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IN A NUTSHELL

Climate Advisory Proceedings: Why Big Polluters' Most Dangerous Arguments to the International Court of Justice (ICJ) Fail

1

BIG POLLUTERS CLAIM

The only relevant international law defining State obligations on climate change is the UN climate regime – UNFCCC, Kyoto Protocol, and Paris Agreement (with some emphasizing the primacy of the Paris Agreement) – and the climate agreements do not actually require States to do very much.

WHY THEY ARE WRONG

The ICJ can and should look to the entire universe of international law, which is not limited to the climate agreements, but encompasses multiple sources of environmental and human rights law, the law of the sea, and other customary and treaty-based law. The climate regime did not erase pre-existing law when it was written, it added to it. The duties to prevent significant transboundary environmental harm and foreseeable violations of human rights did not originate with the climate agreements and they do not end with them. Rather, the climate agreements were established in response to those longstanding duties, which are referenced in the treaties' text, to address how States would cooperate to uphold them in the context of climate change. If the climate regime had never been agreed, States would still have obligations to prevent, minimize, and remedy foreseeable climate harm. Accepting big polluters' argument that the climate regime displaces or limits preexisting preventive principles of customary and conventional international law would mean in practice that the world is less protected because of the adoption of the UNFCCC and the Paris Agreement. As the International Tribunal for the Law of the Sea (ITLOS) made clear in its advisory opinion earlier this year, States' climate obligations are not limited to the UN climate regime, and complying with its terms does not discharge States' duties under other law – such as the law of the sea – which may well require that States do more to tackle the greenhouse gas (GHG) emissions driving climate change or to remedy its damaging impacts. The UN General Assembly did not ask the ICJ to interpret the UNFCCC or the Paris Agreement; it asked the ICJ to clarify what States' legal obligations are under the entirety of international law. The ICJ should reject attempts to narrow the scope of its inquiry or minimize State duties.

2

BIG POLLUTERS CLAIM

The obligations in the UN climate regime are strictly procedural, and the Paris Agreement only requires States to set a national emissions reduction target, not achieve it.

WHY THEY ARE WRONG

The Paris Agreement is not merely a set of voluntary, optional provisions. It is a binding international agreement to enhance the implementation of the UNFCCC – which aims to prevent dangerous anthropogenic interference with the climate system – and strengthen the response to climate change by holding temperature rise to 1.5°C. All the provisions of the Paris Agreement must be interpreted and implemented consistently with that object and purpose – including the requirement of States to formulate and pursue nationally determined contributions (NDCs), self-defined national emissions reduction targets, consistent with the temperature limit. It is all too convenient for big polluters to reduce Paris to mere procedural requirements in an attempt to get themselves off the hook, but such a reading is not consistent with the letter or the spirit of the Agreement. States are required to undertake ambitious efforts that ratchet up over time to reduce greenhouse gas emissions and enhance resilience, and developed countries are obliged to provide financing to developing countries to support necessary climate action. The ICJ should reject attempts to read those duties out of the text and reduce the global climate regime to a mere box-ticking exercise or convert it into a shield to insulate big polluters from accountability.

3

BIG POLLUTERS CLAIM

The duty to prevent significant transboundary environmental harm does not apply to greenhouse gas emissions or climate change.

WHY THEY ARE WRONG

States have a longstanding obligation under customary international law not to cause or allow conduct within their jurisdiction to cause significant environmental harm to other States. That duty, which has been reaffirmed by the ICJ in numerous past opinions, does not apply only to cross-border environmental damage to immediately neighboring States, but to harm to areas beyond national jurisdiction – including the global commons of the oceans and the atmosphere, as well as harm that reaches other States through those mediums. There is no question that the accumulation of greenhouse gas emissions in the atmosphere – principally from fossil fuel production and use – has changed and is changing the global climate system with significant harmful effects on the environment in every country of the world, which undermine human rights. The fact that climate change

