

The ICJ-ISDS Climate Paradox: Reconciling Climate Change Obligations with Investor Protection

PhD Candidate **Haniehalsadat ABOUTORABIFARD**¹

Abstract

The article is developed with the aim of examining the tensions between States' obligations concerning climate change, as consolidated by the 2025 Advisory Opinion of the International Court of Justice, and the mechanisms for the protection of foreign investors within investor – State dispute settlement (ISDS). Although international law imposes on States obligations of due diligence, prevention of significant harm, and effective regulation of private actors, measures adopted to fulfil these obligations may generate investment claims and risks of compensation, producing a chilling effect on climate regulation. This contradiction is analysed through the lens of the sole effects doctrine, the regulatory powers doctrine, and the investment reprisal approach, drawing on relevant case law, including Metalclad, Azurix, and Copper Mesa. It is argued that the problem derives from the asymmetry between the State-centric character of the international climate regime and the investor-protection orientation of ISDS. As a solution, the study proposes the progressive recognition of direct international climate obligations for private investors. By linking the “polluter pays” principle with the reasoning of the arbitral tribunal in Urbaser v. Argentina, the article identifies a doctrinal basis for incorporating investors' climate-related conduct into investment arbitration. This solution offers a potential avenue for achieving greater coherence between investment protection, climate responsibility, and States' capacity to adopt measures necessary to protect the climate system.

Keywords: climate change, International Court of Justice (ICJ), investor-state dispute settlement (ISDS), international investment law, climate obligations, due diligence, “polluter pays” principle, Urbaser v. Argentina.

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1. Introduction

In July 2025, the International Court of Justice (ICJ) delivered a landmark Advisory Opinion affirming Obligations of States in Respect of Climate Change to prevent serious harm to the global climate system.² In particular, the Advisory Opinion extended States' obligations to regulate private actors acting within the States' jurisdiction. The ruling underscores that States are accountable for failing to take

¹ Haniehalsadat Aboutorabifard, York University, Toronto, Ontario, Canada; hanie.fard@gmail.com; ORCID: 0009-0004-8862-0921.

² International Court of Justice, *Obligations of States in Respect of Climate Change*, General List No. 187, Advisory Opinion, July 23, 2025, <https://www.icj-cij.org/case/187/advisory-opinions>.

necessary measures to limit greenhouse gas emissions from private actors, including foreign investors/corporations in the fossil fuel sector. But under the existing architecture of international investment law, those very same corporations can sue host States before *investor-state dispute settlement* (ISDS) tribunals for doing precisely what the ICJ commands. This creates a critical paradox: the same international legal system that imposes climate obligations on States simultaneously empowers private actors to seek compensation when States fulfill those obligations.

This collision — between the ICJ’s authoritative climate jurisprudence and the operational reality of ISDS tribunals — remains largely unexamined. The ICJ’s substantive requirements for States’ climate obligations — due diligence, prevention of environmental harm, and international cooperation — have attracted extensive scholarly attention.³ Yet almost no one has asked how those very obligations to regulate private actors operate within ISDS proceedings, where States’ climate regulations are routinely treated as unlawful interference with protected investor rights.

This article addresses that fundamental gap. We argue that the tension arises from two structural features: the ICJ’s state-centric framework, which overlooks private actors as direct subjects of climate obligations, and the institutional design of ISDS tribunals, which systematically subordinates States’ regulatory power to investor protection⁴. Within this dynamic, a necessary first step toward meaningful implementation of the Advisory Opinion is to recognize foreign investors as direct bearers of international climate obligations. Building on the “polluter pays” principle as discussed by the ICJ and on ISDS arbitral reasoning in the *Urbaser v. Argentina* case, this article proposes a doctrinal shift to operationalize the ICJ’s climate change mandates within ISDS proceedings. That means that, instead of evaluating States’ climate measures as external disruptions to investors’ expectations, ISDS tribunals should consider investors’ violations of their international climate change obligations, as required by the ICJ, through investment dispute procedures.

This article proceeds in six parts. Following this introduction, Part Two examines the ICJ’s Advisory Opinion on States’ climate change obligations to regulate private actors, focusing on how the principle of attribution grounds States’ regulatory duties under international law. Part Three turns to the structure of ISDS tribunals, reviewing how investment protection standards have been incorporated into and made enforceable through investment agreements. Part Four analyzes the principal doctrinal approaches used by ISDS tribunals when reviewing States’ environmental and climate-related regulation, showing how these approaches often privilege investor protection over systemic climate concerns. Part Five advances the article’s normative argument and policy recommendations for recognizing direct climate-related obligations on private

³ Nicholas A. Robinson, “Legal Imperatives to Survive the Climate Crisis: Forethoughts on the ICJ Advisory Opinion,” *Environmental Policy and Law* 55, no. 6 (2025): 178–89, <https://doi.org/10.1177/18785395251380846>; Caroline E. Foster, “The 2025 International Court of Justice Advisory Opinion on Obligations of States in Respect of Climate Change,” *International & Comparative Law Quarterly* 74, no. 4 (2025): 775–809, <https://doi.org/10.1017/S0020589325101292>; Joshua Paine, “Due Diligence, Obligations to Cooperate and to Regulate Private Actors: Insights from Three Climate Change Advisory Opinions,” *Environmental Policy and Law* 56, nos. 1–2 (2026): 18–29, <https://doi.org/10.1177/18785395251394330>.

⁴ Lukas Schaugg, *What Does the International Court of Justice Advisory Opinion on Climate Change Mean for International Investment Law?* (Winnipeg: International Institute for Sustainable Development, March 17, 2026), <https://www.iisd.org/publications/brief/icj-advisory-opinion-international-investment-law>.

actors and considers how such a development could mitigate the tension between the ICJ's climate change mandates and ISDS tribunals. Part Six concludes by highlighting the article's main points.

2. ICJ's Ruling on States' Obligations for Controlling Private Actors

The ICJ's Advisory Opinion affirms that States bear binding legal obligations under international law — derived from climate treaties, customary law, and human rights law — to protect the climate system from anthropogenic greenhouse gas emissions. These obligations extend to regulating private actors within a State's jurisdiction, precluding States from disclaiming responsibility for climate harm caused by non-state actors. This legal consequence flows from the attribution of a State's omission — namely, its failure to adequately regulate private actors — to that State. The Court further clarified that attribution is a prerequisite in all international claims, as it is essential for fixing a particular State's responsibility under international law, and directly addressed the alleged difficulty of attributing private conduct to a State.

The Court emphasized that, based on criteria established by international law, “only an action or omission attributable to a State can give rise to international responsibility.”⁵ It further explained that while attribution in the field of climate science refers to “the process of evaluating the relative contributions of multiple causal factors to a change or event with an assessment of confidence”, “attribution in the context of determining State responsibility denotes ‘the operation of attaching a given action or omission to a State’ under international law.”⁶ Applying this rule, the ICJ held that a State's failure to take adequate measures to safeguard the climate system — whether through the issuance of fossil fuel exploration licences, the continued subsidization of hydrocarbon industries, or the unmitigated production and consumption of fossil fuels — may amount to an internationally wrongful act attributable to that State⁷.

2.1. Paris Agreement: Emission Reduction by Regulating Private Persons

The ICJ's Advisory Opinion offers a critical clarification of the nature of mitigation obligations under the Paris Agreement. The Court held that the obligation to pursue domestic mitigation measures is an obligation of conduct, not an obligation of result. This distinction has profound implications for State accountability: compliance is not measured by achieving a specific emissions-reduction outcome but by whether the State exercised due diligence in its efforts and deployed appropriate means to implement domestic mitigation measures. Significantly, the ICJ expressly extended this due diligence standard to activities carried out by private actors. Indeed, as the International Tribunal for the Law of the Sea observed, the “obligation of due diligence is particularly relevant in a situation in which the activities in question are mostly carried out by *private persons or entities*.”⁸

⁵ International Court of Justice, *Obligations of States*, para. 422.

⁶ International Court of Justice, *Obligations of States*, para. 425.

⁷ International Court of Justice, *Obligations of States*, para. 427.

⁸ International Tribunal for the Law of the Sea, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Case No. 31, Advisory Opinion, May 21, 2024, para. 236, official PDF (emphasis added).

In other words, a State cannot satisfy its Paris Agreement obligations merely by enacting legislation that remains unenforced or by pointing to emissions generated by independent corporations. Rather, the State must actively, diligently, and continuously regulate private-sector behaviour — including through monitoring, enforcement, and corrective measures — to remain in compliance. This holding reinforces and operationalises the broader duty to regulate non-state actors.

