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Climate change litigation through the prism of private international law

Eduardo Álvarez-Armas*

INTRODUCTION

Climate change litigation is a very broad legal phenomenon, with various sub-species, most of which largely arise from a single socio-political concern: the understanding, notably within civil society, that not enough is being done to tackle what the United Nations has come to call the "climate crisis".[1] Over the last three decades, political and diplomatic initiatives have unfolded to try to contain or at least manage climate change and its ramifications, due to the threats they pose to life on the planet. However, as these efforts are perceived to be unsatisfactory, and climate change is perceived to lie at the heart of modern global challenges, the phenomenon of climate change litigation is gaining momentum, notably since the 2015 decision in the famous Dutch case "Urgenda".[2] Interestingly, despite this recent attention, Climate change litigation has possibly existed, with relative discretion, for around three decades too: if one dives into the databases held by the Grantham Research Institute on Climate Change and the Environment and the Sabin Center for Climate Change Law,[3] it is possible to find, for instance, Australian cases going back to the 1990s.[4]

The significant attention this kind of litigation has gained recently has brought along scepticism about its capacity to yield the outcomes it purports to obtain, i.e. redress for climate-change-related damage and/or facilitation of climate-change mitigation and adaptation.[5] However, at the very least its political significance, i.e. its potential to spark

* Assistant professor of law Universidad Pontificia Comillas (Madrid, Spain) and Université catholique de Louvain (Belgium). This article reprises and develops elements already published in E. Álvarez-Armas, "Le contentieux international privé en matière de changement climatique à l'épreuve de l'article 17 du règlement Rome II : enjeux et perspectives" (2020) 3 RDIA 109; and E. Álvarez-Armas, "Goal 13", in R. Michaels, V. Ruiz Abou-Nigm & H. Van Loon (eds), *The Private Side of Transforming the World – UN Sustainable Development Goals 2030 and the Role of Private International Law* (Intersentia 2021) 409. DISCLAIMER: E. Álvarez-Armas provides pro-bono advice to an NGO in a climate litigation case.

1 See <http://un.org/en/un75/climate-crisis-race-we-can-win> accessed 30 May 2024.

2 For a description and timeline: <https://www.urgenda.nl/en/themas/climate-case/climate-case-explained/> accessed 23 September 2024.

3 https://climate-laws.org/cclow/litigation_cases and http://climatecasechart.com/ respectively.

4 *Greenpeace Australia Ltd. v. Redbank Power Co. 1994* ("*Challenge to state council decision granting development consent for a power station*") as referenced in <https://climatecasechart.com/non-us-case/greenpeace-australia-ltd-v-redbank-power-co/> accessed 23 September 2024.

5 "*Mitigation*" is an "*anthropogenic intervention to reduce the sources or enhance the sinks of greenhouse gases*"; and "*Adaptation to climate change refers to adjustment in natural or human systems in response to actual or expected climatic stimuli or their effects, which moderates harm or exploits beneficial opportunities*" (IPCC, *Glossary of*

public debate on global warming, and possibly push forward the above-referred political and diplomatic initiatives, is not to be neglected.[6]

From this standpoint, the following pages intend to sketch the core characteristics, and some selected issues, of one of the above-mentioned sub-species within climate change litigation, which may be labelled as "private international climate change litigation": private party *versus* private party cross-border climate litigation. This is to be understood as litigation: i) amongst private parties only; ii) of a private-law (generally, tort-law) nature; iii) conducted on the basis of private-international-law foundations; iii) over damage threatened or caused by climate-change-derived phenomena.

A first section will contextualize private international climate change litigation (hereinafter "PICCL") within the broader panorama of climate change litigation (I), before presenting some illustrations of the phenomenon (II). Thereafter, a classic structure will be followed: the basics of the international jurisdiction dimension of PICCL will be addressed firstly (III), subsequently proceeding to the presentation of its basic choice-of-law elements (IV). Finally, a series of more advanced considerations will be delivered (V). These will provide a more detailed account of selected issues and challenges surrounding PICCL as a form of litigation.

