

# Kluwer Arbitration Blog

## Addressing Climate Change in ISDS: Introducing the ASIL Task Force on ISDS and Climate Change

Mairée Uran · Monday, May 26th, 2025 · Asociación Latinoamericana de Arbitraje (ALARB)

The intersection of climate change and international investment law has become an increasingly pressing issue in ISDS, shaping both disputes and policy responses. In recent years, a growing number of disputes have emerged, challenging the balance between States' regulatory autonomy to implement climate policies and investors' treaty-based protections. Against this backdrop, the American Society of International Law ("ASIL") has launched a [Task Force on Investor-State Dispute Settlement \(ISDS\) and Climate Change](#) at the 2025 ASIL Annual Meeting in Washington, D.C., to provide structured guidance on the substantive and procedural issues arising in ISDS cases involving climate-related measures.

This initiative comes at a critical moment.

The global legal landscape is evolving in response to climate change, with landmark advisory opinions looming in response to the requests submitted to the [International Court of Justice](#) ("ICJ") and the [Inter-American Court of Human Rights](#) ("IACtHR") that seek to clarify States' obligations under international law on climate action. Meanwhile, the [International Tribunal for the Law of the Sea](#) issued a far-reaching [Opinion](#) on the matter in May 2024 (see [here](#) and [here](#) for analysis on the Opinion) and the UN General Assembly adopted a [resolution](#) recognizing the right to a clean, healthy and sustainable environment as a universal human right in 2022. At the same time, transnational corporations—particularly in the energy, infrastructure, and extractive industries—are facing increasingly stringent climate regulations and heightened scrutiny over their environmental and social impacts, leading to a growing number of cases demanding corporate accountability.

Comprised of leading legal practitioners, arbitrators, State representatives, academics, scientists, and civil society members, the Task Force is chaired by Chiara Giorgetti, Janet Whittaker and the undersigned. It seeks to equip stakeholders with the necessary tools to navigate these disputes effectively. It seeks to ensure that the States, investors and their counsel are abreast of the scientific, regulatory and legal frameworks relevant to present their cases and that tribunals have the necessary tools to assess these disputes fairly and effectively.

### Why This Matters for the International Law Community

The increasing number of advisory opinions and decisions by international courts clarifying States' climate change obligations will impact State responsibility under international law, with significant implications for investment disputes. (The potential effects of the advisory opinions on ISDS have already been analyzed in a recent [Kluwer Arbitration Blog](#)).

As the ICJ, IActHR and ITLOS shape States' legal responsibilities, investment treaty claims may follow. Investors may challenge regulatory measures adopted by States in response to international climate commitments (see, e.g., *Uniper v. Netherlands* and *RWE v. Netherlands*), or disputes may arise over measures taken to adapt to or mitigate the effects of anthropogenic greenhouse gas emissions (see, e.g., *Zeph Investments v. Australia*).

At the same time, investors may seek to hold States accountable for failing to uphold their climate-related obligations when such failures affect their investments (see, e.g., *Peter A. Allard v. Barbados*) or investors in the renewable energy sectors could continue to use ISDS mechanisms to ensure the continued implementation of State-led schemes designed to incentivize green economies (see, e.g., cases against Spain from 2013 to date, available [here](#)).

While environmental regulations and State measures aimed at protecting the environment have played an increasingly central role in investment arbitration as seen in *Infinito Gold Ltd. v. Costa Rica Award* and the *páramo de Santurbán* cases against Colombia (see *Eco Oro Minerals Corp, Red Eagle Exploration Ltd* and *Montauk Metals Inc.*), no investment tribunal has yet substantively addressed the interaction between investment treaty protections and the international legal regime applicable to climate change. Notably, recent cases challenging State climate policies—such as *Uniper v. Netherlands*, *RWE v. Netherlands*, *Koch v. Canada* or *Westmoreland Mining v. Canada*—have been settled or dismissed on jurisdictional grounds, leaving crucial legal questions unanswered.

Beyond State-related disputes, corporate climate litigation is gaining momentum. While the majority of climate change-related cases have been filed against States—before domestic courts (e.g., *Urgenda v. Netherlands*) and international tribunals (e.g., *Klimaseniorinnen v. Switzerland*) (see also [here](#))—since 2015, approximately 230 lawsuits have been initiated against corporations and trade associations, over two-thirds of them since 2020. Notable examples include the ongoing litigation against *RWE* and the cases against *Shell*.