does not stem from a single polluting source, but from multiple concurrent sources of GHG emissions does not make the generation of those emissions at a scale causing significant harm to the climate system any less unlawful. To the contrary, the ICJ has recognized that environmental harm may result from multiple concurrent causes. Nor does the fact that the transboundary harm principle has not yet been applied to GHG emissions or resulting climate change mean it is *inapplicable*. Fundamental legal principles are applied to new factual contexts all the time, and surely if an isolated incident of transboundary pollution is unlawful, then a more extreme and widespread form of such pollution, like GHG emissions altering the climate system, must be. Moreover, the sources of planet-warming emissions are neither unknowable nor uncontrollable. It is beyond dispute that fossil fuel production and use generates the majority of anthropogenic GHGs, and it is well within States' power to restrict that conduct. There is thus no legal basis for holding that the duty to prevent transboundary harm does not apply to conduct that generates GHG emissions at a scale causing significant harm to the climate system – and indeed has applied to that conduct for at least 60 years, since the causes and risks of climate change were scientifically understood. There is thus no legal basis for holding that the duty to prevent transboundary harm does not apply to conduct that generates GHG emissions at a scale causing significant harm to the climate system – and indeed has applied to that conduct for at least 60 years, since the causes and risks of climate change were scientifically understood.

4

BIG POLLUTERS CLAIM

Human rights law doesn't explicitly address climate change and thus doesn't impose climate-related obligations on States or give individuals any right to bring climate-related claims.

WHY THEY ARE WRONG

The idea that a law does not apply to climate change unless it explicitly mentions climate change or greenhouse gases is absurd on its face. If that were true, then the law of the sea would not apply, but the world's ocean court, ITLOS, held otherwise earlier this year, finding that States' obligations to protect the ocean applied to greenhouse gas emissions, which are a form of marine pollution. There are countless contemporary problems and threats to human rights that are not expressly enumerated in human rights law, but that does not mean States do not have human rights obligations to take measures to protect against them. As numerous courts, legal and scientific experts have recognized, climate change is unquestionably a human rights crisis, foreseeably affecting all rights, including the rights to life with dignity, the fundamental rights of peoples to self-determination and survival. As such, it necessarily triggers States' obligations to take all measures within their power to prevent and minimize the violation of rights due to climate change caused by conduct within their jurisdiction or control. Human rights law also requires States to ensure effective remedy when rights are violated. When States' breach their international human rights obligations, they have a duty to provide effective remedy and full reparation for the resultant harm to individuals and Peoples.

5

BIG POLLUTERS CLAIM

States do not have obligations to future generations (those not yet born) and future generations have no rights that can be asserted today.

WHY THEY ARE WRONG

Numerous sources of international law and national constitutions in multiple countries recognize the rights of future generations and the need for those currently alive to exercise precaution in acting, or failing to act, in ways that could disproportionately burden future human beings or deprive them of the opportunity to fully enjoy their rights. The escalating climate crisis poses one of the single greatest threats to the rights of present and future generations. Today's youth and those yet to come will face the consequences of the failure to rapidly and effectively reduce greenhouse gas emissions and enhance human and natural resilience to a changing climate. They will live more of their lives in an ever-warming world, and the longer States delay action or opt for speculative technologies in lieu of proven measures to curb emissions driven primarily by fossil fuels, the greater the burden they will face. Human rights law does not limit State duties to the present time and persons currently alive. The rights of future generations and the principle of intergenerational equity find roots in multiple sources of law dating back a century. Failing to recognize the rights of future generations and the duties that States owe them in respect to protection of the climate system would be a deviation from longstanding legal principles.

6

BIG POLLUTERS CLAIM

The UN climate agreements are silent on fossil fuels so States do not have any international legal obligations to phase out fossil fuels and continued fossil fuel production is necessary for development.

WHY THEY ARE WRONG

The science is undisputed: fossil fuels are the primary cause of climate change, as the chief source of the GHG emissions driving it. If States have obligations to prevent and minimize climate change, they have obligations to control its causes. States simply cannot meet their obligations to prevent, reduce and control GHG emissions, avoid the significant transboundary environmental and human rights harm that climate change causes, and take action to keep temperature rise below 1.5°C without phasing out fossil fuels. Thus their obligation to rapidly reduce and move toward eliminating the production and use of fossil fuels follows inexorably from their obligations to prevent climate change and resultant harm. The silence of the Paris Agreement on fossil fuels is not determinative of whether States have any obligation vis-a-vis fossil fuels.