(A) CONTEXT

The phenomenon of climate change litigation in general began to have a certain prominence after 2005 in the United States, where several waves of (unsuccessful) litigation against private parties (irrespective of whether initiated by public or private subjects) followed one another.[7] The "turn of the tide" came on the 24th June 2015 with the above-referred historic judgment rendered by the District Court of The Hague (The Netherlands) in the so-called "*Urgenda climate case*", where the Urgenda foundation[8] successfully conducted litigation against the Government of the Netherlands for its lack

Terms used in the IPCC Third Assessment Report, 2001, 379 and 365 respectively; <https://archive.ipcc.ch/pdf/glossary/tar-ipcc-terms-en.pdf> accessed 30 May 2024).

6 M Lehmann and F Eichel, "Globaler Klimawandel und Internationales Privatrecht Zuständigkeit und anzuwendendes Recht für transnationale Klagen wegen klimawandelbedingter Individualschäden" (2019) 83(1) Rabels Zeitschrift für ausländisches und internationales Privatrecht 77, at 82. These authors contend that climate change lawsuits often serve less to provide effective legal protection than to attract public attention to the problem of global warming. Cf Shi-Ling Hsu, 'A realistic evaluation of climate change litigation through the lens of a hypothetical judgment lawsuit' (2008) 79 *University of Colorado Law Review* 701, 717: "*By targeting deep-pocketed private entities that actually emit greenhouse gases* […], *a civil litigation strategy, if successful, skips over the potentially cumbersome, time consuming, and politically perilous route of pursuing legislation and regulation*."

7 G Ganguly, J Setzer & V Heyvaert, 'If at First You Don't Succeed: Suing Corporations for Climate Change' (2008) 38/4 *Oxford Journal of Legal Studies* 841, 846ff.

8 In its own words, "*The Dutch Urgenda Foundation aims for a fast transition towards a sustainable society, with a focus on the transition towards a circular economy using only renewable energy*. […] *Urgenda views climate change as one of the biggest challenges of our times and looks for solutions to ensure that the earth will continue to be a safe place to live for future generations*." <https://www.urgenda.nl/en/home-en/> Reportedly, it is "*a citizens' platform which develops plans and measures to prevent climate change [which] also represent*[ed] *886 individuals in this case*." <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:7196> accessed 30 May 2024.

of efforts to combat climate change.[9] In its landmark ruling, which was upheld on the 20th December 2019 by the Dutch Supreme Court,[10] the District Court established that "*the State must take more action to reduce the greenhouse gas emissions in the Netherlands. The State also has to ensure that the Dutch emissions in the year 2020 will be at least 25% lower than those in 1990.*"[11]

Since 2015 there has been a proper "Big Bang" of cases around the globe which have been labelled as "climate litigation". Beyond those which have been inspired or given further momentum by the Urgenda decision (i.e. actions by NGOs and other public-interest representatives around the world against public bodies for lack of action in respect of dealing with climate-change), there is a rich typology of legal means displayed and actors involved (including, for instance, corporation versus corporation for "greenwashing" as unfair competition).[12] One therefore finds a wide variety of litigation forms: individuals versus public bodies; public bodies against corporations; corporations against public bodies; etc…

Although it may be quite graphic to refer to "public" versus "private" climate litigation within this context, depending on whether the defendant is a public entity or a private person,[13] it may be more appropriate to further refine the typology and differentiate along two axes of coordinates: domestic versus international litigation, and public versus private litigation, further restricting the latter to situations where both claimant and defendant are private parties, and the relevant cause of action bears a private-law nature. Admittedly, it may be difficult to draw clear-cut distinctions (notably as climate change is, by definition, an 'international'/global phenomenon), but differences in legal and non-legal stakes along both axes justify the classification effort. The presence of a public entity on either side of the legal relationship will frequently bring various complexities into the picture: potential international law immunities and doctrines such as the 'act of state' when litigation targets a public defendant, or else questions as to whether the lawsuit is grounded on public prerogatives/State authority when litigation is brought by a public plaintiff, for instance. Moreover, (domestic) political and (international) diplomatic dynamics differ widely depending on the public or private nature of the parties involved.

