Journal of Environmental Law, 2025, **00**, 1–11
https://doi.org/10.1093/jel/eqaf039
Advance access publication 14 January 2026
Analysis

OXFORD

Fossil fuel abolition in international law and arbitration

Oliver Hailes*,

ABSTRACT

Fossil fuels have long been regarded as natural resources that States may freely exploit. That right is now limited by the prospect of State responsibility for fossil fuel exploitation, affirmed by the International Court of Justice in its 2025 advisory opinion on climate change. This Analysis examines the Court's unanimous guidance on fossil fuels, as well as the more precise guidance in joint and separate declarations on the phasing out of production, consumption, licensing, and subsidies. Then it considers how States may defend phase-out measures in investor-State dispute settlement (ISDS) proceedings. Drawing an analogy with slavery and other harmful industries that were lawfully abolished without needing to pay full compensation, it examines a range of measures that may be defended in investment arbitration and the possible relevance of climate law in commercial arbitration. It concludes by observing a disparity between international legal developments and the expansion of the oil and gas industry.

KEYWORDS: international law; climate change; advisory opinions; fossil fuels; abolition; international arbitration.

1. TAKING 'HISTORIC' SERIOUSLY

Let us take seriously the refrain that the Advisory Opinion of the International Court of Justice (ICJ) on 23 July 2025 was truly 'historic', even world-historic.[1] It helps first to recall the 2023 finding of the Intergovernmental Panel on Climate Change (IPCC) that estimates of greenhouse gas (GHG) emissions from 'existing fossil fuel infrastructures without additional abatement already exceed the remaining carbon budget' to limit global warming to 1.5 °C above pre-industrial levels.[2] Such warming greatly increases the likelihood of crossing an irreversible

* Assistant Professor, LSE Law School; Associate, Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science. (E-mail: o.hailes@lse.ac.uk). The author provided assistance to counsel for a sovereign participant in the advisory proceedings. All views expressed are strictly in the author's academic capacity. Thanks to Rebeka Hevesi for research assistance and to Anatole Boute, Lea Di Salvatore, Margot Donzé, Stephen Humphreys, Evgenia Stavropoulou, and the anonymous reviewers for their helpful comments.

1 *Obligations of States in Respect of Climate Change* (Advisory Opinion) ICJ (23 July 2025) [ICJ AO].

2 IPCC, *Synthesis Report of the IPCC Sixth Assessment Report (AR6): Summary for Policymakers* (March 2023) B.5.2 and B.5.3.

tipping point in the Earth system, leading to 'a fundamentally different planet with devastating impacts on natural systems and humanity'.[3]

To avoid this trajectory, public and private actors must rapidly rewire the world economy towards decarbonized electrification of all possible sectors. Solar photovoltaics and wind power have certainly grown in the global energy mix, now producing more electricity than coal. But investments and subsidies continue to pour into new oil and gas projects, notwithstanding the price competitiveness of renewable energy.[4] It is imperative not only to de-risk renewables but also to re-risk fossil fuels: to make them less profitable, to stop the industry's expansion, and eventually to phase it out.

In this context, international law provides the only global mechanisms to discipline energy policy and investment decisions, which are otherwise made at national, regional, or sectoral levels.[5] Nowhere in the UN General Assembly's request for an Advisory Opinion did it mention the cardinal problem of phasing out fossil fuels, nor even the euphemism of energy transition.[6] Yet, after considering the submissions of 99 States and 13 international organizations,[7] the ICJ formulated a concise solution to that problem:[8]

> 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.

Can a single sentence remake the world? It is often said that international law is a long game; the real impact of a legal development must be viewed with the hindsight of decades, once the norm has assumed a more durable institutional form.[9] But already we are in a critical decade to curb climate change, perhaps the most important in the existence of our species. This Analysis suggests that the ICJ's recognition of State responsibility for fossil fuel exploitation may in time be viewed as a world-historic shift in the international regulation of natural resources, thus emboldening States to phase out fossil fuels and to defend such measures against arbitral claims by affected investors.

In Section 2, this Analysis recalls how fossil fuels have been historically framed as natural resources that States are freely entitled to exploit, qualified by unevenly enforced obligations of environmental and investment protection. In Section 3, it situates the ICJ's key sentence on State responsibility for fossil fuel exploitation in the wider context of the Advisory Opinion and the more precise guidance on phase-out measures in joint and separate declarations. In Section 4, it considers how States may defend phase-out measures if they are challenged through investor-State dispute settlement (ISDS) proceedings, specifically the international arbitration of investment treaty disputes (investment arbitration) or contractual disputes (commercial arbitration). In doing so, this Analysis draws an analogy between fossil fuels and past examples of harmful industries, foremost slavery, that were lawfully abolished without needing to pay full compensation.

3 William J Ripple and others, 'The 2025 State of the Climate Report: A Planet on the Brink' (2025) 75 BioScience 1016, 1022.