2.2. Customary Law: Prevent Significant Harm by Regulating Private Operators

Turning to States' obligations under customary international law relating to climate change, the ICJ articulated the threshold conditions that activate the duty to prevent significant environmental harm. For this duty to arise, there must exist a risk of significant harm to the environment. Critically, the ICJ held that a risk of significant harm may also arise from the cumulative effects of multiple acts — even where no single act alone would cross the threshold. Such cumulative harm may result from the conduct of various States, private actors, or a combination thereof, provided those actors fall within the respective jurisdiction or control of a State. The ICJ reaffirmed that the duty to prevent significant environmental harm requires States to act with due diligence. This affirmative duty requires States to establish an effective national regulatory system comprising legislation, administrative procedures, and enforcement mechanisms, coupled with ongoing vigilance to ensure the system functions efficiently toward its intended environmental objectives.

With specific reference to climate change, the ICJ held that appropriate rules and measures include regulatory mitigation mechanisms designed to achieve the deep, rapid, and sustained reductions in greenhouse gas emissions necessary to prevent significant harm to the climate system. Adaptation measures — by reducing the risk of significant harm — are also relevant to assessing whether a State is fulfilling its customary obligations with due diligence. Most significantly, the ICJ expressly required that “these rules and measures must regulate the conduct of public and *private operators* within the States' jurisdiction or control and be accompanied by effective enforcement and monitoring mechanisms to ensure their implementation.”⁹ Mere enactment of legislation is insufficient; States must actively enforce, monitor, and correct private conduct contributing to climate harm.

2.3. Human Rights Law: Protect the Climate System by Regulating Private Actors

The ICJ's Advisory Opinion further strengthened States' climate obligations by anchoring them in the binding framework of international human rights law. The Court began by acknowledging the well-documented adverse effects of climate change on the enjoyment of a broad spectrum of human rights, including, but not limited to, the rights to life, health, food, water, sanitation, housing, property, development, and self-determination¹⁰. Against this evidentiary backdrop, the ICJ delivered a holding of

⁹ International Court of Justice, *Obligations of States*, para. 282 (emphasis added).

¹⁰ International Court of Justice, *Obligations of States*, paras. 377–80.

fundamental importance: the full enjoyment of human rights cannot be ensured without the protection of the climate system and other components of the environment. This statement is not aspirational but declaratory of existing law. It establishes a legal nexus between environmental protection and human rights guarantees, meaning that a State's failure to protect the climate system may simultaneously constitute a violation of its human rights obligations.

To guarantee the effective enjoyment of human rights, the Court continued, States must take affirmative measures to protect the climate system and the environment. Such measures include, *inter alia*: "taking mitigation and adaptation measures, with due account given to the protection of human rights, the adoption of standards and legislation, and the regulation of the activities of *private actors*."¹¹ The ICJ emphasized that the regulation of private actors is not a peripheral suggestion but an integral component of States' human rights obligations. Under international human rights law, States are required to take all necessary measures in this regard, including preventing human rights violations by non-state actors operating within their jurisdiction or effective control.

These three sources of international law underscore the ICJ's emphasis on States' affirmative obligations to regulate the climate-related activities of private actors within their jurisdiction. Consequently, where private actors' activities adversely affect the climate system, attribution operates by treating the State's failure to regulate such actors as an omission attributable to the State. Within this framework, attribution does not operate by assimilating the conduct of private actors to that of the State. Instead, responsibility arises from the State's own conduct — specifically, its actions or omissions in failing to exercise the level of regulatory due diligence required under relevant international law. The legal inquiry thus shifts away from the question of whether private greenhouse gas emissions can be legally imputed to the State. Rather, the relevant question is whether the State has adopted and effectively implemented the legislative, regulatory, and administrative measures necessary to prevent, reduce, or control the harmful environmental consequences of activities within its jurisdiction.

When a State fails to take reasonable and appropriate measures, international responsibility attaches to the State for its regulatory failure, not for the underlying conduct of private actors. In this sense, attribution operates in a limited and specific way: it links the State to its own omission to regulate, while the private conduct that generates the harm remains legally distinct. A State is therefore not internationally responsible for private emissions as such, but for its failure to exercise the due diligence required to control them.

Yet this development exposes a structural tension within the broader architecture of international investment law, which aims to protect private actors against the regulatory power of host States. While States are expected to regulate private actors to fulfill their climate obligations, the exercise of that regulatory authority may trigger liability under international investment law when private foreign investors challenge climate-related measures before ISDS tribunals. The institutional frameworks of ISDS tribunals would then pose a challenge to the practical implementation of the ICJ's climate change requirements to regulate private actors.

¹¹ International Court of Justice, *Obligations of States*, para. 403.

3. Overview of ISDS Tribunals and Investment Disputes

Implementing climate-related regulations to limit emissions from private actors within a State's jurisdiction can expose States to legal challenges from those very actors, particularly when such measures adversely affect their profitability. This risk is most acute in the context of foreign direct investment, especially in highly greenhouse gas-intensive sectors, such as fossil fuel extraction, energy production, mining, heavy industry, and large-scale infrastructure. These investments are shielded by substantive protections contained in international investment agreements. Crucially, these protections are enforceable through the ISDS mechanism, which grants foreign investors direct standing to initiate international arbitral proceedings against host States' regulatory power.

International investment agreements impose significant obligations on host States and offer foreign investors a range of treatment standards to protect them against certain forms of state interference, including regulatory measures that may amount to expropriation.¹² Among the most important of these standards is the fair and equitable treatment (FET). The FET standard seeks to establish a baseline for lawful and predictable treatment of foreign investors and their investments.¹³ In practice, foreign investors have invoked the standard in a wide range of situations, including where a host State has frustrated an investor's legitimate expectations, failed to act transparently, engaged in arbitrary or discriminatory conduct, or exercised public authority in bad faith, coercively, or disproportionately. Such investment protection standards are enforceable through ISDS tribunals. Investment treaties grant foreign investors the procedural right to initiate arbitration directly against host States and to seek monetary compensation when they consider that their treaty-based protections have been breached. In practice, ISDS tribunals frequently assess whether regulatory measures adopted by host States violate obligations such as the FET standard and, where a breach is found, order the State to compensate the investor for the resulting losses.¹⁴

In this dynamic, the prospect of being sued by private investors in ISDS tribunals exposes States to significant financial and legal risks that may deter them from adopting robust regulatory measures. Confronted with potential or pending investor claims, governments may delay, weaken, or even withdraw their regulatory initiatives—a phenomenon widely described as regulatory chill.¹⁵ Legal scholars have therefore increasingly questioned the current configuration of investment protection standards and their enforcement through ISDS tribunals, arguing that this framework may produce significant chilling effects on States' regulatory authority. Peterson notes that the breadth of pro-investment provisions turns ISDS tribunals into “an open invitation to unhappy

¹² Roland Kläger, “‘Fair and Equitable Treatment’ and Sustainable Development,” in *Sustainable Development in World Investment Law*, ed. Marie-Claire Cordonier Segger, Markus W. Gehring, and Andrew Newcombe (Alphen aan den Rijn: Kluwer Law International, 2011), 241–62.

¹³ Ioana Knoll-Tudor, “The Fair and Equitable Treatment Standard and Human Rights Norms,” in *Human Rights in International Investment Law and Arbitration*, ed. Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni (Oxford: Oxford University Press, 2009), 310, <https://doi.org/10.1093/acprof:oso/9780199578184.003.0014>.

¹⁴ Kläger, “‘Fair and Equitable Treatment,’” 241–62.

¹⁵ José E. Alvarez, “ISDS Reform: The Long View,” *ICSID Review—Foreign Investment Law Journal* 36, no. 2 (2021): 253–77, <https://doi.org/10.1093/icsidreview/siab036>.

investors, tempted to complain that a financial and business failure was due to improper regulation, misguided macroeconomic policy or discriminatory treatment by the host government.”¹⁶ Alschner and Tuerk reiterate that foreign investors might invoke pro-investment provisions enshrined in IIAs to bring a claim against measures taken by host States to achieve legitimate public policy objectives.¹⁷ The abusive use of claims as a form of coercion — no different from what private investors do all the time — contributes to the chilling effects on State regulatory power.

Sacerdoti joins in this discussion by confirming the possibility of “the interference of legal commitments stemming out of IIAs [international investment agreements], especially directly in favor of foreign investors, with the right and ability of host States to pursue [public] policies.”¹⁸ State sovereignty or “regulatory power”¹⁹ presumptively allows the State to protect essential public interests from certain types of harm.²⁰ However, that presumption is nullified if the host State has considered that, once it has committed to investor protection under an investment agreement in the interest of its economy, it might face the hurdle of infringing the agreement when adopting a new public policy inconsistent with its initial commitment. Such tension between investment protection and the exercise of “regulatory power” indulges foreign investors with compensation (or the threat to seek it) while chilling the regulatory capacity of host States. Schneiderman also asserts that there is an apparent deterrence of domestic regulation in the face of investor claims, and the investment governance regime “has as its object the placing of legal limits on the authority of government, isolating economic from political power, and assigning to investment interests the highest possible protection.”²¹

To reaffirm this criticism, Van Harten and Scott conducted 51 interviews on whether the ISDS provision in NAFTA Chapter 11 contributed to a regulatory chill in the internal vetting of the government decisions related to environmental protection in Ontario.²² They then report that “[g]overnment ministries have changed their decision-making to account for trade concerns including ISDS.”²³ For example, the federal

¹⁶ William D. Rogers, “Emergence of the International Center for Settlement of Investment Disputes (ICSID) as the Most Significant Forum for Submission of Bilateral Investment Treaty Disputes” (presentation, Inter-American Development Bank Conference, Washington, DC, October 26–27, 2000), 4.

