The Struggle Against Fossil Sovereignty

The International Court of Justice in the Climate Crisis

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Private actors are still expanding fossil fuel exploration and production while states continue to enable and even encourage such activities by granting subsidies, licences, and legal protection. This happens even though most fossil fuels must stay in the ground if the Paris target of limiting global warming to 1.5˚C is to stay within reach (IPCC,IEA, andUNEP agree). Apart from the decision of the COP28 in Dubai to transition away from fossil fuels, however, an explicit legal prohibition of measures in support of fossil fuels is not in sight. Or is it? In itsadvisory opinion on Climate Change, the International Court of Justice (ICJ) raises the spectre of illegality for high emitters' continued support of fossil fuels.

Currently, a tangled web of domestic, transnational and international legal norms still enables and entrenches fossil fuel exploitation, production, and consumption. A number of participants in the ICJ advisory proceedings drew attention to this problematic legal infrastructure. We share their concern and sharpen the focus. We introduce the notion of "fossil sovereignty" as a heuristic concept to capture the *ensemble* of otherwise heterogeneous legal norms that promote and protect fossil fuels. We note that the concept of sovereignty is an enigmatic one, often used to refer to a factual entity, somehow located behind the law. In the words of Nazi jurist Carl Schmitt: 'sovereign is he who decides on the state of exception'. In contrast, we are inspired by the tradition of Schmitt's nemesis Hans Kelsen, who decoupled the concept of sovereignty from the notion of an omnipotent state entity and reduced it to the elevated and largely independent position of a group of legal norms in a given legal order. We thus also employ the concept of fossil sovereignty to highlight the *relative independence* of the fossil-friendly legal infrastructure from political interference. Over time, fossil interests have become legally entrenched in a way that has, to date, largely withstood pressure for change. Fossil sovereignty stretches across different regimes and can therefore take the shape of a many-headed Hydra that has proven to protect the integrity of fossil interests remarkably well.

The ICJ now confronts the "ongoing production, licensing and subsidizing of fossil fuels" and links these activities with concrete international legal obligations. It takes on three components of fossil sovereignty that we discuss in turn: the law of fossil fuel subsidies and licenses; the international legal protection of fossil investments; and the question of liability for damages induced by climate change. Alongside the ICJ's many achievements in strengthening international law in response to the climate crisis, we foreground the advisory opinion's potential for the pivotal struggle against fossil sovereignty – in other words, its role in dismantling existing fossil-friendly legal infrastructures.

Fossil fuel subsidies and licenses

New licences and subsidies for fossil fuels have stood in the way of a faster transition to renewable energy for decades. Curtailing state support or even prohibiting private activities on the supply side has been one of the most contentious issues in international climate negotiations over the last years. It is remarkable that the ICJ, for the first time, linked the issue of fossil fuel production with conventional and customary law obligations of states. The ICJ noted:

> *"obligations pertaining to the protection of the climate system do not rest exclusively with consumers and end users, but also include activi-*

> *ties such as ongoing production, licensing and subsidizing of fossil fuels." (para. 94)*

The ICJ thus specifies state obligations regarding the production of fossil fuels. Does this mean that fossil fuel subsidies or new licences for fossil fuel exploration and production are wrongful acts in the view of the ICJ? The answer is: Yes! Under certain conditions.

The ICJ opined that the customary duty to prevent significant harm to the environment obliges states to act with due diligence (paras. 135, 280). This due diligence requirement is stringent and includes the procedural obligation to regulate and assess the environmental impacts of private high-emitting projects on the supply side (para 254, 296). If these projects conflict with the reduction obligations of the respective State in light of the binding 1.5˚C target, such projects may indeed constitute a violation of the State's customary no harm obligation or obligations under Art. 4 of the Paris Agreement.

That providing fossil fuel subsidies or new licenses can amount to an internationally wrongful act became even more apparent when the ICJ considered the legal consequences:

> *"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." (para 427)*

A related question is whether or not impact assessments required for new fossil fuel extraction projects must include so-called "downstream" effects of producing new fossil fuels, namely those emissions generated by the consumption of the fuels. The ICJ explicitly stated that the required impact assessments *can* include downstream effects (para. 298), and moreover suggested that they probably *should*.

As Judges Bhandari and Cleveland point out in their joint declaration, the ICJ

> *"acknowledges that assessments of potential risk of significant harm to the climate system must take into account the cumulative effect of all relevant activities occurring within a State's jurisdiction or control, including risks resulting from fossil fuel production, licensing and subsidies and the foreseeable 'downstream' consequences of such activities in other jurisdictions" (para. 13).*

The advisory opinion thus makes a crucial contribution to dismantling the stronghold of fossil sovereignty. To reach the 1.5˚C target, high-emitting private sectors must be subject to robust legal regulation. High-emitting projects must now be subject to strict eligibility assessments, as high-emitting States, in particular, otherwise risk committing an internationally wrongful act, triggering all consequences of state responsibility – including reparations.

