸ A lack of regulation on this ESG component could lead to corruption and “fraud, regulatory violations and even business failure.”³⁹ Therefore, a firm structure following the values of transparency and ethics could help “improve how a business is run, build trust at all levels, and enhance decision-making in line with the other ESG principles.”⁴⁰

ESG has evolved beyond a simple abbreviation for reporting—it requires businesses to develop long-lasting, ethical behaviors, and forces companies to

29. Gaffney, *supra* note 28.

30. Samy Akeb, *Here We Go: ESG-Disputes in International Arbitration*, TAYLORWESSING (July 19, 2023), <https://www.taylorwessing.com/en/insights-and-events/insights/2023/07/here-we-go-esg-disputes-in-international-arbitration> [https://perma.cc/2WDE-FT6P].

31. *Environmental, Social, and Governance (ESG): A Comprehensive Guide for Business Leaders*, SCOPE ZERO (May 14, 2024), <https://scope-zero.com/blog/environmental-social-governance-esg/> [https://perma.cc/P7CE-X5BU]; Dan Byrne, *A Simple Guide to ESG*, CORP. GOVERNANCE INST., https://www.thecorporategovernanceinstitute.com/insights/guides/simple-guide-esg/?srsltid=AfmBOop_gT3XHzHvFkzDQZSqaRe6oklk7N2e6umEgfMDnVXU7Mx_Mr_9 [https://perma.cc/QR6-KBT5].

32. Jurgen Scheffran, *International Agreements and Cooperation on Climate Change*, EBSCO RESEARCH STARTERS (2024), <https://www.ebsco.com/research-starters/environmental-sciences/international-agreements-and-cooperation-climate-change> [https://perma.cc/H4RB-9YZP].

33. Byrne, *supra* note 31.

34. *Id.*; see also *What Are the Pillars of ESG? The 3 Elements Explained*, AMCS (June 2025), <https://www.amcsgroup.com/blogs/what-are-the-pillars-of-esg-the-3-elements-explained/#environmental-> [https://perma.cc/66JV-LGUY].

35. *Id.*

36. *Id.*

37. *Id.*

38. *Id.*

39. *Id.*

40. *Id.*

reevaluate legal risk, investment strategy, and corporate identity.⁴¹ This recalibration affects every phase of the business lifecycle, from supply chain agreements and due diligence to investment arbitration and enforcement.⁴² Early preparation, such as setting aside money for ESG projects, incorporating ESG principles into agreements, and foreseeing conflicts, is necessary for these habits to become ingrained.⁴³ According to the 2023 Report on ESG Obligations and Related Disputes by the IBA Arbitration Committee, this contractual embedding is crucial to transforming ESG from a voluntary commitment to a legally binding standard.⁴⁴

B. International Law Sources of ESG and Climate Adaptation Commitments

ESG and climate adaptation commitments can be found in the Paris Agreement and in multilateral development bank (MDB) guidelines.⁴⁵ MDB ESG and climate adaptation guidelines are often shaped by international law instruments like the Paris Agreement, which sets internationally recognized goals and targets related to climate change adaptation and resilience.⁴⁶ The World Bank has developed joint methodologies and frameworks to assess and track climate adaptation efforts and finance flows.⁴⁷ MDB guidelines frequently incorporate existing international law standards, providing guidance on climate adaptation principles, requirements, and best practices.⁴⁸ MDBs also support

41. Zhichao Yu et al., *How Does Environmental, Social, and Governance (ESG) Performance Determine Investment Mix? New Empirical Evidence from BRICS*, 24 BORSA ISTANBUL REV. 520, 523 (May 2024), <https://doi.org/10.1016/j.bir.2024.02.007>; *Environmental, Social, Governance (ESG)*, DILIGENT (Jan. 30, 2025), <https://www.diligent.com/resources/guides/esg> [<https://perma.cc/YC78-ZF7U>].

42. DILIGENT, *supra* note 41.

43. Jonathan Barnett & Beatrice Van Tornout, *It's Not Easy Being Green: ESG, Arbitration and the Future of Dispute Resolution*, KLUWER ARB. BLOG (2025), <https://legalblogs.wolterskluwer.com/arbitration-blog/its-not-easy-being-green-esg-arbitration-and-the-future-of-dispute-resolution/> [<https://perma.cc/V9TJ-WXYJ>].

44. *Id.* (noting that the report provides model provisions and helpful advice for integrating ESG into business agreements to help respond to the growth in ESG).

45. *Focus Area: Paris Alignment at IFC*, INT'L FIN. CORP. (Oct. 2025) <https://www.ifc.org/en/what-we-do/sector-expertise/climate-business/paris-alignment-at-ifc> [<https://perma.cc/W7EP-BCFR>]; *Ten MDBs Announce Common Principles to Align New Financing Operations with the Paris Agreement Goals*, NEW DEVELOPMENT BANK, (June 21, 2023), <https://www.ndb.int/news/ten-mdbs-announce-common-principles-to-align-new-financing-operations-with-the-paris-agreement-goals/> [<https://perma.cc/FC86-KP8C>].

46. Kathleen Mogelgaard, Heather McGray & Niranjali Manel Amerasinghe, *What Does the Paris Agreement Mean for Climate Resilience and Adaptation?*, WORLD RESOURCES INST. (Dec. 23, 2015), <https://www.wri.org/insights/what-does-paris-agreement-mean-climate-resilience-and-adaptation> [<https://perma.cc/MBU5-TAYT>]; *MDBs Agree How to Align New Financial Flows with the Paris Agreement Goals*, EUROPEAN INVESTMENT BANK, (June 19, 2023), <https://www.eib.org/en/press/news/mdbs-agree-how-to-align-new-financial-flows-with-the-paris-agreement-goals> [<https://perma.cc/8NjX-JU6E>].

47. European Investment Bank, *Extract of 2021 Joint Report on Multilateral Development Banks' Climate Finance: Joint Methodology for Tracking Climate Change Adaptation Finance* (2022), https://www.eib.org/attachments/lucalli/mdbs_joint_report_2021_en.pdf [<https://perma.cc/9F7W-B5SJ>].

48. *Lessons Learned from Three Years of Implementing the MDB-IDFC Common Principles for Climate Change Adaptation Finance Tracking*, MULTICULTURAL DEV. BANKS CLIMATES FIN. TRACKING WORKING GROUP & INT'L DEV. FIN. CLUB CLIMATE FINANCE WORK GROUP, *LESSONS LEARNED FROM THREE YEARS OF IMPLEMENTING THE MDB-IDFC COMMON PRINCIPLES FOR CLIMATE CHANGE ADAPTATION FINANCE TRACKING* (Nov. 2018), <https://unfccc.int/sites/default/files/resource/Lessons%20Learned%20-%20Adaptation%20-%20MDB-IDFC-full-report.pdf> [<https://perma.cc/A5W8-V7PT>].

countries in integrating climate adaptation into their nationally determined contributions (NDCs) and national adaptation plans (NAPs), which reflects States' efforts to align domestic actions with international goals.⁴⁹

1. The Paris Agreement

Article 7 of the Paris Agreement identifies parties' climate adaptation obligations.⁵⁰ Key components of these adaptation commitments are: (1) the global goal on adaptation; (2) NAPs; (3) international cooperation and support; (4) monitoring and reporting; and (5) loss and damage associated with the adverse effects of climate change.⁵¹

Parties' NDCs establish specific adaptation and emissions reduction targets, and create binding political commitments that can serve as reference points in disputes.⁵² In arbitration, NDCs can be referenced to demonstrate that certain ESG-related measures were foreseeable and aligned with international commitments, especially in ISDS cases involving environmental regulations.⁵³ NDCs can also be used to assess the legitimacy and proportionality of government regulation in response to investor claims under the FET standard.⁵⁴ Though NDCs may not be considered binding legal commitments,⁵⁵ *procedural*

49. *MDBs to Expand Support for Countries Seeking Climate-Resilient Sustainable Transition*, INTER-AMERICAN DEVELOPMENT BANK GROUP (Nov. 7, 2022), <https://www.iadb.org/en/news/mdbs-expand-support-countries-seeking-climate-resilient-sustainable-transition> [<https://perma.cc/M5K6-8CRN>].

50. Bonnie Smith, *Adapting the Paris Agreement*, *ECOLOGY L.Q. ONLINE* (Apr. 18, 2016), <https://www.ecologylawquarterly.org/currents/adapting-the-paris-agreement/#:~:text=Article%207%20%E2%80%9Crecognize%5Bs%5D,UNFCCC%20and%20the%20Kyoto%20Protocol> [<https://perma.cc/3V43-5XYL>]; Paris Agreement, art. 7.

51. *Id.*

52. Benoit Mayer, *International Law Obligations Arising in relation to Nationally Determined Contributions*, 7 *TRANSNAT'L ENV'T L.* 251-75 (July 6, 2018), doi:10.1017/S2047102518000110; ICC's Commission on Arbitration and ADR, *Resolving Climate Change Related Disputes through Arbitration and ADR*, INT'L CHAMBER OF COMMERCE (Nov. 2019), <https://iccwbo.org/wp-content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf> [<https://perma.cc/SF7M-G8DF>]; Steven Finizio & Matteo Angelini, *Climate-Related Disputes and International Arbitration*, *GLOB. ARB. REV.* (Sept. 30, 2024), <https://globalarbitrationreview.com/guide/the-guide-climate-change-and-related-disputes/first-edition/article/climate-related-disputes-and-international-arbitration> [<https://perma.cc/M9AA-QYVQ>].

53. Diana Desierto, *COP25 Negotiations Fail: Can Climate Change Litigation, Adjudication, and/or Arbitration Compel States to Act Faster to Implement Climate Obligations?*, *EJIL: TALK! BLOG OF THE EUR. J. INT'L L.* (Dec. 19, 2019), <https://www.ejiltalk.org/cop25-negotiations-fail-can-climate-change-litigation-adjudication-and-or-arbitration-compel-states-to-act-faster-to-implement-climate-obligations/#:~:text=While%20one%20can%20plausibly%20argue,and%20accountability%20are%20legally%20binding> [<https://perma.cc/32DX-U9EN>].

54. *Id.*; Camille Martini, *From Fact to Applicable Law: What Role for the International Climate Change Regime in Investor-State Arbitration?*, 61 *CAN. YR. INT'L L./ANNUAIRE CAN. DROIT INT'L* 1, 1-36 (Nov. 2024), <https://doi.org/10.1017/cyl.2024.2>

55. See Jorge Vinales, *The Paris Agreement: An Initial Examination (Part I of III)*, *EJIL: TALK! BLOG OF THE EUR. J. INT'L L.* (Feb. 7, 2016), <https://www.ejiltalk.org/the-paris-climate-agreement-an-initial-examination-part-i-of-iii/> [<https://perma.cc/7LNJ-CTJG>]; Tess Bridgeman, *Paris Is a Binding Agreement: Here's Why That Matters*, *JUST SECURITY* (June 4, 2017), <https://www.justsecurity.org/41705/paris-binding-agreement-matters/> [<https://perma.cc/7QYA-N4F4>].

obligations, including transparency, reporting, and accountability, are legally binding.⁵⁶

While the Paris Agreement lacks a direct enforcement mechanism in ISDS arbitration, its articles (especially Article 7 on adaptation) help confirm the legitimacy and reasonableness of State measures that investors challenge.⁵⁷ States may rely on their climate commitments under the Paris Agreement to justify their regulatory actions as aligned with international norms, thereby reinforcing defenses under standards such as Fair and Equitable Treatment (FET).⁵⁸ Although it is more common for the Paris Agreement to be construed as an environmental exception defense for States, it can potentially play a role in interpreting a State's duty of due diligence and assessing damages and other remedies for green investors.⁵⁹

The Paris Agreement is likely to provide an additional overlay of applicable law to a already-complex field.⁶⁰ Article 7's reference to strengthening resilience and reducing vulnerability to climate change supports a host State's right to adopt robust climate-related measures without breaching its investment obligations.⁶¹ Moving forward, the Paris Agreement may serve as an indirect source of law to construe the substantive rights and obligations of the investor and the host State.⁶²

When addressing investment treaty disputes in the climate adaptation context, a threshold step involves distinguishing between "first generation" and "new generation" investment treaties.⁶³ "First generation" investment treaties typically use broad and open-ended standards, which includes providing FET to investments and protecting against expropriation.⁶⁴ "New generation" investment treaties contain express commitments to the sustainable energy transition through provisions that recognize the right to regulate climate change and implement climate treaty commitments.⁶⁵ Unfortunately, most investment treaties are "first generation" treaties adopted prior to the intersection of environmental issues in international investment law dispute resolution.⁶⁶

56. Desierto, *supra* note 53.

57. Arman Sarvarian, *Invoking the Paris Agreement in Investor-State Arbitration*, 38 ICSID REV. 422-40 (2023), <https://doi.org/10.1093/icsidreview/siad006>; Paris Agreement, art. 7.

