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What Are the Implications of the International Court's Climate Change Advisory Opinion for Provinces?

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Case Commented On: Obligations of States In Respect of Climate Change, Advisory Opinion of the International Court of Justice, July 23, 2025

ABlawg has already published posts on constitutional climate change litigation in Canada (the *La Rose* case, here) as well as two posts on the important unanimous Advisory Opinion (AO) of the International Court of Justice (ICJ) on Climate Change, here and here. This post assesses the implications of the AO for a province within the Confederation of Canada, specifically a province like Alberta which is a significant producer of carbon fuels and a significant emitter of greenhouse gases: see ECCC, *Greenhouse Gas Emissions* (2025).

One possible reaction is that the AO can have no implications for a province. After all, as the title to the AO demonstrates, the Opinion is directed at States. Alberta is not a State. And it is Canada that is a party to two of the three main climate change treaties (and indeed all of the other environmental and human rights treaties discussed by the Court) and not Alberta. The federal government may be limited by the division of powers in the *Constitution Acts, 1867 – 1982* when it comes to implementing those treaties in domestic law: *Attorney General for Canada v Attorney General for Ontario, et al. (*the *Labour Conventions* case*)*, 1937 CanLII 362 (UK JCPC), [1937] A. C. 326 but it is the federal State of Canada that bears international responsibility for breach of Canada's international obligations, even where a province may have triggered that breach: *LaGrand Case (Germany v USA)*, [2001] ICJ 466.

Alberta sought to underline the constitutional limitations on the federal government's capacity to implement international treaties this last year when it adopted a new version of the *International Agreements Act*, SA 2025, c I-3.8 in the 2025 Spring Legislative Session. Section 3 of that Act (which purports to apply to all of Canada's international agreements whether "entered into before or after the coming into force of this Act") provides that:

> 3 An international agreement, or a part of an international agreement, that includes a matter that is not exclusively within federal jurisdiction is not binding on the Government of Alberta and is not part of the domestic law of Alberta unless that international agreement, or that part of the international agreement, is implemented by or under an Act of the Legislature of Alberta.

And then there is the point that an AO, much like a Reference opinion of the Supreme Court of Canada, is technically not even binding on the States to whom it is directed.

I want to argue in this post that the above undersells the significance of the AO for the provinces of Canada, specifically those parts of the AO that are based on customary international law rather than treaty law. The outline of my argument is as follows:

1. The ICJ is clear that the law relevant to the protection of the climate system includes both treaty law and customary law. Each influences the other. The content of each may overlap, but each has independent standing.
2. Treaties must be implemented in domestic law to be part of the law of Canada and any domestic implementation legislation is subject to the division of powers, but customary international law is automatically part of the law of Canada.
3. The Court identified two relevant norms of customary international law: (a) States have a duty to prevent significant harm to the environment, including the climate system and (b) States have a duty to co-operate with each other in good faith to prevent significant harm to the climate system.
4. The duty to prevent significant harm is an obligation of conduct which a State must discharge by acting with due diligence, using all means at their disposal, to prevent activities carried out within their jurisdiction or control from causing significant harm to the climate system.
5. Both the duty to prevent significant harm and the related duty to cooperate are part of the domestic law of Canada and, as such, each Province has an obligation to act in a manner consistent with those duties.
6. The question of whether a Province is acting in a manner consistent with its obligations under customary law as part of the law of Canada should be justiciable and amenable to a declaration in a court of competent jurisdiction.
7. Additionally, the two rules of customary law may operate as legal constraints on provincial statutory decision makers and regulators.

