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Injunctions against Climate Change?

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Abstract

This article examines the possibilities of injunctive relief against activities that do or may contribute to climate change. Such remedies are of vital interest to states like Palau in the Pacific Ocean which are in danger of being flooded if climate change and the resultant rise of the sea level continues. The potential addressees of injunctive orders may be private natural or legal persons, or states and their entities. However, the article shows that the present possibilities for effective injunctive relief are limited: there is no single court competent for such cases; nor is one single law applicable if, for instance, Palau would wish to institute proceedings against other states or enterprises in foreign states. In particular, the present substantive law of many countries does not allow injunctive relief against possible contributors to global warming, because these courts regard problems of wrongfulness and causation as insurmountable hurdles.

A. Introduction

The state of Palau is an assembly of islands in the Western Pacific. The highest points of these islands are only a few metres above sea level. A significant rise of the sea level threatens the existence of the islands as well as the whole state and society of Palau. Although other countries[1] are also affected by any rise of the sea, the situation for islands like Palau concerns their very existence.[2]

1 For instance, Bangladesh or the Netherlands.
2 Many other islands like the Maldives, Marshall Islands, etc., will be concerned.

From January 1993 to April 2012 the world sea level rose at a rate of about 3.1 mm per year.[3] That meant approximately 6 cm in 20 years. According to the Australian Commonwealth Scientific and Industrial Research Organisation (CSIRO), the rate of sea-level rise in the last two decades was more than 50% higher than the average rate over the whole 20th century.[4] The rate has thus accelerated in the recent past. The respected and influential Intergovernmental Panel on Climate Change (IPCC) of the United Nations projected that until the end of the 21st century the sea level could rise further between 19 and 59 cm.[5] Other estimates range from 50 to 190 cm.[6] For Palau this would mean the inundation of most of its land. There is no doubt that the rising sea level is a consequence of global warming[7] and there is little doubt that mankind at least contributes significantly to global warming.[8]

On 22 September 2011, Palau's President Johnson Toribiong urged the United Nations in a dramatic speech before the Plenary Meeting to ask the International Court of Justice (ICJ) to give an advisory opinion on the responsibility of states for the consequences of climate change.[9] It is still open whether Toribiong's plea will find sufficient support and, if so, what the ICJ would decide and what impact any decision would have.

It is clear from the outset that it is of no great avail to Palau if the loss of land is compensated in terms of money after that loss has occurred; moreover, it is doubtful if any compensation – from whom? – would be granted at all. What is needed is the avoidance of a situation of inundation in advance. In law, it is injunctive relief that might be helpful.

Could President Toribiong, or, better still, the state of Palau also institute proceedings in one or more international or national courts and ask for an injunction against activities which cause the climate change? This may sound rather strange: Injunctions against whom? Against which activities? In which courts? Under which law? For which reason? After all, does such

3 See CSIRO www.cmar.csiro.au/sealevel/sl_hist_last_15.html, last accessed 19 October 2012; also Nicholls & Cazenave (2010).
4 See CSIRO www.cmar.csiro.au/sealevel/sl_hist_last_15.html, last accessed 19 October 2012.
5 See IPCC (2007b:322–324).
6 See Rahmstorf (2007); Vermeer & Rahmstorf (2009).
7 Global warming causes an increase in sea water and the progressive melting of the Arctic and Antarctic ice sheets and of the inland glaciers and snow fields.
8 See IPCC (2007a). See also the very recent and fair account by Spier (2012:11–25).
9 See Zimmermann & Bäumler (2012).

a legal possibility exist? These questions will be discussed, starting with what is actually meant by injunctive relief.

B. Meaning of Injunctive Relief

Injunctive relief is awarded to a plaintiff by means of a decision of court that orders the defendant to do or not to do a specific act – other than merely paying a sum for damages.[10] For instance, an injunction can be used to order a person to refrain from doing or continuing to do a certain activity, such as emitting CO_2 beyond a defined threshold. It may even be possible that injunctive relief can be ordered against a state, for instance by means of an order that obliges a state to implement or enact legislation against climate change. It is evident that these kinds of orders may be particularly problematic because, as is discussed below, they interfere with the state's sovereign power to legislate.

Injunctive orders can be either provisional or final. The formalities and preconditions of both kinds of injunctions may vary considerably. Generally, the requirements for a preliminary decision are fewer than for the final judgment, as far as proof and certainty of risk are concerned.

In cases of the kind discussed here the claimants are probably most interested in a final decision that ultimately prohibits activities which cause or add to global warming or are at least likely to cause or add to that development. However, a provisional decision which forbids such activities until a final decision is awarded is also of considerable interest.

Since the damage that states like Palau fear has not yet (fully) occurred, the aim of any injunctive relief is to stop activities of possible contributors to global warming insofar and to the extent that these activities may lead to further global warming and to a further rise of the sea level. Preventive injunctions against threatened future damage regularly need to meet specific requirements, because the damage is not entirely certain.

10 See, for instance, Jowitt (1977:975).

C. Possible Defendants

In legal proceedings aiming at an injunction, the claimant must name a specific defendant. When one thinks of possible defendants against whom a climate change injunction may be ordered, the circle of potential defendants is almost unlimited. Actually, almost everybody is involved in activities which can be regarded as causing, or adding to, global warming and therefore almost everybody could be an eventual awardee of an injunction. This is not only true for natural or legal persons, but also for states which by their activities or omissions can influence the climate even more seriously.