58. *Id.* at 429; see also Katie Chung & Paul Stothard, *Fair and Equitable Treatment in Present and Future Investments: What to Expect in Times of Climate Change?*, NORTON ROSE FULBRIGHT (Sept. 2024), <https://www.nortonrosefulbright.com/en/knowledge/publications/1e638789/fair-and-equitable-treatment-in-present-and-future-investments> [<https://perma.cc/BLS2-ULC5>].

59. *Id.*

60. *Id.*

61. See *id.*

62. *Id.*

63. *Investment Treaty Arbitration and Climate Change*, CENTRE FOR CLIMATE ENGAGEMENT HUGHES HALL UNIV. OF CAMBRIDGE (June 2024), <https://lawclimateatlas.org/resources/investment-treaty-arbitration-and-climate-change/#:~:text=Climate%20change%20mitigation%20measures%20have,through%20progressive%20case%20law%20developments> [<https://perma.cc/2HHA-QNTL>].

64. *Id.*

65. Sarvarian, *supra* note 57, at 428 (noting that direct references to the Paris Agreement have begun to appear in a few, very recent bilateral investment treaties).

66. Centre for Climate Engagement, *Investment Treaty Arbitration and Climate Change*, UNIV. OF CAMBRIDGE (June 2024), <https://lawclimateatlas.org/resources/investment-treaty-arbitration-and-climate-change/> [<https://perma.cc/93GN-C38X>].

Nevertheless, arbitral tribunals are increasingly receptive to recognizing climate-related public interest defenses under international law.⁶⁷ For example, in response to the threat of investment claims against a State's right to take measures to combat climate change, several States have adopted investment treaties that expressly acknowledge this right and include other provisions relating to climate change and environmental protection.⁶⁸

In a fair and equitable treatment claim, NDCs and the Paris Agreement will govern the investing party's legitimate expectations in international obligations, even when the applicable bilateral investment treaty does not refer to the Paris Agreement.⁶⁹ Moreover, even without such express provisions, commentators argue that arbitrators should now embrace their role as guardians of sustainable investment.⁷⁰ The recognition of ESG interests in arbitration disputes signals a shift toward a new generation of sustainable, development-friendly investment treaties.⁷¹

2. *Multilateral Development Banks' ESG Standards: Guidelines on Climate Adaptation and Sustainable Infrastructure*

Multilateral development banks (MDBs) like the World Bank, the Inter-American Development Bank (IDB), and the Development Bank of Latin America and the Caribbean (CAF) are increasingly establishing environmental and social safeguard policies that include climate adaptation and resilience standards.⁷² These guidelines influence national regulatory frameworks and

67. See generally ICC's Comm'n on Arbitration and ADR, *Resolving Climate Change Related Disputes through Arbitration and ADR*, INT'L CHAMBER OF COMMERCE (Nov. 2019), <https://iccwbo.org/wp-content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf> [<https://perma.cc/SF7M-G8DF>]; see *Técnicas Medioambientales Tecmed, S.A. v. United Mexican States*, ICSID Case No. ARB (AF)/00/2, Award, (May 29, 2003); *Red Eagle Exploration Ltd. v. Republic of Colombia*, ICSID Case No. ARB/18/12, Award, (Feb. 28, 2024); *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Award on Damages, (July 15, 2024); *Charanne B.V. & Construction Investments S.A.R.L. v. Spain*, SCC Case No. V-062/2012, Final Award, (Jan. 21, 2016).

68. Diana Tsutieva, *Investor-State Arbitration 2025—The Rise of Climate Change-Related and Environmental Provisions in Investment Treaties*, MONDAQ (Dec. 13, 2024), <https://www.mondaq.com/unitedstates/climate-change/1557088/investor-state-arbitration-2025-the-rise-of-climate-change-related-and-environmental-provisions-in-investment-treaties> [<https://perma.cc/3X2C-BA8F>].

69. ICC's Comm'n on Arbitration and ADR, *Resolving Climate Change Related Disputes through Arbitration and ADR*, INT'L CHAMBER OF COMMERCE (Nov. 2019), <https://iccwbo.org/wp-content/uploads/sites/3/2019/11/icc-arbitration-adr-commission-report-on-resolving-climate-change-related-disputes-english-version.pdf> [<https://perma.cc/SF7M-G8DF>];

70. *Id.*

71. *Id.*; see also Alarcon, *supra* note 12 (noting that “investment tribunals should uphold international legal obligations related to climate change as at least a partial defense against state responsibility in ISDS cases, especially when these obligations are rooted in customary international law or jus cogens norms, which do not allow for derogation”).

72. See *Environmental and Social Policies*, WORLD BANK GROUP (Oct. 20, 2021), <https://www.worldbank.org/en/projects-operations/environmental-and-social-policies> [<https://perma.cc/XE5H-6A8G>]; Inter-American Development Bank, *Environmental and Social Policy Framework: Improving the Environmental and Social Sustainability of IDB Operations*, IDB (Sept. 2020), <https://www.iadb.org/en/who-we-are/topics/environmental-and-social-solutions/environmental-and-social-policy-framework> [<https://perma.cc/9XUY-KDDX>]; Development

shape investor expectations. Examples of MDBs' increased engagement on climate include: (1) measuring outcomes of climate adaptation and mitigation measures; (2) ensuring that its operations align with the goals of the Paris Agreement, preparing climate finance reports and engaging in the UN-led process seeking to develop a new collective goal on climate finance; and (3) enhancing early-warning systems for natural disasters.⁷³

The World Bank's Environmental and Social Framework (ESF) includes standards that require borrowers to assess climate risks and incorporate adaptation measures in their project design.⁷⁴ These standards set a baseline for climate-resilient infrastructure and guide procurement, permitting, and environmental licensing processes.⁷⁵ They promote integrated environmental and social risk management with enhanced transparency and stakeholder engagement through timely information disclosure, meaningful and ongoing consultations throughout the project life cycle, and responsive grievance mechanisms to facilitate resolution of concerns and grievances of project-affected parties.⁷⁶

Similarly, the IDB explicitly incorporates climate adaptation, disaster risk management, and sustainability criteria into its project appraisal and financing requirements.⁷⁷ Its 2020–2023 Climate Change Action Plan mandates climate risk screening for all infrastructure projects, encouraging regulatory reforms in borrowing countries that can later be invoked to justify ESG-linked State conduct in investment disputes.⁷⁸ The Climate Change Action Plan “describes the IDB Group's progress since 2016 to support the region's need for low-carbon and climate-resilient development finance and its plan to raise climate regulation ambition in the region.”⁷⁹ The Second Update to the Institutional Strategy specifies that cross-cutting issues, including climate change, continue to hamper development and reaffirms the IDB Group's commitment to addressing these challenges.⁸⁰

Bank of Latin America and the Caribbean, *CAF Strategy to 2026*, DEV. BANK OF LATIN AMERICA AND THE CARIBBEAN (2025), <https://www.caf.com/en/who-we-are/caf-strategy/> [https://perma.cc/9SG7-SYCB]; Caribbean Development Bank, *CDB and CAF Sign MOU to Accelerate Sustainable Development Across the Caribbean*, CARIBBEAN DEV. BANK (June 10, 2025), <https://www.caribank.org/newsroom/news-and-events/cdb-and-caf-sign-mou-accelerate-sustainable-development-across-caribbean> [https://perma.cc/63W9-BZX4].

73. *Multilateral Development Banks Deepen Collaboration to Deliver as a System*, WORLD BANK GROUP (Apr. 20, 2024), <https://www.worldbank.org/en/news/statement/2024/04/20/multilateral-development-banks-deepen-collaboration-to-deliver-as-a-system> [https://perma.cc/4ZVW-853G].

74. World Bank Group, *supra* note 12, at 6.

75. See generally World Bank Group, *supra* note 12.

76. *Id.* at 109-10.

77. Inter-American Development Bank, *Inter-American Development Bank Group Climate Change Action Plan 2021-2025*, 8, 26 (Mar. 2021), [https://publications.iadb.org/en/inter-american-development-bank-group-climate-change-action-plan-2021-2025#:~:text=The%20Inter%2DAmerican%20Development%20Bank's%20\(IDB\)%20Climate%20Change,Group%20Corporate%20Results%20Framework%202020%2D2023%20\(CRF%2020202023\)](https://publications.iadb.org/en/inter-american-development-bank-group-climate-change-action-plan-2021-2025#:~:text=The%20Inter%2DAmerican%20Development%20Bank's%20(IDB)%20Climate%20Change,Group%20Corporate%20Results%20Framework%202020%2D2023%20(CRF%2020202023)) [https://perma.cc/RXR7-X9EC].

78. *Id.* at 23.

79. *Id.* at 6.

80. *Id.*

Finally, CAF's "Green Agenda" and ESG-driven financing promote climate-resilient infrastructure and nature-based solutions.⁸¹ In 2025, CAF "approved \$5.2 billion in financing for 16 development projects across 10 countries, marking the largest funding package in the bank's history."⁸² The funds support initiatives in infrastructure, energy transition, climate action, social services, and urban mobility.⁸³ To facilitate implementation, CAF embraces the importance of partnerships with governments and private sector actors.⁸⁴ These guidelines often influence national infrastructure laws and contract models in Latin America.⁸⁵

These soft law standards from the MDBs have legal relevance in ISDS arbitration. State measures that align with MDBs' ESG and climate adaptation guidelines can be defended as being consistent with internationally endorsed standards. When investors challenge such measures (e.g., environmental licensing restrictions, contract termination due to resilience gaps), States can point to MDB frameworks as evidence of: (1) good faith regulatory action; (2) consistency with international finance norms; and (3) objective expectations of environmental compliance.

C. "Climate Adaptation Relevant" Initiatives in Peru, Colombia, and Ecuador

The climate adaptation frameworks of Peru, Colombia, and Ecuador offer distinct yet complementary approaches to incorporating climate adaptation objectives into national governance. Peru's Climate Change Framework Law provides a comprehensive statutory model that mandates the integration of adaptation into all levels of public planning and investment, grounded in rights-based and intercultural principles.⁸⁶ Colombia's Climate Change Act combines statutory authority with detailed sectoral and territorial planning instruments to implement adaptation objectives for water, agriculture, infrastructure, and coastal systems.⁸⁷ Though lacking a dedicated climate change law, Ecuador

81. See CAF, *The Green Bank of Latin America and the Caribbean: Towards a Cleaner, More Sustainable Region* (Nov. 8, 2021), <https://scioteca.caf.com/handle/123456789/1806> [<https://perma.cc/95SZ-T3QZ>]; CAF, *Financiamiento Climático a Través de Fondos Verdes* [Climate Financing Through Green Funds] (Nov. 8, 2021), <https://scioteca.caf.com/handle/123456789/1819> [<https://perma.cc/8AE2-67XZ>]; CAF, *Urban Resilience: The Climate Change Vulnerability and Adaptability Index* (Nov. 8, 2021), <https://scioteca.caf.com/handle/123456789/1813> [<https://perma.cc/R8WG-58JX>].

82. CAF Commits \$5.2B to Climate Action, Sustainability, and Green Infrastructure, ESG Post (June 30, 2025), <https://esgpost.com/caf-commits-5-2b-to-climate-action-sustainability-and-green-infrastructure/> [<https://perma.cc/8EJZ-VKPZ>].