The following sections elaborate on these claims, but before doing so I will summarize the questions that the United Nations General Assembly posed to the Court. The General Assembly posed two questions for the Court:

a) What are the obligations of States under international law to ensure the protection of the climate system and other parts of the environment from anthropogenic emissions of greenhouse gases for States and for present and future generations?
b) What are the legal consequences under these obligations for States where they, by their acts and omissions, have caused significant harm to the climate system and other parts of the environment …

The first question asked the Court to focus on explicating what are usually referred to as "primary obligations", while the second question is largely concerned with the customary law rules of state responsibility. The chapeau to the questions referenced a series of instruments as well as some general principles, but the Court noted that in answering these questions it was not confined to the listed instruments and that it could consider different sources of law. The Court held that the relevant law included the United Nations Charter, climate change treaties, other multilateral environmental agreements, the Law of the Sea Convention and obligations under human rights law. However, in addition, and as already noted, the Court also identified two relevant rules of

customary international law that required consideration: (a) the duty to prevent significant harm to the environment, including the climate system, and (b) the duty to co-operate for the protection of the environment. These two rules (and principally the first) are the focus of this comment.

1. The Relevant Law Includes Customary International Law as well as Treaty Law

Article 38 of the Statute of the International Court of Justice recognizes a number of different sources of international law. While treaties may be the most prominent and accessible source of international legal obligations, legal obligations may also be sourced in customary law, general principles of law as well as judicial decisions and learned writings. There is no hierarchy between treaty and customary norms, and, as the Court confirms in this case, they may both operate together and in harmony while retaining their separate existence: see especially AO at paras 309 - 315. A principal reason for the Court to identify customary rules as well as treaty rules, even where each covers similar ground, is that treaty rules only bind the parties to the treaty, whereas customary law in principle binds all states. (See especially AO at paras 309 – 315, relationship between treaties and customary norms.) As it happens, Canada is a party to all the treaties discussed in the AO, save the Kyoto Protocol from which Canada withdrew in 2011. My interest in the customary norms discussion in the AO has less to do with the party status issue and more to do with the distinct legal status of customary law as part of the domestic law of Canada.

2. Customary Law is Automatically Part of the Law of Canada

Whereas a treaty must be implemented by a competent domestic statute for the treaty rules to become part of the law of Canada in the sense of creating rights and obligations for Canadians, a customary norm is automatically part of the law, at least in the absence of conflicting legislation: *Nevsun Resources Ltd. v Araya*, 2020 SCC 5 (CanLII), [2020] 1 SCR 166 (*Nevsun*) at paras 86 – 95. And, as such, customary norms should ordinarily be treated as law (and not fact) of which judicial notice may be taken without requiring proof (*Nevsun* at paras 96 – 99) - subject to the qualification that "alleged customs may be contested and require proof". International *Air Transport Association v Canada (Transportation Agency)*, 2024 SCC 30 (CanLII) at para 73.

As Justice Abella noted in *Nevsun* in the context of a motion to strike:

> The doctrine of adoption in Canada entails that norms of customary international law are directly and automatically incorporated into Canadian law absent legislation to the contrary …. That may mean that the [the plaintiffs'] … customary international law claims need not be converted into newly recognized categories of torts to succeed. Since these claims are based on norms that already form part of our common law, it is not "plain and obvious" to me that our domestic common law cannot recognize a direct remedy for their breach. Requiring the development of new torts to found a remedy for breaches of customary international law norms automatically incorporated into the common law may not only dilute the doctrine of adoption, it could negate its application. (at para 128)

I acknowledge that Justices Brown and Rowe, in dissent, took a more limited view of the extent to which a "mandatory" as opposed to a "prohibitive" customary norm might be subject to automatic adoption as part of the domestic law of Canada. (*Nevsun* at paras 169 – 170)

3. The Court Recognized Two Customary Norms: (a) The Duty to Prevent Significant Harm to the Environment, and (b) The Duty to Co-operate for the Protection of the Environment

While the identification of a customary norm "sometimes presents" as Justice Abella noted in *Nevsun* "a challenge for definitional precision" (*Nevsun* at para 74) for a domestic court, in this case the ICJ has done the hard work for us by recognizing two relevant customary norms: (a) the duty to prevent significant harm to the environment, and (b) the duty to co-operate for the protection of the environment. It is hard to imagine a domestic court rejecting this guidance. In the recent *Lho'Imggin v Canada*, 2025 FC 1586 (CanLII) Justice McVeigh observed that while "The ICJ Opinion is advisory and does not directly impose legal obligations on states" it does outline" key principles that may affect state conduct and has substantial persuasive legal authority since it emanates from the principal legal organ of the United Nations." (at para 42)

The ICJ spent considerable time unpacking the content of these two norms (AO at paras 131 – 142 and 271 - 315). The following paragraphs expand on that unpacking.

