Interstate liability for climate change-related damage
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Conclusion

The idea of climate litigation at the interstate level is not new. Tuvalu considered suing certain industrialized states before the ICJ already in 2002. A small island developing nation, Tuvalu is extremely vulnerable to climate change and its very existence is threatened by the rising sea levels. In the absence of an effective international agreement on climate change, it is not surprising that litigation should come as an attractive option to states that are particularly affected by the injurious effects of climate change.

In general, interstate liability may serve a number of different purposes. First, it may perform a corrective function through the enforcement of primary international obligations *ex post facto*; second, it may dissuade states *ex ante facto* from engaging in conduct that would lead to liability thereby performing a preventive function; and third, liability may have a reparative function, which is aimed at shifting the injurious consequences of particular conduct from the victim to its author.721 If the functions of liability are the ‘whys’ of litigation, then the focus of the present work can be said to have lain with the ‘hows.’ The present research has explored the pathways to interstate liability for climate change-related damage and concluded that litigation may be pursued under the law of state responsibility. Legal obstacles to state responsibility have been identified and ways to overcome them have been proposed.

The international political response to climate change being based on science, the first chapter of this treatise focused on the findings of the IPCC AR4. It addressed the causes and consequences of climate change; its impacts across the various geographical regions and sectors; and the main response strategies, namely mitigation and adaptation.

The second chapter described the international climate regime concluding that the current non-binding emissions reduction pledges together with the binding quantified emissions limitation and reduction commitments under the KP second commitment period would not be sufficient to keep the global average temperature rise under 2°C above preindustrial levels.722 It has been put forward that the existence of a gap between the GHG emissions rise consistent with the current

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721 See Chapter 3.
pledges and that necessary to keep the global average temperatures under the 2°C threshold calls for adequate mitigation measures. It has been argued that liability can play a crucial role in ensuring that states take such measures.

In order to identify a legal framework for compelling states to take mitigation measures, the third chapter examined the different modalities of interstate liability used in international law, distinguishing between state responsibility and state liability. It has been found that the legal regime of state responsibility is engaged upon the commission of an internationally wrongful act, whereas state liability originates from the injurious consequences of lawful activities. The chapter discussed four conceptual approaches to state liability in international law giving rise to: (1) the obligation to pay compensation; (2) the obligation to negotiate a redress settlement; (3) the obligation to ensure prompt, adequate, and effective compensation; and (4) the obligation to take response action.

It has been determined that the absolute liability approach to interstate liability involving the obligation to pay compensation is unsuitable for addressing climate change-related damage for several reasons. First, since in international law the absolute liability approach is associated with ultrahazardous activities carrying significant risk, it cannot extend to the emission of GHGs because the emission of GHGs is not a new or dangerous activity in and of itself, and can only cause global warming when reaching high atmospheric concentrations. Second, states would be unlikely to assume absolute liability for climate change-related damage because most of GHG emissions originate from the private sector. Third, difficulties associated with tracing climate change-related damage in the territory of one state to GHG emissions originating in another cannot support the imposition of absolute liability on the source state, particularly given the fact that no state is carbon-neutral. It has been determined that although a liability mechanism imposing on states the duty to pay compensation would be an attractive option for countries suffering from the injurious consequences of climate change, in practice this approach is limited to space activities associated with ultrahazardous risks.