4 Brett Christophers, 'Fossilised Capital: Price and Profit in the Energy Transition' (2021) 27 NPE 146.

5 Oliver Hailes and Jorge E Viñuales, 'The Energy Transition at a Critical Juncture' (2023) 26 JIEL 627.

6 Request for an Advisory Opinion of the International Court of Justice on the Obligations of States in respect of Climate Change, UNGA Res 77/276 (4 April 2023) UN Doc A/RES/77/276.

7 Harro van Asselt and Tejas Rao, 'Fossil Fuel Feuds and the ICJ Advisory Opinion on Climate Change' (2025) RECIEL (forthcoming).

8 ICJ AO (n 1) [427].

9 For a classic example, see Oona A Hathaway and Scott J Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster 2017).

The analogy between slavery and fossil fuel abolition is hardly novel. Both past and present transitions involve the uprooting of an economically significant but inherently harmful source of energy—whether mechanical and embodied or chemical and combusted—raising moral, political, and ultimately legal questions of who must bear the financial burden of stranded assets and historical reparations.[10] Yet, in Section 5, this Analysis observes a disparity between the ICJ's clarification of international law and plans to expand the oil and gas industry, pointing to the importance of both top-down international cooperation and bottom-up social and political action to abolish fossil fuel exploitation.

2. STATUS QUO ANTE: FOSSIL FUELS IN INTERNATIONAL LAW

The geographical allocation of rights to exploit fossil fuels—defined by title over territory and maritime delimitation—was a signal achievement of postcolonial international law, derived from the right of peoples to permanent sovereignty over natural resources as an economic extension of their right to self-determination.[11] Putting to one side the situations of non-self-governing territories and those under occupation, permanent sovereignty is exercised on behalf of peoples via the right of States to freely exploit natural resources.[12] Such rights provide the basis for all regimes that license and subsidize the exploitation of fossil fuels, as well as the network of treaties and contracts undergirding the infrastructure for upstream (exploration and extraction) and downstream (refining and distribution) activities that together produce the principal source of GHG emissions.[13]

But a State's right of exploitation has always been limited by its international obligations. During the heyday of mid-century nationalizations, the most salient obligation was to pay 'appropriate compensation' as a precondition of lawful expropriation,[14] which survived attempts by developing States to enact a variable domestic standard of compensation and was later specified in modern investment treaties as full compensation at fair market value.[15] Since its ascent this century, investment arbitration has become an effective mechanism for multinational corporations to claim damages for unlawful treatment of their oil and gas assets, sometimes to the tune of several billion dollars.[16]

Yet the principle of permanent sovereignty still informs the interpretation and application of treaty standards in cases reaffirming the host State's rights of compensable expropriation and reasonable regulation of natural resources.[17] In this way, the principle reversed a 'hidden assumption' in older writings that any interference with alien property would trigger State responsibility.[18] Keep in mind this point. The ICJ's recognition of State responsibility for fossil fuel exploitation

10 Antony Anghie, 'The Injustices of Reparations' (2025) 119 AJIL 423.
11 Jorge Viñuales, *The International Law of Energy* (CUP 2022) 43–50.
12 Permanent Sovereignty over Natural Resources, UNGA Res 1803 (XVII) (14 December 1962) UN Doc A/5217.
13 Oliver Hailes, 'Valuation of Compensation in Fossil Fuel Phase-Out Disputes' in Anja Ipp and Annette Magnusson (eds), *Investment Arbitration and Climate Change* (Kluwer 2024) 139, 142–44.
14 Res 1803 (n 12) [4].
15 Charter of Economic Rights and Duties of States, UNGA Res 3281 (XXIX) (12 December 1974) UN Doc A/RES/3281(XXIX) art 2(c); Energy Charter Treaty (with Annexes) (adopted 17 December 1994, entered into force 16 April 1998) 2080 UNTS 95 art 13.
16 Lea Di Salvatore, *Investor-State Disputes in the Fossil Fuel Industry* (IISD, December 2021).
17 *Achmea B.V. v Slovak Republic*, PCA Case No 2013-12, Award on Jurisdiction and Admissibility (20 May 2014) [244]–[247]; *Muszynianka spółka z ograniczoną odpowiedzialnością v Slovak Republic*, PCA Case No 2017-08, Award (7 October 2020) [550]–[551], [575].
18 Georges Abi-Saab, 'Permanent Sovereignty over Natural Resources and Economic Activities' in Mohamed Bedjaoui (ed), *International Law: Achievements and Prospects* (UNESCO 1991) 597, 614–15.

represents another reversal in an outmoded assumption, namely that the growth of oil, gas, and coal production—in lockstep with GHG emissions—is internationally lawful.[19]

By at least 1972, States accepted that 'the sovereign right to exploit their own resources pursuant to their own environmental policies' entailed 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'.[20] Over the decades, this principle was refined as a duty of all States to exercise due diligence in the prevention of significant harm to the environment.[21] Yet, until the Advisory Opinion, the prevention principle's application to GHG-emitting activities causing harm to the climate system was debated.

