Part II:
International Law Beyond the State: A Gradual Softening of the Public/Private Dichotomy

The Private Life of the ICJ Advisory Opinion on Climate Change

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I. Introduction

As the various contributions to this volume make abundantly clear, the International Court of Justice's (ICJ) Advisory Opinion on Obligations of States in Respect of Climate Change is a landmark decision in many respects.[1] Yet at first blush it seems rather restrained when it comes to addressing the private sector, particularly coming hot on the heels of the more far-reaching Advisory Opinion by the Inter-American Court of Human Rights (IACtHR).[2]

Keeping in mind that States are the primary addressees of the Advisory Opinion, this contribution discusses what the ICJ said (and what it left out) about the role of the private sector. I suggest that even where the private sector is not addressed directly, the Advisory Opinion still has important implications for business actors.

II. Strengthening Corporate Climate Accountability

As several participants pointed out in the written proceedings, the private sector can be considered responsible for the majority of the world's

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1 ICJ, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025.

2 IACtHR, *Climate Emergency and Human Rights*, Advisory Opinion of 29 May 2025, AO-32/25.

greenhouse gas (GHG) emissions.[3] Indeed, the Carbon Majors Database suggests that 180 companies, including private and state-owned fossil fuel companies as well as heavy industrial emitters, are the source of 70 % of global carbon dioxide emissions since the start of the Industrial Revolution.[4]

Corporations can thus be seen as part of the problem, but they are likewise part of the solution. Companies often possess the financial and technological capacity necessary for the impending climate and energy transition. Moreover, many companies have made voluntary commitments to tackle their carbon emissions, with Oxford University's Net Zero Tracker finding that 60 % of the world's largest 1,977 companies (good for 67 % of the world's annual revenue) have set net zero targets.[5]

The integrity of these targets can be questioned, however, with lofty goals often not being accompanied by implementation mechanisms such as credible climate transition plans, annual progress reports, and interim targets.[6] Moreover, some companies and business associations have actively undermined climate action by questioning climate science[7] and/or lobbying against the strengthening of climate policy.[8]

To strengthen corporate climate accountability, States have sought to regulate corporate emissions, including through carbon pricing, setting emissions standards, climate risk disclosure requirements, and mandatory due diligence legislation, such as the European Union's (EU) Corporate Sustainability Due Diligence Directive, which requires covered companies to take due diligence measures to identify, prevent and mitigate environmental harm along their supply chain.[9]

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3 The Bahamas, 'Written Statement' (22 March 2025), <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-04-00-en.pdf>, para. 127; Kenya, 'Written Statement' (22 March 2024), <https://www.icj-cij.org/sites/default/files/case-related/187/187-20240322-wri-33-00-en.pdf>, para. 5.5.

4 InfluenceMap, 'Carbon Majors: 2023 Data Update' (March 2025) <https://carbonmajors.org/briefing/The-Carbon-Majors-Database-2023-Update-31397>.

5 Net Zero Tracker, 'Net Zero Stocktake 2024' (NewClimate Institute, Oxford Net Zero, Energy and Climate Intelligence Unit and Data-Driven EnviroLab 2024) 17.

6 Net Zero Tracker (n. 5) 21.

7 See, e.g., Benjamin Franta, 'Early Oil Industry disinformation on Global Warming', Environ. Polit. 30 (2021), 663; Naomi Oreskes, *Merchants of Doubt* (Bloomsbury 2010).

8 See, e.g., Catherine Rocchi, 'Climate Protagonists? Strategic Misrepresentation and Corporate Resistance to Climate Legislation', Stan. L. Rev. 74 (2022), 1153.

9 Directive (EU) 2024/1760 of 13 June 2024 on Corporate Sustainability Due Diligence and Amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859 [2024] OJ

In parallel, corporations are increasingly targeted by litigants. By 2024, 230 strategic corporate climate litigation cases had been initiated.[10] In the Netherlands, although the groundbreaking District Court ruling in *Milieudefensie et al. v. Royal Dutch Shell plc* imposing an absolute emission reduction obligation on the company was overturned on appeal, the Court of Appeal still found that companies 'have their own responsibility in achieving the targets of the Paris Agreement'.[11] Companies contributing to climate change have also faced tort law-based challenges in other countries, including in Germany,[12] New Zealand,[13] and the United States.[14] Moreover, myriad climate-washing cases are emerging across the globe.[15]

III. The IACtHR Raises the Bar

While domestic legislators, litigants, and courts have thus sought to strengthen corporate climate accountability, the situation is different at the international level. Notwithstanding the emergence of relevant soft law instruments such as the United Nations (UN) Guiding Principles on Business