(a) The Duty to Prevent Significant Harm to the Environment

The Court began its analysis by rejecting the contention that this rule only applied to scenarios, like the famous *Trail Smelter Arbitration* (1941), in which authorities in state A fail to diligently regulate operations within its jurisdiction such that damage is inflicted within state B. In effect, the Court considered that it had already decided otherwise in its (albeit badly divided) Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (1996) and that therefore:

> This jurisprudence affirms that the duty to prevent significant harm to the environment is not confined to instances of direct cross-border harm and that it applies to global environmental concerns. Therefore, the customary duty to prevent significant harm to the environment also applies with respect to the climate system and other parts of the environment. (AO at para 134, and see also at para 273)(emphasis added)

Next, the Court confirmed that the duty to prevent significant harm is an obligation of conduct (rather than an obligation of result). An obligation of conduct requires all states to act with due diligence to fulfill the obligation (AO at 135). Furthermore, since climate change "poses a quintessentially universal risk to all States … of a general and urgent character" "the Court recognizes that the standard of due diligence for preventing significant harm to the climate system is stringent …" (AO at paras 137 and 138). The Court offered a succinct explanation of the implications of an obligation of conduct much later in its judgment and as part of its discussion of state responsibility as follows:

> [For an obligation of conduct] a State does not incur responsibility simply because the desired result is not achieved; rather, responsibility is incurred if the State fails to take all measures which were within its power to prevent the significant harm. In this connection, the notion of due diligence, which calls for an assessment *in concreto*, is the relevant standard for determining compliance … Thus, a State that does not exercise due diligence

> in the performance of its primary obligation to prevent significant harm to the environment, including to the climate system, commits an internationally wrongful act entailing its responsibility. (AO at para 409)(emphasis added).

One important point to note here is that the responsibility of the State is engaged by the mere failure to take the necessary measures of due diligence. The elements of the cause of action (to use the language of the common law) do not include proof of damage. It is enough that the State has failed to take the necessary measures to control entities within its jurisdiction whose operation may contribute to significant harm to the environment, including the climate system.

The Court also elaborated on the obligation to prevent significant harm. It first clarified that the duty is only triggered when there is a risk of significant harm, recognizing, as had the International Tribunal of the Law of the Sea (ITLOS) in its own *Climate Advisory Opinion*, that this depends on "among other factors, an assessment of the risk and level of harm combined" (AO at para 275). The Court's own assessment of the risk is worth quoting at length since the Court addresses not only the science (where it relies heavily on the work of the Intergovernmental Panel on Climate Change (IPCC)), but also ideas of cumulative effects:

> 276. The Court is of the view that a risk of significant harm may also be present in situations where significant harm to the environment is caused by the cumulative effect of different acts undertaken by various States and by private actors subject to their respective jurisdiction or control, even if it is difficult in such situations to identify a specific share of responsibility of any particular State. States must assess the possible cumulative effects of their acts and the planned activities under their jurisdiction or control. Although such "activities may not be environmentally significant if taken in isolation, . . . they may produce significant effects if evaluated in interaction with other activities" (Climate Change, Advisory Opinion, ITLOS Reports 2024, p 128, para. 365).
> (AO at para 276)(emphasis added)

In other words, the duty may be triggered for a State if activities within the State contribute to emissions in cases where the cumulative effect of global emissions collectively cause significant harm to the climate system, even if the emissions from that individual State could not themselves be said to pose a risk of significant harm.