83. *Id.*

84. *Id.*

85. *Id.*

86. Romany Webb & Jose Felix Pinto-Bazurco, *Peru Passes New Framework Climate Change Law: Top Nine Developments*, CLIMATE L.A.W.: A SABIN CENTER BLOG (Apr. 26, 2018), <https://blogs.law.columbia.edu/climatechange/2018/04/26/peru-passes-new-framework-climate-change-law-top-nine-developments/> [<https://perma.cc/U3H5-HHWW>].

87. L. 50/667, julio 27, 2018, Diario Oficial [D.O.] (Colom.) (July 27, 2018), https://www.funcionpublica.gov.co/eva/gestornormativo/norma_pdf.php?i=87765 [<https://perma.cc/6LXK-4JBC>]; Univ. of Mich. Taubman Coll. of Architecture & Urban & Reg'l Planning & U.N. Hum. Settlements Programme, *Accelerating Climate Action in Colombia: A Review of Planning and Climate Law Frameworks* 25 (2021), <https://graham.umich.edu/>

embeds adaptation imperatives directly into its 2008 Constitution, elevating the rights of nature and ecological protection to constitutionally protected status.⁸⁸ These legal frameworks govern investment projects in climate-sensitive sectors, shaping the intersection between ESG obligations and investor protections. Each framework is relevant to investment treaty disputes by potentially supporting State defenses grounded in climate adaptation commitments.

1. Peru's Climate Change Framework Law

Law No. 30754 is the cornerstone of Peru's climate adaptation legal regime. It provides a valuable framework for assessing ESG risks and obligations in investment arbitration involving climate-sensitive sectors. The law establishes a comprehensive legal and institutional framework for climate action, with both adaptation and mitigation mandates.⁸⁹ As a binding legal instrument, it aligns national policies with Peru's commitments under the Paris Agreement and enshrines a rights-based, intergenerational, intercultural, and ecosystem-based approach to climate governance.⁹⁰

This multidimensional approach reinforces the legitimacy of climate-related regulation and investment planning by anchoring such measures in human rights, long-term thinking, cultural inclusion, and ecological integrity. The rights-based approach ensures that adaptation measures uphold human rights, particularly for Indigenous and vulnerable populations, and safeguard equity across generations.⁹¹ The intergenerational dimension is explicitly institutionalized in the law, requiring climate planning that accounts for the well-being of future generations.⁹² The intercultural element is reflected in the participatory mechanisms the law creates. These mechanisms mandate the inclusion of Indigenous peoples and local communities in decision-making processes.⁹³ The ecosystem-based approach is embedded in the law's provisions that prioritize adaptation strategies grounded in ecosystems, watersheds, and natural infrastructure, linking biodiversity protection directly to climate resilience.⁹⁴

The law requires the integration of adaptation measures into all levels of government planning and investment—national, regional, and local—and integrates climate risk management into development processes.⁹⁵ Article 15 defines adaptation as a cross-sectoral and participatory obligation aimed at

media/files/dow/DDA-2022-Colombia-Accelerating-Climate-Action.pdf [https://perma.cc/44VP-ETUG].

88. Constitución de la República del Ecuador, art. 414 (2008); see generally Mia Wercinski, *An Ombudsman for Nature: Putting Environmental Protection into Practice Within an "Eco-Constitution,"* in DEMANDING A RADICAL CONSTITUTION: ENVIRONMENTALISM, RESILIENCE, AND PARTICIPATION IN CHILE'S 2022 REFORM EFFORTS (Javier Barandiaran & Tristan Partridge eds., 2025), https://doi.org/10.1007/978-3-031-75690-0_5; see generally María Valeria Berros, *The Constitution of the Republic of Ecuador: Pachamama Has Rights*, Arcadia, no. 11 (2015), <https://doi.org/10.5282/rcc/7131>.

89. See generally Climate Change Framework Law, No. 30754 (2018) (Peru).

90. *Id.*

91. *Id.* arts. 2–3.

92. *Id.* art. 3.6.

93. *Id.* arts. 2–4, 6–8, 11, 17, 22, 23.

94. *Id.* arts. 4–8.

95. *Id.*

ensuring resilient and sustainable territories, prioritizing actions in water resource use, territorial and urban planning, climate-resilient infrastructure, and disaster risk prevention.⁹⁶

Law No. 30754 also introduces specific adaptation strategies based on ecosystems, watersheds, carbon reserves, and traditional knowledge, reinforcing the importance of Indigenous and local community participation.⁹⁷ Articles 4–8 designate the Ministry of the Environment as the lead technical and normative authority, while assigning responsibilities to sectoral ministries and subnational governments for implementing and reporting adaptation efforts.⁹⁸ The law also institutionalizes transparency, accountability, and public participation, including the creation of a National Climate Change Commission and a High Level Commission, and incorporates Indigenous consultation rights consistent with ILO Convention 169.⁹⁹ In conjunction with its planning instruments, such as the National and Regional Climate Change Strategies and the NDCs, the law requires consideration of climate risks and adaptation compatibility in evaluating public investment projects.¹⁰⁰

2. *Colombia's Climate Change Act*

Law 1931 of 2018 is Colombia's foundational legal framework for managing climate change, with a focus on both mitigation and adaptation, emphasizing coordination across all levels of government.¹⁰¹ By incorporating climate adaptation into Colombia's development model, Law 1931 reflects a commitment to climate-resilient governance. It offers a viable regulatory context for ESG analysis, particularly in disputes involving infrastructure, mining, or land use planning, where adaptation obligations and public interest regulation intersect with investor expectations. The law identifies climate adaptation as a priority objective, aimed at reducing the vulnerability of populations and ecosystems while promoting resilient, low-carbon development.¹⁰² It mandates the integration of adaptation strategies into national and subnational planning instruments, including development plans, territorial planning, and sectoral policies.¹⁰³

A central feature of the law is the creation of "*Planes Integrales de Gestión del Cambio Climático*"—sectoral (PIGCCS) and territorial (PIGCCT)—which serve as binding planning tools for ministries, regional governments, and environmental authorities.¹⁰⁴ Sectoral plans (PIGCCS) are adopted by national ministries and sectoral authorities such as energy, transport, agriculture, and others, to integrate climate mitigation and adaptation measures into sector-specific policies and investment planning. Territorial plans (PIGCCT) are adopted by departments, districts, and municipalities to incorporate climate risk

96. *Id.* art. 15.

97. *Id.*

98. *Id.* arts. 4–8.

99. *Id.* at arts. 9, 10, 22.

100. *Id.* art. 3.

101. L. 50/667, julio 27, 2018, DIARIO OFICIAL [D.O.] (Colom.).

102. *Id.* art. 3.

103. *Id.*

104. *Id.* art. 8.

management and adaptation strategies into local planning and development frameworks.¹⁰⁵ These plans identify and implement adaptation measures based on climate risk assessments, with a focus on water management, agricultural resilience, infrastructure protection, and coastal defense.¹⁰⁶ The law adopts core principles such as graduality, subsidiarity, and ecosystem-based adaptation, while aligning Colombia's strategy with its international commitments under the Paris Agreement.¹⁰⁷

The law's institutional structure is robust. It establishes the Sistema Nacional de Cambio Climático (SISCLIMA), led by the Intersectoral Climate Change Commission (CICC), and introduces participatory mechanisms through the National Climate Change Council.¹⁰⁸ It also requires that climate change impacts are considered in public investment projects and risk management plans, reinforcing the convergence of adaptation with disaster risk reduction.¹⁰⁹

3. Ecuador's Constitution of 2008

Ecuador's Constitution establishes one of the most progressive environmental legal frameworks by recognizing the rights of nature ("Pacha Mama") and integrating ecological protection into the constitutional order.¹¹⁰ Although the country lacks a dedicated climate change law, the Constitution provides binding constitutional mandates that ground climate adaptation in public policy and regulatory decisions.¹¹¹ Ecuador's constitutional model is especially relevant for ESG analysis in international arbitration because it prioritizes environmental and climate duties, thereby reinforcing the legitimacy of regulatory actions—even those affecting foreign investors—when grounded in ecological and adaptation imperatives.

Article 414 expressly commits the State to adopt transversal and adequate measures to mitigate climate change and protect populations at risk, while also promoting conservation of forests and vegetation.¹¹² Articles 71–74 recognize nature as a legal subject and require the State and individuals to prevent, restore, and avoid irreversible harm to ecosystems, establishing a strong constitutional foundation for climate adaptation measures.¹¹³

Article 73 applies the precautionary principle to restrict or prohibit activities that threaten species or ecosystem cycles, reinforcing the legal authority for

105. Law 1931 of 2018 distinguishes between sectoral climate change management plans (PIGCCS), adopted by national ministries and sector-specific authorities, and territorial climate change management plans (PIGCT), adopted by subnational governments to integrate adaptation and mitigation into local planning instruments.

106. *Id.*

107. *Id.* art. 2.

108. *Id.* arts. 4, 5.

109. *Id.* arts. 23, 24.

110. Mia Wercinski, *An Ombudsman for Nature: Putting Environmental Protection into Practice Within an 'Eco-constitution'*, in DEMANDING A RADICAL CONSTITUTION: ENVIRONMENTALISM, RESILIENCE, AND PARTICIPATION IN CHILE'S 2022 REFORM EFFORTS 83-85 (JAVIERA BARANDIARAN & TRISTAN PARTRIDGE EDS., 2025), https://doi.org/10.1007/978-3-031-75690-0_5.

111. Constitución de la República del Ecuador, art. 414 (2008).

112. *Id.* art. 414.

113. *Id.* arts. 71–74.

adaptation-related zoning, biodiversity protection, and ecosystem-based resilience planning.¹¹⁴ Article 395 consolidates the policy framework by requiring sustainability, intergenerational equity, and preventive action in all environmental governance.¹¹⁵ Collectively, these provisions position adaptation as a constitutional imperative, linking ecological integrity to human well-being and sustainable development.

II. Case Studies in Arbitration as a Forum for ESG Disputes in Latin America

Part II explores case studies from Peru, Colombia, and Ecuador that involve “climate adaptation relevance.” Although there are no International Center for the Settlement of Investment Disputes (ICSID) cases that explicitly address climate adaptation standards as of this writing, several disputes have indirectly addressed adaptation-related measures, particularly where states implement environmental regulations or land-use restrictions in response to climate-related vulnerabilities. Collectively, these cases implicate the environmental, social, and governance dimensions of ESG, illustrating how adaptation-relevant regulatory measures interact with investor protections under international investment law. These cases often involve investor challenges to regulatory actions, which can be interpreted as “climate adaptation relevant” efforts.

A. Bear Creek Mining Corp. v. Peru

This case involved the social and governance dimensions of ESG, arising from Peru’s revocation of a mining concession in response to Indigenous opposition to the Santa Ana Project in the Puno region.¹¹⁶ The dispute centered on the investor’s failure to secure a social license to operate and meaningfully engage with the Aymara communities whose land, water, and cultural heritage were at stake.¹¹⁷ The Tribunal’s findings highlighted the intersection among community consultation obligations, environmental stewardship, and investor rights, noting that Peru’s regulatory response was driven by social unrest and concerns over environmental and cultural impacts.¹¹⁸ The controversy confirms how inadequate stakeholder engagement in extractive projects can escalate into governance challenges, legal disputes, and operational shutdowns. The case illustrates the importance of robust consultation processes, respect for Indigenous rights under instruments such as ILO Convention No. 169,¹¹⁹ and alignment of project development with both environmental and cultural sustainability imperatives.¹²⁰

The community expressed concerns over environmental contamination, especially regarding land and water resources, which were central to the

114. *Id.* art. 73.

115. *Id.* art. 395.

116. Bear Creek Mining Corp. v. Republic of Peru, ICSID Case No. ARB/14/21, Award, ¶¶ 200–202, 237 (Nov. 30, 2017).

117. *Id.* ¶¶ 96, 168, 261.

118. *Id.* ¶¶ 401, 432, 475.

119. *Id.* ¶¶ 11–12, 664.

120. *Id.* ¶¶ 404–06.