Notoriously, the climate change treaties did not expressly admit the necessity of phasing out fossil fuels. But the Glasgow Climate Pact acknowledged that a 'transition towards low-emission energy systems' requires 'accellerat[ed] phasedown of unabated coal power and phase-out of inefficient fossil fuel subsidies'.[22] This acknowledgement was fleshed out by the first Global Stocktake, which called on States to '[t]ransition[] away from fossil fuels in energy systems, in a just, orderly and equitable manner, accelerating action in this critical decade'.[23]

That concludes our sketch of the legal order that enabled the GHG emissions that have so dangerously destabilized the climate system: fossil fuels were allocated to States for exploitation, subject to underenforced environmental limits and well-enforced standards of treatment for energy investors. All that may now have changed.

3. LEX LATA: FOSSIL FUELS IN THE ADVISORY OPINION

The ICJ's key sentence on State responsibility for fossil fuel exploitation is perhaps the most groundbreaking contribution of the Advisory Opinion by effecting a nascent presumption against the lawful expansion of oil, gas, and coal activities. Such a presumption was the necessary conclusion of four steps in the Court's analysis, spanning the relevant climate *science* and the General Assembly's *request* for guidance on the *obligations* of States and their legal *consequences*. Each step is addressed in turn, before considering the more precise guidance in the joint and separate declarations of Judges Bhandari and Cleveland.

3.1 Unanimous guidance

First, the Court traced a multi-decade consensus of the scientific community that identified the combustion of fossil fuels as the predominant source of GHG emissions and the driver of rising global average temperatures, from the First World Climate Conference in 1979 through to the 2023 reports of the IPCC.[24]

Second, in interpreting the scope of the General Assembly's request, the Court noted that 'most' participants submitted that 'obligations pertaining to the protection of the climate system do not rest exclusively with consumers and end users, but also include activities such as ongoing production, licensing and subsidizing of fossil fuels'.[25]

19 Margaretha Wewerinke-Singh and Jorge Viñuales, 'The Great Reset: The ICJ Reframes the Conduct Responsible for Climate Change Through the Prism of Internationally Wrongful Acts' (EJIL:Talk!, 4 August 2025).

20 Declaration of the United Nations Conference on the Human Environment (16 June 1972) UN Doc A/CONF.48/14/Rev.1, principle 21.

21 Leslie-Anne Duvic-Paoli, *The Prevention Principle in International Environmental Law* (CUP 2018).

22 Glasgow Climate Pact, Decision 1/CP.26 (13 November 2021) UN Doc FCCC/CP/2021/12/Add.1, [20].

23 Outcome of the First Global Stocktake, Decision 1/CMA.5 (13 December 2023) UN Doc FCCC/PA/CMA/2023/16/Add.1, [28(d)].

24 ICJ AO (n 1) [53], [72], [80], [85].

25 ibid [94].

Third, the Court held that the obligations of States were not confined to the climate change treaties but included, among other sources, the customary duty to prevent significant harm to the environment.[26] The Court concluded that the standard of due diligence to be applied under both treaty and custom was 'stringent' in view of the 'best available science', requiring a 'heightened degree of vigilance' in a State's adoption of appropriate measures to prevent the risk of significant harm from cumulative GHG emissions, including environmental impact assessments (EIAs); as well as nationally determined contributions (NDCs) that represent its 'highest possible ambition' to achieve the Paris Agreement's goal of limiting global warming to 1.5 °C.[27]

Fourth, the Court held that treaty law did not exclude the legal consequences that generally flow from internationally wrongful acts, including the duties of responsible States to perform their obligations, to cease and not repeat any breach, and to make reparation for any injuries caused by their breach, whether in the form of restitution, compensation, or satisfaction.[28] In identifying which conduct may be attributed to States as breaching the stringent standard, the Court delivered its world-historic guidance: a State's failure 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 a wrongful act where, 'for example, it has failed to exercise due diligence by not taking the necessary regulatory and legislative measures to limit the quantity of emissions caused by private actors under its jurisdiction'.[29]

By admitting the prospect of international responsibility, the Court clarified that the climate obligations of States define an outer limit of their right to exploit fossil fuels. This necessary conclusion was underscored by Judges Bhandari and Cleveland, who found it 'unimaginable' that States can perform their obligations 'without a rapid and drastic reduction in—and the phasing out of—fossil fuel production and dependency'.[30]

3.2 Joint and separate declarations

Judges Bhandari and Cleveland felt the Court could have been 'more forceful' in addressing 'the reality that irreversible harm to the environment is inevitable if the current pace of fossil fuel production, licensing and subsidization continues unchecked'.[31] They identified three main levels at which States must perform their climate obligations.