> 277. The Court notes the assessment by the IPCC that the risk of significant harm to the climate system results from the cumulative impact of various human activities ….. That risk is distinct in the sense that, unlike the instances of transboundary harm, anthropogenic climate change is inherently a consequence of activities undertaken within the jurisdiction or control of all States, although individual States' historical and current contributions differ significantly. It is the sum of all activities that contribute to anthropogenic GHG emissions over time, not any specific emitting activity, which produces the risk of significant harm to the climate system. This does not mean that individual conduct leading to emissions cannot give rise to the obligation to prevent significant transboundary harm even if such activity is environmentally insignificant in isolation. However, it means that the risk associated with climate change is a consequence of a combination of activities by

different States, and that States need to avert the risk through a co-ordinated and co-operative response.

278. The determination of "significant harm to the climate system and other parts of the environment" must take into account the best available science, which is currently to be found in the reports of the IPCC. …. Informed by the best available science and based on the above considerations, the Court considers that the adverse effects of climate change, including rising temperature levels, sea level rise, negative effects on ecosystems and biological diversity, and extreme weather events, indicate that the accumulation of GHG emissions in the atmosphere is causing significant harm to the climate system and other parts of the environment. The question whether any specific harm, or risk of harm, to a State constitutes a relevant adverse effect of climate change must be assessed *in concreto* in each individual situation or case.

279. Accordingly, the Court considers that the diffuse and multifaceted nature of various forms of conduct which contribute to anthropogenic climate change does not preclude the application of the duty to prevent significant harm to the climate system and other parts of the environment. This duty arises as a result of the general risk of significant harm to which States contribute, in markedly different ways, through the activities undertaken within their jurisdiction or control. (AO at paras 276 – 279)(emphasis added)

The Court then went on to elaborate on the content of the duty of due diligence noting that "the higher the probability and the seriousness of possible harm, the more demanding the required standard of conduct." (AO at para 275)

Given the importance of this discussion, I examine the content of the due diligence obligation in more detail under heading #4. I now turn to examine the second primary obligation of customary law identified by the Court.

(b) The Duty to Co-operate for the Protection of the Environment

The Court confirmed that there is a customary law duty to cooperate for the protection of the environment and that such duty:

> … is intrinsically linked to the duty to prevent significant harm to the environment, because uncoordinated individual efforts by States may not lead to a meaningful result. It also derives from the principle that the conservation and management of shared resources and the environment are based on shared interests and governed by the principle of good faith… (AO at para 141).

The Court elaborated on the shared resource approach later in its judgment when it observed that unlike, say, a watercourse, "the climate system … is a resource shared by all States" and, as such "[c]o-operation between States is the very foundation of meaningful international efforts with respect to climate change." (AO at para 302) The content of the duty to cooperate is informed by a number of principles including the principle of sustainable development, equity,

intergenerational equity, and the precautionary principle as well as the duty of good faith (AO at para 303).

The duty includes the duty to cooperate with a view to reaching "a collective temperature goal [and] … to achieve concrete emission reduction targets or a methodology for determining contributions of individual States, including with respect to the fulfilment of any collective temperature goal." (AO at para 305) While treaties and treaty institutions represent the most obvious forum for fulfilling the duty to cooperate, "States are not required to conclude treaties" – but "they are required to make good faith efforts to arrive at appropriate forms of collective action." (AO at para 304) And while the Court acknowledged that States have "some discretion in determining the means for regulating their GHG emissions" this does not allow States "to refrain from co-operating with the required level of due diligence or to present their effort as an entirely voluntary contribution which cannot be subjected to scrutiny." (AO at para 306)(emphasis added) In other words, a State is not the sole judge of the adequacy of its cooperative efforts. "Climate change is a common concern. Co-operation is not a matter of choice for States but a pressing need and a legal obligation." (AO at para 308)

4. Due Diligence as the Required Standard of Conduct

If due diligence is the required standard of conduct for responding to the risk of significant harm to the climate system as "an integral and vitally important part of the environment [to] … be protected for present and future generations" (AO at para 273), what does this require of States? (AO at para 280). The Court summarizes its guidance under seven separate headings: (i) appropriate measures, (ii) scientific and technological information, (iii) relevant international rules and standards, (iv) different capabilities, (v) precautionary approach or principle and respective measures, (vi) risk assessment and environmental impact, and (vii) notification and consultation.

