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Policy pointers

As the International Court of Justice (ICJ) prepares its advisory opinion on the legal obligations of states to take climate action, international law provides a solid basis for affirming these obligations.

The ICJ is also well placed to advance climate policy by clarifying how climate obligations affect the interpretation of other international instruments, including investment protection treaties.

All states — including Small Island Developing States, Least Developed Countries and others particularly vulnerable to climate change — can help clarify international law relevant to climate action by making written submissions to the ICJ by 22 January 2024.

Several international rules will be relevant when preparing submissions, including those under international environmental, human rights and economic law, and the Paris Agreement.

How the International Court of Justice can advance climate action

To achieve the Paris Agreement's goals, states must take swift, comprehensive steps to limit global warming. As the International Court of Justice (ICJ) prepares an advisory opinion to clarify climate obligations, states now have a vital opportunity to help clarify international law on climate action. And although an advisory opinion itself is not legally binding, any climate obligations it identifies would be. This briefing note argues that international law provides a solid basis for recognising climate obligations. But international instruments protecting foreign investment can make it more difficult for states to take climate action. Ensuring that international obligations are aligned with climate goals requires not only making existing climate obligations more explicit but also taking a more integrated approach to interpreting investment protection treaties and advancing their deep reform.

International law provides solid foundations for recognising legal obligations for states to take climate action. These obligations are partly grounded in customary international law that regulates the prevention of environmental harm. They also flow from the Paris Agreement and from international human rights law. However, certain international treaties can make it more costly — and more difficult — for states to take climate action, particularly obligations under treaties that protect foreign investment, including in carbon-intensive sectors such as fossil fuels.

The International Court of Justice (ICJ) — the principal judicial body of the United Nations (UN) — is currently preparing an advisory opinion to clarify the obligations of states to protect the climate system from greenhouse gas

(GHG) emissions (see Box 1). Although not legally binding, the advisory opinion may clarify the nature and content of binding climate obligations, as well as how these obligations affect the interpretation of other international instruments. Many states will view the advisory opinion as a mandate for implementing climate policies at national and regional level.

This is part of a wider set of proceedings aimed at clarifying international legal obligations on climate action, including at the International Tribunal on the Law of the Sea and at the Inter-American Court of Human Rights.

An opportunity to advance climate action

As the ICJ prepares its advisory opinion, there is now an opportunity for all states — including

The ICJ advisory opinion offers the opportunity for a genuinely more systemic approach to exploring the articulation between different norms of international law

Small Island Developing States, Least Developed Countries and other states particularly vulnerable to climate change — and for relevant international organisations to help clarify international law on climate action by participating in the ICJ Advisory Opinion proceedings and making written submissions by the deadline the court has set (22 January 2024).² States and organisations that make a submission will also be able to respond to the perspectives of other states in subsequent written and oral replies.

What international rules can states draw on?

Many states will wish to highlight their position on the existence of climate obligations under international law. In preparing submissions, several international rules will be relevant, including under international environmental, human rights and economic law, and the Paris Agreement.

International environmental law

Principle 21 of the 1972 Stockholm Declaration on the Human Environment affirms that states have “the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.”³ This responsibility is also reiterated by Principle 2 of the 1992 Rio Declaration on Environment and Development.

These texts are not binding and refer to a “responsibility” rather than a duty. But the principle is widely considered to reflect customary international law, binding on all states.⁴ For example, in the ICJ’s advisory opinion on *Legality of the Threat or Use of Nuclear Weapons*, the court held that the “general obligation of States to ensure that activities within their jurisdiction and control respect the environment of other States or of

areas beyond national control is now part of the corpus of international law relating to the environment.”⁵ This position follows a long line of international jurisprudence dating back to the first half of the 20th century, including the *Trail Smelter* arbitration.⁶

In its 2010 *Pulp Mills on the River Uruguay (Argentina v Uruguay)* decision, the ICJ further clarified the content of this obligation, noting that it requires any state “to use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State.”⁷