At the level of general regulation, NDCs must 'address all fossil fuel production, licensing and subsidy activities in a manner consistent with achieving the 1.5 °C temperature goal'.[32] Accordingly, States must 'adopt and enforce regulations consistent with reducing global dependence on fossil fuels', namely 'phasing out the production and use of fossil fuels, transitioning away from fossil fuels and regulating fossil fuels in a manner that does not undermine global co-operation to achieve these goals, including with respect to subsidies'.[33]

At the level of proposed activities, States must ensure that EIAs take into account the cumulative harm to the climate system from 'downstream' or Scope 3 emissions, as domestic and regional courts had already confirmed.[34]

26 ibid [132]–[139], [162]–[171].
27 ibid [138], [246], [254].
28 ibid [405]–[455].
29 ibid [427]–[428].
30 *Obligations of States in Respect of Climate Change* (Joint Declaration of Judges Bhandari and Cleveland) ICJ (23 July 2025) [1].
31 ibid [4]–[10].
32 ibid [18]–[19].
33 ibid [22]–[23].
34 ibid [11]–[17] discussing *R (Finch) v Surrey County Council* [2024] UKSC 20, [2024] 3 WLR 431; Case E-18/24, *Norwegian State v Greenpeace Nordic & Nature and Youth Norway* (EFTA Court, Grand Chamber, 21 May 2025).

At the level of international cooperation, in accordance with the principle of common but differentiated responsibilities and respective capabilities,[35] 'States with greater resources and technical capabilities are obliged to transition away from fossil fuel production and dependency with deeper and faster targets' and must 'provide financial and technological assistance to help developing States with lesser capabilities'.[36]

Both judges addressed fossil fuels in separate declarations. Judge Bhandari specified that the duty of cessation 'would probably have to take the form of discontinuing practices that directly contribute to GHG emissions (e.g. fossil fuel extraction and emission-intensive industrial processes and subsidies for fossil fuel production and consumption)'.[37]

Judge Cleveland observed the concern of several participants, and indeed the IPCC, that international investment law may lead to 'regulatory chill' in the ambition of mitigation measures, such as phasing out fossil fuels.[38] In her view, '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'.[39]

Read together, these declarations raise the practically important issues of whether a State's decision to phase out fossil fuel exploitation may trigger ISDS proceedings and, if so, whether claims may be successfully defended in the light of climate obligations.

4. LEX FERENDA: FOSSIL FUELS IN INTERNATIONAL ARBITRATION

Arbitral awards are mixed on whether measures to ban fossil fuel activities may be characterized as the 'normal and legitimate exercise of … legislative power … for reasons of environmental preservation',[40] on one hand, or a 'direct and unlawful expropriation' taken on the basis of merely 'civic and political views', on the other.[41] Critically, none of the decided cases arose from climate mitigation, as opposed to local conservation.[42] The question of whether tribunals must integrate the climate obligations of States in their interpretation and application of investment treaties has been answered positively in scholarly doctrine—and by Judge Cleveland in her separate declaration—but remains largely untested in practice.[43] This section considers how the Advisory Opinion may have strengthened a State's defence arguments in investment arbitration, then considers the relevance of climate law in commercial arbitration.

4.1 General regulation

Each State enjoys a right to regulate for the public purpose of environmental protection, so long as the measure is neither manifestly disproportionate in its negative impact nor designed to abrogate a specific promise.[44] In light of the Advisory Opinion, the stringency of a State's

35 ICJ AO (n 1) [148]–[157].
36 Joint Declaration (n 30) [24]–[25].
37 *Obligations of States in Respect of Climate Change* (Separate Opinion of Judge Bhandari) ICJ (23 July 2025) [5].
38 *Obligations of States in Respect of Climate Change* (Declaration of Judge Cleveland) ICJ (23 July 2025) [21].
39 ibid [22].
40 *Lone Pine Resources Inc v Canada*, ICSID Case No UNCT/15/2, Final Award (21 November 2022) [618], [622]–[625].
41 *Rockhopper Exploration Plc and others v Italian Republic*, ICSID Case No ARB/17/14, Award (23 August 2022) [10], [197]–[201].
42 Several climate-related cases failed for lack of jurisdiction or were discontinued, notably *Westmoreland Mining Holdings, LLC v Government of Canada*, ICSID Case No UNCT/20/3, Final Award (31 January 2022); *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands*, ICSID Case No ARB/21/4; *Uniper SE and others v Kingdom of the Netherlands*, ICSID Case No ARB/21/22.
43 A technical basis is art 31(3)(c) of the Vienna Convention on the Law of Treaties (opened for signature 23 May 1969, entered into force 27 January 1980) 1155 UNTS 331.
44 Oliver Hailes, 'Environmental Clauses in Investment Arbitration: Deep Roots, Green Shoots and Dead Wood' (2025) 40 ICSID Rev 5–15 <https://doi.org/10.1093/icsidreview/siaf003>.