L2024/1760 (CSDDD). See Andreas Buser, 'Protecting the Climate through EU Supply Chain Legislation? Two Critiques and a Compromise', ELO 3 (2024) 617, (621–622). The Directive initially also included a provision requiring covered companies to adopt and implement climate transition plans (Article 22), but this requirement has been removed as a result of an 'Omnibus' process purportedly aimed at simplifying EU law. See European Commission, 'Prosperity and Competitiveness – Implementation Tracker', <https://commission.europa.eu/priorities-2024-2029/competitiveness/implementation-tracker_en>.

10 Joana Setzer and Catherine Higham, 'Global Trends in Climate Change Litigation: 2024 Snapshot' (Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science), 19.

11 *Milieudefensie v. Shell*, 26 May 2021, C/09/571932 / HA ZA 19–379, para. 7.27.

12 OLG Hamm, *Lliuya v. RWE*, 28 May 2025, 5 U 15/17 (Unofficial Translation).

13 *Smith v Fonterra Co-Operative Group Ltd* [2024] NZSC 5.

14 For an overview, see <https://climatecasechart.com/case-category/common-law-claims/>.

15 Juliana Vélez-Echeverri, Catherine Higham and Joana Setzer, 'Climate-washing Litigation: Towards Greater Corporate Accountability?' (Grantham Research Institute on Climate Change and the Environment, London School of Economics and Political Science, 17 April 2024), <https://www.lse.ac.uk/granthaminstitute/news/climate-washing-litigation-towards-greater-corporate-accountability/>.

and Human Rights,[16] and efforts to develop a dedicated treaty on business and human rights,[17] States remain the primary addressees of international law.

Still, only three weeks before the ICJ published its Advisory Opinion, the Inter-American Court raised the bar by spelling out in detail what States must do to regulate companies' activities in combating the climate crisis.[18]

The IACtHR did not shy away from calling out the private sector, finding that it plays an 'essential role'.[19]. Citing the UN working group on business and human rights, the Court found that corporations 'have obligations and responsibilities with respect to climate change, and [their] impacts … on human rights'.[20]

Moreover, it identified several concrete obligations for States, including: enacting legislation that requires companies to conduct due diligence to identify and address climate-related impacts along the entire value chain (i.e., including through emissions taking place abroad); requiring the disclosure of GHG emissions; and adopting regulations countering greenwashing and undermining corporate lobbying.[21]

The IACtHR also clarified that not all companies are equal, and that 'some of them bear greater responsibility for their impacts on climate change due to the risk created by their activities'.[22] Accordingly, the Court found, States 'must ensure a more demanding supervision and monitoring of [these companies'] activities and, in particular, their compliance with the obligations imposed as a result of those responsibilities', specifically singling out fossil fuel-producing and agro-industrial companies in this regard.[23]

16 UN Office of the High Commissioner on Human Rights, 'Guiding Principles on Business and Human Rights: Implementing the United Nations "Protect, Respect and Remedy" Framework' (United Nations 2011).

17 UN Human Rights Council, 'Open-ended Intergovernmental Working Group on Transnational Corporations and Other Business Enterprises with Respect to Human Rights', <https://www.ohchr.org/en/hr-bodies/hrc/wg-trans-corp/igwg-on-tnc>.

18 For an analysis, see Eoin Jackson, 'Advancing Corporate Climate Accountability Post the Inter-American Court Advisory Opinion on Human Rights and the Climate Emergency', EJIL:Talk!, 21 July 2025.

19 IACtHR, *Climate Emergency and Human Rights* (n. 2), para. 345.

20 IACtHR, *Climate Emergency and Human Rights* (n. 2), para. 346.

21 IACtHR, *Climate Emergency and Human Rights* (n. 2), para. 347.

22 IACtHR, *Climate Emergency and Human Rights* (n. 2), para. 350.

23 IACtHR, *Climate Emergency and Human Rights* (n. 2), para. 353.

Lastly, the IACtHR also included observations on the misalignment of investment treaties and climate change. Such treaties can be used by companies to challenge changes in public policies that affect their investments, including for example fossil fuel phase-out policies. The IACtHR finds that 'it is essential to foster a balance that allows States to adopt legitimate regulatory measures to address the climate crisis, without undermining the legal certainty and predictability that international investment agreements seek to provide as essential incentives for foreign direct investment'.[24]

IV. The ICJ Doesn't Follow Suit?

Compared to the Inter-American Court, the ICJ's Advisory Opinion may seem underwhelming. It does not suggest that companies have their own obligations to address climate change (or even acknowledge soft law instruments like the UN Guiding Principles); it does not expound what States' obligations are in any level of detail; it does not touch upon the question of extraterritoriality; and it does not discuss international investment law.[25] Still, it is useful to reiterate what the ICJ *does* say in relation to private actors.