Several international treaties also affirm comparable obligations, such as Article 3 of the Convention on Biological Diversity, a multilateral agreement ratified by the overwhelming majority of states.⁸ Meanwhile, the UN Convention on the Law of the Sea (UNCLOS) affirms that states have a duty “to protect and preserve the marine environment”, to “take all measures necessary to ensure that activities under their jurisdiction or control are so conducted as not to cause damage by pollution to other States and their environment”² and “to adopt laws and regulations to prevent, reduce and control pollution of the marine environment from or through the atmosphere.”⁹

The obligation to ensure that activities within a state’s jurisdiction or control do not cause significant environmental harm in areas beyond their jurisdictions has often been applied to transboundary impacts between neighbouring states, as in the *Trail Smelter* and *Pulp Mills* cases. But there is no reason this obligation should not apply to GHG emissions and climate impacts — even if, in practice, its application requires proving the direct causal link between the conduct of one state, global climate harm and climate-related impacts in another state.

While UNCLOS does not explicitly mention mitigating GHG emissions, the Intergovernmental Panel on Climate Change (IPCC) is clear that GHG emissions are causing damage to the climate and to marine ecosystems.⁵ Therefore, under UNCLOS and customary international law, states have a duty to minimise to the fullest possible extent the release of harmful substances through the atmosphere.

Paris Agreement

The Paris Agreement is a legally binding treaty adopted by 196 Parties in 2015. It places climate obligations on states. Each Party must communicate how it will contribute to achieving the global goal of limiting warming to 1.5°C

Box 1. The ICJ advisory opinion on climate change

In March 2023, the UN General Assembly (UNGA) adopted a resolution to request an advisory opinion from the ICJ on the matter of state responsibility for addressing climate change.¹ This request reflects broad consensus that the climate crisis is one of the greatest global problems: one that requires the interpretation of existing international law to strengthen global mitigation and adaptation processes.

above pre-industrial levels, and pursue domestic measures to that end. These Nationally Determined Contributions (NDCs) must reflect the country's "highest possible ambition" and respective fair share of the global effort, and successive NDCs must be progressively more ambitious.¹⁰

The Paris Agreement has no enforcement or dispute settlement mechanism. Progress towards achieving its goals is judged on a collective basis. But other legal proceedings may provide a space for holding states to this standard. In the first climate case to be filed with the European Court of Human Rights, a group of Portuguese youth took 32 governments to court.¹¹ They allege that these governments' respective contributions to climate change infringe on their human rights, which are protected under the European Convention on Human Rights. The applicants contend that to assess whether or not states' mitigation measures are adequate relative to the level of mitigation effort required by the Paris Agreement, a 'fair share' approach should be used, such as the approach taken by the Climate Action Tracker.¹² The outcome of this case is expected in spring 2024.

International human rights law

Human rights law also provides the basis for climate obligations. The Human Rights Council has repeatedly emphasised that "the adverse effects of climate change have a range of implications ... for the effective enjoyment of human rights, including the right to life, food, health, housing, self-determination, safe drinking water and sanitation, and development."¹³ In a landmark 2022 resolution, the UNGA affirmed the human right to a clean, healthy and sustainable environment.¹⁴

Human rights are protected by various instruments around the world. A growing body of climate litigation has clarified the obligations stemming from these rights, finding that inadequate efforts to mitigate climate change threaten fundamental human rights. So, where states have an obligation to protect human rights, they also have an obligation to cut emissions and prevent worsening impacts of climate change.

For example, in 2018, Colombia's Supreme Court of Justice found that the government's deforestation in the Amazon was causing "imminent and serious damage to ... all inhabitants of the national territory, including both present and future generations, as it leads to rampant emissions of carbon dioxide into the atmosphere." The court held that "the increasing

deterioration of the environment is a serious attack on current and future life and on other fundamental rights."¹⁵

Significant developments also include the 2019 *Urgenda* judgment, in which the Supreme Court of the Netherlands upheld a lower court's decision that the Dutch government's inadequate emissions reductions targets threatened the right to life, as well as the rights to private life, family life, home and correspondence;¹⁶ and the 2022 *Waratah* judgment in Australia, in which the Land Court of Queensland recommended that an application for a proposed coal mine be rejected because its climate impacts would infringe on human rights.¹⁷

What about international economic law?