duty of due diligence would make it difficult for any fossil fuel investor to prove that a measure's impact was manifestly disproportionate, since States are not merely entitled but obliged to cease any conduct that may engage its international responsibility.[45]

Much will turn on a tribunal's deference to the State's performance of its duty to regulate the activities of private actors.[46] These are not uncharted waters. In *Chemtura v Canada*, the tribunal accepted that a review of agricultural pesticides was the 'result of Canada's international obligations' under multilateral environmental agreements, which undercut claims that the ultimate ban was an expropriation or breached the standard of fair and equitable treatment.[47]

4.2 Proposed activities

At the level of proposed activities, the tribunal in *Discovery v Slovak Republic* held that the investor could not assert a legitimate expectation that its oil and gas drilling would not be subject to evolving EIA requirements, particularly since the State was obliged by EU law to implement those requirements.[48] One may expect a similar line of reasoning in emerging cases where a State has refused to approve a project in light of the ICJ's authoritative guidance.[49] As more courts reaffirm the necessity of accounting for Scope 3 emissions,[50] we must recall 'the special deference that international arbitral tribunals afford to judicial decisions', which are 'widely recognized to validly lead the way in the development of the law according to society's evolving values'.[51]

Still, in *Discovery*, the tribunal implied that 'a stabilization clause or a specific commitment of regulatory stability' may have altered its conclusion.[52] Whereas mere expectations based on subsidies or other incentives are 'essentially *consideranda*' in deciding whether a measure was disproportionate, a more delicate issue concerns the outright abrogation of contractual rights in the performance of a State's climate obligations.[53]

4.3 Abrogation of contractual rights

To discontinue production from existing infrastructure, a State may need to use its sovereign power to abrogate contractual promises; say, an executive direction that public utilities must terminate their power purchase agreements (PPAs); or the legislative cancellation of hydrocarbon concessions.[54] In principle, a State cannot manipulate its dual capacity as sovereign and merchant to 'escape vital obligations under its contract by exercising its superior

45 ibid 41–42.

46 Joshua Paine, 'Due Diligence, Obligations to Cooperate and to Regulate Private Actors: Insights from Three Climate Change Advisory Opinions' (2025) EPL 10–12 <https://doi.org/10.1177/18785395251394330>.

47 *Chemtura Corporation v Government of Canada*, UNCITRAL, Award (2 August 2010) [135]–[143], [266].

48 *Discovery Global LLC v Slovak Republic*, ICSID Case No ARB/21/51, Award (17 January 2025) [607]–[616].

49 *Instituto Preservar e outros v União e outros*, Ação Civil Pública No 5050920-75.2023.4.04.7100, Sentença (9ª Vara Federal de Porto Alegre, 22 August 2025).

50 *Morris and Marcus v Environmental Protection Agency* (High Court, Supreme Court of Judicature of Guyana, 14 March 2025); *Petitions by Greenpeace Ltd and Uplift for Judicial Review* [2025] CSOH 10; *Green Connection NPC & Anor v Minister of Forestry, Fisheries and the Environment & Ors* (5676/2024) [2025] ZAWCHC 349 (13 August 2025) [130]–[157]; *Greenpeace Nordic and Others v Norway* (ECtHR, 28 October 2025) App no 34068/21 [319]–[324].

51 *Montauk Metals Inc (formerly known as Galway Gold Inc) v Republic of Colombia*, ICSID Case No ARB/18/13, Award (7 June 2024) [812]–[815].

52 *Discovery* (n 48) [608]–[610].

53 *Eurus Energy Holdings Corporation v Kingdom of Spain*, ICSID Case No ARB/16/4, Decision on Jurisdiction and Liability (17 March 2021) [315]–[317].

54 Contractual rights are assimilated to property for the purpose of investment treaty claims: Jean Ho, *New Property in International Law* (OUP 2024) 143–6. Conversely, international law enabled the abolition of slavery by undermining the characterization of humans as property: ibid 154–5.

governmental power'.[55] In practice, investors are already being paid out under the assumption that early termination of coal PPAs entitles them to full compensation.[56] But the weight of formative practice on international responsibility for contractual interference involved a State's opportunistic abuse of sovereignty to claw back control of natural resources, rather than to phase out their commercial exploitation.[57]

Whether a State's abrogation of contractual rights for an overriding public purpose is a compensable expropriation, on one hand, or reasonable regulation, on the other, is determined by the customary doctrine of police powers, which turns on the aforementioned test of manifest disproportionality.[58] Compensation is typically payable in cases where a contract was terminated to avoid political crisis or where the State stands to profit by taking over the investor's business as a going concern.[59] But the situation may be different where 'neither the state itself nor any other person within its boundaries will carry on the business'.[60] According to a former ICJ president: 'Measures such as the total suppression, for reasons of general policy, of a detrimental or inconvenient industrial or commercial activity, are not subject to compensation'.[61] In a word, abolition.