Aymara people's opposition to the Santa Ana Project.¹²¹ The community presented evidence that revealed deep fears among Indigenous communities that the open-pit mine would harm "Pacha Mama" (Mother Earth), water sources, and sacred territories.¹²² The Environmental and Social Impact Assessment (ESIA) process faced significant criticism for its technical, Spanish-only presentation, which excluded or marginalized Aymara-speaking participants, failing to adequately address contamination concerns.¹²³

There was a lack of meaningful consultation with the Aymara people under ILO Convention No. 169, which Peru had ratified and implemented into its domestic framework on Indigenous participation and environmental governance.¹²⁴ The Tribunal acknowledged that ILO No. 169 could be considered part of the relevant international legal framework. Although the majority award did not expressly interpret ILO No. 169 as part of the applicable law, Professor Philippe Sands, in his Partial Dissenting Opinion, observed that ILO No. 169 constitutes "a rule of international law applicable to the territory of Peru," which the Tribunal was "entitled" to consider.¹²⁵ The failure to obtain a social license to operate was a central factual and legal issue for the following reasons: (1) the company's community outreach excluded multiple affected communities, (2) there was distrust and accusations of opacity and manipulation by the company, (3) the project ultimately triggered large-scale Indigenous protests, and (4) the 2011 "Aymarazo" demonstrations demanded the suspension of mining activities across southern Puno.¹²⁶ The Tribunal reviewed evidence indicating that Bear Creek should have known about the human rights standards regarding community consent and sustainability in extractive operations.¹²⁷

B. Eco Oro Minerals Corp. v. Colombia

Eco Oro Minerals addressed the environmental and governance dimensions of ESG. The case involved the Tribunal's substantial findings regarding Colombia's efforts to protect the Santurbán Páramo, a fragile and ecologically vital high-altitude ecosystem, from mining activities.¹²⁸ The dispute arose after Colombia, citing its international environmental commitments and constitutional mandate to safeguard the Santurbán Páramo, imposed restrictions that ultimately prevented Eco Oro from developing its gold mining project.¹²⁹

This case illustrates legal tensions between environmental protection and investment rights, demonstrates how tribunals can balance legitimate environmental policy objectives with investor protections, and highlights the importance of good governance, regulatory consistency, and procedural fairness

121. *Id.* ¶¶ 224, 226, 251.

122. *Id.* ¶ 226.

123. *Id.* ¶ 225.

124. *Id.* ¶¶ 405-15.

125. *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Partial Dissenting Opinion of Philippe Sands, ¶ 11 (Nov. 30, 2017).

126. *Bear Creek Mining Corp.*, Award, *supra* note 116, ¶¶ 179-180, 197-198, 228.

127. *Id.* ¶¶ 404-06.

128. *Eco Oro Minerals Corp. v. Republic of Colombia* ICSID Case No. ARB/16/41, Award, ¶¶ 218-220 (July 15, 2024).

129. *Id.* ¶¶ 11-12.

in managing ESG risks. Regarding environmental concerns, the Tribunal acknowledged the global and national significance of the Santurbán Páramo, a unique and ecologically critical high-altitude wetland ecosystem vital for water regulation and biodiversity.¹³⁰ It concluded that Colombia's regulatory actions were rooted in a genuine environmental purpose, invoking the precautionary principle and police powers doctrine to justify restrictions on mining in the protected area.¹³¹ The majority held that Colombia's environmental measures, including its failure to delimit the Santurbán Páramo in a timely and consistent manner, did not amount to indirect expropriation under the treaty because they were non-discriminatory and implemented in good faith to protect the environment.¹³²

With respect to governance concerns, however, the Tribunal held that Colombia failed to meet the minimum standard of treatment under Article 805 of the Canada–Colombia FTA.¹³³ A majority concluded that the State's inconsistent and delayed approach to delimiting the Santurbán Páramo, coupled with its failure to provide a stable and predictable regulatory framework, frustrated Eco Oro's legitimate expectations.¹³⁴ The Tribunal emphasized that while environmental protection is a legitimate public interest, States must implement such protections transparently and coherently, ensuring due process and legal clarity for foreign investors.¹³⁵

C. *Perenco Ecuador Limited v. Ecuador*

Focusing on the environmental and governance dimensions of ESG, this case involved substantial findings by the Tribunal regarding environmental degradation caused by oil operations in Ecuador's Amazon region (Blocks 7 and 21). Ecuador's environmental counterclaims responded to these findings.¹³⁶

Regarding environmental concerns, the Tribunal held that Perenco had caused environmental damage in the course of its operations.¹³⁷ While Perenco argued that some contamination predated its tenure or was caused by other operators, the Tribunal held that Perenco was responsible for contamination unless it could prove otherwise.¹³⁸ Due to disputes between the parties' experts, the Tribunal appointed an independent expert to assess contamination, remedial requirements, and associated costs.¹³⁹ The expert confirmed widespread pollution in the oil blocks, particularly from mud pits, soil, and groundwater.¹⁴⁰ The Tribunal ultimately awarded Ecuador USD 54 million for environmental

130. *Id.* ¶ 86.

131. *Id.* ¶ 642.

132. *Id.*

133. *Id.* ¶ 301.

134. *Id.*

135. *Id.* ¶¶ 717–20.

136. *Perenco Ecuador Limited v. Republic of Ecuador* ICSID Case No. ARB/08/6, Award, ¶¶ 47, 54 (Sept. 7, 2019).

137. *Id.* ¶¶ 765.

138. *Id.* ¶¶ 708, 764–65.

139. *Id.* ¶¶ 47, 514–17.

140. *Id.* ¶¶ 567, 569–71.

remediation, a figure far below Ecuador's original claim but still significant.¹⁴¹ The award was based on Ecuadorian environmental law and considered local remediation costs and land use classifications.¹⁴²

Regarding the governance dimension, the award confirms that States can bring counterclaims against investors to enforce domestic environmental obligations, strengthening governance frameworks in investment arbitration.¹⁴³ The Tribunal held that when environmental damage is established, the investor must prove it did not cause the harm, aligning with the polluter-pays principle and regulatory best practices.¹⁴⁴ Applying this standard, the Tribunal relied on its independent expert's findings to determine remediation costs and ultimately awarded Ecuador USD \$54 million for environmental restoration. This process, which included open expert engagement and transparent evidentiary review, illustrates how procedural fairness and institutional accountability can reinforce ESG-aligned governance in ISDS.¹⁴⁵

Taken together, Bear Creek, Eco Oro, and Perenco reveal that even when national measures aim to safeguard "climate adaptation relevant" concerns, such as Indigenous rights, biodiversity protection, and environmental remediation, arbitral outcomes have not consistently reinforced ESG standards.¹⁴⁶ In Bear Creek, the revocation of a mining concession in response to Aymara opposition underscored the importance of securing a social license and conducting culturally appropriate consultations under ILO Convention No. 169.¹⁴⁷ Yet the Tribunal lacked a structured framework for quantifying non-economic harms, such as cultural loss or diminished community governance capacity.¹⁴⁸

In Eco Oro, Colombia's measures to protect the *Santurbán Páramo* were rooted in precautionary climate adaptation objectives, yet the Tribunal found that inconsistent delimitation of the *páramo* and insufficient regulatory clarity failed to meet the minimum standard of treatment.¹⁴⁹ This outcome illustrates the tension described in Part III.B between legitimate environmental policy goals and the transparency and governance standards expected under investment treaties, revealing that procedural deficiencies, rather than environmental aims, can undermine state defenses in ISDS.

In Perenco, Ecuador's environmental counterclaims led to a USD \$54 million remediation award for Amazon contamination, demonstrating the potential for ISDS to enforce domestic environmental obligations.¹⁵⁰ However, the case also exposed challenges in reconciling conflicting expert evidence, the need for tribunal-appointed specialists, and uncertainties in post-award enforcement, issues central to Part III.A and III.C. Across these cases, the absence of standardized procedures for expert engagement, transparency, and implementation limits arbitration's capacity to align investment protection with

141. *Id.* ¶¶ 899, 1023(b).

142. *Id.* ¶¶ 536, 551.

143. *Id.* ¶¶ 1022–23(b).

144. *Id.* ¶ 708.

145. *Id.* ¶¶ 488–489, 495–497, 711–712, 517–523, 1004–1010, 1013–1014.

146. *Bear Creek v. Peru*, Award, ¶¶ 404–10.

147. *Id.* ¶ 258.

148. For further discussion of this procedural gap, see *infra* Part III.A.

149. *Eco Oro v. Colombia*, Award, ¶¶ 830–38.

150. *Perenco v. Ecuador*, Award, ¶¶ 713–16.

climate adaptation imperatives. Addressing these gaps is essential for ISDS to become a viable forum for ESG-related disputes in Latin America.

III. Procedural Challenges in ESG Arbitration

Arbitration is ideally suited for resolving ESG disputes because it enables tailored solutions that can accommodate the interests of businesses, governments, impacted communities, and environmental concerns.¹⁵¹ Notwithstanding these advantages, there are procedural obstacles that limit the suitability of arbitration as a preferred dispute resolution mechanism for ESG disputes in the ISDS context. Promoting effective resolution of ESG disputes in the arbitration context requires that these procedural challenges are addressed and overcome. Part III evaluates three of these limitations: (1) quantifying ESG impacts; (2) transparency and access to justice; and (3) enforceability and implementation of ESG awards.

A. Quantifying ESG Impacts

Arbitral tribunals should be more proactive in creating, advocating for, or otherwise establishing fair remedies, non-monetary results, and sustainability-focused processes that are tailored to the situation at issue.¹⁵² Ecological degradation, cultural loss, human rights abuses, and intergenerational injustice are frequently at issue in ESG disputes and are difficult to quantify.¹⁵³ Therefore, arbitration may need to develop and provide new remedies, such as injunctive relief or restorative results.¹⁵⁴

The 2025 Australian Centre for International Commercial Arbitration (ACICA) Sustainability Protocol provides useful recommendations and practices. Through mechanisms like carbon budgeting, paperless proceedings, and remote hearings, it promotes ecologically friendly arbitration.¹⁵⁵ Even though such proceedings are mostly voluntary, these programs reflect a trend toward proactive engagement with global issues.¹⁵⁶

151. CIARB (Kenya Branch), *Emerging ESG Considerations in Arbitration: Navigating New Duties and Disclosure Standards*, Panel Discussion during CIARB Kenya @40 Int'l ADR Conf. (n.d.), <https://ciarbkenya.org/emerging-esg-considerations-in-arbitration-navigating-new-duties-and-disclosure-standards/> [<https://perma.cc/CAS5-H2CC>]; James Langley, Catherine Gilfedder & Antonia Tjong, *Procedural Issues in Climate-Related Disputes*, *GLOB. ARB. REV.* (Sept. 30, 2024), <https://globalarbitrationreview.com/guide/the-guide-climate-change-and-related-disputes/first-edition/article/procedural-issues-in-climate-related-disputes> [<https://perma.cc/2KZU-564P>].

152. *Id.*

153. Jonathan Barnett & Beatrice Van Tornout (Fieldfisher), *It's Not Easy Being Green: ESG, Arbitration and the Future of Dispute Resolution*, *KLUWER ARB. BLOG* (June 9, 2025), <https://legalblogs.wolterskluwer.com/arbitration-blog/its-not-easy-being-green-esg-arbitration-and-the-future-of-dispute-resolution/#:~:text=Traditional%20arbitration%20is%20designed%20around,injunctive%20relief%2C%20or%20reputational%20redress> [perma.cc/V9TJ-WXYJ].

154. *Id.*

155. See generally Australian Ctr. for Int'l Com. Arb. (ACICA), *The ACICA Sustainability Protocol: Towards More Sustainable Arbitral Proceedings* (Jan. 2025), <https://acica.org.au/wp-content/uploads/2025/01/ACICA-Sustainability-Protocol.pdf> [<https://perma.cc/C7FS-SP6F>].

156. Barnett & Van Tornout (Fieldfisher), *supra* note 153.

Unlike mitigation, adaptation obligations are rarely framed in absolute terms. Instead, they are process-oriented, focusing on planning, integration, and consultation.¹⁵⁷ In disputes, states may defend contested measures by referencing climate risk assessments, national adaptation strategies, or regional vulnerability indicators.¹⁵⁸ However, tribunals currently lack standardized criteria for assessing whether these steps constitute compliance.¹⁵⁹

One helpful approach is procedural, asking whether a State followed a credible process, grounded in science and stakeholder engagement. For example, failure to conduct climate-informed environment impact assessments (EIAs), or to integrate adaptation into regulatory approvals, may signal non-compliance. Likewise, inconsistent application of adaptation rules, such as retroactive land use restrictions or unclear compensation mechanisms, may weigh against the State's justification. Doctrinal tools such as the precautionary principle also offer flexibility for decision-making in the face of uncertainty. When properly invoked, this principle may help legitimize preventive regulation, even when direct causation is difficult to prove.¹⁶⁰ Overall, a context-sensitive but principled approach, focused on process integrity, data use, and proportionality, can guide tribunals in evaluating adaptation failures without penalizing States for acting in the face of uncertainty.