However, with respect to states, the problem of state immunity must be borne in mind. If states act for public purposes and through means of public law in the exercise of their sovereign public powers (*acta iure imperii*), they can rely on their immunity in foreign courts.[11] This is an acknowledged principle of (public) international customary law and has become part of the law of nations.[12] Only where a claim against a state results from the state's commercial activities – where the state acts like a private natural or legal person (*acta iure gestionis*) – no immunity in foreign courts is granted.[13] Nonetheless, even acts of states in pursuit of their public powers can be appealed against, although only in the courts of that state and to the extent foreseen there.

Thus, in principle, Palau could sue every individual whom it suspects of increasing global warming. It could even sue states – although it might be necessary to sue them in their countries if their activities were of a sovereign public and non-commercial nature.

D. Activities

In theory, it seems possible that injunctive relief could be sought against any kind of activity that adds to global warming. There is great unanimity that

11 See most recently ICJ, judgment of 3 February 2012 (*Germany v Italy*), available at www.icj-cij/docket/files/143/16883.pdf, last accessed 22 October 2012, paras 59ff.; further: Brownlie (2003:335ff.); Hailbronner & Kau (2010:181); Stein & von Buttlar (2005:270ff.); particularly with regard to the ICJ judgment: Hess (2012).

12 See ICJ, judgment of 3 February 2012 (*Germany v Italy*), available at www.icj-cij/docket/files/143/16883.pdf, last accessed 22 October 2012.

13 (ibid.); Hailbronner & Kau (2010:181).

CO_2 – and other greenhouse gas emissions[14] – are a cause of the global increase in temperatures.[15] All activities producing such emissions could thus be possible targets of injunctions.[16] Since everybody produces CO_2 in a certain way it is evident that there must be thresholds beyond which such emissions become inadmissible. It remains to be discussed in more detail below under which further conditions injunctions against such emissions which may cause damage in future are admissible. However, in principle, legal action can be brought against all activities which increase greenhouse gas effects – e.g. driving vehicles, producing goods, consuming energy.

With respect also to the activities of states, omissions of legislators can result in an increase of greenhouse gas effects: if a state omits to prohibit climate-detrimental activities of its citizens, it may likewise contribute to global warming. At least theoretically, injunctive relief may be available also in this case. From the viewpoint of states like Palau, this kind of judicial action might be the most effective if states could be ordered to introduce and enforce legislation against activities that lead to global warming.

As far as the nature of the legislative activity or non-activity of a state is concerned, it is hardly doubtful that it qualifies as *actus iure imperii*: to legislate or not to legislate is the very exercise of the state's sovereign power; it is state activity par excellence. As a consequence a state enjoys immunity in foreign courts with respect to its legislative activity or inactivity.[17]

E. International Environmental Conventions

There are a considerable number of international conventions which aim at the protection of the environment and at the avoidance of climate change. Presently, about 1,200 such bi- or multilateral conventions exist.[18] Particularly relevant is the UN Framework Convention on Climate Change of 1992, which has been ratified by 195 states and by the EU. This Convention has formulated the aim of "stabilisation of greenhouse gas concentrations in the

14 For the list of greenhouse gases, see Annex A to the Kyoto Protocol.
15 See IPCC (2007a).
16 Annex A to the Kyoto Protocol lists certain sectors which are specifically involved in the production of greenhouse gases.
17 See supra under Section C.
18 A collection of international environmental treaties can be found on http://www.inf ormea.org/treaties, last accessed 17 April 2013.

atmosphere at a level that would prevent dangerous anthropogenic interference with the climate system."[19] It lays down that ratifying states "should protect the climate system" and "should take precautionary measures to anticipate, prevent or minimise the causes of climate change and mitigate its adverse effects".[20] As a Framework Convention it does not contain precise obligations and thresholds concerning CO_2 – or other greenhouse gas emissions. These precise obligations and limits must be fixed by other conventions like the Kyoto Protocol of 1997, which in particular the United States has not ratified.

However, in its Article 14 the Framework Convention installed a mechanism for the settlement of disputes among the states that are parties to the Convention. These provisions apply as well to any related instrument which the Conference of the Contracting States adopts.[21] Yet, the settlement procedure merely concerns "the interpretation or application of the Convention"[22] – or the related instrument. It is doubtful whether this formulation covers cases where a state that has ratified the Framework Convention – and a related instrument like the Kyoto Protocol – can invoke the settlement procedure to force another contracting state to fulfil its obligations and stop certain emissions. The claim for injunctive relief against another state can hardly be qualified as "interpretation or application" of the Framework Convention. Moreover, the Framework Convention contains no provision which entitles a state to proceed against another for failure of observance of its obligations under the Framework Convention or a related instrument. It is the task of the Conference of the Contracting Parties and the organs of the Conference to see to the implementation and observance of those duties by the states bound by these instruments.

The question thus remains whether there is a legal basis to institute proceedings against states and private natural or legal persons who may contribute to climate change. There is first the problem of eventual jurisdiction.

19 Article 2 UNFCCC.
20 Article 3(1) and (3) UNFCCC.
21 Article 14(8) UNFCCC; see for instance also Article 19 Kyoto Protocol.
22 Article 14(1) UNFCCC.

F. Jurisdiction

Where could a state like Palau institute proceedings against activities of others which lead to a rise of the sea level?