4.4 Abolition as reasonable regulation

Throughout the twentieth century, some rather quaint expressions of police power were framed in terms of abolition: 'lotteries, the manufacture of oleo-margarine and "pool halls" were abolished without compensation', so too was 'the prohibition of the manufacture and sale of alcoholic liquor'.[62] In mid-century debates, the archetypal object of abolition—chattel slavery—was contrasted with resource nationalization; the abolition of slavery entailed no transfer of wealth and thus engaged no duty to compensate.[63] Although many States had historically elected to compensate slave owners, such practice was characterized as prudent policy to prevent economic disruption rather than evidencing any international obligation to compensate aliens for their acquired rights.[64]

Whether the abolition of fossil fuel exploitation now falls on the expropriation or regulation side of the police powers divide is bound to affect the cost and resilience of phase-out measures in the face of international challenges. On one hand, to nationalize the fossil fuel industry would require full compensation, even if the State planned to phase out production.[65] On the other hand, abolition is an extreme form of regulation, so some compensation may be prudent.[66]

55 *Jalapa Railroad and Power Company*, Mexico-US Claims Commission, AMC Docket No 42, Decision No 13-E (1943) US Dept of State Publication 2859, Arbitration Series 9: American Mexican Claims Report 538, 540–2.

56 Anatole Boute, 'Phasing Out Coal Investment Contracts: Does Just Transition Finance Legitimize Unjust Compensation?' (2025) 40 ICSID Rev <https://doi.org/10.1093/icsidreview/siae037>.

57 Stephen M Schwebel, 'On Whether the Breach by a State of a Contract with an Alien is a Breach of International Law' in *Justice in International Law: Selected Writings* (CUP 1994) 425.

58 FA Mann, 'State Contracts and State Responsibility' (1960) 54 AJIL 572, 583–8; *Certain Iranian Assets (Islamic Republic of Iran v United States of America)* (Judgment) [2023] ICJ Rep 51 [149], [156]–[157], [185]–[186].

59 Stephan W Schill, 'Enabling Private Ordering: Function, Scope and Effect of Umbrella Clauses in International Investment Treaties' (2009) 18 Minn J Int'l L 1, 75–84.

60 Mann (n 58) 587.

61 Eduardo Jiménez de Aréchaga, 'International Law in the Past Third of a Century' (1978) 159 Recueil des Cours 1, 300.

62 Samy Friedman, *Expropriation in International Law* (Steven & Sons 1953) 51. See also Edwin Borchard, 'The "Minimum Standard" of the Treatment of Aliens' (1939) 33 ASIL Proceedings 51, 70–1.

63 Eduardo Jiménez de Aréchaga, 'The Duty to Compensate for the Nationalization of Foreign Property' (1963) II ILC Yearbook 237.

64 Georges Kaeckenbeeck, 'La Protection Internationale des Droits Acquis' (1937) 59 Recueil des Cours 317, 331–2; Rudolf L Bindschedler, 'La Protection de la Propriété Privée en Droit International Public' (1956) 90 Recueil des Cours 174, 211–27.

65 Fergus Green and Ingrid Robeyns, 'On the Merits and Limits of Nationalising the Fossil Fuel Industry' (2022) 91 Royal Institute of Philosophy Supplements 53.

66 A State's offer of compensation need not preclude any claims against the same company for its contribution to climate-related harms: *Lliuya v RWE AG*, Oberlandesgericht Hamm, 5 U 15/17 (28 May 2025).

Indeed, when Alberta and the Netherlands decided to phase out coal power, each government offered partial compensation to ease the burden for some operators, which arguably reinforced the reasonableness of such measures when they were impugned by investors.[67] But neither measure was arbitrated on the merits; the claim against Canada failed for lack of jurisdiction and two cases against the Netherlands were discontinued.[68]

However, in parallel proceedings under Article 1 of the First Protocol to the European Convention on Human Rights, The Hague District Court held that the phase-out legislation was foreseeable property regulation that did not impose an excessive burden on coal power producers, particularly in view of the hardship clause that allowed for partial compensation.[69] Conversely, in an earlier case, the uncompensated termination of a contract to construct an oil refinery constituted an unlawful interference with possessions.[70]

This emerging practice suggests a degree of continuity with older examples of abolition. Looking forward, contractual rights to exploit fossil fuels may be lawfully abolished in a State's performance of its climate obligations without needing to pay full compensation, though partial compensation would be prudent to ensure that the measure is not deemed manifestly disproportionate. If a tribunal is satisfied that an investment's value was destroyed by reasonable regulation, that finding may preclude any award of damages, even if the State were to have fallen short of due process in implementing the phase-out measure.[71]

