Proceedings of ICILLP 2025 Symposium: Property Law and Blockchain Applications in International Law and Legal Policy
DOI: 10.54254/2753-7048/2025.LD29448

How to Defend the Climate by Protecting State Regulatory Capacity

Anxin Ruan

School of Law, Nankai University, Tianjin, China
2311052@mail.nankai.edu.cn

Abstract. In this work, the paper examines how international investment treaties and investor–state dispute settlement (ISDS) mechanisms constrain the ability of states to implement effective climate policies. Focusing on the conflict between investment protection and environmental regulation, this study analyzes how provisions such as fair and equitable treatment (FET) and expropriation clauses have been interpreted to challenge domestic climate measures. Through an in-depth case analysis of Eco Oro Minerals v. Colombia, complemented by a comparative discussion of Philip Morris v. Uruguay and Vattenfall v. Germany, this research reveals how ambiguous treaty language and procedural bias in arbitration can generate a "regulatory chill" that discourages strong environmental action. The paper further argues that reforming investment treaties by incorporating explicit climate exceptions, enhancing transparency in arbitration, and balancing arbitrator appointment can restore states' regulatory autonomy while maintaining investment confidence. Ultimately, this work highlights that defending climate policy within the international investment regime is both a legal and institutional challenge, and that empowering state regulatory capacity is essential to align global investment governance with the objectives of the Paris Agreement.

Keywords: Climate Regulation, International Investment Law, State Regulatory Capacity

1. Introduction

The global community is becoming increasingly aware of the connection between foreign investment and climate goals as the Earth's climate crisis intensifies. A growing number of countries are implementing stringent climate and environmental regulations in response to the climate crisis, in order to meet their international obligations, such as those outlined in the Paris Agreement. However, these measures frequently conflict with the provisions of international investment agreements (IIAs) for investment protection. Traditional Bilateral Investment Treaties (BITs) place a premium on protecting the rights of foreign investors through concepts like national treatment and most-favoured-nation treatment, but they disregard the host nation's role in protecting its environmental interests and obligations. The global community is starting to condemn this negation.

The International Centre for Settlement of Investment Disputes (ICSID) [1], in particular, examines how it causes regulatory restraints, encroaches on domestic climate laws, and undermines

© 2025 The Authors. This is an open access article distributed under the terms of the Creative Commons Attribution License 4.0 (https://creativecommons.org/licenses/by/4.0/).

DOI: 10.54254/2753-7048/2025.LD29448

environmental enforcement, which offer fewer opportunities for Participation by affected communities or civil society organizations.

2. Past research

2.1. Constraints on state regulatory power

In order to understand how buyer-state arbitral awards and investment treaties limit states ' ability to regulate climate, scholars mainly concentrate on the legitimate frameworks that underlie investment treaties and judicial tribunals ' decisions regarding climate measures. And how they might set limits on the state's ability to tackle climate issues, followed by functional options and strategies to minimize the stress.

2.2. The legal mechanism for treaties and arbitral choices

Bilateral investment treaties and the Energy Charter Treaty are examples of funding contracts. Usually contain procedures to protect foreign investors from governmental modifications. These phrases conflict with climate plans: a). Fair and equitable treatment. It provides shareholders with a" stable and predictable" legal setting. This requires that one desist from immediate policy changes that undermine owners ' reasonable expectations, according to tribunals. b). Provisions for Expropriation: Investors usually refute that climate measures (e.g., cases of indirect expropriation that permit compensation) include fossil fuel phase-out pitches and environmental permit expulsions. Whether the determination negates" greatly all" of the market's price or goes against what is genuinely expected from owners, tribunals determine. c). Most-Favorite-State Clauses Investors benefit from additional treaties by using MFN clauses [2]. For example, if a condition offers traders better terms under a more recent agreement, MFN may posthumously expand those protections, limiting regulatory freedom.

The main disagreements between fair and equitable treatment (FET) clauses and environmental regulations, as well as the ambiguous standards for indirect expropriation and the limitations of treaty mechanisms such as general exceptions, are examined by Yin [3]. Contracts that limit express judgment are generally interpreted warmly by courts, which in turn favor investor rights over climate goals. This includes controlling the context of climate exceptions. Tribunals properly limit the scope of climate carve-outs, also when they are included in agreements. Additionally, climate science receives minimal attention. Seldom do courts promote funding commitments over the Paris Agreement or other climate agreements. The court acknowledged the Netherlands' commitments to the atmosphere in RWE v. Netherlands, but decided that stage-out must also comply with the FET and expropriation standards. Prizes have a" cold impact", which dissuades claims from adopting strong climate guidelines. Baetens criticizes tribunals' inconsistent use of FET and expropriation standards, noting that "rigid interpretations may invalidate legitimate climate measures" [4]. Implementing a proportionality check for regulatory steps, utilizing international law principles, and applying these principles to reconcile competing standards are some of the suggested solutions. Aggarwal and Kabra argue that the common instances and carve-outs in older contracts offer limited protection, while calling for more explicit language to safeguard legitimate rules. To stop undermining international conservation efforts, they emphasize the need to align IIAs with weather principles [5].