The required "*appropriate measures"* are stringent: due diligence requires a State to "use all the means at its disposal in order to avoid activities which take place in its territory, or in any area under its jurisdiction, causing significant damage to the environment of another State" (at para 281 and quoting from *Pulp Mills on the River Uruguay (Argentina v. Uruguay)*, Judgment, I.C.J. Reports 2010 (I), para. 101.). This requires "a national system, including legislation, administrative procedures and an enforcement mechanism necessary to regulate the activities in question, and . . . exercise adequate vigilance to make such a system function efficiently, with a view to achieving the intended objective" (AO at para 281)(emphasis added), and quoting from the ITLOS, *Climate Change, Advisory Opinion*, at para 235). These "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." (AO at para 282)

Under the "*science and technology"* heading the Court noted that where the "generally recognized scientific evidence that it is highly probable that significant harm will occur, the standard of due diligence will be more demanding" and that due diligence also "requires States to actively pursue the scientific information necessary for them to assess the probability and seriousness of harm." (AO at para 283) The availability of technology also "influences what can reasonably be expected of a State." (AO at para 286)

"Generally accepted standards" also influence what might be expected of states in fulfilling their due diligence obligation. And, interestingly, such standards might include standards adopted within the treaty-based climate regime, thereby illustrating the close inter-connection between customary and treaty norms (AO at paras 287 – 289 and at paras 312 – 313).

The "*precautionary principle"* also informs what due diligence requires with the result that if there are plausible indications of risks "a State 'would not meet its obligation of due diligence if it disregarded those risks'." (AO at para 294 and quoting from the ITLOS AO with respect to the Area (2011) at para 131)

Procedural obligations may also be important to the duly diligent discharge of the obligation to prevent significant harm. This may require states to conduct environmental impact assessments, although in the context of climate change the Court recognizes that this may cause states to adopt more general procedures, in addition to project specific procedures to assess the "possible downstream effects" of specific activities (AO at para 298). In sum:

> While the Court is aware that the cumulative and diffuse nature of GHG emissions may involve some difficulty in risk assessment, it considers it important that all States provide for and conduct EIAs with respect to particularly significant proposed individual activities contributing to GHG emissions to be undertaken within their jurisdiction or control, on the basis of the best available science. Such specific climate-related assessments could identify previously unknown information about possibilities for reducing the quantity of GHG emissions by relevant proposed individual activities. (AO at para 298)(emphasis added)

A State's procedural obligations as part of a due diligence duty to prevent significant harm to the climate system may also require notification and consultation with other States:

> The Court considers that, given the specific character of the processes leading to climate change, notification and consultation are particularly warranted when an activity significantly affects collective efforts to address harm to the climate system, such as the implementation of policy changes in relation to the exploitation of resources linked to GHG emissions, or with respect to information that is necessary for meaningful co-operation among States to address the adverse effects resulting from GHG emissions. (AO at para 299)

In sum, a principal customary law obligation of all States is a duty to prevent significant harm to the environment including the climate system. That duty is a duty of conduct not a duty of result. As such, the duty of due diligence (which is not a free-standing duty but instead a necessary element of the customary law rule) addresses how a state must discharge the obligation imposed by the rule. The inquiry is necessarily multi-faceted and context specific but that does not imply a lack of stringency. Indeed, the overall standard to be achieved is that prescribed in the Court's formal Order:

> [The Court, unanimously] Is of the opinion that customary international law sets forth obligations for States to ensure the protection of the climate system and other parts of the

environment from anthropogenic greenhouse gas emissions. These obligations include the following:

(a) States have a duty to prevent significant harm to the environment by acting with due diligence and to use all means at their disposal to prevent activities carried out within their jurisdiction or control from causing significant harm to the climate system and other parts of the environment …

(b) States have a duty to co-operate with each other in good faith to prevent significant harm to the climate system and other parts of the environment, which requires sustained and continuous forms of co-operation by States when taking measures to prevent such harm; (AO at para 457)(emphasis added).