It has further been concluded that the approach to state liability based on the duty to negotiate on the reparation of transboundary harm when no internationally wrongful act has been committed is of little utility in the climate change context. This approach to liability has not taken hold in international law in general as it does not actually require states to reach an agreement, nor can it compel states to submit their dispute to a third party for settlement. Based on the occurrence of transboundary harm, the approach involving the obligation to negotiate a redress settlement would also entail complications with demonstrating the causal connection between the emissions of GHGs in one state and the harm suffered in another’s territory (also see above).
Furthermore, it has been established that the approach to liability giving rise to the obligation to ensure prompt, adequate, and effective compensation cannot be relied upon in addressing climate change-related damage. While this approach would be attractive for climate change victims, such as members of coastal communities or inhabitants of low-lying islands, in international law its application has been limited to situations involving hazardous activities. It has been concluded that the emission of GHGs does not fall under the definition of ‘hazardous,’ and states cannot be required to ensure prompt, adequate, and effective compensation to victims of harm caused by activities that are considered non-hazardous. Another difficulty with applying this approach to climate change-related damage is that the obligation to ensure prompt, adequate, and effective compensation channels liability to operators. This could potentially result in unreasonably wide coverage as virtually every private party emits GHGs.

The last approach to state liability analysed in the third chapter has likewise been rejected as unsuitable for situations involving climate change-related damage. First, the obligation to take response measures is mainly directed at the consequences of harm to the environment and cannot be relied upon to ensure that states take measures to mitigate climate change. Second, while most of climate change-associated harm amounts to damage to property, the obligation to take response measures only extends to damage to the environment per se. Third, even if it could be argued that climate change is causing purely environmental damage, the obligation to take response measures would not be effective, particularly in cases of loss of territory to the sea level rise. Finally, since this approach engages operators’ liability, additional problems would arise with identifying the operator responsible for the environmental harm caused by climate change.

Having concluded that none of the state liability schemes discussed can be successfully applied to climate change-related damage, Chapter 3 turned to the law of state responsibility in order to determine whether it can provide a legal framework for the accountability of states for climate change-related damage. While state liability pertains to situations when lawful conduct has resulted in harm, state responsibility is engaged in instances when a state has committed an internationally wrongful act. The chapter provided a thorough analysis of state responsibility by first focusing on its origins, including the notion of an internationally wrongful act, attributability of wrongful conduct to the responsible state, breach of an international obligation, retroactivity, and circumstances precluding wrongfulness; and distinguishing between due diligence obligations and absolute obligations, and obligations of conduct and obligations of result. Next, the chapter considered the content of state responsibility and the legal consequences of an internationally wrongful act, namely cessation and reparation (restitution, compensation, and satisfaction). Third, Chapter 3 dealt with breaches of obligations.
arising under peremptory norms of international law and, finally, the implementation of state responsibility was examined. It has been concluded that, as a general framework, the law of state responsibility has the potential to encompass accountability of states for climate change-related damage.

Given the absence of international jurisprudence on interstate liability for climate change-related damage, Chapter 4 examined a selection of legal actions launched in various national jurisdictions in order to identify the legal hurdles encountered by plaintiffs in the process of litigating climate change. It has been submitted that the relevance of domestic litigation for potential interstate claims can be justified through the notion of general principles of law. Legal challenges have been identified for three groups of climate change cases: (1) claims related to procedural injury; (2) claims for injunctive and/or declaratory relief; and (3) claims for compensation. They have included issues related to non-justiciability of political questions, standing, causation, attribution, and retroactivity. An analysis of climate change litigation in domestic courts has shown that albeit claims related to procedural injury have enjoyed the most degree of success, procedural justice cannot offer any immediate relief to climate change plaintiffs. Claims for compensation have thus far been unsuccessful and while suing for damages could be an attractive strategy for climate change claimants, actions for damages can only address adaptation to, and remediation of, climate change that is either happening or has already taken place. Conversely, injunctions are associated with mitigation action due to their preventive potential and as such can be effective in combating climate change. Injunctive relief claims have enjoyed some degree of success in domestic courts.

In order to evaluate whether the law of state responsibility can provide a legal framework for the accountability of states for climate change-related damage and whether it can provide an effective remedy in such situations, Chapter 5 undertook to identify primary obligations relating to climate change and analyse the practical application of the secondary rules of state responsibility in the international climate policy context. Basically, Chapter 5 has sought to apply the legal framework of the law of state responsibility to the climate change problem. Having distinguished the relevant primary obligations of states, namely international obligations on climate change mitigation; obligations on climate change adaptation; and the customary obligation to prevent significant transboundary harm, the fifth chapter determined the origins of state responsibility for breaches of those obligations by industrialized
states party to the KP; EITs; industrialized states not party to the KP; and developing states.  