The International Legal Protection of Fossil Investments

The international legal protection of fossil investments is another main component of fossil sovereignty. Judge Cleveland, in her declaration, recalls the IPCC's finding in this regard that

> *"international investment agreements may lead to 'regulatory chill', which may lead to countries refraining from or delaying the adoption of mitigation policies, such as phasing out fossil fuels" (para. 21).*

If nothing else, the expansive legal protection of fossil investments risks significantly increasing the cost of climate policies. International investment law inexorably links climate protection regulation with significant financial liabilities for States, enabling investors who can no longer realise their high-emitting projects to sue States for actual and projected losses of profit – often to the tune of billions.

A prominent illustration of this is thewidely discussedarbitral award in *Rockhopper v. Italy*. Briefly: "No Oil" was the slogan around which Italian civil society mobilised to prevent new oil drilling off the Italian coast. Protests were ultimately successful, and in 2016, the Italian Parliament passed a law banning oil exploration within 12 nautical miles of the coast. But before that happened, in 2014, the UK-based

company Rockhopper had bought an Italian enterprise for US$40 million in hopes of securing offshore drilling rights – hopes dashed by the new law. In response, Rockhopper took the Italian State to arbitration. In 2022, the three arbitrators found that Italy had violated Rockhopper's property rights and had to pay the company US$250 million in compensation for lost profits. (The award wasrecently annulled for reasons unrelated to the substance of the case.)

Rockhopper v. Italy amplified growing concerns that international investment law is fundamentally at odds with effective climate protection. The European Union and its Member States have since withdrawn from the European Energy Charter Treaty (ECT), which provided the jurisdictional basis for Rockhopper's claim against Italy. While some argue that the ECT's sunset clause ensures that the legal protection of investments continues for another 20 years beyond the treaty's termination, this claim can berebutted with solid legal doctrine.

The ICJ's advisory opinion lends further support to efforts aimed at pushing back the international legal protection of fossil investments. As Judge Cleveland points out:

> *"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." (para 22)*

Under the tangible influence of the fossil lobby, the international legal protection of fossil investments has expanded significantly – often through judicial activism within a regime ridden with conflicts of interest. The ICJ has significantly strengthened the legal position of States prioritising their obligations under international climate law over the commercial interests of the fossil fuel industry.

Liability for Climate Change-Induced Damages

The body of law we associate with the concept of fossil sovereignty has, to date, largely shielded activities relating to the extraction, production, and consumption of fossil energy from legal responsibility and liability. High-emitting actors have, by and large, been able to claim that their GHG emissions have been, well, legal. Private actors will continue to play that card for as long as States do not comply with their obligation to regulate and adjust the domestic legal frameworks for their GHG emissions.

The ICJ has now made clear that breaches of the obligation to regulate private emitters may give rise to the 'full panoply of legal consequences' under the rules of state responsibility (para 445). Moreover, these obligations also can have *erga omnes* character (para 440). Together with its findings on causality and attribution, the ICJ thus created solid grounds for inter-state climate litigation regarding wrongful acts or omissions.

As Judge Yusuf spelled out in his separate opinion, the question of the legality, i.e. wrongfulness, of an act or omission is decisive for international legal *responsibility*, but not necessarily so for questions of *liability*. Actors can under certain conditions be liable for injury caused by acts that are *per se* lawful. Most legal systems know the principle according to which injuries caused by certain high-risk activities are sufficient for triggering liability, even if the act or omission at issue is not wrongful (*sic utere tuo ut alienum non laedas*). Strict liability regimes are also well established in various international liability conventions regarding activities that, due to their scale, may have dangerous and largely uncontrollable effects (e.g., Art. IIConvention on International Liability for Damage caused by Space Objects).

Given that the catastrophic effects of further increasing GHG emissions are well established, it is unsurprising that some domestic courts have recently espoused stricter standards of liability when it comes to injury in the climate crisis. The recent decision in*Lliyuya vs. RWE* serves as a good example: a Peruvian farmer, Saúl Lliyuya, brought a civil action against the German energy corporation RWE, alleging that the company's contribution to climate change infringed on his property rights. RWE relied on the fact that all of its GHG emissions had been licensed (legal) under German public law, and argued that this effectively

precluded liability. The German court rejected this argument, holding that legality does not preclude liability, and that foreseeable harm to protected rights (e.g., property) is sufficient to trigger liability.

Adequate liability standards in the climate field could be further clarified by way of subsequent resolutions of the United Nations General Assembly or through other legal and political instruments. For now, the ICJ left the question of liability for arguably lawful emissions open.

Concluding Remarks

Over the course of decades, law has primarily functioned to enable and support the extraction, production, and consumption of fossil energy. As a result, planetary destruction remains not only awfully lucrative but also, in many cases, legally protected. The substantive impact of the ICJ's advisory opinion on climate change will depend largely on how effectively it contributes to dismantling the stronghold of fossil sovereignty. That tangled web of fossil-friendly laws has often obstructed or blunted progressive climate politics or any other interference with unsustainable, fossil-driven profit-making.

The ICJ has strengthened States' due diligence obligations concerning private sector emissions. Its findings on States' obligations in the climate crisis push for changes in international investment law, and they leave room for developments in the liability standards for injury caused by GHG emissions. These are critical steps in the struggle against fossil sovereignty.

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