¹⁷ Wolfgang Alschner and Elisabeth Tuerk, “The Role of International Investment Agreements in Fostering Sustainable Development,” in *Investment Law within International Law: Integrationist Perspectives*, ed. Freya Baetens (Cambridge: Cambridge University Press, 2013), 217–31, <https://doi.org/10.1017/CBO9781139855921.014>.

¹⁸ Giorgio Sacerdoti, “Investment Protection and Sustainable Development: Key Issues,” in *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated, Increasingly Diversified*, ed. Steffen Hindelang and Markus Krajewski (Oxford: Oxford University Press, 2016), 27, <https://doi.org/10.1093/acprof:oso/9780198738428.003.0002>.

¹⁹ “Regulatory power” refers to a state’s authority to regulate matters within its territory, including the power to enact primary and secondary legislation.

²⁰ Andrew Newcombe, “The Boundaries of Regulatory Expropriation in International Law,” *ICSID Review—Foreign Investment Law Journal* 20, no. 1 (2005): 1–57, <https://doi.org/10.1093/icsidreview/20.1.1>.

²¹ David Schneiderman, *Constitutionalizing Economic Globalization: Investment Rules and Democracy’s Promise* (Cambridge: Cambridge University Press, 2008), 4.

²² Gus Van Harten and Dayna Nadine Scott, “Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada,” *Journal of International Dispute Settlement* 7, no. 1 (2016): 92–116, <https://doi.org/10.1093/jnlids/idv031>.

²³ Van Harten and Scott, “Investment Treaties,” 93.

government's proposals for plain cigarette packaging in Canada is an example that effectively shows the chilling effect of ISDS tribunals on Canadian regulatory sovereignty. In the mid-1990s, the US tobacco lobby threatened the Canadian government with an investor-State challenge to commence NAFTA arbitration proceedings if the Canadian government proceeded with planned restrictions on cigarette packaging. The federal government's proposals were abandoned and replaced with watered-down requirements to increase the size of health warning labels on packages.

This discussion reveals that ISDS tribunals could also exercise jurisdiction even over disputes in which foreign investors challenge environmental or climate-related regulatory measures adopted by host States. As a result, regulatory action required by the ICJ may be reframed within ISDS tribunals as unlawful interference with protected investment interests. It is in this sense that ISDS has increasingly been understood as a potential hurdle to the effective implementation of States' climate change obligations. The following section therefore examines how the institutional framework of ISDS tribunals may constrain, discourage, or penalize States' measures adopted in pursuit of ICJ's climate change requirements.

4. The Hurdle of ISDS Tribunals for Fulfilling States' Climate Change Obligations

The chilling effect of ISDS tribunals on State regulatory power prompts scrutiny of the conflicts these tribunals can create between protecting foreign investors and safeguarding the environment, particularly when host States adopt climate-related measures to comply with obligations recognized by the ICJ. In this context, the chilling effect raises significant concerns that foreign investors could exploit ISDS tribunals to protect themselves, to the detriment of equally (or more) worthy environmental protection goals. In practice, ISDS tribunals frequently render decisions that host States' environmentally oriented regulatory actions "may constitute violations of applicable investment treaties, for which the State may be held internationally responsible and liable to provide sizable financial compensation to foreign investors."²⁴ As a result, even where regulatory action is adopted for public and environmental purposes, States may still face claims that such measures amount to indirect expropriation or violate other treaty standards, especially the FET standard.²⁵

This tension is particularly acute in sectors that are highly greenhouse gas intensive, including fossil fuel extraction, energy production, mining, heavy industry, and large-scale infrastructure. Climate mitigation requires States to regulate, phase out, or, in some instances, prohibit activities in precisely these sectors. Yet these are also the sectors most frequently protected by investment agreements, and investors in these sectors are often well positioned to challenge adverse regulatory changes through ISDS. The result is a structural conflict: the very measures that international climate law

²⁴ Sander R. P. van der Ploeg, "Protection of Regulatory Autonomy and Investor Obligations: Latest Trends in Investment Treaty Design," *The International Lawyer* 51, no. 1 (2018): 109–19, at 109, <https://scholar.smu.edu/til/vol51/iss1/7/>.

²⁵ International Institute for Sustainable Development, Center for International Environmental Law, and ClientEarth, *Investor-State Dispute Settlement (ISDS) Mechanisms and the Right to a Clean, Healthy, and Sustainable Environment* (June 16, 2023), <https://www.iisd.org/publications/brief/iisd-ciel-clientearth-isds-sustainable-environment-submission-2023>.

increasingly requires States to adopt may simultaneously trigger claims under international investment law.

In this context, the ICSID's *Biannual Caseload Statistics* report indicates that parallel with the intensified actions of States towards climate change management, ISDS tribunals have been utilized more and more often by foreign investors in the fossil fuel sector to challenge the environmental measures taken by host States.²⁶ This data is confirmed by case-related trends in the 2023 fiscal year that show foreign investors in the fossil fuel industry are at the forefront of extensively utilizing ISDS tribunals for investment protection by impeding the progress and adoption of initiatives aimed at addressing climate change, posing significant challenges for host States aspiring to transition away from fossil fuels. It is worth quoting here several major findings of the *Statistics* report:

*A full range of economic sectors are involved in ICSID cases. As in previous years, the extractives and energy sectors accounted for the largest share of cases in FY2023. Twenty-seven percent of new cases involved the oil, gas, and mining industry and 15% related to electric power and other energy sources. The finance sector was also prominent, accounting for 11% of cases. Construction and transportation each made up 9%, while information and communication, and agriculture, fishing, and forestry each accounted for 7%. Other cases involved water, sanitation, and flood protection (4%); tourism (2%); and services and trade (2%). A mix of other industries accounted for the remaining 7% of cases registered in FY2023.*²⁷

In addition to the surge in investment disputes in the fossil fuel sector, the report also reveals that among cases decided by tribunals in FY2023, 59% of awards upheld the investors' claims in part or in full, 24% of awards rejected all of the investors' claims on the merits, 14% of awards declined jurisdiction, and 3% of awards decided that the claims are manifestly without legal merit.²⁸ This fact is also confirmed by the 2021 *Investor-State Disputes in the Fossil Fuel Industry* report that shows the share of fossil-fuel-related disputes decided in favor of the investor has risen sharply in ISDS tribunals. It highlights that "[out] of the 60 disclosed arbitral awards, only 13 were decided in favour of the State based on the merits, while 43 have been decided in favour of the investor, which corresponds to over 70% of total disclosed fossil fuel arbitrations. In other words, of the fossil fuel arbitrations that reach the merits stage, almost three out of four are decided in favour of the investor."²⁹

The mere prospect of such disputes and the potential settlement outcome has become a powerful deterrent, discouraging host States from implementing regulatory measures that protect the environment but may negatively impact foreign investors.³⁰

²⁶ International Centre for Settlement of Investment Disputes, *The ICSID Caseload—Statistics, Issue 2023-2* (Washington, DC: International Centre for Settlement of Investment Disputes, 2023), official report.

²⁷ International Centre for Settlement of Investment Disputes, *ICSID Caseload—Statistics*.

²⁸ International Centre for Settlement of Investment Disputes, *ICSID Caseload—Statistics*.

²⁹ Lea Di Salvatore, *Investor-State Disputes in the Fossil Fuel Industry* (Winnipeg: International Institute for Sustainable Development, 2021), 16, <https://www.iisd.org/publications/report/investor-state-disputes-fossil-fuel-industry>.

³⁰ "Stranded but Costly: How Some International Treaties Threaten the Environment," *The Economist*, October 5, 2020, <https://www.economist.com/finance-and-economics/2020/10/05/how-some-international-treaties-threaten-the-environment>.

