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The ICJ's Advisory Opinion on Climate Change: A Progressive Judgment in a Capitalist Legal Cage

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Introduction

The International Court of Justice's (ICJ) recent advisory opinion (AO) on the actions states should take regarding climate change marks a significant event for public international law, according to many scholars and pundits. The request to the Court to issue the AO was a powerful act of legal and political resistance from the Global South, led by vulnerable countries, especially Small Island Developing States (SIDS), that are the most affected by climate change. The goal was to work within the existing structure of international law to achieve climate justice through the world's highest court, as an act of legal and political resistance against the materialistic pressures of the Bretton Woods development model.

Although the AO can be seen as a powerful symbol that reinforces the role of international law in addressing the existential threat posed by climate change, it does not alter the reality on the ground, which is the pervasive structure of global capitalism protected by a dense international, transnational, and national network of public and private laws based on the principles of property and contract. The analysis in this article argues that the AO's expected material effectiveness in addressing climate change for the SIDS is structurally limited by a parallel and more potent legal regime—investor-state dispute settlement (ISDS)—which serves as the primary legal technology for protecting fossil fuel capital.

This article analyzes a specific obligation—the prohibition on new fossil fuel exploration and the issuance of new licenses for it as an internationally wrongful act — to demonstrate precisely how the ontology of international law creates a capitalist legal cage that neutralizes climate action, thereby perpetuating the neocolonial dynamics the AO purports to address. As such, by focusing on fossil fuel exploration, this article aims to demonstrate the struggle in the cage over competing logics and legal grammars between the AO and ISDS.

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Therefore, we infer from historiography that the sovereignty of capital's expansion has consistently superseded the sovereign obligation to safeguard populations and the environment in pursuit of the neoliberal model of development; the legal meanings brought by the AO present a structural contradiction with no indication that it will be resolved in the interests of the Global South.

The Real Rule of Law: Capitalism

The trained eye of a Third World Approaches to International Law (TWAIL) scholar identifies the neocolonial features of public international law, highlighting its imperialistic roots and its continued use to perpetuate the domination and exploitation of the Global South. However, the survival of capitalism requires a subtle legal mechanism to conceal its continuous need for expansion and accumulation. This can be done within the confines of public international law, such as the emergence of the principle of sustainable development, which has become instrumental and a quasi-jus cogens to sustain the business-as-usual approach under the banner of "ecologically friendly" consumption.

The real power to regulate climate change lies in the legal framework that supports the global economy, which is sustained by a hard-wired network of private rights, powers, and privileges that keeps states in line and protects capital in its constant imperative of accumulation. The system works through ISDS, a separate system of justice in which private businesses can bypass domestic courts and bring cases to secret, temporary arbitral tribunals. A small group of commercial arbitrators works at these tribunals.

Taking the fossil fuel industry as an example, the cage is sustained by three factors opposing the AO to the ISDS: the scale of the legal threat, the regulatory deterrence effect, and the neocolonial pattern.

First, although renewable energy has become cheaper than burning oil, fossil fuels are three times more profitable. The international investment regime, comprising more than 3,000 treaties that allow foreign companies to sue sovereign states, is its most potent legal tool in the climate context (for the worst). In this regard, the fossil fuel industry is the most litigious part of this system, and they have used it to fight climate action that impedes business. From the available data (not all procedures are open), more than US$80 billion was awarded to oil companies in litigation against governments, or in other words, the combined GDP of the 45 poorest countries in the world. The recent movement for energy transition has sparked a dark perspective: the magazine Science has published a research article pointing to a potential US$340 billion in legal claims from oil investors. The same trend is observed as states are being sued for ending coal mining, denying drilling permits,

or otherwise attempting to align their policies with climate goals.

Second, the ISDS is powerful because it makes policymakers afraid to make decisions on climate change (in this case, the system is "democratic" as it extends even to Global North countries). The mere threat of an ISDS lawsuit is often enough to cause regulatory paralysis, leading governments to put off, weaken, or drop important climate laws because they don't want to be held responsible for significant damages (and the loss of potential foreign investment). Since 2015, ISDS cases related to mining and oil have doubled, with 246 lawsuits linked to oil. To that end, public regulation is secondary to protecting private rights, and private capital holds the state's democratic power to regulate in the public interest hostage.

Third, the system does not operate the same in different parts of the world. Data shows that claims are overwhelmingly brought by investors from a small number of wealthy countries (the US, UK, Netherlands, Spain, and Canada account for 51%). The targets are often Global South nations; nearly 80% of contract-based claims are against low-income countries, and 60.4% of potential ISDS claims target middle- and low-income countries.