First, the Court finds that the material scope of the questions posed by the UN General Assembly encompasses 'States' obligations concerning all actions or omissions of States, *and of non-State actors within their jurisdiction or effective control*, that result in the climate system and other parts of the environment being adversely affected by anthropogenic GHG emissions'.[26] It thus suggests that the conduct of private actors is relevant to determining the obligations of States as well as the extent to which States have fulfilled those obligations. Moreover, the impacts of those activities are not limited to the impacts on other States, but also on areas beyond national jurisdiction.[27]

24 IACtHR, *Climate Emergency and Human Rights* (n. 2), para. 163.

25 With the exception of Declaration by Judge Cleveland, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, paras. 21–22.

26 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 95 (emphasis added).

27 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 272, with the Court citing ICJ, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, ICJ Rep. 226.

Second, citing last year's Advisory Opinion on climate change by the International Tribunal for the Law of the Sea (ITLOS),[28] the Court posits that Article 4(2) of the Paris Agreement imposes a due diligence obligation 'to take domestic mitigation measures, including in relation to activities carried out by private actors'.[29]

Third, in discussing the contents of the customary due diligence obligation to prevent significant harm, the Court suggests that States ought to adopt 'regulatory mitigation mechanisms that are designed to achieve the deep, rapid, and sustained reductions of GHG emissions that are necessary for the prevention of significant harm to the climate system', and that such 'rules and measures *must regulate the conduct of public and private operators* within the States' jurisdiction or control and be accompanied by effective enforcement and monitoring mechanisms to ensure their implementation'.[30] It hereby echoes its earlier jurisprudence in *Pulp Mills*, in which it found that States' due diligence requires 'a certain level of vigilance in their [appropriate rules and measures] enforcement and the exercise of administrative control applicable to public and private operators, such as the monitoring of activities undertaken by such operators'.[31] In short, States have an obligation to regulate the GHG emissions of private actors, and to ensure those regulations are implemented and enforced.

Fourth, the Court reiterates the importance of regulating private sector activities to safeguard human rights. The Court did not follow the participants, such as Vanuatu,[32] who had referred to a statement by human rights treaty bodies that found that 'States must regulate private actors, including by holding them accountable for harm they generate both domestically and extraterritorially'.[33] The Court nevertheless indicates that States must take the 'necessary measures' to guarantee the effective enjoyment of human rights.[34]

28 ITLOS, *Request for an Advisory Opinion Submitted by the Commission of Small Island States on Climate Change and International Law*, Advisory Opinion of 21 May 2024, case no. 31.

29 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 252.

30 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 282.

31 ICJ, *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, judgment of 20 April 2010, ICJ Rep. 14, para. 197.

32 Republic of Vanuatu, 'Written Statement' (22 March 2024), para. 254.

33 UN International Human Rights Instruments, 'Statement on human rights and climate change', UN Doc. HRI/2019/1 (14 May 2020), para. 12.

34 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 403.

Last but not least, the Court deals with the role of private actors in the context of establishing state responsibility. Although some participants argued that private conduct generally cannot be attributed to a State, the ICJ makes clear that such attribution is not needed as the relevant conduct for the purposes of state responsibility is a State's failure to regulate private actors. Accordingly, 'a State may be responsible where … 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'.[35] Perhaps surprisingly, given its cross-references to ITLOS jurisprudence throughout the Advisory Opinion, the ICJ does not discuss the possibility raised in the ITLOS *Area* Advisory Opinion that in cases 'where the [private] entity in question is empowered to act as a State organ … or where its conduct is acknowledged and adopted by a State as its own', it *is* possible to attribute private conduct to a State.[36] Moreover, whereas some participants had argued that the Court should do so,[37] the ICJ does not elaborate on the specific legal consequences of state responsibility in such cases (e.g., guaranteeing non-repetition by requiring the adoption of specific legislation to regulate private GHG emitters).

IV. Reading between the Lines

Although these findings are useful in that they clarify the obligations to regulate corporations under the Paris Agreement, custom, and human rights law, and indicate that breaching such obligations can give rise to state responsibility, the Court, unlike the IACtHR, falls short of spelling out the contents of the obligation to regulate private actors.