The growing prominence of business and human rights frameworks—such as the [UN Guiding Principles on Business and Human Rights](#) and the [EU Corporate Sustainability Due Diligence Directive](#)—also demonstrates a shift in investor responsibility. Failure to consider climate-related obligations can expose investors to significant liability risks. As corporate climate accountability cases increase, adapting to climate-related regulatory measures may no longer be seen as a compliance issue but also a key risk mitigation and dispute prevention strategy.

A clear understanding of how **investment treaty standards interact with the evolving climate legal and factual landscape** is essential for all stakeholders, including States, arbitrators, legal practitioners, civil society, arbitral institutions, and the private sector.

## **Bridging ISDS with Broader Issues: The Role of Attribution Science and Damages Considerations**

Climate change is an inherently cross-cutting issue. Investment arbitration does not operate in isolation, and tribunals are called to consider broader legal and factual frameworks, including procedural issues, evidentiary standards and appropriate valuation methods.

In particular, proving specific causation in climate-related disputes presents unique challenges. Attribution science quantifies how human-induced climate change contributes to specific environmental impacts, such as rising temperatures, extreme weather events, and ecosystem disruptions. It is becoming a key tool for proving causation and assessing damages in climate-related disputes, offering tribunals a scientific basis for liability determinations. These findings have already influenced climate litigation in domestic and international courts and could become increasingly relevant in ISDS where causation is a fundamental element in determining State liability.

By integrating climate attribution science, tribunals can strengthen the evidentiary basis for balancing investor protections with a State's right to regulate in the public interest. For example, if a government revokes a permit for an intensive emissions project, climate attribution studies could help to determine whether the measure was a proportionate and justified response to climate risks. Likewise, investors claiming expropriation or unfair treatment may need to address scientific evidence on their projects' environmental impact. Attribution science can also assess whether State actions, such as phasing out coal plants or denying fossil fuel permits, are grounded in scientifically proven climate risks. Additionally, it can help quantify an investor's contribution to climate-related harm, directly influencing liability and damage assessments.

Likewise, damages determinations in climate-related ISDS disputes pose unique questions, particularly regarding valuation methodologies and the appropriate quantification of harm. Traditional approaches to damages in investment arbitration, such as discounted cash flow ("DCF") analysis, may not fully capture the economic, environmental, and social complexities inherent in climate disputes and the question of how to assess financial harm in climate-related disputes is likely to gain prominence.

By exploring best practices for assessing damages in climate-related cases and developing guidance for arbitrators on integrating scientific and economic evidence, the Task Force aims to help shape a more informed and consistent approach to these complex cases.

## **Conclusion**

No systematic effort has been made to-date to clarify how international climate change obligations interact with investment treaty protections and assess the impact of international climate change obligations on the complex relationship between foreign investors and host States. The ASIL Task Force on ISDS and Climate Change represents an important effort to address this critical gap, ensuring that investment arbitration evolves in response to the legal challenges posed by climate change.

The evolving intersection of ISDS and climate law has significant implications for States, investors, and the broader international community, making it imperative to develop clear and concrete guidelines. By fostering dialogue and identifying relevant laws, rules, principles, and best practices the Task Force aims to:

- Clarify the tools available to interpret investment treaty standards in light of international climate obligations;
- Develop best practices for handling climate-related evidence in ISDS cases;
- Engage with regional and international adjudicatory bodies to ensure coherence across legal frameworks.

As ISDS continues to be shaped by new treaties, emerging jurisprudence, and evolving scientific evidence, the Task Force provides an opportunity to proactively shape the conversation and offer practical solutions for one of the most pressing issues in international law today. By integrating insights from investment law, climate science, and broader international legal frameworks, the Task Force will serve as a crucial resource for all stakeholders navigating the future of ISDS in a climate-impacted world.

### *Engaging with the Task Force*

*The Task Force welcomes engagement from stakeholders across the international law community. If you are interested, we encourage you to reach out and stay informed as we develop our recommendations. A comprehensive Report addressing key issues will be presented at the 2027 ASIL Annual Meeting.*

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