I. No General and Automatic Jurisdiction of the ICJ

Any member state of the United Nations can approach the International Court of Justice. Since Palau is a UN member state[23], it could make use of the jurisdiction of the ICJ. However, according to its Statute the Court is competent for disputes between states only.[24] Thus, Palau or like states could institute proceedings against other states before the ICJ, but not against private persons or entities.

Further, the defendant state must have submitted to the jurisdiction of the ICJ in one way or another, as detailed in Articles 35–37 Statute of the ICJ. Only one third of the UN member states (67 out of 193) have ratified the ICJ Statute and have generally submitted to the jurisdiction of the Court by express declaration and some of these states have even done so under certain (permitted) reservations.[25] Also, the UN Framework Convention on Climate Change of 1992 provides for the possibility of voluntary submission to the ICJ's jurisdiction.[26]

A number of states which are seen as being particularly important for the world climate, such as the USA, China, Russia and Brazil, have not ratified the ICJ Statute and it remains open whether they ever will. They thus cannot be sued before the ICJ, unless they were to submit or specifically agree to such proceedings. This seems unlikely. In reality, there is therefore little chance to sue all states that may add to global warming before the ICJ. On the contrary, if Palau or a like state were to sue all those states which have already submitted to the ICJ's jurisdiction and even if this dispute were to be decided in favour of Palau, the effect would be limited. Only if Palau

23 Palau has been a UN member state since 15 December 1994.

24 See Article 34(1) ICJ Statute.

25 See the list of ratifications and declarations, available at www.icj-cij.org/jurisdiction/index.php?p1=5&p2=1&p3=3, last accessed 17 April 2013; further Schröder (2010:625).

26 Article 14(2)(a) UNFCCC of 1992; the status of ratifications on the UN website however records no declarations of submission to the ICJ's jurisdiction.

could reach similar judgments in other courts against all states which still stay outside the ICJ Statute would there be a real chance of success.

This fact demonstrates the ICJ's limited position as a 'world court'. The advantage that the ICJ is a central court for the whole globe before which no state can invoke its immunity is much reduced by the principle of voluntariness and the requirement that the defendant state must have agreed to the Court's jurisdiction.

II. No Global Jurisdiction Regime

Thus far, except for jurisdiction agreements,[27] no global jurisdiction regime exists and the globally intended Hague Convention on Choice of Court Agreements is not yet in force. Moreover, it is most unlikely that jurisdiction agreements will play a role in situations discussed here.

III. Regional Jurisdiction Regimes

However, instruments exist on a regional level that regulate international jurisdiction. In Europe, the Brussels I Regulation of the European Union (EU) provides for such rules, and even for injunctive measures. This Regulation is the most prominent and most far-reaching example of a regional unification of jurisdiction rules. Other regional integration movements such as the Organisation pour l'Harmonisation en Afrique du Droit des Affaires (OHADA) have enacted only a few separate jurisdiction rules thus far, but have not installed a full and comprehensive jurisdiction scheme.[28] Therefore only the solutions of the Brussels I Regulation will be discussed here with respect to climate change injunctions.

27 Hague Convention on Choice of Court Agreements of 30 June 2005.

28 See in particular Articles 3 and 20 of the Act on *Organisation des procedures simplifiées de recouvrement et des voies d'exécution*. The Act entered into force on 10 July 1998.

1. Jurisdiction with Respect to Natural or Legal Persons

a) Final Decisions

The Brussels I Regulation covers only civil and commercial matters. However, activities of private persons which potentially add to global warming and which will be prohibited by an injunction would fall within the scope of the Regulation.

The general jurisdictional basis of the Regulation in such cases is the defendant's domicile.[29] If the domicile is located in an EU member state, the claimant can sue there. This rule follows the worldwide accepted maxim *actor sequitur forum rei*: the claimant can and generally must sue the defendant at the defendant's domicile.

The domicile of natural persons is to be determined according to the law of the country of the alleged domicile.[30] Companies and legal persons, on the contrary, have their domicile either at their statutory seat, at their central administration, or at their principal place of business.[31]

The Brussels I Regulation provides for a number of exceptions regarding the jurisdiction at the defendant's seat. The exceptions that could be relevant here depend on the qualification of the respective activity as contractual or tortious.[32] It is rather evident that any activity that could add to a rise of the sea level is tortious as seen from the perspective of the potential claimant Palau. According to Article 5 (3) Brussels I Regulation, a claimant may sue the defendant at the place "where the harmful event occurred or may occur."[33] However, this exception applies only where the defendant's domicile is an EU member state and the forum is in another EU member state.[34] It does not concern the jurisdiction of courts outside the EU whose competence the EU is not empowered to regulate.

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29 Article 2(1) Brussels I Regulation.
30 Article 59(1) and (2) Brussels I Regulation.
31 Article 60(1)(a) – (c) Brussels I Regulation.
32 See Article 5(1) and (3) Brussels I Regulation.
33 On 14 December 2010 the Commission tabled a proposal for an amended Brussels I Regulation, COM (2010) 748 final. However, Article 5(3) remains essentially unaffected.
34 The amendment proposal (see preceding footnote) concerning Article 5 suggests the abolition of the domicile requirement.