With respect to obligations on climate change adaptation, it has been concluded that industrialized countries’ failure to finance adaptation measures in developing states or their failure to provide to developing countries technology and capacity-building resources for adaptation purposes cannot give rise to state responsibility.

With regard to obligations on climate change mitigation, it has been submitted that since the international climate regime only requires industrialized states to adopt mitigation policies and measures, and developing states are not legally bound to take such measures, only developed countries’ responsibility can be engaged for failure to do so. It has been argued that in practice it would be difficult to demonstrate breach in the absence of an internationally accepted benchmark for mitigation policies and measures. As far as quantified GHG emissions reduction or limitation targets are concerned, it has been put forward that in order to launch a compensation claim against an industrialized state for failure to meet its target, the claimant state would have to wait until after the obligation is due following the end of the first commitment period.

It has been submitted that, today, breach of the obligation to prevent significant transboundary harm can provide the sole legal basis for engaging the international responsibility of any state that fails to take adequate mitigation measures. Under the KP, industrialized countries are only required to achieve their quantified emissions reduction or limitation targets under the first commitment period by the end of 2012.  

Under the KP review and reporting procedures, assessment of non-compliance will not occur before 2015. It has been argued that the claimant state could argue already now that if a developed state is on a clear trajectory towards non-compliance with its KP target, it cannot be considered to have acted with due diligence in its efforts to comply with the customary duty to prevent significant transboundary harm. Furthermore, since the obligation to prevent significant transboundary harm is part of customary international law, it does not differentiate between developed and developing states. Industrialized states, party or non-party to the KP alike, as well as developing states can be held responsible for breaching the obligation, i.e. lack of due diligence in a state’s efforts to prevent significant transboundary harm would give rise to its international responsibility. It has been submitted that in order to prevent significant transboundary harm, states have a procedural obligation to regulate activities within their jurisdiction or control. Substantively, in order to prevent significant transboundary harm associated with

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723 See 1992 UNFCCC, Art. 3(1) (the principle of common but differentiated responsibilities and respective capabilities).

724 Following the Doha amendment, under the second commitment period, industrialized countries are required to achieve their individual emissions limitation and reduction commitments by the end of 2020.
climate change, they must take mitigation action. It has been argued that such mitigation action must be compatible with the global temperature rise of less than 2°C above pre-industrial levels.\(^725\) It has further been argued that, since the obligation to prevent extends to actual as well as potential harm, the claimant state would have to show that GHG emissions originating in the respondent state are merely capable of causing damage by way of their contribution to global warming.

Chapter 5 has established the origins of state responsibility for industrialized states, including EITs, party to the KP (\textit{e.g.} Canada); industrialized states not party to the KP (\textit{e.g.} the US); and developing states (\textit{e.g.} China). It has been submitted that despite Canada’s withdrawal from the KP, it is responsible for breaching at least some of its obligations under the Protocol and could additionally be challenged for acting in breach of its customary duty to prevent significant transboundary harm. It has been argued that the US as well as heavily emitting developing states could likewise be held responsible under international law for breaching the obligation to prevent significant transboundary harm.

It has also been put forward that the law of state responsibility can provide a legal basis for seeking injunctive relief that would require the responsible state to take adequate mitigation measures or discontinue the construction or modernization of a single major GHG emitting source until the relevant procedural and substantive duties are fulfilled. It has been submitted that under the law of state responsibility, cessation and guarantees of non-repetition would in effect amount to injunctive relief. A declaration of wrongfulness by an international court calling for cessation of wrongful conduct in respect of a state failing to take adequate mitigation measures and thus acting in breach of the obligation to prevent significant transboundary harm would be equivalent to an injunction. It has also been suggested that obligations on climate change mitigation be considered as peremptory norms of international law, no derogation from which is permitted.