4.5 Exclusion of fossil fuel claims

Aside from defending claims on their merits, past practice on slavery may offer a fertile line of inquiry in developing arguments to exclude fossil fuel claims.[72] In the 1855 case of the *Lawrence*, a commission declined to hear the claim that a ship had been unlawfully condemned because 'the African slave trade at the time of this condemnation … was contrary to the law of nations'.[73] To similar effect, in *Phoenix Action v Czech Republic*, the tribunal believed 'nobody would suggest' that access to investment arbitration should be granted in respect of assets or activities that violated 'the most fundamental rules of protection of human rights, like investments made in pursuance of torture or genocide or in support of slavery or trafficking of human organs'.[74]

The ICJ stopped short of finding that the *erga omnes* obligation to prevent significant harm to the climate system qualifies as a peremptory norm,[75] though Vice-President Sebutinde emphasized the adverse effects of sea level rise on the *jus cogens* right to self-determination.[76] However, the Inter-American Court of Human Rights held that the 'prohibitions arising from the obligation to preserve our common ecosystem, as a precondition to the enjoyment

67 *Westmoreland Mining Holdings LLC v Government of Canada*, ICSID Case No UNCT/20/3, Statement of Defence (26 June 2020) [43]–[49], [86]–[87]; *RWE AG and RWE Eemshaven Holding II BV v Kingdom of the Netherlands*, ICSID Case No ARB/21/4, Respondent's Counter-Memorial (5 September 2022) [458]–[461].

68 See n 42 above.

69 *RWE Generation NL B.V. v De Staat der Nederlanden*, ECLI:NL:RBDHA:2022:12635 (Rechtbank Den Haag, 30 November 2022); *Uniper Benelux N.V. v De Staat der Nederlanden*, ECLI:NL:RBDHA:2022:12653 (Rechtbank Den Haag, 30 November 2022).

70 *Stran Greek Refineries and Stratis Andreadis v Greece* App No 13427/87 (ECtHR, 9 December 1994) [57]–[75].

71 *Eco Oro Minerals Corp. v Republic of Colombia*, ICSID Case No ARB/16/41, Award on Damages (15 July 2024) [290]–[317]; Hailes, 'Valuation' (n 13) 148–50.

72 Edwin M Borchard, *The Diplomatic Protection of Citizens Abroad* (Banks 1915) 737–39; 'Fifth Report on State Responsibility, by Mr. Roberto Ago, Special Rapporteur' (1976) II(1) ILC Yearbook 3, [45]–[50].

73 *Case of the 'Lawrence'*, US-Great Britain Commission, Decision of the Umpire (4 January 1855) in John Bassett Moore, *History and Digest of the International Arbitrations to which the United States has been a Party* vol 3 (Government Printing Office 1898) 2824–25.

74 *Phoenix Action, Ltd v Czech Republic*, ICSID Case No ARB/06/5, Award (15 April 2009) [78].

75 ICJ AO (n 1) [439]–[443].

76 *Obligations of States in Respect of Climate Change* (Separate Opinion of Vice-President Sebutinde) ICJ (23 July 2025) [8].

of other rights that have already been identified as fundamental, are of peremptory importance and are, therefore, of a *jus cogens* nature'.[77]

Even where a norm has not achieved peremptory status, the tribunal in *Cortec v Kenya* declined to hold a State 'financially responsible for investments created in defiance of their laws fundamental [to] protecting public interests such as the environment'.[78] May a State likewise object to a tribunal's jurisdiction or the admissibility of an investor's claim on the ground that a fossil fuel investment was made contrary to international climate law under the lax regulation or even the contractual promises of a previous government?[79] Time will tell.

4.6 Climate law in commercial arbitration

Problems may arise from the routine submission of contractual disputes to commercial arbitration governed by the parties' choice of domestic law.[80] Fossil fuel contracts—such as long-term sale-purchase agreements between coal producers and power plants—are bound to contain force majeure clauses, which often allow for termination where 'acts of government' interfere with contractual performance but may require a party to use their 'reasonable efforts' to challenge a phase-out measure.[81] In cases involving State entities, a tribunal may find that a contractual stabilization or economic equilibrium clause represents a valid indemnity against the costs of regulatory interference, regardless of whether the interference was induced by international obligation.[82] Such clauses are common in the hydrocarbon sectors of developing States, which may be locked into fossil fuel dependence by their costly commitments.[83]

Still, it is not unknown for commercial tribunals to apply international law as part of a contract's proper law, whether by express choice or implication.[84] Here it is worth noting that, in Judge Cleveland's view, all 'investment instruments'—not just treaties—'must be informed by States' obligations in respect of climate change under international law'.[85] A relevant applicable law—whether governing the contract, the arbitral seat, or the place of enforcement—may thus prove amenable to public policy arguments based on international law in challenging the validity of contracts or awards that contradict the performance of a State's climate obligations.[86]

5. TOWARDS ABOLITION?

This Analysis posited the world-historic impact of the ICJ's recognition of State responsibility for fossil fuel exploitation, which may embolden States to phase out fossil fuels and to defend

77 *Climate Emergency and Human Rights*, Advisory Opinion OC-32/25 (IACtHR, 29 May 2025) [291].