In consequence, states like Palau could sue natural or legal persons domiciled in the EU at their seat in the EU. The Regulation covers this case.[35] For a jurisdiction elsewhere the rules of the Brussels I Regulation are of no avail.

b) Provisional Measures

The Brussels I Regulation contains a specific article on provisional legal measures. Article 31 allows a party to approach any EU court for such "provisional, including protective, measures" as foreseen in the law of that court's state, even if the Regulation assigns jurisdiction as to the substance of the matter to the courts of another EU member state. This provision is a further jurisdiction rule and extends jurisdiction for provisional measures: where national law so allows, the claimant can institute proceedings also there – in addition to the courts which are competent under the Regulation[36] and where a lawsuit may already be pending.[37] The claimant can choose to apply for provisional procedural measures in the court which has jurisdiction under the Regulation for the substance of the matter or in the court which is competent according to the law of that court's country. It must be noted that the claimant may make use of even those exorbitant national jurisdiction provisions which the Regulation explicitly bans[38] like the jurisdiction under Articles 14 and 15 French Code civil or under § 23 German Code of Civil Procedure.[39]

Again, the rule is only applicable if the relevant courts are located in the EU. Moreover, the European Court of Justice (ECJ) requests "the existence

35 See European Court of Justice (2000) ECR I-5925 (C-412/98, *Group Josi Reinsurance v Universal General Insurance*) for a claim of a Canadian against an EU-seated insurance company.

36 See European Court of Justice (1998) ECR I-7091 (C-391/95, *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line*); further Pertegás Sender (2012); Kropholler & von Hein (2011); Bogdan (2012:129); Leible (2006).

37 European Court of Justice (1998) ECR I-7091 (C-391/95, *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line*) paras 29 and 34; Kropholler & von Hein (2011:Article 31 para. 14).

38 See European Court of Justice (1998) ECR I-7091 (C-391/95, *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line*) para. 42; Vlas (2012:Article 3 para. 2); Kropholler & von Hein (2011:Article 31 para. 17).

39 See Article 3(2) in connection with Annex I Brussels I Regulation. The Annex I lists all national jurisdiction rules forbidden under the Regulation.

of a real connecting link" between the dispute and the forum.[40] Only if national law meets this condition are courts competent under Article 31 Brussels I Regulation to grant provisional relief in accordance with their national law (the national requirements for provisional measures vary considerably among the EU member states).[41] The real connecting-link requirement further limits the choice of claimants between the court of the substance of the matter and other courts for provisional relief.

The term *provisional measures* is not defined in the Regulation or its accompanying materials. It comprises those measures which according to the ECJ "are intended to preserve a factual or legal situation so as to safeguard rights the recognition of which is sought elsewhere from the court having jurisdiction as to the substance of the matter."[42] The measure must have a provisional character and must not, in fact, finally decide the dispute nor create irreversible consequences.[43]

In our hypothesis, Palau could make use of Article 31 Brussels I Regulation in all EU member states depending on the relevant possibilities of the respective national law and on the existence of a real connecting link between the dispute and the forum.[44]

2. Jurisdiction with Respect to States

The Brussels I Regulation does not supersede international customary law. If a state enjoys immunity in foreign courts, the Regulation respects this.[45] Thus, under the Regulation, injunctions against legislative inactivity of states cannot be claimed. Such claims fall outside the scope of the Regulation.[46]

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40 European Court of Justice (1998) ECR I-7091 (C-391/95, *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line*).

41 See Bogdan (2012:129).

42 See European Court of Justice (1992) ECR I-2149 (C-261/90, *Reichert and Kockler v Dresdner Bank AG*).

43 European Court of Justice (1998) ECR I-7091 (C-391/95, *Van Uden Maritime BV v Kommanditgesellschaft in Firma Deco-Line*); European Court of Justice (1999) ECR I-2277 (C-99/96, *H H Mietz v Intership Yachting Sneek BV*); further Pertegás Sender (2012:Article 31 para. 22).

44 For instance, under German law provisional relief relevant here is the *einstweilige Verfügung* (§ 935 Civil Procedure Code).

45 See European Court of Justice (2007) ECR I-1519 (C-292/05, *Lechouritou v Germany*); see thereto Geimer (2008:226); Stürner (2008:204).

46 European Court of Justice (2007) ECR I-1519 (C-292/05, *Lechouritou v Germany*).

On the contrary, insofar as states are involved in commercial activities in the same way as private natural or legal persons, the Regulation's normal jurisdiction rules apply. For instance, the production and sale of energy by state-owned entities has to be, and has been, regarded as civil and commercial activity.[47] To such cases the above-mentioned rules applicable to private defendants apply.

3. Joint Defendants

The Brussels I Regulation (Article 6(1)) allows a claimant to sue several defendants in the court in the country where only one of them is domiciled. However, the respective provision requires that the claims are "so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings."[48] It further applies only where the relevant domicile is located in an EU member state.[49] The provision creates the opportunity to concentrate claims against various defendants in one court if the claims are sufficiently closely related so that separate decisions would risk divergent judgments.

It was disputed whether or not defendants who are domiciled in non-EU states can also be joined in proceedings where only one or more co-defendants are domiciled in the EU. A number of authors support the view that this should be possible;[50] others oppose it.[51] In the past, the European Court of Justice refused in *Réunion européenne*[52] to apply Article 6(1) in a case where a claimant intended to join a defendant domiciled in one EU state in proceedings in another EU state against a party that was not domiciled in the EU. The Court reasoned that otherwise the EU-domiciled defendant would

47 See for instance Amtsgericht Bonn, *Neue Juristische Wochenschrift* 1988, 362; Landgericht Bonn, *Neue Juristische Wochenschrift* 1989, 1225 (regarding the energy production by the Soviet nuclear reactor in Tshernobyl as civil and commercial activity).

