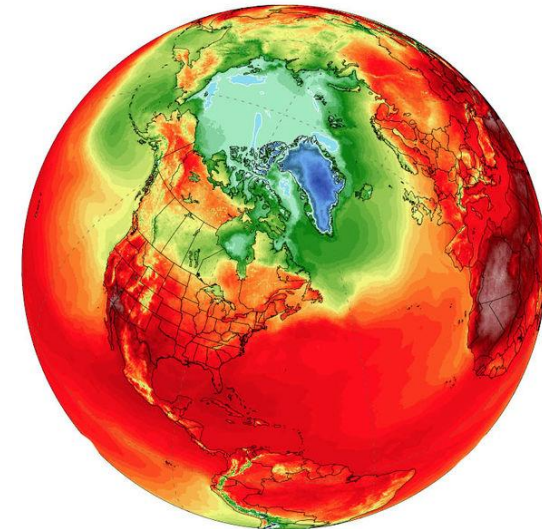




Causation Puzzles in International Climate Litigation

Andre Nollkaemper



‘the relationship between something that happens and the reason for it happening’

The complexity-reducing effect of international law

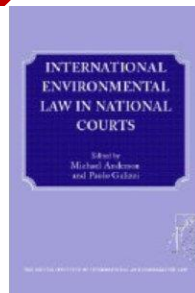
I. THE SECRETARY-GENERAL OF THE UNITED NATIONS
TO THE PRESIDENT OF THE INTERNATIONAL
COURT OF JUSTICE

12 April 2023.

I would like to inform you that the United Nations General Assembly, at its sixty-fourth plenary meeting held on 29 March 2023, under agenda item 70, adopted resolution 77/276 entitled “Request for an advisory opinion of the International Court of Justice on the obligations of States in respect of climate change”. Certified true copies of the resolution, in English and French, are attached.

In this resolution, the General Assembly decided, in accordance with Article 96 of the Charter of the United Nations, to request the International Court of Justice to render an advisory opinion pursuant to Article 65 of the Statute of the Court, on the following questions:

- (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, with respect to:
 - (i) States, including, in particular, small island developing States, which due to their geographical circumstances and level of development, are injured or specially affected by or are particularly vulnerable to the adverse effects of climate change?
 - (ii) Peoples and individuals of the present and future generations affected by the adverse effects of climate change?”



RQ

- How have defendants used causation arguments to get around responsibility
- What strategies have courts used to crack causation puzzles
- How do we evaluate these strategies from the perspective of shared responsibility

Building blocks

- General causation v specific causation
- Factual causation v legal causation

Sneak preview

Courts have replaced puzzles of cause-effect relations based on factual specific causation by a combination general causation combined with normative standards based on the imperative to prevent global risks

while traditionally, legal causation served to *restrict* the responsibility-consequences of factual causation, climate change practice suggests that normative causation extends rather than narrows responsibility

Causation as escape

‘In view of the global causes of climate change, the causal link between any activities of the respondent Governments and the alleged effects on the applicants had not been established in this case’

(Respondent states in Duarte v Portugal and 32 other states, ECtHR 2024)

‘On very large-scale problems, such as ocean plastics pollution or ocean acidification from greenhouse gas emissions, the inability of legal doctrine to address cumulative causation issues effectively insulates states, international organisations and operators from liability’

(Craik, Mackenzie and Davenport (eds), ‘Allocation of Liability for Environmental Harm in Areas beyond National Jurisdiction’, *Liability for Environmental Harm to the Global Commons* (Cambridge University Press 2023))

Individualisation of causation

‘the collective nature of the causation of climate change does not absolve the State party of its individual responsibility that may derive from the harm that the emissions originating within its territory may cause’

Committee on the Rights of the Child, *Sacchi et al. v. Argentina*

Incorporating causation in substantive obligations

‘A State shall use all means at its disposal in order to avoid activities which take place in its territory or any area under its jurisdiction, causing significant damage to the environment of another states or to areas beyond national jurisdiction’

Incorporating causation in human rights obligations

the applicable test for engaging the responsibility of the State is ‘that reasonable measures which the domestic authorities failed to take could have had a real prospect of altering the outcome or mitigating the harm.’

(ECtHR, KlimaSeniorinnen v Switzerland)

Contribution as causation

‘The ecological damage stemming from the surplus greenhouse gas emissions is of a continuous and cumulative nature to the extent that failure to comply with the first carbon budget has resulted in additional greenhouse gas emissions on top of the preceding emissions which will continue to have an effect over the life of these gases in the atmosphere, which is for around 100 years.

(France, Administrative Court of Paris, Notre Affaire à Tous and Others v. France, 14 October 2021)

Uncracked puzzles: compensation claims

‘A responsible state is under an obligation to make *full reparation for any moral or material damage caused* by the internationally wrongful act’

(Art 31 Articles on Responsibility of States for Internationally Wrongful Acts)

Possible solutions

- One for all: a path for the largest (historical) emitters?
- Probabalistic and proportionate solutions

Causation and the role of courts

‘the shift to a normative rather than a factual causation test comes with a price. While it prevents difficult and perhaps impossible factual assessments, it does require that a court engages in normative arguments on what states should have done and could have done to prevent a particular risk’.

For more information: [Causation Puzzles in International Climate Litigation by Andre Nollkaemper :: SSRN](#)