The International Chamber of Commerce (ICC) Climate Change Report¹⁶¹ indicated that the "single most important feature of arbitrating climate change related disputes is the ability to ensure that appropriate expertise is available to the parties and the tribunal in addition to understanding of disputes and their resolution techniques."¹⁶² Arbitration is suitable for disputes that require specialist technical knowledge. Appointing arbitrators with specific expertise in environmental or ESG matters can lead to a more informed and efficient proceedings.¹⁶³ These disputes often involve scientific and technical information that requires expertise that domestic courts lack, even with the benefit of expert

157. See James Patterson et al., *Beyond Inputs and Outputs: Process-Oriented Explanation of Institutional Change in Climate Adaptation Governance*, 29 ENV'T POL'Y & GOVERNANCE 360 (July 29, 2019), <https://doi.org/10.1002/eet.1865>.

158. Mark Baker et al., *Climate-Related Disputes: Adaptation and Innovation*, NORTON ROSE FULBRIGHT (Oct. 2018), <https://www.nortonrosefulbright.com/en/knowledge/publications/cf5bb18c/climate-related-disputes-adaptation-and-innovation> [<https://perma.cc/M35J-MDQP>].

159. Danielle Attwood, *Rocks and Hard Places: The Predicament of Arbitrators in Investor-State Dispute Settlement in Times of Climate Change*, Vol. 6 Issue 3, ITA IN REVIEW (2024), <https://itainreview.org/articles/2024/vol6/Issue3/rocks-and-hard-places.html> [<https://perma.cc/5LGP-BACP>]; Martini, *supra* note 54.

160. Rio Declaration on Environment and Development, ¶ 15, U.N. Doc. A/CONF.151/26/Rev.1 (Vol. 1) (June 14, 1992).

161. Int'l Chamber of Comm., *ICC Commission Report: Resolving Climate Change Related Disputes through Arbitration and ADR* (Nov. 2019), <https://iccwbo.org/news-publications/arbitration-adr-rules-and-tools/icc-arbitration-and-adr-commission-report-on-resolving-climate-change-related-disputes-through-arbitration-and-adr/> [hereinafter "ICC Climate Change Report"] [<https://perma.cc/R4D4-Y7KE>].

162. Steven Finizio & Matteo Angelini, *Climate-Related Disputes and International Arbitration*, GLOB. ARB. REV. (Sept. 30, 2024), <https://globalarbitrationreview.com/guide/the-guide-climate-change-and-related-disputes/first-edition/article/climate-related-disputes-and-international-arbitration> [perma.cc/M9AA-QYVQ] (quoting ICC Climate Change Report, ¶ 5.7).

163. *Id.* See also CIARB (Kenya Branch), *supra* note 151.

witness input.¹⁶⁴ Expert witnesses can be valuable resources in evaluating the scope of damages in these disputes.¹⁶⁵

In addressing these disputes in the future one obstacle to overcome is separating state regulatory or fiscal action impacts from economic harms not attributable to the state.¹⁶⁶ Having a field expert as an arbitrator would allow for complex issues to be considered in a timely and thorough manner, especially when the evidence submitted is conflicting.¹⁶⁷ Due to its flexible nature, arbitration can enable parties to decide when and how they offer expert evidence, which would make the process more efficient because the arbitrator and the other parties are informed of the competing positions earlier in the process.¹⁶⁸ Finally, the parties' opportunity to select a qualified tribunal and use expert evidence to support their case offers a valuable advantage because "it increases the prospect that decisions will reflect sound and up-to-date knowledge in a new and fast-moving area like environmental law and policy."¹⁶⁹ Given the complexity of ESG-related claims, technical experts are central to evaluating adaptation obligations. Yet most tribunals still rely on party-appointed experts, which can lead to conflicting reports and partisan analysis.¹⁷⁰

Tribunal-appointed experts can help navigate contested issues such as projected climate risks, ecological thresholds, or infrastructure resilience. Their independence strengthens procedural fairness and supports more credible assessments. Tribunals should also draw on global guidance, such as IPCC reports or regional adaptation frameworks, to ground expert analysis in recognized climate science. By incorporating technical expertise throughout the process, arbitration can better respond to the interdisciplinary nature of ESG disputes and ensure more informed, legitimate outcomes.

B. Transparency and Access to Justice

Concerns about the role of democratic accountability, procedural justice, and the public interest in what are typically private, party-driven arbitration processes are becoming more pressing as climate and environmental disputes increasingly go to ISDS arbitration forums.¹⁷¹ To ensure that arbitration aligns

164. Finizio & Angelini, *supra* note 162.

165. Christopher John Goncalves & Alayna Tria, *Expert Analysis in Climate-Related Gas, LNG and Power Disputes*, GLOB. ARB. REV. (Sept. 30, 2024), <https://globalarbitrationreview.com/guide/the-guide-climate-change-and-related-disputes/first-edition/article/expert-analysis-in-climate-related-gas-lng-and-power-disputes> [https://perma.cc/6GJU-JYV5].

166. *Id.*

167. James Langley et al., *Procedural Issues in Climate-Related Disputes*, GLOB. ARB. REV. (Sept. 30, 2024), <https://globalarbitrationreview.com/guide/the-guide-climate-change-and-related-disputes/first-edition/article/procedural-issues-in-climate-related-disputes> [https://perma.cc/KP4K-EJ6V].

168. *Id.*

169. Finizio & Angelini, *supra* note 162.

170. See Eugen Sarbu, *The Use of Experts in International Arbitration*, SARBU PARTNERS (Aug. 11, 2025), <https://sarbupartners.ro/the-use-of-experts-in-international-arbitration/#:~:text=Experts%2C%20whether%20appointed%20by%20parties,insight%20but%20risk%20perceived%20bias> [https://perma.cc/9EJW-9BDK].

171. *How Arbitration Is Changing Environmental & Climate Dispute Resolution*, RF ARBITRATION, <https://www.rf-arbitration.com/publications/blog/how-arbitration-is-changing-environmental-and-climate-dispute-resolution> [https://perma.cc/UU7D-NEWV].

with ESG, climate adaptation, and sustainability objectives, environmental public policy, transparency, and participatory rights must be promoted in climate-related arbitration.

Lack of transparency obscures whether public funds are being used to pay arbitral awards¹⁷² and veils how tribunals assess climate science and risk.¹⁷³ Transparency enables individuals to be more confident in the arbitration process and protects arbitration against unwarranted criticism.¹⁷⁴ It also allows for outsiders to understand that the interests of all stakeholders, including the affected communities, are considered.¹⁷⁵ Disclosure of businesses' ESG standards is essential in promoting corporate accountability.¹⁷⁶ This disclosure can also include businesses' environmental impacts, social responsibilities, or governance practices.¹⁷⁷ Such disclosures can also serve as evidence in arbitration proceedings, helping to prove compliance with ESG responsibilities and transparency in reporting.¹⁷⁸

The confidentiality that arbitration provides can be an asset and a potential liability. It provides privacy for the parties involved, but it also limits transparency concerning issues of public interest.¹⁷⁹ Transparency in ESG-related disputes can be achieved in various ways: (1) opening proceedings to the public; (2) publicizing awards; (3) disclosing businesses' ESG standards, and (4) providing access to amicus curiae briefs.¹⁸⁰ In arbitration, there is no general rule of confidentiality.¹⁸¹ Depending on the law applicable to the agreement in question, arbitral tribunals may issue orders concerning the confidentiality of the arbitration proceedings.¹⁸²

Third-party participation has its advantages in climate-related arbitration. Arbitration allows a neutral and efficient forum for these disputes.¹⁸³ It improves the business's reputation by allowing other stakeholders, who may be

172. See Aishani Narain, *Transparency in Arbitration Proceedings*, 11 *ARB. L. REV.* (2019), <https://insight.dickinsonlaw.psu.edu/cgi/viewcontent.cgi?article=1255&context=arbitrationlawreview> [perma.cc/M8DY-QHG7].

173. Abby Husselbee & Sara Dewey, *Driving Transparency and Aligning Climate-Related Risk Disclosure Requirements*, *ENV'T & ENERGY L. PROG. HARV. L. SCH.* (June 5, 2024), <https://eelp.law.harvard.edu/driving-transparency-and-aligning-climate-related-risk-disclosure-requirements/> [https://perma.cc/3EXR-9NEF]; Joaquin Terceño, Campbell Herbert & Pedro Ramirez, *Evaluation of Scientific Evidence in Investor-State Arbitration: A Suggested Framework*, *FRESHFIELDS* (June 28, 2023), <https://riskandcompliance.freshfields.com/post/102ihpq/evaluation-of-scientific-evidence-in-investor-state-arbitration-a-suggested-fram> [https://perma.cc/5XRT-6G6J].

174. Narain, *supra* note 172.

175. *Id.*

176. *Id.*

177. *Id.*; see also Philipp Krueger et al., *The Effects of Mandatory ESG Disclosure Around the World*, *J. ACCT. RSCH.* (May 4, 2024), <https://doi.org/10.1111/1475-679X.12548>.

178. See Terceño et al., *supra* note 173.

179. *Id.* (noting that “the consequences of adverse publicity can be just as damaging as the financial repercussions of defending a claim”); see also CIARB (Kenya Branch), *Emerging ESG Considerations in Arbitration*, *supra* note 151.

180. Int'l Chamber of Comm., *supra* note 161; CIARB (Kenya Branch), *supra* note 151.

181. PLC Arbitration, *Confidentiality Standard in ICSID Arbitration*, THOMSON REUTERS (Feb. 17, 2010), [https://uk.practicallaw.thomsonreuters.com/3-501-4948?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/3-501-4948?transitionType=Default&contextData=(sc.Default)&firstPage=true) [https://perma.cc/D2H5-KDHH].

182. *Id.*

183. Int'l Chamber of Comm., *supra* note 161.

affected by the business's activities, into the forum and discussion.¹⁸⁴ Conveying corporate social responsibility allows businesses to obtain higher international quality standards and improve their credit rating, thereby improving their access to top segments of financial markets.¹⁸⁵ Offering an arbitral forum for claims from affected local stakeholders or from political opponents enables companies to meet certain legal requirements while allowing the project to move forward.¹⁸⁶ Third party opinions and views also may be “addressed through a separate grievance mechanism, or in single contractual arbitration through joinder of an additional party or non-party participation” through mechanisms like submissions of amicus curiae briefs with the parties’ consent.¹⁸⁷ Accordingly, a non-party to the dispute may offer “special perspectives, arguments, or expertise on the dispute.”¹⁸⁸

Climate justice requires tribunals to regard environmental protection not as a discretionary policy goal, but as a core sovereign obligation informed by scientific consensus and international climate commitments.¹⁸⁹ The *Vattenfall v. Germany* dispute, where a nuclear power plant phase-out law was challenged, is illustrative.¹⁹⁰ The tribunal’s approach raised concerns that climate action could trigger liability.¹⁹¹ To address this concern, investment treaties must be oriented to affirmatively create a climate-related policy space, enabling states to regulate environmental harms without fearing investor backlash.

Transparency is not merely procedural; it is a precondition for legitimacy in climate governance.¹⁹² Climate disputes are rarely bilateral. Indigenous communities, youth, and local environmental defenders often “bear the brunt” of environmental degradation and regulatory failure,¹⁹³ yet they lack a seat at the arbitration table or in policymaking. Institutional frameworks, such as the UNCITRAL Rules on Transparency in Treaty-Based Investor-State Arbitration,¹⁹⁴ attempt to create baseline transparency obligations. While Article 4 provides

184. *Id.* ¶ 5.82.

185. *Id.*

186. *Id.* ¶ 5.82.

187. *Id.* ¶ 5.83.