Best available science makes clear that States cannot meet their duties under the Paris Agreement or achieve the ultimate objective of the UNFCCC – to prevent dangerous anthropogenic interference with the climate system – without ending reliance on oil, gas, and coal. While States have a sovereign right to utilize their natural resources, they cannot do so to the detriment of other States or the global community — and evidence abounds that exploitation of fossil fuels causes harm to the environments of every State, the global commons of the atmosphere and the ocean, and the planet as a whole. Individuals and Peoples have a right to development, which includes a right to improve their access to basic necessities and welfare, but that right does not entitle a State to expand the use of resources that ultimately undermine health, welfare, survival, and self-determination – their own Peoples' and others' – by driving climate change. Rather, such a right may give rise to a claim against those States that have contributed the most cumulatively to climate change by generating and failing to regulate sources of GHG emissions under their jurisdiction and control, thereby depriving other Peoples of their human rights and exacerbating the challenge of sustainable development.

7

BIG POLLUTERS CLAIM

States only knew about the causes and harmful consequences of climate change since the late 1980s or early 1990s, so they cannot be held legally responsible for any conduct that predates that time. Historical conduct is legally irrelevant because it either predates any obligation to prevent GHG emissions and climate change, recognized for the first time in the UN climate agreements, or those obligations were not triggered because the harm was not foreseeable.

WHY THEY ARE WRONG

It is particularly disingenuous for big polluters such as the United States to claim that States first became generally aware of the risk that anthropogenic GHG emissions could cause significant global harm only in the late 1980s when widely published studies, including an advisory report to the President of the US in the mid-1960s, clearly tied increasing CO2 levels to humanity's burning of fossil fuels and warned of the possibility of large temperature increases and sea level rise by the year 2000. Ample evidence shows that major emitting States not only were aware of independent scientific studies on the causes and consequences of climate change, but in fact supported and published such research for many decades before the climate regime was established. From at least the early 1960s, widely reported studies revealed that fossil fuels were the primary cause of anthropogenic GHG emissions, the accumulation of which in the atmosphere was changing the climate system, and which, if left unchecked, would lead to dangerous levels of global warming and devastating impacts on people and the planet. This scientific evidence was not in the exclusive domain of any one State; several major emitters were involved in leading research on the greenhouse effect, including the US, Germany, UK, USSR, and Australia, among others. The basic science proving the greenhouse effect and the impact of GHGs on carbon dioxide's warming impact were established by the mid-1800s. By the late 1800s

scientists in multiple countries acknowledged that burning fossil fuels would inevitably raise global temperatures in the future, and more science attributing temperate rise to the burning of fossil fuels emerged before World War II. From the 1950s on, scientists began tracking levels of CO2 in the atmosphere and acknowledged the need to address the "carbon dioxide problem". This awareness triggered the duties of States to take all necessary measures to prevent GHG emissions at levels causing significant transboundary environmental harm and infringing human rights. Instead, major emitters not only failed to reduce but actively expanded fossil fuel production and use, increasing emissions. That conduct over many decades breached their duties, and thus they must cease the wrong, guarantee it won't recur, and repair the injuries caused.

8

BIG POLLUTERS CLAIM

Because the sources and impacts of climate change are so complex and diffuse, it is not possible to establish causation, linking specific State action or inaction to climate change-related harm.

WHY THEY ARE WRONG

It cannot be that because multiple States have contributed to climate change, none can be held accountable, and because so many people are harmed, none can demand justice. That answer is too convenient for those who bear the largest responsibility for the current escalating crisis, as a result of their cumulative contributions to GHG emissions, and too unjust for all the rest, suffering disproportionately from the adverse impacts of a crisis they didn't cause. Numerous courts have considered and rejected the argument that climate change is too complex to adjudicate. Under longstanding jurisprudence, the fact that multiple States may have concurrent legal duties or may have breached their obligations does not diminish the responsibility of each individual State to comply with its obligations or face legal consequences when its failure to do so causes harm. States can share responsibility for injury to which they have jointly contributed, in proportion to their relative contributions to the harm. Climate change is not a "whodunnit"? Science leaves no doubt as to its primary causes and its devastating consequences for people and the environment. Methods exist to calculate the cumulative emissions of individual States over time, just as they do to calculate the contributions of specific industry actors over time, such as the Carbon Majors study showing that over 60% of all anthropogenic CO2 emissions since the start of the industrial era can be traced to just 90 fossil fuel and cement producers. At the same time, attribution science confirms the role of climate change in adverse events and impacts, such as storms, heatwaves, fires, floods, and drought. There is thus no factual or legal hurdle to establishing causation–linking a State's generation of or failure to regulate GHG emissions from sources within its jurisdiction and control, to climate change-related injuries–and no bar to holding individual States accountable for climate harm.