Aspects of international economic law reinforce these climate obligations. For example, several trade agreements reaffirm Parties' commitment to effectively implement the Paris Agreement.¹⁸ And while international human rights law primarily establishes obligations for states, the UN Guiding Principles on Business and Human Rights affirm the responsibility of businesses to respect human rights.¹⁹ This applies to all sectors including carbon-intensive ones, such as fossil fuels.

But certain international law obligations can make it more costly — and therefore more difficult — for states to take climate action. For example, a global network of international treaties protects foreign investment against adverse state action (Box 2). While there is no direct inconsistency between obligations to mitigate climate change and those to protect investments, tensions can and do arise in their application.

Mitigating climate change may require systemic measures to regulate, restrict or phase out

Box 2. Investment protection treaties

International investment law centres on a network of over 2,500 bilateral and regional investment treaties. The treaties promote cross-border investment flows by establishing obligations as to how states must protect investments by nationals of other state(s) within their territory. Most investment treaties allow investors to bring disputes to international arbitration (investor–state dispute settlements or ISDS) if they consider the state to have breached its treaty obligations.

There have been to date well over 1,200 ISDS arbitrations. Arbitral tribunals issue awards and can order states to compensate investors if they find violations. The awards have legal bite: based on widely ratified multilateral treaties, if a state fails to comply, an investor may seek enforcement in any signatory country where the state holds commercial interests (for example, by seizing goods or freezing bank accounts).

carbon-intensive activities. But the investment treaty system is fundamentally about protecting business — including fossil-fuel companies — in the face of public action, potentially increasing the cost of climate response.²⁰ And fossil-fuel businesses have been frequent users of this system.²¹

In certain circumstances, other norms (of constitutional law, for example) may also require states to compensate businesses for the adverse consequences of public action. But investment protection treaties — as interpreted and applied by international tribunals — establish more rigorous substantive protections, special procedural arrangements and opportunities to receive larger amounts of damages than might be available under national law.²² As the IPCC notes, this can constrain space for climate action. Measures can be shelved or delayed, in full or in part.²³ Even without legal proceedings, the explicit or implicit threat of recourse to the treaties can provide leverage to the fossil-fuel industry and strengthen its position in negotiations with governments over possible compensation.²⁴

In a hard-hitting report to the UNGA, the United Nations Special Rapporteur on the Right to a Clean and Healthy Environment concluded that “by slowing, weakening and in some cases reversing climate and environmental actions, ISDS claims have devastating consequences for a wide range of human rights.”²⁵

Towards a systemic approach

International law offers tools to address tensions between rules governing foreign

investment, climate change and human rights. For example, ‘systemic integration’ requires international tribunals to consider other relevant rules of international law — including climate obligations — when interpreting investment protection treaties.²⁶ Investor–state arbitral tribunals have applied this approach but their jurisprudence has also highlighted its limits, not least because the jurisdiction of investor–state arbitral tribunals (and therefore the rules they are responsible for interpreting and applying) are ultimately confined to the investment protection treaty.

The ICJ advisory opinion offers the opportunity for a genuinely more systemic approach to exploring the articulation between different norms of international law. This can enhance clarity on how climate obligations affect the interpretation of other international instruments, including investment protection treaties, to ensure the application of these instruments does not undermine the ability of states to honour their climate obligations. Ultimately, however, ensuring that the balance of legal obligations is supportive of climate action requires deep reform to align investment treaties with climate goals.²⁷