Yet it is by reading between the lines that we can see the broader relevance of the Advisory Opinion for business activities. In particular, several findings may more indirectly have major implications for the private sector.

First, the Court's finding that the 1.5°C threshold is the agreed lodestar for climate action[38] will likely have reverberations in the private sector over

35 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 428.
36 ITLOS, Responsibilities and Obligations of States with Respect to Activities in the Area, Advisory Opinion of 1 February 2011, ITLOS Reports 2011, case no. 17, para. 182.
37 Republic of Colombia, 'Written Statement' (22 March 2024), para. 4.10; Republic of Vanuatu, 'Written Comments' (15 August 2024), para. 190.
38 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 224.

time, as private standards and benchmarks tied to the Paris Agreement's 'well below 2°C' goal will become less credible. To be certain, the Court omits crucial details about the specific pathway towards 1.5°C (e.g., with or without overshoot[39]), meaning that it will still not be entirely clear what exactly States (let alone companies) need to align with. Nevertheless, drawing on private standards such as those developed by the Science-Based Targets Initiative,[40] companies – particularly those that want to brandish their climate credentials – are well advised to develop and implement 1.5°C-aligned climate transition plans. Moreover, companies should expect that plaintiffs in strategic corporate climate litigants will draw upon the Advisory Opinion's endorsement of the 1.5°C goal to argue for stronger corporate climate action.

Second, the Court put major fossil fuel-producing and -consuming companies on notice, stating that '[f]ailure 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'.[41] Although the addressee here is the State, the wrongful acts listed here mainly benefit private companies (e.g., fossil fuel companies being granted exploration licenses, or receiving tax breaks or other subsidies). Moreover, although the Court discussed the scenario where private conduct is not necessarily attributable to the State, as the aforementioned ITLOS *Area* Advisory Opinion reminds us, in some cases such conduct *is* attributable to the State, notably in the case of state-owned enterprises that are also major GHG emitters.[42]

Third, the Court's findings on environmental impact assessments (EIAs) are clearly relevant to those private activities for which an EIA is required. Specifically, the Court finds that 'possible specific climate-related effects must be assessed … at the level of proposed individual activities, e.g. for

39 On the concept of overshoot, see Uta Kloenne et al., 'Interactive: The Pathways to Meeting the Paris Agreement's 1.5 °C Limit', Carbon Brief, 8 December 2023.

40 Science-Based Targets Initiative, 'SBTi Corporate Net-Zero Standard, Version 1.2' (March 2024).

41 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 427.

42 See Alex Clark and Philippe Benoit, *Greenhouse Gas Emissions from State-Owned Enterprises: A Preliminary Inventory* (Columbia University, Center for Energy Policy 2024).

the purpose of assessing their possible downstream effects'.[43] As Judges Bhandari and Cleveland point out in their joint declaration, this means that EIAs for fossil fuel projects require consideration of the downstream impacts of fossil fuel production (i.e., the combustion of fossil fuels by end users), even if these take place in other jurisdictions.[44] The Judges point to relevant domestic cases, including the 2024 *Finch* ruling by the United Kingdom Supreme Court[45] and a subsequent decision by the Court of the European Free Trade Association.[46] However, the ICJ's Advisory Opinion goes beyond such individual rulings by suggesting that, under customary international law, EIAs for fossil fuel projects also in other jurisdictions should consider end-use emissions. This is likely to pose new hurdles for companies seeking to expand fossil fuel production.

V. Conclusion

Those expecting the Court to set out detailed obligations for States on how to regulate private actors, or suggest that private actors have their own climate obligations, may be disappointed. But such expectations were unrealistic from the start. The Court's pronouncements on States' obligations to regulate private actors and the indication that not meeting those obligations may entail state responsibility are a helpful affirmation of the basic requirements for States vis-à-vis the private sector. Moreover, the Court's findings on the 1.5°C threshold, fossil fuels, and EIAs will likely shape the future of corporate climate accountability.

43 ICJ, *Obligations of States in Respect of Climate Change* (n. 1), para. 298.

44 Declaration by Judges Bhandari and Cleveland, *Obligations of States in Respect of Climate Change*, Advisory Opinion of 23 July 2025, paras. 11–17.

45 *R (on the application of Finch on behalf of the Weald Action Group) v. Surrey County Council and Others* [2024] UKSC 20.

46 EFTA Court, *Norwegian State v. Greenpeace Nordic, Nature and Youth Norway*, judgment of 21 May 2025, E-18–24.