From this standpoint, focusing specifically on those cases featuring cross-border elements where civil society/individuals turn against corporations, PICCL is to be characterized (as announced) by confronting one or several private-party claimants (as opposed to public bodies) and one or several private-party defendants (as opposed to public entities), the latter generally being amongst the so-called "Carbon Majors".

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9 See footnote 2.

10 <http://www.urgenda.nl/en/climate-case/> accessed on 23 September 2024.

11 An English version of the 2015 judgment rendered by the District Court of The Hague can be found under the following permanent link: <http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:RBDHA:2015:7196> The quotation is taken from the summary provided in the same webpage; accessed 23 September 2024.

12 See, for instance, <https://climatecasechart.com/non-us-case/iberdrola-and-others-vs-repsol/> accessed 23 September 2024.

13 The Sabin Center sub-divides its "Global Climate Litigation Database" into "*Suits against governments*", "*Suits against corporations, individuals*" and "*Advisory opinions*" <https://climatecasechart.com/non-us-climate-change-litigation/> accessed 23 September 2024.

Carbon Majors are a group of 90 corporations, which, following scientific evidence, are responsible for "*63 % of cumulative worldwide emissions of industrial CO2 and methane between 1751 and 2010*".[14] Moreover, as indicated, PICCL will frequently respond to the features of what, under comparative methodologies, could be labelled as tort law (or non-contractual obligations under EU terminology). This is so, irrespective of whether internally these cases would be considered to rely on pure tort law or to arise from the "law of nuisance" (which in certain systems is a part of property law/rights in rem). Overall, PICCL aims to provide compensation for damage suffered, and/or where available, at the introduction of injunctive relief. As it does so at the international level, it is sustained and framed by private-international-law elements.

(B) SAMPLE CASES

As a relatively recent variety within climate change litigation, and possibly also due to the costs and practical difficulties that it entails for plaintiffs, PICCL illustrations are still scarce in the above-referred databases. The Grantham Research Institute and Sabin Center databases show approximately five cases[15] that could respond to the features identified above as characterizing PICCL.[16] Three of them have been selected for presentation hereinafter, as they illustrate three potential approaches that this kind of litigation may pursue.

In *Milieudefensie v Shell* 2019,[17] seven Dutch NGOs (and, initially, over 17,000 individuals) brought Royal Dutch Shell before the District Court of The Hague (The Netherlands), on the basis of both EU and Dutch rules of private international law (Royal Dutch Shell had at the time its registered office in the United Kingdom and its principal place of business in the Netherlands). The claimants sought to obtain the transposition of the legal reasoning of the *Urgenda* case to private subjects (corporations). Specifically, they sought to obtain, inter alia, an order that Shell limits "the joint volume of all CO_2 emissions associated with its business activities and fossil fuel products in such a way that the joint volume of those emissions is reduced by (net) 45% by 2030 compared to 2010 levels."[18] They sustained their claim on Dutch tort law, under which Shell would

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14 R Heede, 'Tracing anthropogenic carbon dioxide and methane emissions to fossil fuel and cement producers, 1854 2010' (2014) 122 *Climatic Change* 229. For updated data <https://climateaccountability.org/carbon-majors/> accessed 23 September 2024.

15 Other than the three cases presented hereafter, *Asmania et al. v. Holcim* <https://climatecasechart.com/non-us-case/four-islanders-of-pari-v-holcim/> combines compensatory and injunctive approaches, and *Friends of the Earth (Les amis de la terre) et al v Total* <https://www.climate-laws.org/geographies/france/litigation_cases/friends-of-the-earth-et-al-v-total> is based on the French *Loi sur le devoir de vigilance* (both accessed 24 September 2024).

16 <https://climate-laws.org/cclow/litigation_cases> and <http://climatecasechart.com/ > both accessed 30 May 2024. Beyond the cases mentioned, some further five or six cases, located in non-EU jurisdictions such as Argentina and Australia, could potentially be classified as PICCL, but their files do not contain enough information to ascertain whether that is indeed the case.

17 <https://en.milieudefensie.nl/climate-case-shell/climate-case-against-shell> (not to be confused with the 2008 *Milieudefensie v Shell* "common" environmental litigation <https://en.milieudefensie.nl/shell-in-nigeria>) both accessed 24 September 2024.