48 Art 6(1) Brussels I Regulation.

49 See Muir Watt (2012:para. 20).

50 See for instance Kropholler & von Hein (2011:Article 6 para. 7); Leible (2006:Article 6 para. 7); Schack (2010:para. 360).

51 See Oberlandesgericht Hamburg, *Deutsche Rechtsprechung auf dem Gebiete des Internationalen Privatrechts* 1992 Nr 193; Gaudemet-Tallon (2002:para. 223).

52 European Court of Justice (1998) ECR I-6511 (C-51/97, *Réunion Européenne SA v Spliethoff's Bevrachtingskantoor BV and Master of the Vessel 'Alblasgracht 002'*).

lose the protection under the Regulation (then under the respective Convention) for self-defence at own domicile. Also the wording of Article 6(1) that addresses persons "domiciled in a Member State" favours a restrictive interpretation of the provision. Very recently, the European Court of Justice explicitly excluded the application of Article 6(1) Brussels I Regulation if one of the defendants is domiciled outside the EU.[53] And although the amendment proposal for the Brussels I Regulation suggested the deletion of the words "domiciled in a Member State" in Article 6(1), which would have opened the door to a wider interpretation of the provision, the new version of the Regulation did not change the former wording. However, under policy considerations it would be preferable to place EU- and non-EU-domiciliaries on an equal footing.

The close-connection that Article 6(1) Brussels I Regulation further requires is present where, as the text indicates, a separate treatment of and decision on claims creates the danger of irreconcilable judgments. In a case where companies of the same group in a concerted action had violated the claimant's patent in different EU member states, the ECJ nonetheless denied the close link between the claims because different laws applied to the claims.[54] The decision has been rightly criticised as "overly dogmatic".[55] More recent decisions of the ECJ interpret the close connection element much less dogmatically. The Court no longer formally requires as an indispensable precondition that the legal basis of the different actions or the applicable law must be the same.[56] These are aspects which the national court only has to take into account when deciding whether or not a sufficiently close connection exists.

> Thus, a difference in legal basis between the actions brought against various defendants, does not, in itself, preclude the application of Article 6(1) of Regulation No 44/2001, provided however that it was foreseeable by the defendants

53 ECJ 11 April 2013 (Case C-645/11, *Land Berlin v Sapir and others.*).

54 European Court of Justice (2006) ECR I-6535 (C-539/03, *Roche Nederland BV v Frederick Primus and Milton Goldenberg*).

55 Muir Watt (2012:para. 25a).

56 See European Court of Justice (2007) ECR I- 8319 (C-98/06, *Freeport plc v Olle Arnoldsson*) para. 40f.; European Court of Justice (C-145/10, *Painer v Standard VerlagsGmbH and Others*) paras 80ff., available at curia.europa.eu/juris/document/document.jsf?text=&docid=115785&pageInd, last accessed 23 October 2012.

> that they might be sued in the Member State where at least one of them is domiciled.[57]

It may be inferred from this decision that Article 6(1) Brussels I Regulation allows a concentration of actions in one court where several tortfeasors who are domiciled in different EU member states have caused damage by a concerted act. In that case, each tortfeasor must foresee the possibility of being sued in the domicile state of another co-defendant. And in that case it should be irrelevant whether or not all tortfeasors are domiciled in the EU.

Whether the same rule should apply in the case of independently acting tortfeasors is however doubtful. Taking the ECJ's requirement of foreseeability seriously militates against the application of Article 6(1) Brussels I Regulation. Independent tortfeasors cannot foresee that and where other tortfeasors acted and might be sued. The Court gives a clear hint in this direction when it states: "For that purpose [*sc. to avoid the risk of irreconcilable judgments*], the fact that defendants against whom a copyright holder alleges substantially identical infringements of his copyright *did or did not act independently* may be relevant."[58]

Even more doubtful is the case where some or only one of independently acting tortfeasors are domiciled within the EU, and some outside. For the outsiders it is even less foreseeable that they might be sued in the EU than for EU-domiciliaries. The EU would develop Article 6(1) Brussels I Regulation into a kind of US-American 'long arm statute', if in such a case all tortfeasors could be sued in the EU because only one of them is domiciled there, although all others have no connection whatsoever with that jurisdiction. This would mean an overstretching of the jurisdictional competence of the EU.

In the case of a hypothetical action of Palau, it is rather clear that the potential defendants – all those who are alleged to have added to global warming and rise of the sea level, which means almost everybody or at least very many all over the globe – have not acted in concert, but independently. It is unlikely that the ECJ would accept an interpretation of Article 6(1) Brussels I Regulation granting a court of an EU member state jurisdiction

57 European Court of Justice (C-145/10, *Painer v Standard VerlagsGmbH and Others*) para. 81, available at curia.europa.eu/juris/document/document.jsf?text=&docid=115785&pageInd, last accessed 23 October 2012.

58 European Court of Justice (C-145/10, *Painer v Standard VerlagsGmbH and Others*) para. 83, emphasis added, available at curia.europa.eu/juris/document/document.jsf?text=&docid=115785&pageInd, last accessed 23 October 2012.

on actions against all these defendants and thus accord EU courts in fact worldwide jurisdiction over climate change injunctions. Despite the desirability of a central court for such global questions, in the author's view procedural justice requires to refuse such a wide-ranging jurisdiction of an arbitrarily chosen national court of first instance. This court, wherever situated, is not better equipped than any other court and is certainly in no better position to decide the case than the courts at the defendant's domicile.