For instance, in 2017, the Canadian oil firm, Vermillion, threatened the French government with an ISDS case over its fossil fuel phase-out plan, ultimately leading to a weakened version of the environmental regulations.³¹ Vermilion argued that the French government's proposed environmental law would violate its rights under the Energy Charter Treaty (ECT), an international agreement that protects energy investments. Vermilion claimed that the new law amounted to an indirect expropriation of its investments, as it would render its permits worthless, and that it was a breach of the treaty's fair and equitable treatment clause. Following Vermilion's legal threat and extensive lobbying, the French government passed a watered-down version of the law in late 2017. The final law, while still a step toward a fossil fuel phase-out, was significantly weakened: instead of a complete ban, the law allowed existing fossil fuel exploration and extraction permits to continue until their expiry, which in some cases could extend beyond 2040.³²

Similarly, in 2022, both Denmark and New Zealand acknowledged that the fear of ISDS litigation had constrained their ability to implement climate policies within the investment sector.³³ A very important example of this dynamic in the Global South was Indonesia's decision to allow open-pit mining in protected forests following a threat of investment arbitration. Despite environmental concerns, the government's decision was taken under the profound influence of potential ISDS claims — in other words, this provides an example of regulatory chill where host States hesitate to enforce or enact environmental regulations due to fear of being sued before ISDS tribunals.³⁴

Likewise, in 1999, Indonesia enacted Forestry Law No. 41, which prohibited open-pit mining in protected forest areas to safeguard the environment. This legislation affected numerous mining companies holding pre-existing contracts, leading to significant pushback from the industry. International mining corporations, notably Australia's Newcrest Mining, threatened to initiate arbitration before an ISDS tribunal, seeking substantial compensation for potential losses. These legal threats exerted considerable pressure on the Indonesian government, prompting it to relax the ban in 2004 by issuing a regulation that allowed 13 companies with prior contracts to continue their open-pit mining operations in protected forests.³⁵ This decision underscores how the threat of arbitration can compel governments to amend or revoke environmental protections, prioritizing investment interests over environmental considerations.

These examples are troubling when considered with the ICJ's climate change obligations. The ICJ has affirmed States' affirmative obligations to regulate private actors to prevent, reduce, and control greenhouse gas emissions. However, compliance

³¹ Di Salvatore, *Investor-State Disputes*.

³² David R. Boyd, *Paying Polluters: The Catastrophic Consequences of Investor-State Dispute Settlement for Climate and Environment Action and Human Rights*, UN Doc. A/78/168 (July 13, 2023), OHCHR report.

³³ Elizabeth Meager, "COP26 Targets Pushed Back under Threat of Being Sued," *Capital Monitor*, January 14, 2022, <https://www.capitalmonitor.ai/analysis/cop26-ambitions-at-risk-from-energy-charter-treaty-law-suits/>.

³⁴ Kyla Tienhaara, "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement," *Transnational Environmental Law* 7, no. 2 (2018): 229–50, <https://doi.org/10.1017/S2047102517000309>.

³⁵ Kyla Tienhaara, *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy* (Cambridge: Cambridge University Press, 2009), 217–27; Stuart G. Gross, "Inordinate Chill: BITs, Non-NAFTA MITs, and Host-State Regulatory Freedom: An Indonesian Case Study," *Michigan Journal of International Law* 24 (2003): 893–960.

may require measures that adversely affect private investors, leading to claims before ISDS tribunals that often rule in favor of foreign investors. This undermines States' climate measures. To understand how ISDS tribunals treat the ICJ's climate requirements, the focus should be on how arbitral tribunals discount the climate justifications behind measures. This inquiry is critical: if arbitral tribunals prioritize investor protections over environmental imperatives, they effectively neutralize States' climate change obligations affirmed by the ICJ.

4.1. Three Approaches Taken by ISDS Tribunals

The highly controversial practice of ISDS tribunals that narrow or discount many host States' meaningful actions towards climate change protection is often due to the widespread application of the *sole effects doctrine*,³⁶ the restricted utilization of the *regulatory power doctrine*,³⁷ and the infrequent recourse to the *investment reprisal approach*³⁸ used by investment arbitrators in investment disputes. The following analysis reveals that the hurdle of ISDS in fulfilling States' climate change obligations is not a lack of adequate States' climate change regulations, but rather the ISDS tribunals' institutional framework, which prevents such regulations from ever reaching the merits of the award.

A. The Sole Effects Doctrine. The sole effects doctrine, the most common perspective invoked in investment disputes, suggests that ISDS tribunals should primarily or exclusively consider the impact of a disputed State's regulatory measure on investment when evaluating claims of violations of any treatment standards included in investment agreements. According to this doctrine, other factors, such as the government's intention or the purpose of the measure, should not be given significant consideration in assessing the claim. For instance, this doctrine considers the environmental purpose of regulatory measures taken by host States irrelevant in the violation of the FET standard and notes that the only thing that matters in evaluating whether host States have expropriated foreign investments "is the extent of the measure's impact on the investor."³⁹ The sole effects doctrine applied by ISDS tribunals is not just a form of legalistic reductionism but also justifies itself through value-laden, purposive arguments. One basis for the doctrine is the assumption that investment agreements are geared towards protecting private investors against the expropriation measures of host States, and thus, any doubt as to whether a measure or regulation amounted to expropriation ought to be resolved in favor of investors.⁴⁰ Therefore, ISDS tribunals

³⁶ Ben Mostafa, "The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law," *Australian International Law Journal* 15 (2008): 267–96, <https://doi.org/10.3316/informit.066837449517184>.

³⁷ Daniel Sierra-Camargo and Natalia Suárez-Ricaurte, "The Right to Regulate," in *Rethinking Investment Law*, ed. David Schneiderman and Gus Van Harten (Oxford: Oxford University Press, 2023), 180, <https://doi.org/10.1093/oso/9780192871084.003.0009>.

³⁸ Martin Jarrett, *Contributory Fault and Investor Misconduct in Investment Arbitration* (Cambridge: Cambridge University Press, 2019), <https://doi.org/10.1017/9781108630511>.

³⁹ Fiona Marshall, with contributions from Aaron Cosbey and Deborah Murphy, *Climate Change and International Investment Agreements: Obstacles or Opportunities?* (Winnipeg: International Institute for Sustainable Development, 2010), 44, <https://www.iisd.org/publications/report/climate-change-and-international-investment-agreements-obstacles-or>.

⁴⁰ Virtus Chitoo Igbokwe, "Determination, Interpretation and Application of Substantive Law in Foreign

embrace the sole effects doctrine as more consistent with investment agreements' pro-investment nature and objects,⁴¹ while also relying on a single criterion of economic effects because this makes assessment simpler and more predictable.⁴²

Metalclad v. Mexico is a high-profile case that encapsulates the sole effect doctrine because the ISDS tribunal took the view that the purpose of a measure that deprives an investor of the benefit of its investment is irrelevant to whether the measure may amount to expropriation.⁴³ In this case, the ISDS tribunal considered solely the economic effects of the host State's measures on the foreign investors, while sidelining the host State's environmental motivations, and awarded the host State full compensation to the foreign investor. This economic impact test provides a stark test for an expropriation that would capture virtually every type of environmental protection measure, which, at least in the short term, imposes costs or limits the economic benefit of a business. Thus, despite acknowledging the importance of environmental motivations behind the measures taken by the host State, the ICSID tribunal applied the sole effect doctrine and characterized the host State's measures as an expropriation.

The case illustrates the potential tension between investment protection and environmental governance within the ISDS system. By emphasizing the economic impact of regulatory measures while largely disregarding their environmental purpose, the tribunal adopted an interpretation of expropriation that places significant weight on investor expectations and economic loss. This approach has contributed to broader debates about whether investment arbitration can unduly constrain States' ability to pursue environmental protection and other public policy objectives.

B. The Regulatory Power Doctrine. In contrast to the sole effect doctrine, the regulatory power doctrine "has some promise to balance a system that emerged, originally, to protect and privilege foreign investors in a (post-) colonial context."⁴⁴ Sovereign states have inherent power to regulate in the public interest and this regulatory power has been recognized as a rule of customary international law.⁴⁵ In investment disputes in which host States adopt measures in the public interest that adversely affect investors' private interests, ISDS tribunals could apply the regulatory power doctrine to hold that host States need not compensate investors in circumstances that might otherwise amount to treaty violations. In this approach, ISDS tribunals intend to draw a distinction between non-compensable acts adopted by the State in the pursuit of legitimate public welfare purposes and acts not in the public interest that require the payment of compensation.⁴⁶

However, there is "no guidance that arbitral tribunals in distinguishing such actions from regulatory measures not subject to compensation."⁴⁷ This results in

Investment Treaty Arbitrations," *Journal of International Arbitration* 23, no. 4 (2006): 267–300.

⁴¹ Mostafa, "Sole Effects Doctrine," 267.

⁴² Lukas Vanhonnaecker, *Intellectual Property Rights as Foreign Direct Investments: From Collision to Collaboration* (Cheltenham: Edward Elgar, 2015), 44, <https://doi.org/10.4337/9781784712518>.

⁴³ *Metalclad Corporation v. United Mexican States*, ICSID Case No. ARB(AF)/97/1, Award, August 30, 2000, <https://www.italaw.com/cases/671>.

⁴⁴ Sierra-Camargo and Suárez-Ricaurte, "Right to Regulate," 180.

⁴⁵ Jeremy Waldron, "Are Sovereigns Entitled to the Benefit of the International Rule of Law?," *European Journal of International Law* 22, no. 2 (2011): 315–43, <https://doi.org/10.1093/ejil/chr031>.

⁴⁶ Lone Wandahl Mouyal, *International Investment Law and the Right to Regulate: A Human Rights Perspective* (Abingdon: Routledge, 2016), <https://doi.org/10.4324/9781315684055>.