I have previously commented on the way in which the concept of due diligence effectively imposes duties on what might previously have been considered discretionary powers here: Bankes, "Reflections on the role of due diligence in clarifying State discretionary powers in developing Arctic natural resources" (2020) 56 Polar Record and I have also noted that there are similarities between the international law relating to due diligence and the developing domestic jurisprudence on the duty of diligent implementation of historic (and modern) treaties between the Crown and Indigenous peoples: see "*Restoule*: Tugging on the Rope and the Duty of Diligent Implementation of Treaty Promises".

5. Both the Duty to Prevent Significant Harm and the Related Duty to Cooperate are Part of the Domestic Law of Canada and, as such, each Province has an Obligation to Act in a Manner Consistent with those Duties

It is impossible to read Alberta's new *International Agreements Act* quoted above without gaining the impression that Alberta considers that it is free to pick and choose which of Canada's international obligations it needs to respect, especially where such obligations touch upon what Alberta regards as areas of its exclusive jurisdiction - such as any matters relating to the development of its natural resources. While this may be a tenable legal position with respect to treaty obligations (to the extent that claims of "exclusive" jurisdiction are actually valid – see "The Word 'Exclusive' Does Not Confer a Constitutional Monopoly, Nor a Right to Develop Provincial Resource Projects)" it is not a tenable position when it comes to rules of customary international law. "Customary obligations are the same for all States and exist independently regardless of whether a State is a party to the climate change treaties" (AO at para 315) and such obligations are automatically part of the common law of Canada with or without the consent of a province.

We are not here concerned with the validity of federal legislation seeking to implement customary or treaty obligations (as in the *Labour Conventions* case) in relation to climate change law. Rather, the question is that of whether a province has a legal duty to have regard to obligations under customary international law relating to climate change when regulating (or choosing not to regulate) activities within its jurisdiction. This especially concerns activities over which a province claims to have exclusive jurisdiction (e.g. the granting of Crown oil and gas rights or a decision to condition (or not) grants or licences with a requirement to install carbon capture and storage technology), that contribute to the harm or significant risk of harm to the global climate system. Similarly, parties may seek to raise a case questioning the failure of a jurisdiction to establish an emissions reduction target, or to update a manifestly inadequate or outdated target (see, for

example, Alberta's *Emissions Management and Climate Resilience Act*, SA 2003, c E-7.8 s 3), or to relax an existing emissions reduction target - either at the economy wide level or with respect to a particular sector or a particular greenhouse gas (e.g. methane).

My view is that if customary law obligations are part of the common law of Canada, then it must follow that a province has a duty to prevent significant harm to the climate system unless it can point to some sort of immunity or valid legislation that expressly conflicts with the customary law rules. Just as a corporation does not enjoy a general immunity from customary law norms (see *Nevsun* at paras 104 – 113) neither does a province. And for discussion of the question as to whether or not a province may legislate in violation of customary international law see G V La Forest, "May the Provinces Legislate in Violation of International Law?", (1961) 39 Canadian Bar Review 78, 1961 CanLIIDocs 28. I acknowledge that while I refer to La Forest's discussion, this is not the place to pursue this point. It is contested (see, for example, the dissenting judgment of Justices Brown and Rowe in *Nevsun* at para 173) and requires a more detailed treatment. That said, I note that the ordinary presumption is one of consistency and not conflict: *International Air Transport Association v Canada (Transportation Agency)*, 2024 SCC 30 (CanLII). In other words, the fact that a province may have established an emissions target or standard that falls short of that required by customary international law is not itself legislation that conflicts with the customary law norm. A province does not create a conflict simply by legislating in a field that is also covered by international law.