These three factors are the bars that make up the capitalist legal cage. This architecture works exactly to keep fossil capital from being held accountable by democracy and the public interest. It shows a system in which the material power to protect accumulated wealth is far stronger than the moral duty to protect a livable planet, making it very hard to meet the AO's climate obligations. The cage is where the calls for climate justice and the entrenched power of investors' rights come into direct conflict.

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Climate Justice v. Investors' Rights

The empirical analysis of the fossil fuel dimension in the last part demonstrates that the AO and the ISDS system are on a direct collision course, and by consequence, the imperative of climate justice and investors' rights. The AO states that taking action on climate change is a legal obligation, while the ISDS system portrays that failing to comply with contracts is a breach of investor rights. The conflict represents the most recent development in a protracted history of international law, enabling colonial and neocolonial exploitation, as the ISDS tends to have a stronger appeal and sufficient teeth to enforce its decisions, which domestic courts support. It is not a fair fight between these two legal grammars, though the imperative of climate justice has the higher moral ground.

For Sundhya Pahuja, the promise of decolonization, especially the call for permanent sovereignty over natural resources, was co-opted and transformed into a legal regime for investor protection under the banner of development, creating the duty to protect foreign investments. This phenomenon is rooted in the very formation

of the post-colonial international legal order.

To Usha Natarajan and Julia Dehm, international law creates an artificial and dysfunctional distinction between natural resources (things that can be exploited and traded) and the environment (things that can be managed economically); thus, when these two perspectives clash, the economic dimension that allows exploitation for capital accumulation inevitably prevails. The conflict is not incidental; it is the inevitable result of a legal framework that paradoxically seeks to safeguard the environment while fervently advocating the exploitation of resources as the condition for development.

These two perspectives from TWAIL scholars are fundamental to understanding the capitalist cage within which the AO and ISDS are constrained (although sharing the same ontological base). The Global North's past emissions are what caused the climate crisis, but the Global South, which contributed the least to the problem, is the one that suffers the most from it. The call for climate justice and reparations is a call to address this deep-seated historical unfairness. The ISDS system works as a neocolonial tool because investors from the Global North mostly sue governments in the Global South, which already struggle economically to provide the basic services and rights to their populations. It is a system that protects businesses' capital while weakening the regulatory independence of post-colonial states. The table below summarizes this structural conflict:

Feature	ICJ Advisory Opinion	Investor-State Dispute Settlement
Legal Domain	Public, state-to-state, human rights, environmental	Private, commercial, property rights
Primary Obligation/ Right	State obligation to protect the climate and human rights	Investor's right to profit and a stable regulatory environment
Core Actors	States, international community, and individuals	Foreign corporations, investment funds
Adjudicators	Judges of the International Court of Justice	Private, party-appointed commercial arbitrators
Enforcement	Moral/political weight, domestic court application	Legally binding awards are enforceable against state assets globally
Outcome for Climate Action	Legally justifies ambitious state regulation/climate litigation	Penalizes and chills ambitious state regulation

The TWAIL theoretical approach vis-à-vis the fossil fuel dimension shows that this structural conflict is not a design mistake; it is what the system was meant to do. The AO, despite its purported normative advancements and use as a tool for political and legal resistance, remains subject to the substantive authority of the ISDS regime. It is a progressive judgment stuck in a capitalist legal cage that is still very well-armed to protect the profits of Global North investors, maintain neocolonial relationships, and, in the end, ensure that the logic of accumulation prevails over the urgent need for climate justice.

Final Remarks

The colonial and neocolonial track in the history of the international system points to the prevalence of the ISDS framework (or other international economic law frameworks such as BITs or ACFIs) over the AO's potential to address climate change appropriately. In the book Capital Realism: Is There No Alternative?, Mark Fisher borrows a phrase from Fredric Jameson and Slavoj Žižek that perfectly captures the idea of capitalism's victory: "It is easier to imagine an end of the world than an end of capitalism."

The reach of the AO as a legal and political tool to challenge ISDS remains to be tested. The agency of the SIDS and the epistemic input from TWAIL indicate the need to go beyond merely commemorating a symbolic victory and to continue these strategic efforts to challenge the existing structural conflict in international law within the cage of capitalism. The AO's potential strength does not come from a fair fight but from being used as a weapon against this very fossil fuel protection racket.

In the end, the AO's best contribution is to reveal the fundamental contradiction inherent in international law. The worth of the document will not be determined by its content, but by its utilization in the essential political and legal endeavor to challenge the private legal framework that prioritizes fossil fuel profits over the imperatives of climate justice. The battle for a habitable planet becomes essentially a contest regarding the supremacy of legal regimes.