

Insights

IMPACT OF THE ICJ'S CLIMATE CHANGE ADVISORY OPINION ON INVESTMENT TREATY DISPUTES

Sep 04, 2025

INTRODUCTION

On 23 July 2025, the International Court of Justice handed down its unanimous Advisory Opinion on the Obligations of States in respect of Climate Change (the “**Opinion**”). The Opinion is not legally binding on other courts and tribunals, but it offers influential legal guidance on the matter of States’ obligations in relation to climate change under international law.

The Opinion addresses:

- the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations; and
- the legal consequences under these obligations for States where they, by their acts and omissions have caused significant harm to the climate system and other parts of the environment.

The Opinion may influence what action States will take to address climate change and may lead to changes in existing climate-change and energy policies or measures that investors might have relied upon in making their existing investments. This in turn will lead to issues of whether changes to existing climate-change and energy policies or measures by States may result in breaches of their obligations under investment treaties. As this blog analyses, the Opinion brings additional uncertainty in the short term to the interpretation and application of investment treaty obligations in investment treaty disputes concerning climate change.

PRINCIPAL CLIMATE TREATIES & STATES’ OBLIGATIONS

There are three Principal Climate Treaties identified by the ICJ:

- the 1992 United Nations Framework Convention on Climate Change;

- the 1997 Kyoto Protocol; and
- the 2015 Paris Agreement

The common objectives of all three treaties is to regulate international response towards climate change, stabilise greenhouse gases concentrations, and establish quantified emissions limitation and reduction commitments. Under these Principal Climate Treaties, State parties are obliged, amongst other things, to:

- prepare, maintain and continually update nationally determined contributions that reflect their respective “highest possible ambition” and to regularly report on their progress;
- implement measures to adapt to the impacts of climate change; and
- cooperate with other State parties in good faith which include financial and technological assistance from developed States to developing States.

States also have obligations and duties with respect to climate change under customary international law and other treaty rules.

Taken together, the Opinion identifies the following two general obligations of States to address climate change under international law:

- to protect the climate system from harmful effects of greenhouse gases, which could include taking actions to limit fossil fuel production and consumption; and
- to regulate the conduct and activities of private actors within their jurisdiction to protect the climate system from harmful effects of greenhouse gases.

“Failure of a State to take appropriate action to protect the climate system from GHG emissions – including through fossil fuel production, fossil fuel consumption, the granting of fossil fuel exploration licences or the provision of fossil fuel subsidies – may constitute an internationally wrongful act which is attributable to that State.”

(emphasis added).

IMPLICATIONS OF THE OPINION FOR INVESTMENT TREATY DISPUTES

Although the ICJ’s Opinion prescribes no specific conduct, policies or measures a State should adopt to comply with its climate-change obligations under international law, the clear enunciation of a general obligation on States under international law to protect the climate system from greenhouse gases, including by regulating production and consumption of fossil fuel, will influence States’ conduct. It may lead to a more robust, drastic approach by States to limit or further regulate

existing or future fossil fuel ventures, or to encourage renewable energy ventures within their jurisdiction.

However, an abrupt and drastic change in domestic energy policies or measures can constitute a breach of a State's obligations under investment treaties to afford foreign investors and their investments a certain level of protection. In particular, the tribunal in *RREEF v Spain* observed in its Decision on Responsibility that an investor is:

"entitled to expect that the [State] would not significantly modify the legal framework applicable to the investors as provided for in its domestic law at the time when the investments were made."

A violation of such legitimate expectation could constitute a breach of the relevant investment treaty. In such a case, the State would be obliged to give full reparation, usually taking the form of monetary compensation for damages caused by the significant change in the legal framework applicable to the investment.

There is therefore a potential conflict between the climate-change obligations under international law as identified by the ICJ for States on the one hand and a State's obligations to foreign investors and their investments under investment treaties on the other. As the UN's Intergovernmental Panel on Climate Change recognised, States' separate obligations under investment treaties "*may lead to 'regulatory chill'*", in that States may refrain from or delay their adoption of climate-change mitigation policies, such as the phasing out of fossil-fuel based energy production or consumption.

On this conflict, the ICJ rejected the primacy of climate-change obligations but did not address the interaction between climate-change and investment obligations under international law. However, it observed that as "*a generally recognised principle... when several rules bear on a single issue, they should, to the extent possible, be interpreted so as to give rise to a single set of compatible obligations*".

Further, Judge Cleveland of the ICJ in her separate opinion concluded that:

"the interpretation of investment instruments must be informed by States' obligations in respect of climate change under international law, including the stringent due diligence standard to which States are bound in implementing such obligations."

Given this suggestion for investment obligations to be informed by climate-change obligations, State parties will most likely seek to argue against conventional interpretation and application of investment treaty obligations in the context of climate-change or energy regulations.

This development from the ICJ's Opinion brings additional uncertainty in the short term to the interpretation and application of investment treaty obligations in the context of climate-change or

energy regulations, and therefore the strength of investment treaty claims of investors, particularly those who invested in either carbon or renewable energy industries. Although it would have been helpful for the ICJ to have addressed the interaction between climate-change and investment obligations under international law, this task has effectively been left with investment treaty tribunals (and understandably so, as it formed no part of the ICJ’s mandate with respect to the Opinion as set out in the UN General Assembly’s resolution). Future investment treaty awards on matters relating to climate change should clarify this interaction and the interpretation and application of investment treaty obligations on climate-change related regulatory changes.

RELATED CAPABILITIES

- Environment
- ESG & Energy Transition
- Energy Transition
- International Arbitration
- Oil, Gas & Sustainable Fuels
- Public Policy & Government Affairs
- Renewables & Storage
- Electric Vehicles & Charging Infrastructure

MEET THE TEAM



Kevin Cheung

Senior Associate, London

kevin.cheung@bcplaw.com

[+44 \(0\) 20 3400 4844](tel:+442034004844)

This material is not comprehensive, is for informational purposes only, and is not legal advice. Your use or receipt of this material does not create an attorney-client relationship between us. If you require legal advice, you should consult an attorney regarding your particular circumstances. The choice of a lawyer is an important decision and should not be based solely upon advertisements. This material may be “Attorney Advertising” under the ethics

and professional rules of certain jurisdictions. For advertising purposes, St. Louis, Missouri, is designated BCLP's principal office and Kathrine Dixon (kathrine.dixon@bclplaw.com) as the responsible attorney.