Much the same is true of obligations under customary international human rights law. For example, to the extent that elements of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) represent customary international law, it is incumbent on provincial governments to respect those rules, regardless of whether or not that jurisdiction has adopted UNDRIP implementing legislation: see my comments on both the trial and appellate decisions in *Gitxaala v British Columbia (Chief Gold Commissioner),* 2025 BCCA 430 (CanLII) here and here. I note that Justice McVeigh in the recent and apparently relevant *Lho'Imggin v Canada* rejects the claim that a breach of an international treaty obligation is justiciable in a domestic court, but their opinion fails to deal with the scenario in which the international obligation is grounded in customary international law (*Lho'Imggin* at para 54, although later (at paras 57 – 59) Justice McVeigh clearly recognizes this distinction).

I emphasise that the duty to apply customary rules of international law is a duty of *domestic* law. International law may provide the *content* of norms to be applied, but it is the domestic law of Canada that *requires* the application of the norm. And it is the domestic courts that are competent to assess whether a province has discharged its domestic law obligations that automatically became part of the domestic body of laws. By contrast, it the responsibility of a competent international court to assess whether Canada has fulfilled its obligations under customary international law or treaties. The two propositions are complementary and not inconsistent.

6. The Question of Whether a Province is Acting in a Manner Consistent with its Obligations Under Customary Law as Part of the Law of Canada Should be Justiciable and Amenable to a Declaration in a Court of Competent Jurisdiction

The question of whether a Province is acting in a manner consistent with its obligations under customary law is a question of law that is justiciable. The concerns as to justiciability that were articulated by Justice Côté in *Nevsun* (at paras 294 – 312) when assessing the application of a rule of customary law are not relevant here since the subject of the type of inquiry contemplated by this post is the conduct of a sub-unit of the federation rather than a foreign State.

While the existing case law is perhaps usually concerned with the question of whether a positive law of a jurisdiction is inconsistent with a rule of international law (see, for example, *Reference as to Powers to Levy Rates on Foreign Legations*, 1943 CanLII 39 (SCC), [1943] SCR 208 and *Reference re Secession of Quebec*, 1998 CanLII 793 (SCC), [1998] 2 SCR 217 at paras 108 – 146), there is no reason to think that questions as to the failure to legislate or the failure to legislate to a particular standard are exempt from legal inquiry. As we have seen in the discussion above, due diligence obligations typically require a State to establish an appropriate legislative framework, including appropriate monitoring and enforcement, in order to discharge its obligations. The seminal *Trail Smelter Arbitration* is illustrative. That case, as is well known, involved a lead zinc smelter in Trail, British Columbia, a smelter that was undoubtedly operating on the basis of provincial authorizations. The Arbitral Award ultimately concluded that the regime under which the smelter was operating was not sufficiently stringent to protect downwind properties in the State of Washington from suffering significant harm from the continued operation of the smelter. Accordingly, as part of its Award, the tribunal prescribed a new and more restrictive operating regime for the smelter that, in its estimation, would allow the smelter to operate in such a way as to avoid significant transboundary harm. That regulatory regime in other words was designed to bring the smelter into compliance with the no significant harm rule of customary international law.

A person should be able to make an application for a declaration that a province has failed to fulfil its duty under customary international law to prevent significant harm to the environment including the climate system if that person is able to establish public interest standing based on the usual rules: *British Columbia (Attorney General) v Council of Canadians with Disabilities*, 2022 SCC 27 (CanLII), [2022] 1 SCR 794. As the Court noted in that case, in exercising or withholding its discretion to grant public interest standing:

> … a court must cumulatively assess and weigh three factors purposively and with regard to the circumstances. These factors are: (i) whether the case raises a serious justiciable issue, (ii) whether the party bringing the action has a genuine interest in the matter, and (iii) whether the proposed suit is a reasonable and effective means of bringing the case to court. (at para 28)

The purposes that justify granting standing include (i) giving effect to the principle of legality and (ii) ensuring access to the courts, or more broadly, access to justice. (ibid at para 30) While a court should not attach particular weight to any particular principle, "The legality principle encompasses two ideas: (i) state action must conform to the law and (ii) there must be practical and effective ways to challenge the legality of state action." (at paras 32 & 33) The latter is particularly significant in the context of climate policy.