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Notes

¹ Shetye, A (12 April 2023) It is so decided: Promoting climate justice through international law. <https://bit.ly/45ehr41> / ² International Court of Justice, Obligations of States in respect of Climate Change (order of 4 August 2023). <https://bit.ly/3ESgaWb> / ³ United Nations, United Nations Conference on the Human Environment, 5–16 June 1972, Stockholm. <https://bit.ly/3PUfNAC> / ⁴ See also: Dupuy, P-M, Le Moli, G and Viñuales, JE (2018) Customary international law and the environment. Cambridge Centre for Environment, Energy and Natural Resource Governance. <https://bit.ly/3tiFzWc> / ⁵ International Court of Justice, Legality of the threat or use of nuclear weapons (advisory opinion), 8 July 1996, paragraph 29. www.icj-cij.org/case/95 / ⁶ Trail Smelter Case (United States v Canada). <https://bit.ly/3PDyXJQ> / ⁷ Case concerning pulp mills on the River Uruguay (Argentina v. Uruguay), Judgment. ICJ Reports (20 April 2010). <https://bit.ly/3teNcNi> / ⁸ Convention on Biological Diversity, Article 3. <https://bit.ly/3rvFAFY> / ⁹ UNCLOS, Articles 192, 194.2 and 212.1. <https://bit.ly/3tbf2dC> / ¹⁰ Paris Agreement, Articles 4.2 and 4.3. <https://bit.ly/3ZBTByC> / ¹¹ Court application filed 3 September 2020. <https://bit.ly/3PEnZne> / ¹² The Climate Action Tracker finds respondent states’ mitigation efforts and/or commitments inadequate, relative to their ‘common but differentiated responsibility and respective capability’ or ‘fair share’ as outlined in the Paris Agreement. <https://climateactiontracker.org/methodology/cat-rating-methodology/fair-share> / ¹³ See, for example, the resolution adopted by the Human Rights Council (12 July 2019) on human rights and climate change. UNGA Human Rights Council, Document A/HRC/RES/41/21. <https://bit.ly/46aUWif> / ¹⁴ UNGA, A/RES/76/300 (28 July 2022). <https://digitallibrary.un.org/record/3983329> / ¹⁵ For excerpts of the court decision translated into English, see: <https://bit.ly/3ZCbrHV> / ¹⁶ Supreme Court of the Netherlands (20 December 2019) State of the Netherlands v Urgenda Foundation. ECLI:NL:HR:2019:2007. Judgement. <https://bit.ly/3QOUYUc> / ¹⁷ Waratah Coal Pty Ltd v Youth Verdict Ltd & Ors (No 6) [2022] QLC 21. Land Court of Queensland (25 November 2022). www.sclqld.org.au/caselaw/QLC/2022/21 / ¹⁸ See, for example, the EU–Viet Nam Free Trade Agreement, Article 13/6. <https://bit.ly/3ZBgg5y> / ¹⁹ See Principle 11 in UNOCHR (2011) Guiding principles on business and human rights. <https://bit.ly/45800mb> / ²⁰ Brauch, MD (15 March 2022) Climate action needs investment governance, not investment protection and arbitration. <https://bit.ly/468gdcr> / ²¹ Di Salvatore, L (2021) Investor-state disputes in the fossil fuel industry. International Institute for Sustainable Development, Winnipeg. <https://bit.ly/3rsYIK2> / ²² Cotula, L (2023) International investment law and climate change: reforming the ISDS agenda. *Journal of World Investment & Trade*. <https://bit.ly/3F57jjK> / ²³ IPCC (2022) Climate change 2022: mitigation of climate change. www.ipcc.ch/report/ar6/wg3 / ²⁴ Tienhaara, K and Cotula, L (2020) Raising the cost of climate action? Investor-state dispute settlement and compensation for stranded fossil fuel assets. IIED, London. iied.org/17660IIED / ²⁵ Boyd, DR (2023) Paying polluters: the catastrophic consequences of investor-State dispute settlement for climate and environment action and human rights. United Nations, New York. <https://bit.ly/3PDjr22> / ²⁶ Vienna Convention on the Law of Treaties, Article 31(3)(c). <https://bit.ly/3ZCXmne> / ²⁷ UNCTAD and IIED (2022) International investment agreements and climate action. www.iied.org/20841x