IV. Jurisdiction under National Law

It is a globally accepted maxim that, in principle, the claimant can sue the defendant at the latter's seat.[59] However, besides that rule, the jurisdictional requirements vary considerably under which national laws grant injunctive relief. The best evidence of these differences is Annex I of the Brussels I Regulation. The Annex lists the so-called exorbitant rules on jurisdiction, all of which are generally excluded under the Regulation,[60] but can be invoked under national law. Further, the national rules may provide for further jurisdiction grounds with respect to provisional injunctive relief. National law often allows joining claims of several defendants if there is a close connection between the claims and a procedural need to decide on all claims in one proceeding.[61]

For a hypothetical suit of Palau against all potential contributors to climate change, the courts of Palau will probably have jurisdiction because the damage would occur in that country if the sea level would continue to rise as predicted. Whether a respective injunction of a Palauan Court would be recognised in the country where the potential contributor is seated is a separate question and is discussed below.

Whether there is any other national law that would allow the concentration of all climate change injunctions in one of its courts appears at best unlikely. It is even doubtful if an eventual class action in the United States could cover this case. However, the question needs further research and cannot be answered finally here.

59 See Illmer (2012:1021); Schack (2010:para. 192).
60 Except under art 31 Brussels I Regulation; see above under Section F.III.1.b.
61 See for instance § 93(1) Austrian Jurisdiktionsnorm.

V. Mid-summary

For an injunction against all potential contributors to future sea-level rise, Palauan courts would most likely accept jurisdiction because the assumed future damage would occur there. There is one exception: foreign states acting in their sovereign power would be immune even in Palauan courts. On the other hand, it is rather unlikely that all these eventual claims could be brought in one single court elsewhere. In principle, outside Palau each potential contributor would have to be sued in the jurisdiction which is competent for that contributor. Should Palau wish to sue foreign states for their omission to legislate against climate change, this could only be done in each respective state according to the applicable procedures and requirements there. Presently, a concentration of all eventual claims against climate change in one single court is impossible.

G. Applicable Law

I. Qualification

In order to determine the applicable law, the activities which can be possible targets of injunctive relief must first be classified either as contractual or as non-contractual since the conflicts rules differ. There is little doubt that the activities that are relevant here qualify as non-contractual, so that the conflicts rules on extra-contractual obligations apply. Any duty to stop activities that may contribute to climate change can only be based on tort law.

II. No Global Conflicts Rules

On the global level, no conventions or other instruments exist that generally regulate the applicable law for international torts. Liability conventions do exist for specific risks, for instance nuclear damage[62] or oil pollution.[63]

62 Paris Convention on Third Party Liability in the Field of Nuclear Energy of 1960 and the Vienna Convention on Civil Liability for Nuclear Damage of 1963, both with various later protocols and additional conventions.

63 Brussels Convention on Civil Liability for Oil Pollution Damage of 1969 and its supplementary instruments.

These conventions provide that the author of such damage must compensate for any loss, and even pay for precautionary measures, but these conventions are not concerned with the liability for activities which may contribute to climate change.

III. EU Conflicts Rules

1. General Rule

On a regional level, the Rome II Regulation of 2007[64] contains conflicts rules which apply in all EU member states, except Denmark. The Regulation distinguishes between general and environmental torts. The general rule is that, in the absence of a choice of law by the parties, "the law of the country in which the damage occurs" is applicable (Article 4(1) Rome II Regulation).[65] This means the law of the place where the injury of the victim's rights happens (*lex loci damni*) applies.[66] Neither the place where the tortfeasor acted nor where consequential losses occurred matters.[67] An escape clause allows for the application of a "manifestly more closely connected" law.[68] According to this rule, the law of Palau would apply in our hypothesis.

2. Environmental Damage

For environmental damage, Article 7 Rome II Regulation offers a special conflicts rule: In lieu of the law at the place where the damage occurred, the claimant may choose "the law of the country in which the event giving rise to the damage occurred". Thus, the victim can opt for the law of the place where the tort was committed and the tortfeasor acted. This means that the

64 Regulation (EC) No 864/2007 of the European Parliament and of the Council of 11 July 2007 on the law applicable to non-contractual obligations (Rome II).

65 Article 4(2) Rome II Regulation prefers the law of the habitual residence of the parties in the same state. In cases of the nature discussed here, this rule evidently does not come into play.

66 See Recital 17 Rome II Regulation: "the country where the injury was sustained or the property was damaged respectively"; further Thorn (2012:Article 4 para. 6) Bach (2011:para. 14); Junker (2010:Article 4 para. 18).

67 See references in the preceding footnote.

68 Article 4(3) Rome II Regulation.

victim must decide in advance – prior to a judgment – whether that law or the *lex loci damni* is more favourable for his own interests.

According to Recital 24 Rome II Regulation, environmental damage means an "adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource for the benefit of another natural resource or the public, or impairment of the variability among living organisms." Thus environmental damage must have caused damage to the person or property of the claimant.[69]

The rise of the sea level through global warming and the resultant loss of inundated land is a case of environmental damage in the sense of Article 7 Rome II Regulation. The loss would enable a state like Palau to opt for the law of the country where the acts of climate degradation were committed.