⁴⁷ Vera Korzun, "The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-

inconsistency in ISDS tribunals' decisions when they apply the regulatory power doctrine to the extent that, in some cases, they have relieved States from the duty to compensate investors where regulation has a legitimate public purpose,⁴⁸ while in others, they have held the State to a much harsher standard.⁴⁹

This approach is highly controversial in the context of the alleged violation of the FET standard. Although the regulatory power doctrine calls for balancing foreign investors' financial interests against the public interests pursued by host States, its practical capacity to shield States from liability remains limited under the FET standard. The FET standard is not a single, clearly defined rule but a composite standard encompassing several sub-elements — such as protection of investors' legitimate expectations, denial of justice, lack of due process, arbitrariness, and failure to provide full protection and security. Many of these components operate as autonomous obligations that are not subject to explicit public-interest exceptions. Consequently, even where a regulatory measure is adopted in good faith to pursue legitimate objectives — such as environmental protection or climate mitigation — tribunals may still find a breach of the FET standard if the measure is considered to have frustrated the investor's legitimate expectations or undermined the stability and predictability of the legal framework. In such circumstances, ISDS tribunals have often reduced the scope of state regulatory authority to favour investors.⁵⁰ Indeed, the tribunal's analysis shifts from the legitimacy of the public purpose to the manner in which the measure affects the investor, thereby preserving the possibility that States must compensate foreign investors despite acting in pursuit of legitimate regulatory goals. Accordingly, despite the potential of the regulatory power doctrine to preserve regulatory space and rebalance the inequities of ISDS, the wide margin of interpretation and ambiguity of indirect expropriation and the fair and equitable treatment standards allow legitimate expectations of investors to displace host States' regulatory purposes such as responsiveness to environmental concerns.

The *Azurix Corp. v. The Argentine Republic* case is a clear example that shows the restricted application of the regulatory power doctrine in ISDS tribunals.⁵¹ In that case, the ISDS tribunal began by indicating its willingness to give weight to the environmental motivation behind the measures to consider them a legitimate regulatory act of the host State. However, the tribunal still found the measures unfair and inequitable and thus held the host State responsible for compensating the investor. Despite accepting that the measures were grounded in environmental concerns, the tribunal ultimately held that Argentina had breached the FET standard. The tribunal thus shifted the analytical focus from the public purpose of the regulation to the adverse economic consequences for the investor. In doing so, it reaffirmed that even bona fide

Outs," *Vanderbilt Journal of Transnational Law* 50, no. 2 (2017): 355–414, at 375, <https://scholarship.law.vanderbilt.edu/vjtl/vol50/iss2/3/>.

⁴⁸ *Philip Morris Brands Sàrl, Philip Morris Products S.A., and Abal Hermanos S.A. v. Oriental Republic of Uruguay*, ICSID Case No. ARB/10/7, Award, July 8, 2016, <https://www.italaw.com/cases/460>.

⁴⁹ *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003, <https://www.italaw.com/cases/1087>.

⁵⁰ Daria Davitti, "Proportionality and Human Rights Protection in International Investment Arbitration: What's Left Hanging in the Balance?," *Nordic Journal of International Law* 89, nos. 3–4 (2020): 343–63, <https://doi.org/10.1163/15718107-89030005>.

⁵¹ *Azurix Corp. v. Argentine Republic*, ICSID Case No. ARB/01/12, Award, July 14, 2006, <https://www.italaw.com/cases/118>.

environmental regulation remains subject to the discipline of investment protection standards and may generate full compensation if deemed inconsistent with treaty obligations.

The significance of the Azurix award therefore lies in its illustration of how the regulatory powers doctrine operates within the broader structure of investment protection. While the tribunal acknowledged that Argentina's actions were connected to environmental and public welfare concerns, it ultimately subordinated those considerations to the requirements of the FET standard. In doing so, the tribunal reaffirmed that even bona fide environmental regulation remains subject to the discipline of investment treaty obligations. Where such regulation is found to be inconsistent with standards such as fair and equitable treatment — particularly where it creates instability, unpredictability, or economic harm for the investor — it may still give rise to State responsibility and an obligation to compensate the investor.

C. The Investment Reprisal Approach. The investment reprisal approach, similar to the regulatory power doctrine, is a more balanced approach that not only weighs the environmental motivations behind the measures taken by host States but also considers the financial effects of those measures on foreign investors to reduce damage compensation in investment disputes. When the environmentally risky activity of a foreign investor breaches the host State's environmental rights, the injured host State adopts an environmental measure in response to that activity, which the investor argues violates its investment protection rights. In such a case, if the foreign investor challenges the legitimacy of the measure under the indirect expropriation standard, the ISDS tribunal could apply the investment reprisal approach to determine that, while the host State's measure does breach a treatment standard, the breach is nonetheless only partially compensable in light of the environmental motivation behind its measure along with the measure being sufficiently tailored to be the specific reprisal it claims to be. Thus, the notion of investment reprisal, as conceived by Jarrett, conveys the concept that, while "some blameworthy conduct performed by the investor ...provokes the host State's breach [of an investment agreement]," the blameworthiness may serve as a defence that reduces host States' accountability towards injured investors.⁵² It might be said that an investment reprisal is permissible, although not substantively lawful, in the sense of qualifying the extent of wrongfulness with the normative work being done at the stage of apportioning fault at the stage of determining the quantum of compensation.

However, despite the potential of the investment reprisal approach to partially validate host States' environmental measures that still constitute investment treaty violations, there are compelling reasons why ISDS tribunals have limited their acceptance of the dispute settlement procedures. First, investment reprisal should only apply in circumstances where the host State has no other course of action available to it in pursuing justice for the investor's illegality. Thus, if there is another avenue for seeking justice against the relevant wrongdoer, ISDS tribunals reject the application of the investment reprisal approach. Second, considering the exceptional nature of investment reprisal as a permitted form of self-help, it should only apply in circumstances where the investor's misconduct is particularly egregious, which will not usually be the case with mere breaches of domestic law.⁵³ Third, the investment reprisal

⁵² Jarrett, *Contributory Fault*, 110.

⁵³ Martin Marcoux and Andrea K. Bjorklund, "Foreign Investors' Responsibilities and Contributory Fault

approach is, to date, being accepted in ISDS tribunals only in indirect expropriation cases. If an investor is denied fair and equitable treatment, national treatment, or most-favored nation treatment, the State cannot justify its actions through investment reprisal.⁵⁴ In particular, due to the multiple possible bases for investor protection under the fair and equitable treatment standard and with all of them focused at some level on *illegitimate* conduct, justifying host States' environmental regulatory measures as a *legitimate* reprisal is so far a bridge too far for tribunals.⁵⁵ As a result of the reprisal defence being rejected or circumvented, host States are found liable to compensate foreign investors without taking into account any contributory fault of the investor.

Copper Mesa Mining Corporation v. Republic of Ecuador is a case in which the ISDS tribunal found that regulatory measures taken by the host State constituted an expropriatory that needs to be compensated.⁵⁶ However, instead of holding the host State liable to fully compensate the foreign investor, the ISDS tribunal referred to Article 39 of the Draft Articles on Responsibility of States for Internationally Wrongful Acts *to reduce the amount of compensation* by 30 per cent. It explained that the investor's injury was caused both by the host State's unlawful expropriation and also by the investor's own contributory negligent acts that reduced the chances of the mining concession held by the investor being a commercial success. In this case, the investor wrongdoing was factored into the tribunal's calculus of the host State's remedies. This approach signals that the host State in investment arbitration proceedings may raise the defence of the investor's contributory fault in order to seek a reduction of remedies. This defence has later been characterized by legal scholars as an "investment reprisal" approach, relied upon in the ISDS tribunal to reduce damages after identifying the host State's breach of its obligation under the expropriation provision of the applicable investment agreement.⁵⁷

The significance of Copper Mesa therefore lies in its confirmation that investment arbitration is not necessarily a one-directional system in which only State conduct is scrutinized. Although ISDS remains primarily designed to protect investors against host State misconduct, the case shows that tribunals may also consider whether the investor's own behaviour contributed to the injury. For climate and environmental disputes, this reasoning is particularly valuable because it supports the argument that investors should not be allowed to externalize environmental, social, or climate-related harms while still demanding full compensation when States adopt corrective regulatory measures.

The interplay between these three approaches — the dominance of the sole effect test, the functional neutralization of the regulatory power doctrine, and the limited application of the investment reprisal method — creates an institutional framework that fundamentally hinders States from fulfilling climate change obligations. While the ICJ

in Investment Arbitration," *International & Comparative Law Quarterly* 69, no. 4 (2020): 877–905, <https://doi.org/10.1017/S0020589320000354>.

⁵⁴ Barnali Choudhury, "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?," *Vanderbilt Journal of Transnational Law* 41, no. 3 (2008): 775, at 793, <https://scholarship.law.vanderbilt.edu/vjtl/vol41/iss3/3/>.

⁵⁵ Marshall, *Climate Change and International Investment Agreements*, 44.