188. *Id.* ¶ 5.90.

189. See Paris Agreement, Dec. 12, 2015, 3156 U.N.T.S. 79.; U.N. Framework Convention on Climate Change (May 9, 1992), S. Treaty Doc. No. 102-38.

190. *Vattenfall AB & Ors. v. Federal Republic of Germany*, ICSID Case No. ARB/12/12 (pending; see German Federal Ministry for Economic Affairs and Climate Action [BMWK] press releases and publicly available settlement terms from 2021).

191. See *id.*

192. See *Why is Transparency Important in Climate Agreements?*, SUSTAINABILITY DIRECTORY (Oct. 4, 2025), <https://climate.sustainability-directory.com/question/why-is-transparency-important-in-climate-agreements/> [<https://perma.cc/GZ6G-64VW>]; Aarti Gupta, Ingrid Boas & Peter Oosterveer, *Transparency in Global Sustainability Governance: To What Effect?*, 22 J. ENV’T POL’Y & PLAN. 84 (Feb. 21, 2020), <https://doi.org/10.1080/1523908X.2020.1709281>.

193. See *Marginalised Communities Bear the Brunt of Climate Crisis in USA: New Report*, ENV’T JUST. FOUND. (Oct. 5, 2021), <https://ejfoundation.org/news-media/marginalised-communities-bear-the-brunt-of-climate-crisis-in-usa> [<https://perma.cc/S24G-BVGX>]; CIVICUS, *Who Bears the Brunt?*, https://monitor.civicus.org/globalfindings_2024/whobearsthebrunt/ [<https://perma.cc/AGW7-7Y3V>] (last visited Mar. 10, 2026).

194. United Nations Commission on International Trade Law (UNCITRAL), UNCITRAL Rules on Transparency in Treaty-based Investor-State Arbitration (Jan. 2014), <https://uncitral.un.org/sites/uncitral.un.org/files/media-documents/uncitral/en/rules-on-transparency-e.pdf> [<https://perma.cc/9QSP-BNTE>].

avenues for amicus participation,¹⁹⁵ arbitral tribunals still treat public interest input as exceptional rather than essential.

C. Enforceability and Implementation of ESG Awards

Many Latin American countries have weak environmental governance frameworks, burdened by economic challenges, corruption, inadequate public participation, and political instability.¹⁹⁶ These limitations impair effective implementation of arbitral awards that impose ESG-related obligations on states or investors. Indigenous communities and local stakeholders also often report non-compliance with environmental safeguards despite favorable arbitration awards.¹⁹⁷ These factors undermine investor confidence in ESG arbitration as a credible mechanism, while simultaneously allowing states to evade compliance without repercussions. To address this challenge, regional cooperation mechanisms, including the Pacific Alliance¹⁹⁸ and Mercosur,¹⁹⁹ are exploring frameworks to enhance environmental governance and harmonize arbitration practices with sustainable development commitments.

As Latin American countries face growing pressures to align economic development with sustainability goals, ESG considerations increasingly permeate investment arbitration in the region.²⁰⁰ The enforcement and implementation of arbitral awards containing ESG or climate-related obligations is challenging, shaped by regional governance realities and judicial practices. These disputes often involve States or State entities, causing claimants to fear bias or procedural disadvantage when litigating claims in their opposing state party's domestic courts.²⁰¹ The New York Convention recognizes and enforces arbitral awards through contracting states' enforcement of arbitration agreements and foreign arbitral awards.²⁰²

National courts in Latin America play a critical gatekeeping role in the enforcement of arbitral awards, including those with ESG components. The region exhibits a diverse judicial landscape, with courts showing varying degrees of

195. *Id.* art. 4.

196. See Paikene Mangani, Ghulam Dastgir Khan & Naseer Ahmad, *Sustainable Governance, Conflict and Environmental Justice in Critical Mineral Extraction in Latin America and Africa*, 1 P. & SUSTAINABILITY 100017 (Dec. 2025).

197. César Rodríguez-Garavito, *Ethnicity.gov: Global Governance, Indigenous Peoples, and the Right to Prior Consultation in Social Minefields*, 18 IND. J. GLOBAL LEGAL STUD. 263, 278, 285 (2011), <https://doi.org/10.2979/indjglolegstu.18.1.263>.

198. Carlos González Arruti, *The Pacific Alliance: Towards a Model of Sustainable Development*, 14 BEIJING L. REV. 199 (Mar. 2023), <https://doi.org/10.4236/blr.2023.141011> (noting that the Pacific Alliance Framework seeks to harmonize arbitration practices with sustainable development commitments).

199. Roland M. Stein et al., *EU-Mercosur Agreement on Sustainability*, CHAMBERS AND PARTNERS (July 21, 2025), <https://chambers.com/articles/eu-mercursosur-agreement-on-sustainability> [<https://perma.cc/73SF-Y6HB>] (noting that the sustainability chapter of the EU-Mercosur Agreement emphasizes that trade between the two blocs must actively advance sustainable development goals).

200. See generally *From Crisis to Resolution: The Evolving Landscape of ESG Arbitration in Latin America*, WHITE & CASE (Nov. 6, 2023), <https://www.whitecase.com/insight-our-thinking/latin-america-focus-fall-2023-crisis-resolution> [<https://perma.cc/DD6W-UVP9>].

201. Finizio & Angelini, *supra* note 162.

202. *Id.*

receptiveness to arbitration awards.²⁰³ Some courts, including those in Mexico and Peru, have demonstrated openness to upholding arbitral awards that reflect environmental obligations, often influenced by their countries' commitments under international agreements such as the Paris Agreement and the Escazú Agreement on environmental democracy.²⁰⁴ These courts increasingly recognize the importance of balancing investor rights with public interest in environmental protection.²⁰⁵ By contrast, courts in other countries have been cautious or resistant, citing sovereignty concerns or domestic policy priorities.²⁰⁶ In some instances, courts invoke public policy exceptions under the New York Convention²⁰⁷ to refuse enforcement, particularly when awards are perceived to interfere with national development plans or regulatory autonomy.²⁰⁸

Latin American courts also operate within political and economic pressures that may influence enforcement outcomes. Persistent capacity constraints and gaps in specialized expertise further limit judicial engagement with complex ESG-related awards. Weak institutional coordination, inadequate technical resources, and inconsistent environmental monitoring systems have been identified as structural barriers to effective environmental governance in the region.²⁰⁹ Addressing these deficiencies requires targeted reforms, including (1) judicial training on the intersection of international investment and environmental law; (2) regional judicial dialogues to promote consistency and peer learning; (3) exchange of best practices in ESG arbitration enforcement; and (4) legislative alignment of domestic arbitration laws with global climate

203. See Francisco Rivero & Isabella Lorduy, *Enforcement of Awards in Latin America*, LATIN LAW. (Aug. 26, 2025), <https://latinlawyer.com/guide/the-guide-international-arbitration-in-latin-america/fourth-edition/article/enforcement-of-awards-in-latin-america> [<https://perma.cc/AWE2-55MU>]; Luke Musto, *International Law Analysis: Enforcing International Arbitration Awards*, HARRIS GÓMEZ GROUP, <https://www.hgomezgroup.com/international-law/international-law-analysis-enforcing-international-arbitration-awards-in-latin-america/> [<https://perma.cc/2JEU-9AHV>] (last visited Feb. 3, 2026).

204. Isabella Kaminski, *Environmental Litigation in Latam and Caribbean Bolstered by Escazú Treaty*, CLIMATE DIPLO. (Aug. 27, 2024), <https://climate-diplomacy.org/magazine/environment/environmental-litigation-latam-and-caribbean-bolstered-escazu-treaty> [<https://perma.cc/78AR-GLED>].

205. See, e.g., *Ruling on Modification to Ethanol Fuel Rule*, SABIN CTR. FOR CLIMATE CHANGE L. (2019) (Mex.), https://www.climatecasechart.com/document/ruling-on-modification-to-ethanol-fuel-rule_6154 [<https://perma.cc/LH9B-UCEC>].

206. Francisco Rivero & Isabella Lorduy, *Enforcement of awards in Latin America*, LATIN LAW. (Aug. 26, 2025), <https://latinlawyer.com/guide/the-guide-international-arbitration-in-latin-america/fourth-edition/article/enforcement-of-awards-in-latin-america> [perma.cc/AWE2-55MU].

207. Convention on the Recognition and Enforcement of Foreign Arbitral Awards, art. V(2)(b), June 10, 1958, 21 U.S.T. 2517, 330 U.N.T.S. 38 [hereinafter New York Convention].

208. See New York Convention, art. V(2)(b); Zena Prodromou, *The Public Policy Exception under Article V(2)(b) of the New York Convention in the Time of Covid-19*, KLUWER ARB. BLOG (Feb. 17, 2021), [https://legallblogs.wolterskluwer.com/arbitration-blog/the-public-policy-exception-under-article-v2b-of-the-new-york-convention-in-the-time-of-covid-19/#:~:text=The%20public%20policy%20exception%20under%20Article%20V\(2\)\(b\),so%20national%20courts%20must%20interpret%20its%20meaning](https://legallblogs.wolterskluwer.com/arbitration-blog/the-public-policy-exception-under-article-v2b-of-the-new-york-convention-in-the-time-of-covid-19/#:~:text=The%20public%20policy%20exception%20under%20Article%20V(2)(b),so%20national%20courts%20must%20interpret%20its%20meaning) [<https://perma.cc/2TW7-JNAS>].

209. Inter-American Dev. Bank & World Justice Project, *Environmental Governance Indicators for Latin America and the Caribbean: A Cross-Country Assessment of Environmental Governance in Practice in Argentina, Bolivia, Brazil, Colombia, Costa Rica, the Dominican Republic, El Salvador, Jamaica, Peru & Uruguay*, 13–26 (2020), <https://publications.iadb.org/publications/english/document/Environmental-Governance-Indicators-for-Latin-America-the-Caribbean.pdf> [<https://perma.cc/UCJ2-UEPX>].

governance frameworks.²¹⁰ By integrating these measures into regional legal systems, Latin America could enhance the credibility of arbitration as a mechanism for resolving ESG disputes and improve the enforceability of awards that advance climate adaptation and sustainable development goals.

IV. Enhancing ESG and Climate Adaptation Considerations in ISDS Arbitration

Peru, Colombia, and Ecuador have developed strong legal and constitutional frameworks for climate adaptation, providing a foundation of legitimacy for regulatory actions affecting investors.²¹¹ ISDS arbitration is increasingly being used to adjudicate ESG and climate-related disputes, as highlighted in the selected case studies.²¹² There is a need for greater alignment between international investment law, ESG standards, and climate governance. When these intersecting objectives align properly, ISDS arbitration can promote sustainable development.

A central challenge in effectively applying domestic climate and ESG standards in ISDS arbitration is the structural imbalance embedded in many international investment treaties, which are designed to favor investors over States' regulatory authority.²¹³ Rather than reinforce this asymmetry through treaties, States should prioritize domestic institutions. This effort includes enhancing the technical capacity, transparency, and independence of administrative bodies, investment promotion agencies, and environmental ministries that interface with foreign investors.

Investment protection mechanisms should complement, not replace, robust domestic institutions. By fostering public trust and improving regulatory performance, States can reduce reliance on treaty-based exceptions that protect investor goals while promoting sustainable development grounded in local governance frameworks. Many ESG-related conflicts escalate due to inadequate consultation, social exclusion, and a lack of early dialogue.²¹⁴ International legal frameworks can play a more proactive role in facilitating pre-dispute engagement through mediation, joint fact-finding, and early warning systems. Cooperative mechanisms rooted in dialogue, transparency, and inclusion of vulnerable populations should be institutionalized to promote equitable and sustainable outcomes. This shift reflects a move away from adversarial dispute resolution toward a restorative model aligned with ESG principles and climate resilience.

210. *Id.*

211. Soledad Aguilar & Eugenia Recio, *Climate Law in Latin American Countries*, in *CLIMATE CHANGE AND THE LAW* 653 (Erkki J. Hollo et al. eds., Springer 2013).

212. See *supra* Part II.

213. See Angin, *supra* note 1; David Gaukrodger, *The Balance Between Investor Protection and the Right to Regulate in Investment Treaties: A Scoping Paper*, OECD Working Papers on International Investment (2017).