The ICJ for its part confirmed that obligations with respect to the protection of the climate system are owed *erga omnes* (i.e. a duty owed to all States):

> In the present context, the Court considers that all States have a common interest in the protection of global environmental commons like the atmosphere and the high seas. Consequently, States' obligations pertaining to the protection of the climate system and other parts of the environment from anthropogenic GHG emissions, in particular the obligation to prevent significant transboundary harm under customary international law, are obligations *erga omnes*. (AO at para 440)

A court's jurisdiction to grant a bare declaration is broad but not unlimited. As the Court stated in *Ewert v Canada,* 2018 SCC 30 (CanLII):

> A declaration is a narrow remedy but one that is available without a cause of action and whether or not any consequential relief is available … A court may, in its discretion, grant a declaration where it has jurisdiction to hear the issue, where the dispute before the court is real and not theoretical, where the party raising the issue has a genuine interest in its resolution, and where the respondent has an interest in opposing the declaration sought … (at para 81).

"A bare declaratory judgment does not grant consequential or coercive relief" but it does "set out the parameters of a legal state of affairs or the legal relationship between the parties." (*Shot Both Sides v Canada*, 2024 SCC 12 (CanLII) at paras 65 & 66) The issue of whether or not a province is in breach of its duty to avoid significant harm to the environment, including the climate system, is not academic, hypothetical or merely theoretical (ibid at para 82).

7. The Two Rules of Customary Law May Operate as Legal Constraints on Provincial Statutory Decision Makers and Regulators

It is well established that there is an interpretive presumption that statutes and the exercise of statutory powers must be exercised in conformity with Canada's international obligations, whether arising from treaties or customary international law. As such they may help inform whether a decision was a reasonable exercise of an administrative power: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII) at para 114, *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 (CanLII) at paras 104 – 117. For example, the two rules of customary law recognized by the Court in the AO may discipline the exercise of statutory powers under Alberta's *Emissions Management and Climate Resilience Act* or the regulations enacted under that statute. They may also be relevant considerations for the Alberta Energy Regulator in exercising its powers under numerous energy enactments.

Concluding Comments

The Court's Advisory Opinion illuminates the customary law obligations of States with respect to the protection of the climate system. It does so at a general level as befits an Advisory Opinion. It cannot go beyond that since the Court lacked a concrete fact pattern against which to measure whether a particular State is in compliance with its international obligations, and, in particular, any due diligence obligations that may apply to that State. I have followed the same somewhat abstract approach here. I have not tried to assess whether the conduct of any particular province falls below

the standards established by customary international law with respect to the protection of the climate system. Instead, I have tried to make the case that the customary law obligations articulated by the Court are part of the common law of Canada, that those obligations impose stringent due diligence obligations of conduct, and that it is therefore legitimate to question whether a province's regulation of activities (or the failure to regulate those activities) that contribute to the risk of significant harm to the climate system, meets or fall short of the standards prescribed by customary international law. To paraphrase Justice Abella in *Nevsun*:

> Customary international law is part of Canadian law. [Alberta] is a [province] bound by Canadian law. It is not "plain and obvious" to me that … claims against [Alberta] based on breaches of customary international law cannot succeed. (*Nevsun* at para 132)

Such an issue should be justiciable and the declaratory approach presents an alternative to (or fallback for) the constitutional climate change cases such as *La Rose v Canada*, 2023 FCA 241(CanLII), *Mathur v Ontario*, 2024 ONCA 762 (CanLII), (leave to appeal dismissed) and *Dykstra v Saskatchewan Power Corporation*, 2025 SKKB 175 (CanLII) or the *Nevsun*-inspired potential tort-based claims such as *Lho'Imggin.* Admittedly, the declaratory approach does not provide coercive relief, but it does have the potential to clarify the legal obligations of a province. That should count for something if we are, as the *Charter* proclaims, a country that is founded on respect for the rule of law. Finally, and additionally, the two customary rules recognized by the Court may be relevant to the exercise of statutory powers by decision makers and regulators, such as when considering the approval of new carbon projects.

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