Significant legal and administrative reforms, such as agreement development and judicial reforms, are necessary to address the conflict between economic concerns and purchase protection.

DOI: 10.54254/2753-7048/2025.LD29448

One aspect of treaty modernization is the inclusion of explicit environmental exceptions. New treaties, such as the EU's draft Carbon Border Adjustment Mechanism (CBAM) and the U.S.-Mexico-Canada Agreement (USMCA), contain climate measure carve-outs, provided they are proportionate and non-discriminatory. The OECD Conference on Investment Treaties ' proposals to correlate treaties with the Paris Agreement, which include excluding coal and gas investments from security and prioritizing lower-carbon projects, are another factor. According to the UN Convention on Transparency and the EU's Investment Court System (ICS), efforts are being made to enhance transparency and establish appellate mechanisms. Additionally, as tribunals often refer to established legal instruments, such as the UN Guiding Principles on Business and Human Rights, to strike a balance between climate obligations and investor rights, there is a growing emphasis on incorporating climate considerations into jurisprudence.

3. Methodology

This paper aims to provide useful insights into how state-level actions on climate policy are hindered by recent arbitration practices, as well as how administrative adjustments and reforms can mitigate tensions between economic regulation and investment protection.

To understand how investment treaty provisions, particularly the fair and equitable treatment (FET) and expropriation clauses, interact with the Colombian government's adopted environmental measures, the paper conducts a thorough analysis of Eco Oro Minerals v. Colombia. In contrast, this analysis will examine how the court interprets the economic carve-outs' impact on state governmental space in light of climate change.

Next, a comparative analysis of Eco Oro's legal arguments with recent international jurisprudence may be conducted. To identify typical patterns and discrepancies in how tribunals address climate protection within the investment mediation framework, this will involve reviewing various significant cases where investment protection provisions intersect with environmental regulations, such as Philip Morris v. Uruguay and Suez and Vivendi v. Argentina. The analysis will examine whether judges continue to promote investor rights and confiscation claims in favor of acknowledgment of climate goals and environmental protections as legitimate public policy goals.

4. Hypotheses

H1: States may contain non-negotiable steps (NPMs) in their investment treaties to promote legislation of climate change. NPPs are powerful instruments in the context of international investment law. There are provisions in several international investment treaties, including those signed by members of the World Trade Organization (WTO), that permit states to enforce their domestic regulatory measures under specific circumstances (e.g., such as environmental concerns, safety, and health).

To safeguard their regulatory independence in common policy, including health and environmental issues, states should include such provisions in expense agreements, as demonstrated by the Philip Morris v. Uruguay case.

However, the specific vocabulary of treaties and the interpretation provided by tribunals may limit the effectiveness of carve-outs. The practical implementation of climate rules may be hampered if a judge does not acknowledge that they fall under the umbrella of "non-prevented steps". Yet, treaties that directly define climate-related cut-outs can help with this problem.

H2: Tribunal treatments may be modified to increase their visibility.

DOI: 10.54254/2753-7048/2025.LD29448

In investor-state dispute settlement (ISDS), transparency is a crucial and evolving issue. The Vattenfall AB v. Germany circumstance, which highlighted the lack of accountability in ISDS techniques, has gained momentum.

In recent years, the UNCTAD and ICSID have made changes to accountability, including allowing second-group proposals and making hearings more accessible to the public.

Buyers frequently object to complete clarity, particularly in matters of business awareness, despite the reputation for greater clarity. Additionally, it may be necessary to make substantial changes to how climate issues are incorporated into the process if clarity alone does not ensure that cultural concerns are effectively addressed.

There is a good possibility that this transformation will be implemented, especially within the framework of climate change, where public interest in the environment is extremely important, given the growing calls from people, institutions, and advocacy groups for more transparent ISDS techniques.

H3: Tribunal guidelines may be changed to include NGOs operating in the environment.

The court's ability to consider common interests and economic issues may be enhanced by including weather-related NGOs in the ISDS process. Implementing this reformation, however, will face major problems.

There is no organized precedent for fully involving Organizations in ISDS trials. Although some courts have permitted second-gathering amicus curiae briefs, this remains a popular practice.

Including NGOs in the decision-making process may complicate matters, introduce bias, and lead to delays in outcomes. Tribunals may even avoid interference from outside, especially if it challenges the standard investor-state dynamic. Additionally, NGOs involved in climate change may lack the necessary expertise to participate effectively in complex mediation trials.