9

BIG POLLUTERS CLAIM

The conduct causing climate change does not trigger legal consequences and the ICJ need not reach the question of responsibility for climate harm because the climate regime displaces the law of state responsibility and substitutes cooperation for liability, and because it is impossible to establish breach of legal obligation or prove causation of climate harm.

WHY THEY ARE WRONG

While they employ diverse strategies, big polluters are engaged in a clear and sustained attack on reparations, cutting off avenues for redress and climate justice. It is a fundamental principle of law and justice that where there is a right, there is a remedy, and where a State has breached its duties and injury ensues, it must cease the wrong and repair the harm. In the face of escalating climate devastation, big polluters' defense is to deflect the question, deny that they ever breached their legal obligations, or insist that their conduct is too attenuated from the injuries. Some States contend that the Court's inquiry is only forward-looking, as it concerns States' existing legal obligations, or that the only legal consequences are those dictated by the climate treaties, which require only cooperation, not accountability. But nothing in the formulation of the question precludes the possibility that existing obligations applied in the past, and thus that past conduct, like present conduct, breaches those duties. And facts can be ascertained linking specific injuries to climate change, and climate change in turn to the conduct of a State or group of States, laying the foundations for accountability. Moreover, that the UN climate agreements do not address liability for climate harm does not mean that no legal consequences attach to States' violation of their obligations under those agreements or other applicable law. Nor does it mean that responsibility can only be addressed through political frameworks for loss and damage dialogue and funding. It simply means that default principles found under the law of State responsibility apply, alongside those set forth under the law of human rights. Given that the polluting conduct of countries over decades breaches multiple international legal obligations, those principles require cessation of the breach and reparation of the resultant injuries. Such measures are not acts of charity, but obligations of justice. The ICJ's guidance would be incomplete without addressing the legal consequences when States' failure to uphold their duties causes harm to the climate system – as it so clearly has.

10

BIG POLLUTERS CLAIM

The form that any legal consequences would take is too fact- and context-specific to be addressed in an advisory opinion on climate change.

WHY THEY ARE WRONG

The Court can and should affirm that the basic principles underpinning the legal consequences for an internationally wrongful act, and the multiple forms that cessation, non-repetition and reparation may take, apply without limitation in the context of climate change. Remedy is by no means limited to monetary compensation, and may encompass a variety of structural measures that address non-recurrence and reparation. Cessation of the breach not only requires halting wrongful, climate-destructive conduct but also providing guarantees of non-recurrence. When it comes to conduct breaching international climate obligations – including the failure of major cumulative emitters to rapidly reduce GHG emissions, as well as their continued investment in, authorization of, and support for expansion of fossil fuel production and use – cessation could entail immediate action to halt expansion of oil, gas, and coal production and use, and accelerate the phaseout of fossil fuels. Reparation of injuries resulting (in whole or in part) from a State's wrongful act can take multiple forms, including restitution, compensation (for both material and non-material harm), and satisfaction. In the case of climate-related harm, reparation could encompass structural reforms such as debt cancellation to free up fiscal space for climate action, ecosystem restoration, support for adaptive capacity and human mobility, including climate-induced displacement and migration, and recognition of the territories, maritime boundaries and continued statehood and sovereignty of States threatened with disappearance due to climate change-induced sea level rise. In the case of compensation, the inability to prove the exact quantum of damages does not preclude the right to remedy or an award. Nor will the fact that multiple States' breaches of their duties have contributed to the climate-related injuries preclude individual State responsibility for remedy. The Court must not exempt the conduct causing climate change and its dire consequences from fundamental precepts of international law, including the maxim that where there is a right, there is a remedy. To do otherwise would give a free pass to big polluters and let them dictate the law.