

Climate Liability under Public International Law

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1. State responsibility for transboundary harm

According to the International Panel on Climate Change (IPCC), a growing pollution of the atmosphere with greenhouse gases (GHG), in particular CO₂, will in all probability lead to a further rise in the global average temperature and as a result to serious environmental damage.

Despite the complexity of causation and the cumulative nature of climate damages – the author argues – that under applicable customary law, states which allow the emission of GHG within their territory, are obliged to limit GHG emissions and may be liable to compensate other states that suffer damage from climate change impacts.

His legal analysis is based on the "Draft Articles on Prevention of Transboundary Harm from Hazardous Activities" (ILC-Prev. Draft), and the "Draft Articles on Responsibility of States for Internationally Wrongful Acts" (ILC-Res. Draft) of the International Law Commission (ILC), as well as the assumption that both documents correctly reflect the applicable substantive norms of customary international law.

2. Duty of prevention

2.1 According to the rules of the ILC Prev. Draft, states threatened by significant environmental harm resulting from activities on the territory of another state, have the right – depending on the likelihood of damages – to demand the removal of the risk. In the case of possible "disastrous" damages a "low probability" is already sufficient to justify such a request. If, however, (only) "significant" damage may occur, "high probability" is required to trigger the duty of prevention. The climate risks associated with GHG emissions – for example as a result of the expected sea level rise or severe weather events on the level of the typhoon "Hayan" that hit the Philippines last year – can be qualified as "disastrous" and, therefore, meet these preconditions.

2.2 Many states contribute to GHG emissions. However, the cumulative nature of climate change does not exclude the attribution of damages according to the concurrent causation of each individual state. Since all emissions contribute to the total pollution of the atmosphere with GHG, no state can argue that emissions released within its territory may not cause climate change and its impacts. The duty of prevention therefore applies in relation to a certain state if the emissions attributable to that state significantly increase the risk of environmental damage in another state.

2.3 The standard of proof required to substantiate a claim for the violation of the duty of prevention can be derived from the decision in the famous Trail Smelter arbitration – the foundational decision of modern international environmental law – and the generally recognized rules of evidence under public international law. Accordingly, "clear and

convincing evidence” of a serious potential damage must be provided (to comply with preventative duties). This condition is met for various risks outlined in the IPCC reports. Proof “beyond reasonable doubt” is not required.

3. Possible compensation claims

3.1 States that violate their obligations under international law are usually liable vis-à-vis the injured states in accordance with the rules of the ILC Res. Draft for compensation. A state which contrary to the requirements of the ILC Prev. Draft allows GHG emissions within its territory that affect the climate, violates its obligations under public international law.

3.2 The Trail Smelter decision excludes legal liability for transboundary environmental damages if they are “too indirect, remote and uncertain”. This exclusion applies to indirect economic damages resulting from adverse effects on the environment, i.e. the connection between injury and the financial loss. Damages to the environment itself must be made good to the extent that they were foreseeable.

3.3 Whether the attribution of damages to climate change that have already occurred (as a result of GHG emissions) also requires “clear and convincing evidence” – as in the case of preventive measures – is questionable. In the Trail Smelter decision, the court considered the greater likelihood (“more probable”) sufficient to establish causation subsequently. This suggests that to prove the causal link between climate change and the resulting harm the less stringent standard of “preponderance of evidence” generally used in public international law applies.

3.4 Due to the cumulative character of climate change damages, every state is severely liable only to the extent concurrent causation can be attributed. The arbitral award in the Trail Smelter case further specifies that if multiple causes coincide in substantial damage, the court may estimate the proportional contribution of different factors. This notion can be transferred to the calculation of states’ liability share for climate damage damages. The prerequisite is that such an estimate is not speculative, but can be made from “reasonable inference”.

4. Conclusions

States that are threatened by serious environmental damage as a result of climate change can request other states, on whose territory GHG emissions are released that (taking into account the already given GHG pollution of the atmosphere) increase the risk of such damage, to take basic measures to limit GHG emissions. If climate damages occur, compensation claims are possible.

The ability to raise claims under general international law may become more relevant, if the ongoing international negotiations to address climate change and to reach a fair burden sharing agreement between “polluter states” and their “victims” will fail.

In a nutshell:

- States are obliged to limit GHG emissions originating in their territory if these emissions increase the risk for “serious” transboundary environmental damage with high probability.

- If “disastrous” damages are possible even a low likelihood of their occurrence as a result of additional GHG emissions suffices to give rise to a duty of care to limit GHG emissions accordingly.
- The IPCC reports provide “clear and convincing” evidence for risks associated with climate change as a result of GHG emissions.
- States can be held partially liable to pay compensation to other states for damages caused by climate change proportionate to their respective contributions.
- “Preponderance of evidence” can be regarded as sufficient for proving causation when compensation for damages due to climate change is sought.
- The amount of the partial liability of a single state for environmental damages caused by GHG emissions may be prorated based on reasonable inference provided there is sufficient factual evidence for such a (not purely speculative) estimation.