Although this transformation has the potential to significantly improve economic considerations, its medium authenticity is a result of the ISDS system's resistance to established standards. Courts may become more receptive to considering broader customer opinions as climate change becomes a more significant issue in global leadership.

H4: To maintain a better picture of trader and condition interests, the arbitrators in trader-state disputes may remain chosen. In ISDS techniques, there is an effectively documented problem with the stability of interests between buyers and states. Suez and Vivendi v. Argentina serves as an example of how challenging it is to strike a balance between these interests in trader-state disputes, especially in those involving cultural policies such as climate regulation.

The ICSID and UNCITRAL systems allow for the appointment of arbitrators by both parties involved in the disagreement, despite there being no common standard for evaluating judges. Given that many judges have been hired by law firms or companies representing investment interests, critics claim that this creates a potential conflict of interest that may lead to discrimination against investors' interests.

Ensuring a more equitable picture may require basic adjustments to the selection of arbitrators, perhaps through the introduction of quotas or different panels. Established arbitration bodies and constitutional professionals, who are accustomed to a more natural and generally investor-friendly system, do object to this.

Although those who are invested in the current system object against it, increased scrutiny and open pressure for reform might inspire ISDS bodies to adopt more sensible procedures, especially since issues like climate change demand complex decision-making. Due to its ability to successfully address both administrative justice and environmental concerns, this reform has a medium to high level of possible validity.

DOI: 10.54254/2753-7048/2025.LD29448

5. Case analysis and study

5.1. Colombia v. Eco Oro Minerals, 2021

5.1.1. Background and results

The Brazilian government's decision to abolish mining in the páramo, higher-altitude wetland ecosystems, which are ethically sensitive and vital for climate stability and regulation, led to this case [6]. In accordance with the Canada-Colombia Free Trade Agreement (FTA), the French company Eco Oro Minerals, which planned to mine in these areas, was directly impacted. Due to Eco Oro, the moratorium constituted an indirect expropriation of its investment, violating the fair and equitable treatment norm.

The judicial tribunal rendered a subtle ruling on two fronts, acknowledging the legitimacy of Colombia's climate goals and confirming that measures aimed at protecting biodiversity may be subject to environmental exceptions under the treaty. On the other hand, it determined that some aspects of the ban's implementation had legal flaws, establishing a violation of investment protection standards. The results of this case are twofold: first, it demonstrates that host states may still be held responsible under ISDS when treaty language is vague and implementation lacks legal rigor; and second, it demonstrates that climate protection is a genuine public policy objective in investment arbitration.

5.1.2. What role do rules play

The FTA's climate exceptions opportunity was in the middle of this debate. The court interpreted the treaty's speech to allow states to take the necessary steps to preserve diversity and protect people, animal, or plant life. This understanding officially supported Colombia's ban on mining.

The court even examined Colombia's regional economic laws, which designate the páramo communities as protected areas, as well as global commitments, such as the Convention on Biological Diversity. In doing so, the judge demonstrated that it was willing to consider climate legislation obligations in both domestic and international economic law, including the state's obligation to protect the environment and the recognition that climate protection is a genuine public policy goal.

The court determined that some of Colombia's measures were inconsistent with investment safety standards because of the country's application of the rule's legal flaws. This demonstrates that even when economic objectives are excellent, they may agree to the principles of fairness, accountability, and non-bias.

5.1.3. What is shown in it

Three important points are made evident in this instance:

There is a greater awareness of environmental protection in funding mediation. An important law for environmental-related legislation was established when a judicial tribunal, for the first time, expressly declared that treaty exceptions apply to "measures designed to preserve biodiversity."

The interconnectedness of many legal frameworks. International economic treaties and home environmental legislation in Colombia provided various sections of legal justification for its regulatory activity.

The important part of the application and agreement language. Despite the court's understanding of the economic justification, Colombia received a limited ruling based on the ambiguity of the

DOI: 10.54254/2753-7048/2025.LD29448

treaty's provisions and its weak domestic implementation. This demonstrates how economically sensible climate measures are implemented in mediation, not only through the convention's speech but also in their practical application.

5.2. What does it mean in relation to my keyword

How do investment treaties and judicial prizes restrict the ability of states to implement regulations in response to climate change, and why are they of such great impact on the study problem? It demonstrates:

1. Climate behavior is constrained by confusing agreement language. Without certain exceptions, tribunals may also interpret climate protection laws; however, these interpretations are often confusing and leave states responsible.

2. Administrative flaws have undermined economic legitimacy. Treaty vulnerabilities may arise from attempting to utilize them in a manner that is both beneficial and transparent, even if the measures align with international agreements.