214. See *supra* Part III.

A. Substantive Measures to Align ESG Standards in Investment Decision-Making and Contractual Practice

To effectively align ESG standards with sustainable development goals, States must address both the policy frameworks that guide investment decision-making and the contractual mechanisms that govern project execution. This section explores substantive measures to embed ESG considerations throughout the investment lifecycle. Subpart A.1 focuses on how domestic legal frameworks, such as climate change laws and constitutional mandates, can clarify regulatory expectations and promote ESG-aligned investment decisions. Subpart A.2 examines how standardized contractual tools, including international model clauses and procurement guidelines, can operationalize ESG and climate adaptation obligations in project agreements. Together, these complementary measures enhance legal certainty, improve ESG compliance, and reinforce the legitimacy of regulatory interventions.

1. *Clarifying Regulatory Expectations through ESG-Oriented Legal Frameworks*

Investment disputes frequently arise in contexts where there is a misalignment between national regulatory objectives and investor expectations.²¹⁵ To reduce the incidence and intensity of such disputes, States should adopt proactive and transparent investment policies that clearly articulate the categories of investment they seek to attract and the environmental and social standards applicable to those investments.

A predictable legal and regulatory environment strengthens investor confidence while allowing governments to promote sustainable development goals. For example, by screening proposed projects based on ESG criteria such as environmental safeguards, social inclusion, and climate adaptation, governments can ensure alignment between investment flows and public policy goals.

In Latin America, national legal frameworks on climate change provide a foundation for articulating these priorities and enhancing transparency in investment decision-making. Peru's Climate Change Framework Law mandates the integration of climate adaptation into all levels of planning and public investment.²¹⁶ The law institutionalizes transparency, accountability, and public participation through the establishment of a National Climate Change Commission and a High-Level Commission, and it reinforces the role of Indigenous consultation in alignment with ILO Convention No. 169.²¹⁷ Article 15 of the law defines adaptation as a cross-sectoral, participatory obligation, emphasizing its implementation in water resource management, territorial planning, infrastructure development, and disaster risk prevention.²¹⁸

Similarly, Colombia's Climate Change Act requires the incorporation of climate adaptation strategies into national and subnational planning instruments,

215. Angin, *supra* note 1.

216. See *supra* Part I.C.1.

217. Climate Change Framework Law, No. 30754, arts. 9, 10, 22 (2018) (Peru).

218. *Id.* art. 15.

including development and territorial plans.²¹⁹ The statute establishes binding implementation mechanisms such as the Planes Integrales de Gestión del Cambio Climático, which are grounded in climate risk assessments and focused on areas such as infrastructure protection, agricultural resilience, and water management.²²⁰ The law's institutional framework, led by the SISCLIMA system and the Intersectoral Climate Change Commission, ensures coordinated governance and participatory engagement through the National Climate Change Council.

In Ecuador, although the legislature has not yet enacted a comprehensive climate statute, the 2008 Constitution provides a binding legal basis for climate adaptation and ecological protection.²²¹ Articles 71-74 recognize nature as a subject of rights and impose affirmative obligations on the State to prevent and remedy environmental harm.²²² Article 414 commits the State to adopt adequate and cross-cutting adaptation measures to protect vulnerable populations and ecosystems.²²³ The constitutional framework is further reinforced by the precautionary principle enshrined in Article 73, which legitimizes restrictions or prohibitions on activities that pose threats to ecosystem integrity and biodiversity.²²⁴

These legal instruments reflect important progress in embedding ESG and climate adaptation goals into domestic law, yet they often stop short of providing the type of clear, enforceable mechanisms that give investors predictable operational boundaries. To make these frameworks more investment-friendly while safeguarding sustainability objectives, future legislative reforms should: (1) define measurable ESG performance indicators linked to permitting and licensing processes; (2) establish standardized timelines and procedures for environmental and social impact reviews to reduce uncertainty; (3) include explicit provisions for investors who comply with adaptation and ESG requirements in good faith; and (4) integrate dispute-prevention tools, such as pre-project consultation protocols and mediation mechanisms, directly into climate and environmental statutes. Much like previous World Trade Organization (WTO) dispute settlement body jurisprudence seeking to reconcile market access objectives under the WTO with environmental safeguards under multilateral environmental agreements,²²⁵ climate and ESG laws in Latin America must bridge the gap between regulatory ambition and investment certainty, offering both the flexibility needed for adaptive governance and the clarity required for investor confidence.

2. *Embedding Climate Adaptation Obligations in Standardized Contractual Tools*

ESG-related disputes often arise from vague or inconsistent contractual language concerning environmental and social obligations, as well as from

219. See *supra* Part I.C.2.

220. L. 50/667, art. 8, julio 27, 2018, DIARIO OFICIAL [D.O.] (Colom.).

221. See *supra* Part I.C.3.

222. CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR, arts. 71–74 (2008).

223. *Id.* art. 414.

224. *Id.* art. 73.

225. See generally Gretchen L. Gaston & Randall S. Abate, *The Biosafety Protocol and the World Trade Organization: Can the Two Coexist?*, 12 PACE INT'L L. REV. 107 (2000).

the absence of clear benchmarks to assess compliance with climate adaptation goals.²²⁶ This lack of clarity can create uncertainty about the scope of investor responsibilities, the extent of State regulatory powers, and the legal consequences of regulatory changes introduced in response to climate risks. To address these challenges, States and public entities should adopt standardized contractual mechanisms that embed ESG obligations—particularly those related to adaptation and resilience—directly into public-private partnership contracts and engineering, procurement, and construction agreements.

International contractual instruments offer practical templates for operationalizing climate adaptation standards in a manner that is consistent, transparent, and enforceable. The World Bank's ESF, for instance, provides detailed requirements for the identification, assessment, and management of environmental and social risks in investment projects.²²⁷ Under its environmental and social standards (ESS), climate risk assessments and resilience-building measures are mandated in project design, construction, and monitoring.²²⁸ The ESF further requires borrowers to consider adaptation strategies based on ecosystem services, community vulnerability, and climate projections, factors that can be expressly translated into binding contractual clauses.²²⁹

Similarly, the FIDIC Climate Change Clauses—developed in 2021 in collaboration with The Chancery Lane Project—introduce tailored contractual language for integrating climate mitigation and adaptation objectives into infrastructure agreements.²³⁰ These clauses are intended for incorporation into the standard suite of FIDIC contract forms, including the Conditions of Contract for Construction (Red Book),²³¹ for Plant and Design-Build (Yellow Book),²³² and for EPC/Turnkey Projects (Silver Book).²³³ By incorporating obligations related to emissions reduction, resource efficiency, and climate resilience, the FIDIC Climate Change Clauses provide a structured framework for allocating environmental responsibilities throughout the project lifecycle.

In the context of climate adaptation, these clauses enable contracting authorities to assign specific duties to contractors regarding the design and implementation of infrastructure capable of withstanding climate-related hazards.

226. Paine & Sheargold, *supra* note 18, at 298.

227. See *supra* Part I.B.2.

228. *Id.*

229. *Id.*

230. See generally Practical Law Corp. Transactions, *The Chancery Lane Project: Model Climate Clauses*, THOMSON REUTERS (2022), <https://www.thomsonreuters.co.kr/content/dam/ewp-m/documents/korea/ko/pdf/other/practical-law-toolkit-the-chancery-lane-project-model-climate-clauses-2022.pdf> [<https://perma.cc/9JUJ-PCW8>].

231. INT'L FED. OF CONSULTING ENGINEERS, *Construction Contract 2nd Ed (2017 Red Book)*, <https://fidic.org/books/construction-contract-2nd-ed-2017-red-book> [<https://perma.cc/RSD4-5YL3>].

232. INT'L FED. OF CONSULTING ENGINEERS, *EPC/Turnkey Contract 2nd Ed (2017 Silver Book)*, <https://fidic.org/books/epcturnkey-contract-2nd-ed-2017-silver-book> [<https://perma.cc/Q5DZ-DUGM>].

233. INT'L FED. OF CONSULTING ENGINEERS, *EPC/Turnkey Contract 2nd Ed (2017 Silver Book)*, <https://fidic.org/books/epcturnkey-contract-2nd-ed-2017-silver-book> [<https://perma.cc/Q5DZ-DUGM>]. For an overview of the red, yellow, and silver books, see generally Mansoor Ali, *FIDIC Red, Yellow, and Silver Books—A Brief Overview*, INST. OF CONSTRUCTION CLAIMS PRACTITIONERS (Dec. 18, 2022), <https://www.instituteccp.com/fidic-red-yellow-and-silver-books-a-brief-overview/> [<https://perma.cc/HRJ7-JLZU>].

This includes obligations to assess climate risks, incorporate resilience-enhancing features such as flood control systems or heat-resistant materials, and adapt performance requirements based on evolving environmental standards. The clauses also encourage the use of climate-aligned materials and construction methods, periodic environmental reporting, and contingency measures for responding to extreme weather events or regulatory changes related to climate governance.²³⁴

Procurement frameworks developed by multilateral development banks, including the World Bank and the Inter-American Development Bank, increasingly integrate climate risk considerations and sustainability-related criteria into project design and evaluation processes. These frameworks allow for contractual and technical adjustments in response to evolving environmental conditions and regulatory developments. By contrast, the UNCITRAL Model Law on Public Procurement establishes a procedural structure grounded in transparency and objective evaluation criteria, which States may adapt to integrate ESG-aligned requirements into domestic procurement systems.²³⁵

Incorporating such clauses into standardized contractual templates clarifies the allocation of environmental and climate-related responsibilities at the project's inception, reducing ambiguity in subsequent arbitral interpretation. Embedding ESG obligations within contractual language also provides a stronger legal foundation for regulatory measures grounded in climate adaptation and environmental protection. Standardization thus enhances coherence and predictability while offering clearer compliance benchmarks for public and private actors.

B. Procedural Measures to Strengthen ESG Legitimacy and Effectiveness in ESG Arbitration

While substantive reforms are essential to ensure clarity and predictability in regulatory and contractual design, procedural reforms are necessary to preserve the legitimacy of arbitration as a forum for resolving ESG-related claims. Climate-related disputes often engage legal and factual issues that transcend the interests of the immediate parties, raising broader questions of transparency, participation, evidentiary complexity, and long-term enforceability. This

234. Forsters, *Guidance Note—Construction ESG* (Oct. 2024), https://www.forsters.co.uk/wp-content/uploads/2024/10/BD51_Construction-ESG-Briefing.pdf [<https://perma.cc/WQ39-LFEY>]; Jon Gilbert et. al, *Extreme Weather Events and the Risk of Delay and Disruption on Construction Projects*, FRESHFIELDS (Nov. 25, 2021), <https://sustainability.freshfields.com/post/102hc2u/extreme-weather-events-and-the-risk-of-delay-and-disruption-on-construction-proje> [<https://perma.cc/QVR5-QDWQ>]; Tom Smith et. al, *Managing Extreme Weather-Related Delay and Disruption Claims on Projects*, HOGAN LOVELLS (Jan. 7, 2025), <https://www.hoganlovells.com/en/publications/managing-extreme-weatherrelated-delay-and-disruption-claims-on-projects> [<https://perma.cc/VES2-HZFD>]; Nathaniel Horrocks-Burns et. al, *Climate Change and the Construction Industry*, THOMSON REUTERS PRACTICAL LAW (May 7, 2024), [https://uk.practicallaw.thomsonreuters.com/w-026-6499?transitionType=Default&contextData=\(sc.Default\)&firstPage=true](https://uk.practicallaw.thomsonreuters.com/w-026-6499?transitionType=Default&contextData=(sc.Default)&firstPage=true) [<https://perma.cc/Q7DH-8G45>].

235. See generally Géraud de Lassus St-Geniès, *The Early Work of the United Nations Commission on International Trade Law on Climate Change: A First Analysis*, 74 U. NEW BRUNSWICK L.J. 80 (2023).

section proposes three procedural reforms for aligning arbitration with ESG values and enhancing its legitimacy as a forum for climate adaptation disputes.