IV. National Conflicts Rules

As seen above in our hypothetical case, no one single court is competent for all kinds of injunctive relief and no one single regime is in place for the determination of the applicable law. Thus, most of the various national courts that would have to be approached would apply their own conflicts rules. There is a wide acceptance of the rule that the law of the place is applicable where the tort was committed. However, other – more refined – rules do exist. It is outside the scope of this paper to give a broad comparative survey of the variety of these rules. However, Swiss law may serve as a non-representative example here (of a country outside the EU). Articles 132–142 of the Swiss Federal Act on Private International Law of 18 December 1987 (Bundesgesetz über das Internationale Privatrecht [IPRG]) establish a very differentiated set of conflicts rules for international torts. In regard to emissions from land (including industry plants), the victim may choose between the law of the country where the land is located and the law of the country where the effect of the emission occurs.[70] For other sources of climate damage, for instance activities such as driving and transport, the general rule applies which provides the following: (1) after the damaging event, the par-

69 Junker (2010:Article 4 para. 18); Wagner (2008:9).
70 Article 138 Swiss IPRG.

ties may agree on the law of the forum,[71] but may also decide on another law;[72] (2) in the absence of a choice by the parties, the law of the place is applicable where both parties have their habitual residence;[73] (3) in default of such a common habitual residence, the law of the country applies where the tort was committed;[74] (4) where, however, the damage occurs in another country than that where the tort was committed, the law of this other country applies if the tortfeasor ought to have foreseen that the damage would occur there;[75] (5) where the tort violates an existing contract or other legal relationship between the parties, the law governing this relationship is applicable.[76]

The Swiss example shows that it can be burdensome to designate the applicable law and uncertainties may remain. In our hypothetical case it is, for instance, doubtful whether a potential contributor to global warming would have foreseen the effect on a state like Palau.

V. Evaluation

With respect to the applicable law, it is a frequent rule of national or regional conflicts law that the law of the country applies where the damage – the violation of the victim's interests – occurred or threatens to occur. This rule allows treating all claims according to one single law. However, equally often the law of the country where the tort was committed is designated as the governing law. This rule leads to the application of many different laws for an identical damage (the so-called mosaic principle). In our hypothetical case it is most likely that there is no one single law, but a variety of laws which would apply.

71 Article 132 Swiss IPRG; under Swiss law the forum is generally the domicile of the defendant (Article 129(1) Swiss IPRG).
72 See Siehr (2002:361).
73 Article 133(1) Swiss IPRG.
74 Article 133(2) sent 1 Swiss IPRG.
75 Article 133(2) sent 2 Swiss IPRG.
76 Article 133(3) Swiss IPRG.

H. Substantive Requirements for Injunctions

Once the applicable law has been determined, it is this national law on injunctions that finally decides whether a state like Palau could ask for an order to restrain others from contributing to climate change. The substantive and procedural rules of this law on provisional and final injunctions must be examined.[77] Again, the example of one single law – in this case German law – must suffice here.

I. Precautionary Claim

Under §§ 823 (1) and 1004 (1) sent 2 German Civil Code (Bürgerliches Gesetzbuch, BGB), a claimant may ask for a restraining order (*vorbeugende Unterlassungsklage*) against a threatened violation of rights if the following conditions are met: (1) a protected right of the claimant must be at stake, (2) the serious threat must be established that the right will be wrongfully infringed, (3) the defendant must be the responsible person.

1. Protected Right

German law protects only certain interests such as life, bodily integrity and property.[78] In the hypothetical case of the state of Palau its land would be affected. This is a protected position which would allow a claim under §§ 823 (1), 1004 (1) sent 2 BGB.

2. Serious Threat of Wrongful Infringement

a) Serious Threat

A successful claim requires that there be a serious threat that the protected interest of the claimant will be wrongfully infringed. Thus, there must first

77 On injunctive relief in the context of greenhouse gas emissions, see Spier (2012:194–198), with further references.

78 § 823(1) German Civil Code (Bürgerliches Gesetzbuch, BGB) contains a list of protected interests.

be a serious threat of an infringement.[79] If no prior violation has taken place, there must be a clear and imminent danger that an infringement will be committed.[80] Prior violations create a rebuttable presumption of repetitions.[81] It is likely that in our hypothetical case the requirement of a serious threat will be seen to be present.

b) Wrongful Infringement

Secondly, the threatened infringement must be wrongful. According to the prevailing view in Germany, wrongfulness means that the result of the tortfeasor's conduct must contradict commandments of the law (*Lehre vom Erfolgsunrecht*).[82] Therefore, in principle, the violation of a protected right founds the – rebuttable – presumption of wrongfulness. The defendant may, however, advance reasons demonstrating that he was justified in causing the damage, for instance acting in self-defence.

In our hypothetical case, the activities of eventual contributors to climate change will often be licenced by a public authority. Such licence will regularly allow certain emissions. Even if the licensee observes the requirements and thresholds fixed by the licence, this does not necessarily exclude the wrongfulness of damage caused to others.[83] However, with respect to restraining orders against threatened damage, the observance of prescribed licence conditions or legal standards will play a role and regularly lead to the refusal of the claimed order.

With respect to claims against the (German) state because of omitted legislation, German law generally does not permit such claims. This has been so decided in the case of dying forests.[84] The state could not be held liable for not enacting legislation that would have avoided damage by emissions to the trees of the forest owners.

79 See Federal Court (Bundesgerichtshof, BGH) *Neue Juristische Wochenschrift* 2005, 594; Sprau (2012:para. 20).
80 Gursky (2006:para. 214).
81 BGH *Neue Juristische Wochenschrift* 1994, 1281.
82 See, for instance, BGH *Neue Juristische Wochenschrift* 1996, 3205; Sprau (2012:§ 823 para. 25); for other views, see Hager (2009:para. H15f.).
83 Kohler (2010:para. 330).
84 BGH *Neue Juristische Wochenschrift* 1988, 478, with note Eike von Hippel.