⁵⁶ *Copper Mesa Mining Corporation v. Republic of Ecuador*, PCA Case No. 2012-2, Award, March 15, 2016, <https://pca-cpa.org/en/cases/140/>.

⁵⁷ Jarrett, *Contributory Fault*.

frames climate action as a distinct legal duty of States, the ISDS framework continues to view such actions through the lens of investment protection and legitimate expectations. The interaction between *Metalclad*, *Azurix*, and *Copper Mesa* illustrates how host States seeking to comply with the ICJ's Advisory Opinion concerning States' climate change obligations may nevertheless incur liability under ISDS. If, in order to meet their international obligations to prevent significant environmental harm and reduce greenhouse gas emissions caused by private investors, States revoke permits for fossil fuel projects or designate protected areas, tribunals following the logic of *Metalclad* may apply the sole effects doctrine and focus primarily on the economic deprivation suffered by the investor, treating the climate rationale as legally secondary. With such a dominant approach, host States have no choice but to comply with their obligations under investment agreements, and "if the host state measures substantially impact the property of foreign investors or its use, they may constitute a compensable expropriation."⁵⁸ Even where tribunals acknowledge the legitimacy of environmental objectives, as in *Azurix*, they may still find a breach of the FET standard by holding that abrupt regulatory transitions, subsidy withdrawals, or accelerated phase-outs frustrated the investor's legitimate expectations or undermined legal stability. Cordonier Segger and Newcombe observe that, in cases where new environmental regulations are necessary for the public interest, "the decisions of IIA tribunals have favored foreign investors to the detriment of [the environment of] host States."⁵⁹ They argue that ISDS tribunals have been biased in favor of investment protection while neglecting the nature, purpose, and character of the measures taken by host States. That means compliance with ICJ-articulated climate duties does not necessarily shield States from compensation. Only in limited circumstances, reflected in *Copper Mesa*, might tribunals reduce damages on the basis of investor misconduct or contributory fault; yet such reductions have traditionally been confined to egregious behavior rather than environmentally harmful investment choices. Taken together, these cases demonstrate that although the ICJ frames climate change obligations of States, the prevailing ISDS jurisprudence continues to interpret climate measures through the lens of investor injury, thereby exposing host States to financial liability even when they act to fulfill their international climate obligations.

This structural tension — between what the ICJ demands and what ISDS tribunals penalize — lies not in any single case or standard, but in the deeper asymmetry between a state-centric climate regime and an investor-centric dispute settlement mechanism. Addressing this tension, therefore, requires a more fundamental rethinking of how climate responsibilities are allocated within the international legal order. It is to this task — reconciling climate change obligations with investor protection — that the following policy recommendation is directed.

⁵⁸ Gudrun Monika Zagel, "International Investment Agreements (IIAs) and Sustainable Development: Are the African Reform Approaches a Possible Way out of the Global IIA Crisis?," *Manchester Journal of International Economic Law* 17, no. 1 (2020): 26–47, at 29.

⁵⁹ Marie-Claire Cordonier Segger and Andrew Newcombe, "An Integrated Agenda for Sustainable Development in International Investment Law," in *Sustainable Development in World Investment Law*, ed. Marie-Claire Cordonier Segger, Markus W. Gehring, and Andrew Newcombe (Alphen aan den Rijn: Kluwer Law International, 2011), 103.

5. Policy Recommendations: From Refracted Responsibility to Direct Private Actors' Climate Change Obligations

The tension between ISDS tribunals and the climate change obligations articulated by the ICJ is not, at its core, a dispute about the hierarchical authority or binding force of international climate law. The difficulty arises elsewhere: it lies both in the ICJ's state-centric framework and in the investor-centric institutional design of ISDS tribunals.

The Advisory Opinion adopted an unmistakably state-centric framing of climate change responsibility. The questions submitted by the General Assembly asked the Court to clarify States' obligations under international law, and the Court adhered to its established practice of avoiding interpretations that exceed the scope of the advisory request.⁶⁰ As a result, the Advisory Opinion consistently addressed climate change obligations through the doctrinal lens of state responsibility. Within this framework, private actors appear as the primary sources of greenhouse gas emissions, yet their legal relevance arises only indirectly — through States' obligation to regulate them with due diligence. The Court made this point explicit when it clarified that the responsibility of States in relation to private actors arises when a State fails to exercise the regulatory diligence required to limit harmful activities occurring within its jurisdiction. This formulation reflects the classic architecture of international law: harm may be produced by private actors, but legal responsibility is mediated through the State.

At the same time, international investment law operates through an asymmetrical structure in which foreign investors possess only direct procedural rights against States before ISDS tribunals, which are designed to protect investors, adjudicate only State responsibility, and award monetary compensation as their primary remedy.⁶¹ Within this framework, tribunals are procedurally and doctrinally oriented toward evaluating whether a State has interfered with protected economic interests—not whether an investor's conduct has contributed to internationally wrongful environmental harm.

The consequence is a mismatch between the state-centered responsibility articulated by the ICJ and the investor-centered institutional framework of ISDS tribunals. States are expected to regulate private actors rigorously in order to satisfy their climate obligations, but those same regulatory measures frequently expose them to investor claims for compensation. Therefore, as long as the ICJ's articulation of climate obligations remains confined to state-centric responsibility, tribunals will lack a doctrinal basis to integrate investor responsibility into their reasoning.

My policy recommendations focus on resolving this tension by requiring a shift in the allocation of responsibility. The ICJ must articulate climate obligations in a manner that recognizes that private actors — especially investors engaged in greenhouse

⁶⁰ On March 29, 2023, the United Nations General Assembly requested an advisory opinion from the International Court of Justice. United Nations General Assembly, "Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change," Res. 77/276, UN Doc. A/RES/77/276 (March 29, 2023), <https://docs.un.org/en/A/RES/77/276>; International Court of Justice, *Obligations of States*, 8.

⁶¹ Gus Van Harten, "Perceived Bias in Investment Treaty Arbitration?," in *The Backlash against Investment Arbitration: Perceptions and Reality*, ed. Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung, and Claire Balchin (Alphen aan den Rijn: Kluwer Law International, 2010), 433–54.

gas emission-intensive activities — bear direct duties under international law. Crucially, such obligations must not depend on attributing private conduct to the State; rather, they must attach directly to the investor's own operations. This would provide ISDS tribunals with the legal tools necessary to move beyond investment protection rights and consider investors' international climate change obligations in dispute settlement procedures. These policy recommendations — that the ICJ considers direct climate change obligations of private actors and that ISDS tribunals take into account international environmental obligations of investors — do not emerge from a vacuum. Rather, they find support in both the ICJ's discussion and the ISDS tribunal's reasoning.

Regarding the ICJ's discussion on private actors' climate change obligations, the most revealing passage is the conversation on the "polluter pays" principle, where direct international law obligations on private actors are acknowledged as a feature of certain areas of environmental law:

This principle is not mentioned in the climate change treaties but is expressed in Principle 16 of the Rio Declaration, according to which:

"[n]ational authorities should endeavour to promote the internalization of environmental costs and the use of economic instruments, taking into account the approach that the polluter should, in principle, bear the cost of pollution, with due regard to the public interest and without distorting international trade and investment".

That recommendation has been followed by States in certain sector-specific treaties and various types of national legislation, mostly in the form of strict liability of private actors for specific hazardous activities. However, the principle "that the polluter should, in principle, bear the cost of pollution" is not envisaged or reflected in any of the climate change treaties. Nor has it been accepted that this principle applies directly in the relations between States without having been specified in a treaty (see Case concerning the audit of accounts between the Netherlands and France in application of the Protocol of 25 September 1991 Additional to the Convention for the Protection of the Rhine from Pollution by Chlorides of 3 December 1976, Decision of 12 March 2004, United Nations, Reports of International Arbitral Awards, Vol. XXV, p. 312, paras. 102-103; see also ILC Principles on the allocation of loss in the case of transboundary harm arising out of hazardous activities, Yearbook of the International Law Commission, 2006, Vol. II, Part Two, pp. 74-75, paras. 11-15). Accordingly, the Court does not consider that the "polluter pays" principle is part of the applicable law for the purposes of this Advisory Opinion. This does not preclude the possibility that forms of strict liability for hazardous acts and other kinds of acts that are not wrongful under international law are developing.⁶²

This seems to acknowledge that, with the polluter pays principle under consideration, it is possible for international law to impose direct obligations on private actors. Although for this specific principle of the polluter pays, the court is fixed on its very particular status and not on general questions of the direct obligations of private actors under customary law, it discussed the possibility of strict liability for private actors only imprecisely. Sentences in the paragraph suggest that the non-treaty law of private

⁶² International Court of Justice, *Obligations of States*, paras. 159–60.

obligations in the sustainable development realm (including future law on polluter pays) are left open: “Nor has it been accepted that this principle applies *directly in the relations between States* without having been specified in a treaty” () and “This does not preclude the possibility that forms of strict liability for hazardous acts and other kinds of acts that are not wrongful under international law are *developing*” (emphasis added). Accordingly, considerable room seems to have been left for the kind of developing international instruments that impose direct climate change obligations on private actors. Much is guarded and carefully crafted in this paragraph, such as to leave open direct customary duties on private actors, while never actively entertaining or encouraging this possibility.