1. *Improving Evidentiary Rigor and ESG Impact Assessment through Independent Expertise*

Given the scientific and technical complexity of many ESG claims, particularly those related to environmental harm, adaptation standards, or social impacts, arbitral tribunals must also strengthen evidentiary procedures to ensure objective and well-informed adjudication. One promising reform is the institutionalization of independent or jointly appointed experts in ESG-related disputes. Such experts can assist the tribunal in evaluating contested technical issues and reduce the risk of evidentiary asymmetries that may arise between States and investors.

*Perenco v. Ecuador*²³⁶ provides a compelling model for expert-driven evidentiary procedures. Faced with conflicting assessments of environmental damage in Ecuador's Amazon region, the tribunal appointed an independent environmental expert to evaluate the extent of contamination and recommend appropriate remediation measures.²³⁷ The expert's findings played a decisive role in determining the amount awarded to Ecuador for environmental restoration.²³⁸ This approach not only improved the technical quality of the award but also enhanced procedural fairness by mitigating information asymmetries and grounding the decision in verifiable, site-specific data.

Beyond assessing causation and liability, arbitral tribunals must also improve how ESG-related harm is measured and quantified. This is particularly relevant in climate adaptation disputes, where the harm often involves complex, long-term, and non-economic consequences, such as disruption of ecosystems, displacement of vulnerable populations, or increased exposure to climate-related hazards. Traditional valuation models, which prioritize direct economic loss, are ill-suited to capture these multidimensional impacts. Moreover, over-reliance on party-appointed experts can lead to fragmented methodologies, conflicting evidence, and perceptions of bias, especially when ESG valuation becomes entangled with politically sensitive regulatory measures.²³⁹

To address these challenges, arbitration practice should evolve toward more standardized, transparent, and science-based approaches to ESG impact quantification. Institutions and tribunals could draw on interdisciplinary methodologies, including ecosystem services valuation, climate risk modeling, and participatory impact assessments, tools commonly used in environmental governance and climate finance. International frameworks such as IPCC adaptation indicators, UNEP resilience metrics, or regional climate vulnerability

236. See *supra* II.C.

237. *Id.*

238. *Id.*

239. Ian Meredith & Louise Bond, *Expert Evidence in International Arbitration: Common Criticisms and Innovative Solutions*, K&L GATES (Aug. 24, 2021), <https://www.klgates.com/Expert-Evidence-in-International-Arbitration-Common-Criticisms-and-Innovative-Solutions-8-24-2021#:~:text=As%20indicated%20above%2C%20concerns%20regarding,in%20a%20fundamentally%20incompatible%20way> [<https://perma.cc/7RTW-99BB>] (discussing criticisms of party-appointed experts in arbitration).

indices can provide credible reference points to evaluate whether a state's adaptation measures or an investor's conduct satisfies relevant environmental obligations.

Tribunal-appointed independent experts are essential to implementing these methods effectively. Their engagement should go beyond technical evaluation to include a clear explanation of the data sources, modeling assumptions and uncertainties involved. Procedural rules should ensure that expert reports are accessible, translated where necessary, and open to comments from the parties and, where appropriate, from affected communities. These measures not only enhance the evidentiary integrity of ESG arbitration but also promote legitimacy by grounding decision-making in recognized scientific consensus and inclusive evaluation processes.

Additional cases underscore how the absence of independent expertise and standardized valuation methodologies can weaken the arbitral proceedings. In *Bear Creek Mining v. Peru*²⁴⁰ and *Eco Oro Minerals v. Colombia*,²⁴¹ tribunals faced highly technical issues related to environmental impact assessments, biodiversity risks, and community health concerns, yet neither tribunal appointed neutral experts to assist in evaluating the competing claims. While these disputes involved significant ESG dimensions, they were adjudicated without the benefit of structured, tribunal-led scientific assessment.²⁴² This omission limited the tribunals' ability to fully assess the factual and technical complexities of the claims. Ultimately, this issue reinforces the need for procedural reforms that can institutionalize the use of neutral expertise and credible ESG valuation tools in arbitration.

2. *Enhancing Transparency and Stakeholder Participation*

As climate-related disputes frequently involve rights and interests of non-disputing stakeholders, arbitral procedures should be recalibrated to promote inclusiveness, transparency, and procedural fairness. Mechanisms such as *amicus curiae* submissions from affected communities, civil society organizations, and subject-matter experts can introduce critical perspectives and factual insights that improve the quality and legitimacy of arbitral outcomes. Such participation is especially important in ESG disputes, where the social legitimacy of outcomes may depend on whether affected populations had meaningful channels of engagement.

To address current shortcomings, tribunals should consider making procedural reforms. These reforms may include: (1) the admissibility of *amicus* briefs in cases raising issues of environmental or social impact; (2) the mandatory publication of procedural decisions concerning third-party participation; and (3) tribunal obligations to facilitate accessibility for non-party stakeholders, including the provision of translated materials in Indigenous languages and simplified procedural formats for community engagement.

240. See *supra* Part III.A.

241. See *supra* Part III.B.

242. *Id.*

The relevance of these reforms is reflected in recent Latin American cases that underscore how procedural shortcomings in stakeholder engagement and transparency can undermine both the legitimacy and effectiveness of ESG-related arbitration. In *Bear Creek Mining v. Peru*,²⁴³ the tribunal's analysis revealed the procedural failures associated with a lack of meaningful community engagement and consultation. The Environmental and Social Impact Assessment (ESIA) read in a technical and Spanish-only format, marginalizing Aymara-speaking participants and excluding affected communities from the consultation process.²⁴⁴

This failure ultimately led to the revocation of the mining concession.²⁴⁵ The case advances the argument for procedural reform by revealing the consequences of excluding vulnerable populations from project-related decision-making and underscores the importance of culturally and linguistically accessible procedures. Moreover, the tribunal's reference to ILO Convention No. 169 supports the inclusion of Indigenous participation frameworks within arbitral procedures, reinforcing the call for mechanisms such as amicus submissions or translated materials to enhance stakeholder engagement.²⁴⁶

Similarly, in *Eco Oro Minerals v. Colombia*,²⁴⁷ while the core dispute centered on environmental regulation, the tribunal identified regulatory opacity and procedural inconsistency as contributing factors to the breach of fair and equitable treatment. The State's failure to clearly communicate the delimitation of the Santurbán Páramo ecosystem reflected a lack of transparency in regulatory decision-making, which had implications not only for investor rights but also for public trust.²⁴⁸ This case reinforces the importance of procedural reforms that institutionalize transparency and foster open channels of communication with all affected stakeholders during both the pre-dispute and arbitral phases. Together, these cases demonstrate how the absence of inclusive and transparent procedures can escalate ESG-related disputes and weaken the perceived legitimacy of arbitral outcomes. They affirm the need for investment arbitration to evolve procedurally by embracing participatory tools that reflect the public interest dimensions of climate and sustainability governance.

3. *Strengthening the Enforceability and Implementation of ESG-Related Awards*

ESG arbitration must address not only how tribunals render awards but also how they implement them. Awards involving non-pecuniary remedies, such as environmental restoration, compliance with domestic climate laws, or forward-looking adaptation measures, face unique enforceability barriers. These challenges include ambiguity in award terms, potential incompatibility with domestic legal systems, and difficulties in post-award oversight.

243. See *supra* Part III.A.

244. *Id.*

245. *Id.*

246. *Bear Creek Mining v. Peru*, *supra* note 116, ¶¶ 405–415.

247. See *supra* Part III.B.

248. *Eco Oro Minerals v. Colombia*, *supra* note 128, ¶ 227.

Perenco v. Ecuador²⁴⁹ illustrates how these challenges can be addressed through careful award design and reliance on domestic legal standards. In that case, the tribunal upheld Ecuador's environmental counterclaim and awarded compensation for environmental remediation,²⁵⁰ basing its calculation on Ecuadorian law and locally grounded land-use classifications.²⁵¹ By aligning the award with the host state's environmental framework and quantifying remediation through expert-led, verifiable methodologies, the tribunal enhanced the legal and practical enforceability of the award.²⁵² This approach demonstrates that tribunals can formulate ESG-related remedies, particularly those involving environmental repair, in ways that are both effective and compatible with national enforcement mechanisms.

In contrast, cases such as *Bear Creek* and *Eco Oro* highlight a broader limitation in current arbitration practice. Although these disputes involved significant social and environmental impacts, the tribunals confined the resulting awards to conventional monetary remedies, giving little attention to the design or enforcement of long-term regulatory or restorative outcomes.²⁵³ While neither case directly addressed the implementation of non-pecuniary obligations, both illustrate the growing need for arbitral remedies that extend beyond compensation to account for structural and ecological harm, particularly in disputes where sustainability and public interest considerations are central.

These examples reinforce the importance of designing awards that are not only substantively sound but also practically enforceable. Tribunals should consider remedies that are clearly articulated, legally grounded, and capable of execution in domestic jurisdictions. Arbitral institutions may also support implementation by promoting post-award innovations such as monitoring mechanisms, expert follow-up, or compliance reporting, particularly in disputes involving environmental protection or adaptation-related obligations.

Conclusion

Latin America is one of the world's most climate-vulnerable regions.²⁵⁴ In response to increasingly urgent climate adaptation challenges, policy-makers have established climate adaptation requirements in international law agreements such as the Paris Agreement and in climate finance and ESG standards issued by multilateral development banks like the World Bank and Inter-American Development Bank. Peru, Colombia, and Ecuador have

249. See *supra* Part III.C.

250. Perenco v. Ecuador, *supra* note 136, ¶¶ 899, 1023(b).

251. *Id.* ¶¶ 1022–23(b).

252. *Id.* ¶¶ 567, 569–71.

253. *Eco Oro Minerals Corp. v. Republic of Colombia*, ICSID Case No. ARB/16/41, Award (Sept. 9, 2021), ¶¶ 826–830 (ordering compensation but declining to address environmental restoration measures); *Bear Creek Mining Corp. v. Republic of Peru*, ICSID Case No. ARB/14/21, Award (Nov. 30, 2017), ¶¶ 666–667, 860–861 (granting monetary damages and dismissing claims for other forms of relief).

254. IDB Fact Sheets, *Climate Change and Latin America and the Caribbean* (Mar. 6, 2024), <https://www.iadb.org/en/news/climate-change-and-latin-america-and-caribbean> [<https://perma.cc/S4KB-UPN5>] (last visited Oct. 10, 2025).

adopted ambitious legal frameworks to implement these climate adaptation commitments.²⁵⁵ These laws integrate resilience objectives into national development and infrastructure planning and establish enforceable obligations for both public and private actors.

Foreign investment plays a vital role in the economic development of Latin America and can also serve as a catalyst for sustainable transitions. If not properly aligned with domestic and international climate adaptation goals, however, foreign investment projects can aggravate environmental vulnerabilities in the region. Arbitral tribunals are addressing ESG-related claims involving climate adaptation obligations in Latin America, assessing the extent to which climate adaptation measures are enforceable under ISDS frameworks. Scholars have criticized ISDS for several reasons, including its failure to strike an appropriate balance between the right of states to regulate and the protection of foreign direct investment.

The enforcement of ESG obligations—particularly those related to climate adaptation—is an emerging issue in arbitration in ISDS in the region. Case studies in Peru, Colombia, and Ecuador underscore the tension between protecting investors' interests and the state's authority to enforce climate adaptation measures. Though ISDS arbitration offers an opportunity to implement climate adaptation objectives, procedural challenges in ESG arbitration threaten to limit the effectiveness of arbitration in the ISDS context.

This growing interface between ESG obligations and investment protection regimes underscores the need for coherence. Latin American states must optimize their ability to enforce climate adaptation obligations while continuing to attract and retain responsible foreign investment. This article proposed substantive and procedural reforms for arbitration to facilitate compliance with climate adaptation standards in Latin America while balancing investor rights and public policy objectives. The proposed reforms seek to align ESG transparency standards in investment decision-making with procedural reforms to enhance the legitimacy and effectiveness of ESG arbitration, thereby promoting investment that is both economically beneficial and environmentally sustainable.

255. See Climate Change Framework Law, No. 30754 (2018) (Peru); L. 50/667, julio 27, 2018, DIARIO OFICIAL [D.O.] (Colom.); CONSTITUCIÓN DE LA REPÚBLICA DEL ECUADOR [Constitution], Sept. 28, 2008, arts. 73, 395, 414.