3. By the Defendant

The defendant must be responsible for the threatened infringement. This requires that the defendant's activity must be the cause of the actual or threatened infringement.[85] This requirement poses difficulties in cases of the kind discussed here. In a rather general sense, there is a causal link between any activity contributing to climate change and the threatened loss of land in Palau. Without all those activities, Palau would not face the risk of inundation. On a concrete level it is very problematic to state that, for instance, the emissions of a German energy plant cause the rise of the level of the Pacific Ocean (to which extent?).[86]

One could argue that the German plant is a joint tortfeasor together with all other contributors to the climate change and that § 830 BGB applies, which makes all of them jointly and severally liable for the damage. The provision even applies where persons did not act in concert, but were independent actors, who by the mere fact of their activity could have caused the same damage.[87] The German courts are, however, reluctant to invoke the provision in cases where huge numbers of potential tortfeasors are involved, as for instance in the case of violent mass demonstrations. In such cases only those persons are held liable who were directly involved in, or directly supported, acts of violence.[88] It is not unlikely that German courts would follow this pattern also here and deny a sufficiently causal link. Yet, it remains to be seen how the German courts will decide cases of the kind discussed here.

In legal writing the concepts of proportional liability and market share liability have been suggested for cases where very many persons have contributed to a damage, but it is unknown to which extent. Then, so it is suggested, every contributor should bear a proportional share of the damage or a share in proportion to its market share.[89] Yet, these concepts have not been

85 See BGH *Neue Juristische Wochenschrift* 1976, 799; BGH *Neue Juristische Wochenschrift* 2004, 3102.
86 The causation problem is discussed by Spier (2012:175–179).
87 § 830(1) sent 2 BGB is interpreted in this sense; see Eberl-Borges (2012:para. 67).
88 See BGH *Neue Juristische Wochenschrift* 1984, 1226.
89 See, for instance, Bodewig (1985:548).

applied by German courts and the prevailing view among German legal writers is to reject them.[90]

II. Provisional Order

Under German law, a provisional restraining order is admissible if the claimant has a legal claim – the three requirements discussed above must be present – and if there is a special need provisionally to secure the rights of the claimant.[91] The proof of the claim need not be as strict as in the final, main proceeding. Because of the issues of wrongfulness and causation, the outcome in our hypothetical case would not be any different from that discussed above.

Even if a restraining order were to be granted, the formulation of its precise content (which the claimant must suggest) would pose problems. An order restraining a defendant from the continuation of climate-damaging activities would be much too vague and therefore inadmissible. The order would have to state the concrete threshold, for instance of emissions, which the defendant's plant or other activity should not transgress. That means that the claimant would have to formulate this precise threshold for each individual defendant.

III. Evaluation

In summary, under German law it is not likely that the courts would grant a final or provisional order restraining the defendant from further activities which may contribute to climate change but which are yet allowed under German law. The case may be otherwise if the defendant does not observe the prescribed conditions and thresholds. But even in that case it is more than doubtful whether the courts would regard as established the necessary causal link.

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90 See, for instance, Eberl-Borges (2012:para. 115 with further references). However, the Principles of European Tort Law propose a presumption of equal shares in case of minimal causation where many have caused a damage but it is certain that none of them caused the entire damage or a determinable part of the damage and that each contributed only in a minimal way (Article 3:105 Principles of European Tort Law).

91 § 935 German Code of Civil Procedure (Zivilprozeßordnung, ZPO).

It is not unlikely that presently also other legal systems would decide likewise.[92]

I. Recognition and Enforcement of Judgments

In the event that the courts of Palau or the courts of any other country would render a judgment or provisional order restraining natural or legal persons in other countries from contributing to climate change, the question arises whether this decision would be recognised and enforced in the country where each defendant is domiciled and committing the offending activities. No global convention on this matter exists; but there are many bilateral and – on a regional level – also multilateral instruments. The already mentioned Brussels I Regulation belongs to the latter and allows for a simple recognition and enforcement of a decision of court of an EU member state in another EU member state.[93]

Where none of these inter- or supranational instruments applies, the national rules on the recognition and enforcement of foreign judgments must be used. These rules are often reluctant to recognise and enforce foreign decisions. Some require an international treaty with the country where the judgment was rendered;[94] others request reciprocity;[95] yet others certain minimum conditions.[96] Thus, even if an injunction against climate change were to be ordered, its enforcement in other countries might meet considerable obstacles.

J. Conclusions

The overall picture is not encouraging: at present injunctions as a legal means in the fight against climate change do not promise much success. They meet hurdles they can hardly overcome. Though only few national laws could be examined here, the hope is but small that other legal systems fare much better

92 For a comparative survey on these cases of *minimal causation*, see Koch (2007:543), stating that most jurisdictions would deny liability.
93 See Articles 32ff. Brussels I Regulation.
94 In general, Russia.
95 For instance, Germany (§ 328(1) No. 5 ZPO; except for non-financial cases).
96 For instance, Switzerland (Articles 25–28 Swiss IPRG).

and accept more generous injunctive relief against activities contributing to climate change. However, the survey shows that it is necessary and worthwhile to re-consider and re-adjust the hurdles, in particular the wrongfulness of climate-change-sensitive activities and the causation problem.

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