By carefully distinguishing between inter-state responsibility and the strict liability of private actors, the Court effectively carved out a doctrinal space for the development of private-law duties that bypass the state-centric framework of responsibility. This distinction is critical for ISDS tribunals: while the ICJ found that the polluter pays principle has not yet matured into a rule governing relations between States in the climate context, its acknowledgement of “developing” forms of strict liability for hazardous acts opens an opportunity to hold private investors environmentally responsible in ISDS tribunals. It allows for the argument that as international law evolves to internalize the costs of climate harm, the applicable law in an investment dispute must include the investor’s obligations to account for the environmental externalities of their project.

Regarding the ISDS tribunal’s reasoning on investors’ environmental obligations, it should also be noted that the proposition that foreign investors may bear direct international obligations that can be invoked before ISDS tribunals is not as novel or unprecedented as it initially appears. In *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*,⁶³ the tribunal took the first significant step toward recognizing that corporations operating internationally can be subjects of international legal duties.⁶⁴ The tribunal noted that “it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law.”⁶⁵ It then clearly rejected the position that corporations are, by nature, not subjects of international law and therefore not capable of holding international obligations such as human rights in what were asserted to be exclusive State-to-State relations governed by international law. Instead, the tribunal noted that private parties have commitments and, indeed, legal obligations to comply with international human rights. The tribunals explained that the relevant investment agreement shows that the Contracting States accepted that investors are entitled to invoke rights arising from international law. If the agreement therefore is not based on a corporation’s incapacity to hold rights under international law, it cannot be admitted that it would reject by necessity any idea that a foreign investor company could not be subject to international law obligations. The tribunal further observed that international law accepts corporate social responsibility as a standard of crucial importance for companies

⁶³ *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*, ICSID Case No. ARB/07/26, Award, December 8, 2016, <https://www.italaw.com/cases/1144>.

⁶⁴ *Urbaser v. Argentina*.

⁶⁵ *Urbaser v. Argentina*, para. 1195.

operating in the field of international commerce.⁶⁶ In light of this more recent development, “it can no longer be admitted that companies operating internationally are immune from becoming subjects of international law.”⁶⁷ Accordingly, the tribunal decided that basic human rights are complemented by an obligation on multiple actors, both public and private parties, not to engage in activity aimed at destroying such rights. This award is critical for ISDS tribunals: if the ICJ recognized the polluter pays principle as applicable law in climate change litigation, investment tribunals should take into consideration investors’ climate change obligations when adjudicating investment disputes. Despite relying exclusively on arguments that seek to broaden States’ regulatory powers, this approach supports the view that, as international law evolves to internalize the costs of climate harm, ISDS tribunals must consider the investor’s own duty to account for the environmental externalities of their project. Such an approach would complement the ICJ’s emphasis on regulatory diligence by ensuring that the actors whose activities generate climate harm are themselves legally accountable within the dispute-settlement system governing their investments.

Accordingly, the combination of the “polluter pays” principle and the reasoning laid down in the *Urbaser* case opens a tangible window of opportunity for translating the ICJ’s Advisory Opinion into concrete outcomes within ISDS proceedings. The polluter pays principle, if acknowledged by the ICJ as relevant to climate change regulation, could provide a substantive international obligation that attaches to private actors whose activities generate significant greenhouse gas emissions. Meanwhile, the *Urbaser* case supplies the procedural gateway: the ISDS tribunal’s holding that foreign investors can bear direct international legal obligations means that this principle can enter despite settlement procedures. Together, these two elements offer a more immediate and practical pathway to better implementation of the ICJ’s rulings by reconciling climate change obligations with investor protection in ISDS tribunals.

6. Conclusion

This article has sought to demonstrate that the ICJ’s 2025 Advisory Opinion on climate change, for all its normative ambition, operates within an international legal order in which States are simultaneously commanded to regulate private actors and exposed to investor claims for doing so. Although the Advisory Opinion is a powerful statement of what States must do to fight climate change, in the real world, when a government tries to regulate fossil fuel companies or reduce greenhouse gas emissions, those same companies can sue the government in ISDS tribunals, claiming that the new rules violate investment treaties. This creates a major problem: the ICJ says States must act, but ISDS can punish them for doing so.

The structural tension is embedded in the very architecture of international law: the state-centric framework of the ICJ, on the one hand, and the investor-centric framework of ISDS tribunals, on the other. The result is a regulatory environment in which the threat of ISDS proceedings exerts a chilling effect on States’ climate change regulatory power, as the ICJ has confirmed — a dynamic that, if left unaddressed, would threaten to reduce the Advisory Opinion to a statement of aspirations.

⁶⁶ *Urbaser v. Argentina*, para. 1195.

⁶⁷ *Urbaser v. Argentina*, para. 1195.

This article has argued that this tension doesn't have to last. We already have the legal tools to fix it. The first is the "polluter pays" principle — a well-established rule in international environmental law that says those who cause pollution should bear the costs. If the ICJ's Advisory Opinion reinforces this principle and makes clear that it should be considered applicable law in climate change litigation, then it would apply to private actors, such as foreign investors. The second is a landmark ISDS case called *Urbaser v. Argentina*. In that case, the tribunal said that foreign investors could be subject to international law and bear direct international obligations in investment disputes. Put simply: the "polluter pays" principle tells us *what* investors should be responsible for, and the *Urbaser* case shows us *how* ISDS tribunals can take that responsibility into account. Together, they give tribunals a clear, existing legal path to align ISDS with the ICJ's climate goals.

Bibliography

I. Books and articles

1. Alschner, Wolfgang, and Elisabeth Tuerk. "The Role of International Investment Agreements in Fostering Sustainable Development." In *Investment Law within International Law: Integrationist Perspectives*, edited by Freya Baetens, 217–31. Cambridge: Cambridge University Press, 2013. <https://doi.org/10.1017/CBO9781139855921.014>.
2. Alvarez, José E. "ISDS Reform: The Long View." *ICSID Review—Foreign Investment Law Journal* 36, no. 2 (2021): 253–77. <https://doi.org/10.1093/icsidreview/siab036>.
3. Choudhury, Barnali. "Recapturing Public Power: Is Investment Arbitration's Engagement of the Public Interest Contributing to the Democratic Deficit?" *Vanderbilt Journal of Transnational Law* 41, no. 3 (2008): 775–832. <https://scholarship.law.vanderbilt.edu/vjtl/vol41/iss3/3/>.
4. Cordonier Segger, Marie-Claire, and Andrew Newcombe. "An Integrated Agenda for Sustainable Development in International Investment Law." In *Sustainable Development in World Investment Law*, edited by Marie-Claire Cordonier Segger, Markus W. Gehring, and Andrew Newcombe, 99–142. Alphen aan den Rijn: Kluwer Law International, 2011.
5. Davitti, Daria. "Proportionality and Human Rights Protection in International Investment Arbitration: What's Left Hanging in the Balance?" *Nordic Journal of International Law* 89, nos. 3–4 (2020): 343–63. <https://doi.org/10.1163/15718107-89030005>.
6. Di Salvatore, Lea. *Investor-State Disputes in the Fossil Fuel Industry*. Winnipeg: International Institute for Sustainable Development, 2021. <https://www.iisd.org/publications/report/investor-state-disputes-fossil-fuel-industry>.
7. Foster, Caroline E. "The 2025 International Court of Justice Advisory Opinion on Obligations of States in Respect of Climate Change." *International & Comparative Law Quarterly* 74, no. 4 (2025): 775–809. <https://doi.org/10.1017/S0020589325101292>.
8. Gross, Stuart G. "Inordinate Chill: BITs, Non-NAFTA MITs, and Host-State Regulatory Freedom: An Indonesian Case Study." *Michigan Journal of International Law* 24 (2003): 893–960.
9. Igbokwe, Virtus Chitoo. "Determination, Interpretation and Application of Substantive Law in Foreign Investment Treaty Arbitrations." *Journal of International Arbitration* 23, no. 4 (2006): 267–300.
10. International Institute for Sustainable Development, Center for International