It has been submitted that since all states are affected by climate change and can therefore be considered injured, all states have the \textit{locus standi} to invoke state responsibility. It has also been recognized that it may not be easy to submit a dispute regarding alleged breaches of obligations related to climate change mitigation or the obligation to prevent significant transboundary harm to a third party for settlement because the acceptance of international courts’ jurisdiction by states is voluntary. It has therefore been suggested that in situations, when not all parties to the dispute have recognized the jurisdiction of a particular court, self-help, which could take the form of trade-related environmental countermeasures,

\(^725\) Cancun Agreements: Outcome of the work of the Ad Hoc Working Group on Long-term Cooperative Action under the Convention, UNFCCC Decision 1/CP.16 (2010), para. 4.
may be an attractive option for a state suffering from the injurious consequences of climate change.

Now that the main findings of the present treatise have been summarized, it is important to draw some conclusions from the analysis of domestic litigation related to climate change (Chapter 4) in terms of what can be learnt from it for the purposes of interstate responsibility. The legal hurdles singled out in the analysis of domestic jurisprudence (political question doctrine, standing, causation, attribution, and retroactivity) do not all recur to the same extent in the context of interstate responsibility. Yet, the way domestic courts have treated these issues, e.g. causation, can provide helpful insights for the benefit of interstate claims that may be brought in the future.

The first legal obstacle identified is the political question doctrine. It has not been a major obstacle in procedural injury claims but presented considerable difficulties in claims for compensation and actions for injunctive relief. Some courts have ruled that claims before them presented questions of a political nature that should be left to the executive and legislative branches of government. The political question doctrine is based on the domestic governance model of the separation of powers. It has no analogue at the interstate level due to the fundamentally different nature of the international legal order whereby all states enjoy sovereign equality.

The second hurdle in domestic climate change litigation is standing. Generally, it has not been problematic in procedural injury claims but created substantial difficulties for plaintiffs seeking compensation or injunctive relief. In US case law, the requirements for standing have been identified as causation (see below), redressability, and injury, all of which need to be satisfied for a claim to proceed on the merits. Whereas the requirements of causation and redressability in domestic claims have been difficult to meet, plaintiffs have had little difficulty showing injury.

At the interstate level, standing is also a requirement for bringing a claim. In order to have standing under the law of state responsibility, the claimant state has to demonstrate injury. It is unlikely to present major challenges because, as far as climate change is concerned, every state is an injured state and as such, has the locus standi under the law of state responsibility (see Section 5.5.1).

The third, and the most significant, obstacle climate change plaintiffs have grappled with is causation. An analysis of procedural injury claims has revealed that, in US case law, requirements for causation as an element of standing have been relaxed. It is important to mention that although the plaintiffs in Massachusetts v. EPA – one
of the most prominent climate change cases in the US – sought an injunction, the injury complained of was of a procedural character. Although the plaintiffs also satisfied the traditional standing requirements, their success could be attributed, in part, to the relaxed causation standard involved in establishing a procedural right. Australian procedural injury claimants have largely been successful in establishing general as well as specific causation. Australian courts have accepted the general causal link between anthropogenic GHG emissions and climate change. They have also accepted specific causation by recognizing that contributions from a particular source of GHG emissions must be taken into account when making an EIA.

An interstate claimant alleging procedural injury would also appear to have a good chance for successfully demonstrating causation. In fact, Micronesia’s challenge of a power plant modernization project in the Czech Republic, albeit submitted through diplomatic channels, suggests that it can be done. Micronesia was able to show that the transboundary impact of a single emissions source must be reflected in the EIA because of its contribution to climate change, which, through its manifestations, causes harm in its territory. Failure to exercise other procedural duties inherent in the obligation to prevent significant transboundary harm, such as the duty to notify a potentially affected state or failure to monitor transboundary impacts of a project, could also be challenged.