78 *Cortec Mining Kenya Limited and others v Republic of Kenya*, ICSID Case No ARB/15/29, Award (22 October 2018) [333], [343]–[365].

79 Oliver Hailes, 'The Customary Duty to Prevent Unabated Fossil Fuel Production: A Tipping Point for Energy Investment Arbitration?' (2023) 1 Transnatl Disp Mgmt.

80 Wendy J Miles, 'International Commercial Arbitration and Investment Agreements Involving States' in Anja Ipp and Annette Magnusson (eds), *Investment Arbitration and Climate Change* (Kluwer 2024) 63.

81 Anatole Boute, 'Environmental Force Majeure: Relief from Fossil Energy Contracts in the Decarbonisation Era' (2021) 33 JEL 339.

82 Peter D Cameron, *International Energy Investment Law: The Pursuit of Stability* (2nd edn, OUP 2021) 102–20. Cf. Lujing Fan and Shixi Huang, 'Addressing the Challenge of Stabilization Clauses in Resolving International Energy Investment Disputes under Climate Change' (2025) Climate Policy <https://doi.org/10.1080/14693062.2025.2525464>.

83 Lea Di Salvatore and Maria Julia Gubeissi, *Billion-Dollar Exposure: Investor-State Dispute Settlement in Mozambique's Fossil Fuel Sector* (CCSI, 2024).

84 *Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata B.V. v Petroleos de Venezuela, S.A. and others*, ICC Case No 20549/ASM/JPA (C-20550/ASM), Final Award (24 April 2018) [89], [153]–[175]; *Bankswitch Ghana Ltd. v Republic of Ghana*, PCA Case No 2011-10, Award Save as to Costs (11 April 2014) [11.35]–[11.70].

85 Declaration of Judge Cleveland (n 38) [22].

86 *World Duty Free Company v Republic of Kenya*, ICSID Case No ARB/00/7, Award (4 October 2006) [138]–[157]; *Société MK Group c/ S.A.R.L. Onix et Société Financial Initiative*, Cour d'appel de Paris, 16 January 2018, No 15/21703 [14]–[39].

such measures in ISDS proceedings. The joint and separate declarations underscored the importance of discontinuing fossil production, the necessity of accounting for Scope 3 emissions in EIAs, and the relevance of a State's stringent duty of due diligence in the interpretation of investment instruments.

Such guidance may strengthen a State's defence arguments in investment arbitration, notably where a phase-out measure takes the form of general regulation or the refusal to approve a proposed activity. In addressing the abrogation of contractual rights, this Analysis drew an analogy with past examples of harmful industries, such as slavery, that were lawfully abolished without needing to pay full compensation. Whether this analogy can be put to work in investment or commercial arbitration depends on the facility of counsel and the willingness of tribunals to take seriously the ICJ's Advisory Opinion as a driver of *bona fide* interventions to keep fossil fuels in the ground.

To ensure that phase-out measures are not viewed as disproportionate, several forms of international cooperation may help to harmonize their implementation, including the exclusion of fossil fuels from the modernized Energy Charter Treaty,[87] an OECD proposal to do the same for bilateral investment treaties,[88] the prohibition of certain fossil fuel subsidies,[89] and a 'roadmap' to transition away from fossil fuels, supported by more than 80 States.[90] But most energy policy and investment decisions are flowing in precisely the wrong direction, with plans to produce more than double the amount of oil and gas than would be consistent with limiting warming to 1.5 °C.[91]

Such plans are, in the ICJ's language, failures to take appropriate action to protect the climate system from GHG emissions. Yet, as the Court acknowledged, its Advisory Opinion merely provides legal clarity, which must 'guide social and political action to address the ongoing climate crisis'.[92] Amid this critical decade, where have all the abolitionists gone?

FUNDING

None declared.

87 Modifications and Changes to Annexes to the Energy Charter Treaty, CCDEC202413 (3 December 2024) annex NI.
88 OECD, 'Methods to Align Investment Treaty Benefits for Energy Investment with the Paris Agreement and Net Zero: Note by the Secretariat' (26 June 2024) DAF/INV/TR1/WD(2024)1/REV1, 12–15.
89 Agreement on Climate Change, Trade and Sustainability (ACCTS) (signed 15 November 2024, not in force), Ch 4.
90 'Revealed: Leak Casts Doubt on COP30's "Informal List" of Fossil-Fuel Roadmap Opponents' (CarbonBrief, 28 November 2025).
91 *The Production Gap Report 2025* (SEI, Climate Analytics and IISD, September 2025).
92 ICJ AO (n 1) [456].