3. Climate management is both a hazard and an option thanks to expense mediation. Buyers who challenge climate change may experience a "regulatory chill", which creates a "regulatory chill". The advantage lies in the fact that more and more judges are recognizing environmental and climatic protection as reasonable goals, which encourages states to restructure agreements with obvious weather screening.

In conclusion, Eco Oro Minerals v. Colombia illustrates how funding mediation both supports and constrains climate legislation simultaneously. It emphasizes the importance of clarifying global government's weather exceptions, strengthening the connection between domestic laws and international law, and ensuring fair and open implementation. These lessons can be taken to create purchase agreements that respect genuine buyer interests without compromising urgent climate action.

6. Recommendations

6.1. Directly add climate regulatory exception clauses to treaties

Hosting countries can protect opportunities while maintaining the ability to implement climate plans by including Non-Precluded Measures (NPM) clauses. According to the circumstances of Philip Morris v. Uruguay [7], several state regulations are more likely to be upheld by courts when contracts contain provisions for public health. Potential contracts specifically discuss climate and environment as legitimate exceptions to prevent limiting interpretations that restrict regulatory reach.

6.2. Enhance transparency in arbitration techniques

The impenetrable character of arbitration generally marginalizes climate plan considerations. A lack of public hearings and input from stakeholders may cause tribunals to favour investor interests, according to Germany v. Rattenfall. Public hearings and awards may be a part of reforms, as well as allowing people to view and be involved, to ensure that weather concerns are properly taken into account [8]. UNCTAD and ICSID have largely promoted this pattern, but it still needs incarceration.

DOI: 10.54254/2753-7048/2025.LD29448

6.3. Update the arbitrator appointment process to create balanced objectives

Outcomes are directly influenced by the content of the court. In the case of Suez and Vivendi v. Argentina, the judge was criticized for exaggerating the individual's pursuit without considering the state's need to secure public services during financial difficulties [9]. To prevent architectural pro-investor bias, more equitable appointment processes, such as introducing different expert rosters or appointing arbitrators with backgrounds in climate or human rights, should be considered to ensure that state regulatory interests are protected.

7. Conclusion

The latest model of international investment law, according to this post, poses significant challenges for global cultural actions, although they are not overwhelming [10]. The conflicting goals of purchase security and climate management can be effectively reconciled through targeted agreement development, procedural changes to the trader-state Dispute Settlement (ISDS) mechanism, and the strategic engagement of non-state actors.

Creating clear rights and responsibilities ultimately fosters a more secure and lasting purchasing environment, contrary to what some scholars claim. Overhauling ISDS and imposing climate obligations on traders may hinder foreign investment [11]. Moreover, its validity will become increasingly doubtful if the foreign investment regime overlooks significant common concerns, such as climate change.

References

[1] International Center for Investment Dispute Resolution (ICSID) 2022 Amendments to the Rules and Regulations. Washington, D. C., ICSID Secretariat, 2022. http : //icsid. World Bank.. org/resources/regulations/rules- and-regulations/2022- modifications

[2] Lorenzo, Cotula. The ISDS Reform Agenda: Learning International Investment Law and Climate Change. The Journal of World Investment & Trade 24 (4–5): 766–791.

[3] Yin Mengru, International Investment Arbitration and the Right of Host Countries to Regulate Environmental Protection, National Institute of Development and Security Studies, Jilin University, 2024, DOI: 10.27162/d.cnki.gjlin.2024.006475.

[4] Freya Baetens, The Kyoto Protocol in Investor-State Arbitration: Reconciling Climate Change and Investment Protection Objectives, Sustainable Development in World Investment Law (2011), Global Trade Law Series, Volume 30, pp. 683 – 715.

[5] Manish Aggarwal and Ridhi Kabra, Chapter 7: Regulating for Climate Change Without Breaching Investment Treaties, in Annette Magnusson and Anja Ipp (eds), Investment Arbitration and Climate Change, pp. 165 -178, Dec 2023.

[6] Eco Oro Minerals Corp., Colombia, ICSID Case No. Cab / 1/41

[7] Abal Hermanos S. A. v. the Oriental Republic of Uruguay, ICSID Case No. Cab /10 / 7

[8] Federal Republic of Germany v. Rattenfall AB, ICSID Case No. 12 / 12 / 12 /

[9] Suez, Sociedad General de Aguas de Barcelona, S.A. and Vivendi Universal, S.A. v. Argentine Republic (II), ICSID Case No. ARB/03/19

[10] International Center for Investment Dispute Resolution (ICSID) 2022 Amendments to the Rules and Regulations. Washington, D. C., ICSID Secretariat, 2022. http : //icsid. World Bank. Org/resources/regulations/rules- and-regulations/2022- modifications

[11] Gleason, T. Human rights and international public law perspectives on sponsor-state counterclaims for economic harm in investor-state dispute resolution. 21 Int Environ Agreements, 427- 444 (2021).