An examination of domestic jurisprudence has revealed a relaxed standard of causal proof in procedural injury cases. It could be argued that it is indicative of a general principle of law. Therefore, a procedural injury claim at the interstate level would likely not be hampered by causal ambiguity.

In domestic claims for injunctive relief, causation as part of the standing inquiry has been a key challenge for climate change plaintiffs, even though the ‘fairly traceable’ standard is significantly lower than the one involved in the causa proxima test used to decide claims on the merits. The courts have indicated that considerable evidentiary challenges must be expected at the merits stage. Although, as pointed out earlier, the successful outcome of Massachusetts v. EPA was, to some extent, rooted in the procedural character of the injury alleged, the plaintiffs were also able to meet the traditional standing requirements and show causation to the ‘fairly traceable’ degree.

In order to seek an injunction at the interstate level, it must be determined that a primary norm has been breached, which would give rise to the obligation of cessation. It has been argued that in proving breach of the primary obligation to prevent significant transboundary harm, causation hinges on the foreseeability of potential harm. In more specific terms, the claimant state would need to demonstrate that GHG emissions originating in the respondent state are capable of
causing it foreseeable harm. Therefore, it has been argued, the respondent state must exercise due diligence and start taking adequate mitigation measures.

An evaluation of domestic claims for injunctive relief suggests that, should they be decided on the merits, causation would likely prove an insurmountable obstacle. At the interstate level, the *causa proxima* test would also likely be impossible to meet. However, the need for proving the causal link between the injury and the internationally wrongful act only arises in reparation claims, e.g. claims for compensation (see below). Therefore, injunctive relief sought on the basis of the obligation of cessation may provide the sole pathway to interstate liability for climate change-related damage.

A study of domestic claims for compensation has shown that plaintiffs have had enormous difficulties with proving causation as an element of standing. The courts have indicated that evidentiary challenges to demonstrating causation on the merits would likely be impossible to overcome.

It has been argued that, under the law of state responsibility, the *causa proxima* test involved in sustaining a claim for reparation would likely be impossible to meet. Domestic plaintiffs’ lack of success, too, seems to point in the same direction.

The fourth legal challenge identified in the analysis of domestic jurisprudence is attribution. National courts have addressed the question of attribution of harm particular respondent as part of discussion on causation, demonstrating which has presented enormous challenges to plaintiffs. The courts have noted, however, that there is a lack of clarity as to whose GHG emissions have caused the plaintiffs’ injuries.

Albeit related to attribution in domestic case law, attributability in the law of state responsibility is a distinctly different concept. Attributability of wrongful conduct to the state is one of the elements of an internationally wrongful act. It has not been contested that GHG emissions from private actors cannot be attributed to the state but it has been argued that failure to regulate the conduct of private actors can. Therefore, unlike in domestic case law, attributability of wrongful conduct is unlikely to become a hurdle to interstate liability.

The last legal issue presented in the analysis of domestic case law is that of retroactivity. Domestic courts have not explicitly dealt with it in the context of climate change. It has been argued, however, that it would be of relevance to compensation claims at the merits stage of the proceedings because of the fact that claims for compensation concern injuries that are actual; not potential harms. Cut-off dates have been used to address retroactivity in, for example, US tobacco cases. At the interstate level, retroactivity is likely to pose challenges in the context of
reparation. It has been submitted that the introduction of a cut-off date would likely preclude the responsibility of the respondent state because climate change has been caused by anthropogenic GHG emissions released worldwide from the time of the Industrial Revolution.

The present treatise has assessed the possible forms of redress available to the claimant state suffering climate change-related injuries. Following a careful examination of legal challenges likely to be encountered by the claimant state, the conclusion is that the law of state responsibility can provide the legal framework for an interstate claim seeking injunctive relief on the basis of the obligation of cessation.