- Environmental Law, and ClientEarth. *Investor-State Dispute Settlement (ISDS) Mechanisms and the Right to a Clean, Healthy, and Sustainable Environment*. June 16, 2023. <https://www.iisd.org/publications/brief/iisd-ciel-clientearth-isds-sustainable-environment-submission-2023>.
11. Jarrett, Martin. *Contributory Fault and Investor Misconduct in Investment Arbitration*. Cambridge: Cambridge University Press, 2019. <https://doi.org/10.1017/9781108630511>.
 12. Kläger, Roland. “‘Fair and Equitable Treatment’ and Sustainable Development.” In *Sustainable Development in World Investment Law*, edited by Marie-Claire Cordonier Segger, Markus W. Gehring, and Andrew Newcombe, 241–62. Alphen aan den Rijn: Kluwer Law International, 2011.
 13. Knoll-Tudor, Ioana. “The Fair and Equitable Treatment Standard and Human Rights Norms.” In *Human Rights in International Investment Law and Arbitration*, edited by Pierre-Marie Dupuy, Ernst-Ulrich Petersmann, and Francesco Francioni, 310–43. Oxford: Oxford University Press, 2009. <https://doi.org/10.1093/acprof:oso/9780199578184.003.0014>.
 14. Korzun, Vera. “The Right to Regulate in Investor-State Arbitration: Slicing and Dicing Regulatory Carve-Outs.” *Vanderbilt Journal of Transnational Law* 50, no. 2 (2017): 355–414. <https://scholarship.law.vanderbilt.edu/vjtl/vol50/iss2/3/>.
 15. Marcoux, Martin, and Andrea K. Bjorklund. “Foreign Investors’ Responsibilities and Contributory Fault in Investment Arbitration.” *International & Comparative Law Quarterly* 69, no. 4 (2020): 877–905. <https://doi.org/10.1017/S0020589320000354>.
 16. Marshall, Fiona, with contributions from Aaron Cosbey and Deborah Murphy. *Climate Change and International Investment Agreements: Obstacles or Opportunities?*. Winnipeg: International Institute for Sustainable Development, 2010. <https://www.iisd.org/publications/report/climate-change-and-international-investment-agreements-obstacles-or>.
 17. Meager, Elizabeth. “COP26 Targets Pushed Back under Threat of Being Sued.” *Capital Monitor*, January 14, 2022. <https://www.capitalmonitor.ai/analysis/cop26-ambitions-at-risk-from-energy-charter-treaty-lawsuits/>.
 18. Mostafa, Ben. “The Sole Effects Doctrine, Police Powers and Indirect Expropriation under International Law.” *Australian International Law Journal* 15 (2008): 267–96. <https://doi.org/10.3316/informit.066837449517184>.
 19. Mouyal, Lone Wandahl. *International Investment Law and the Right to Regulate: A Human Rights Perspective*. Abingdon: Routledge, 2016. <https://doi.org/10.4324/9781315684055>.
 20. Newcombe, Andrew. “The Boundaries of Regulatory Expropriation in International Law.” *ICSID Review—Foreign Investment Law Journal* 20, no. 1 (2005): 1–57. <https://doi.org/10.1093/icsidreview/20.1.1>.
 21. Paine, Joshua. “Due Diligence, Obligations to Cooperate and to Regulate Private Actors: Insights from Three Climate Change Advisory Opinions.” *Environmental Policy and Law* 56, nos. 1–2 (2026): 18–29. <https://doi.org/10.1177/18785395251394330>.
 22. Robinson, Nicholas A. “Legal Imperatives to Survive the Climate Crisis: Forethoughts on the ICJ Advisory Opinion.” *Environmental Policy and Law* 55, no. 6 (2025): 178–89. <https://doi.org/10.1177/18785395251380846>.
 23. Rogers, William D. “Emergence of the International Center for Settlement of Investment Disputes (ICSID) as the Most Significant Forum for Submission of Bilateral Investment Treaty Disputes.” Presentation at the Inter-American Development Bank Conference, Washington, DC, October 26–27, 2000.
 24. Sacerdoti, Giorgio. “Investment Protection and Sustainable Development: Key Issues.” In *Shifting Paradigms in International Investment Law: More Balanced, Less Isolated*,

- Increasingly Diversified*, edited by Steffen Hindelang and Markus Krajewski, 19–40. Oxford: Oxford University Press, 2016. <https://doi.org/10.1093/acprof:oso/9780198738428.003.0002>.
25. Schaugg, Lukas. *What Does the International Court of Justice Advisory Opinion on Climate Change Mean for International Investment Law?* Winnipeg: International Institute for Sustainable Development, 2026. <https://www.iisd.org/publications/brief/icj-advisory-opinion-international-investment-law>.
 26. Schneiderman, David. *Constitutionalizing Economic Globalization: Investment Rules and Democracy's Promise*. Cambridge: Cambridge University Press, 2008.
 27. Sierra-Camargo, Daniel, and Natalia Suárez-Ricaurte. "The Right to Regulate." In *Rethinking Investment Law*, edited by David Schneiderman and Gus Van Harten, 180–98. Oxford: Oxford University Press, 2023. <https://doi.org/10.1093/oso/9780192871084.003.0009>.
 28. "Stranded but Costly: How Some International Treaties Threaten the Environment." *The Economist*, October 5, 2020. <https://www.economist.com/finance-and-economics/2020/10/05/how-some-international-treaties-threaten-the-environment>.
 29. Tienhaara, Kyla. *The Expropriation of Environmental Governance: Protecting Foreign Investors at the Expense of Public Policy*. Cambridge: Cambridge University Press, 2009.
 30. Tienhaara, Kyla. "Regulatory Chill in a Warming World: The Threat to Climate Policy Posed by Investor-State Dispute Settlement." *Transnational Environmental Law* 7, no. 2 (2018): 229–50. <https://doi.org/10.1017/S2047102517000309>.
 31. Van der Ploeg, Sander R. P. "Protection of Regulatory Autonomy and Investor Obligations: Latest Trends in Investment Treaty Design." *The International Lawyer* 51, no. 1 (2018): 109–19. <https://scholar.smu.edu/til/vol51/iss1/7/>.
 32. Van Harten, Gus. "Perceived Bias in Investment Treaty Arbitration?" In *The Backlash against Investment Arbitration: Perceptions and Reality*, edited by Michael Waibel, Asha Kaushal, Kyo-Hwa Liz Chung, and Claire Balchin, 433–54. Alphen aan den Rijn: Kluwer Law International, 2010.
 33. Van Harten, Gus, and Dayna Nadine Scott. "Investment Treaties and the Internal Vetting of Regulatory Proposals: A Case Study from Canada." *Journal of International Dispute Settlement* 7, no. 1 (2016): 92–116. <https://doi.org/10.1093/jnlids/idv031>.
 34. Vanhonnaecker, Lukas. *Intellectual Property Rights as Foreign Direct Investments: From Collision to Collaboration*. Cheltenham: Edward Elgar, 2015. <https://doi.org/10.4337/9781784712518>.
 35. Waldron, Jeremy. "Are Sovereigns Entitled to the Benefit of the International Rule of Law?" *European Journal of International Law* 22, no. 2 (2011): 315–43. <https://doi.org/10.1093/ejil/chr031>.
 36. Zagel, Gudrun Monika. "International Investment Agreements (IIAs) and Sustainable Development: Are the African Reform Approaches a Possible Way out of the Global IIA Crisis?" *Manchester Journal of International Economic Law* 17, no. 1 (2020): 26–47.

II. Cases and Official Documents

1. *Azurix Corp. v. Argentine Republic*. ICSID Case No. ARB/01/12. Award, July 14, 2006. <https://www.italaw.com/cases/118>.
2. Boyd, David R. *Paying Polluters: The Catastrophic Consequences of Investor-State Dispute Settlement for Climate and Environment Action and Human Rights*. UN Doc. A/78/168, July 13, 2023. OHCHR report.
3. *Copper Mesa Mining Corporation v. Republic of Ecuador*. PCA Case No. 2012-2.

- Award, March 15, 2016. <https://pca-cpa.org/en/cases/140/>.
4. International Centre for Settlement of Investment Disputes. *The ICSID Caseload—Statistics, Issue 2023-2*. Washington, DC: International Centre for Settlement of Investment Disputes, 2023. Official report.
 5. International Court of Justice. *Obligations of States in Respect of Climate Change*. General List No. 187. Advisory Opinion, July 23, 2025. Case materials.
 6. International Tribunal for the Law of the Sea. *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*. Case No. 31. Advisory Opinion, May 21, 2024. Advisory opinion (PDF).
 7. *Metalclad Corporation v. United Mexican States*. ICSID Case No. ARB(AF)/97/1. Award, August 30, 2000. <https://www.italaw.com/cases/671>.
 8. *Philip Morris Brands Sàrl, Philip Morris Products S.A., and Abal Hermanos S.A. v. Oriental Republic of Uruguay*. ICSID Case No. ARB/10/7. Award, July 8, 2016. <https://www.italaw.com/cases/460>.
 9. *Técnicas Medioambientales Tecmed S.A. v. United Mexican States*. ICSID Case No. ARB(AF)/00/2. Award, May 29, 2003. <https://www.italaw.com/cases/1087>.
 10. United Nations General Assembly. “Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in Respect of Climate Change.” Res. 77/276. UN Doc. A/RES/77/276, March 29, 2023. <https://docs.un.org/en/A/RES/77/276>.
 11. *Urbaser S.A. and Consorcio de Aguas Bilbao Bizkaia, Bilbao Biskaia Ur Partzuergoa v. Argentine Republic*. ICSID Case No. ARB/07/26. Award, December 8, 2016. <https://www.italaw.com/cases/1144>.