18 Page 205 of the unofficial translation of the court summons, which can be found under the "summons" link at <http://climatecasechart.com/non-us-case/milieudefensie-et-al-v-royal-dutch-shell-plc/> accessed 24 September 2024.

have "a duty of care towards the claimants to contribute to preventing [climate-change-derived] danger and to act in line with … Paris climate target[s]."[19] Their position was further argued, amongst other grounds, on a claim to indirect horizontal effect of Articles 2 ("right to life") and 8 ("Right to respect for private and family life, home and correspondence") of the European Convention of Human Rights.[20] On 26 May 2021, the trial level decision was issued. The District Court of The Hague

> Order[ed] [Shell], both directly and via the companies and legal entities it commonly includes in its consolidated annual accounts […] to limit or cause to be limited the aggregate annual volume of all CO_2 emissions into the atmosphere […] due to the business operations and sold energy-carrying products of the Shell group to such an extent that this volume will have reduced by at least net 45% at end 2030, relative to 2019 levels.[21]

Although the decision was welcomed as a "turning point" (since "[f]or the first time in history"[22] a court had ruled in the referred sense against a corporation within the climate change litigation context), civil society's joy did not last very long: Shell announced an appeal,[23] and in a decision rendered on the 12th November 2024 the Court of Appeal of The Hague overturned the trial decision.[24] At the time of writing it is not known whether the matter will proceed to the Supreme Court.

In *Lliuya v. RWE*, the plaintiff, Mr. Saúl Lliuya, lives in Huaraz, a city in Perú situated on the Andes mountains, precisely at the feet of a glacier that global warming is melting, increasing the water volume of a lake (Palcacocha) that will eventually overflow and flood Mr. Lliuya´s property.[25] Backed-up by German NGO Germanwatch, he has sued German electricity-provider RWE in order to avoid damage to his property. He contends, on the basis of scientific data/evidence, that, as RWE has contributed to 0.47% of all GHG emissions since the beginning of the industrial era,[26] it is liable to contribute to 0.47% of the costs of the preventative measures (building/construction works) required to prevent his property from being flooded.[27] The plaintiff´s approach to his case is undoubtably creative: by focusing on the claimant's aspiration to protect his own property from future damage, the case circumvents several difficulties typically encountered in environmental litigation (*locus standi* in respect of diffuse interests and "visibility" of latent damages). Notwithstanding this

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19 ibid paras 38–39.

20 ibid paras 40, 50–55.

21 Point 5.3 of the Court-issued English translation of the District Court Judgment <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2021/20210526_8918_judgment-1.pdf > accessed 24 September 2024.

22 Statements of Milieudefensie representatives <https://en.milieudefensie.nl/news/historic-victory-judge-forces-shell-to-drastically-reduce-co2-emissions> accessed 24 September 2024.

23 Shell announced its appeal back in 2021 https://www.shell.nl/media/persberichten/media-releases-2021/reactie-shell-op-uitspraak-klimaatzaak.html#english; Milidefensie´s "Statement of defence on appeal" is available in the Sabin Center database <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20221018_8918_na.pdf> both accessed 24 September 2024.

24 The English translation of the decision can be found in <https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2024/20241112_8918_judgment.pdf> accessed 6 December 2024.

25 <https://rwe.climatecase.org/en/background#palcacocha> accessed 24 September 2024.

26 Lliuya v. RWE, Statement of claim, point 8.2, p. 19; accessed 24 September 2024 <https://www.germanwatch.org/sites/germanwatch.org/files/announcement/20822.pdf>

27 Ibid, p. 2 (idea adapted from the petitum) accessed 24 September 2024.

focus on private rights and interests, the case, if successful, will indirectly produce climate-beneficial results. The case is still ongoing, and that is so despite not succeeding at trial level before the District Court in Essen (Germany) due to issues of causality (even if scientific evidence was offered to the court in the statement of claim). An appeal is currently pending before the Higher Regional Court in Hamm, which has, in principle, accepted the causal link, and opened the evidentiary phase.[28] After a long hiatus, due to the fact that the Higher Regional Court wanted to take evidence *in situ* in Peru, and the COVID pandemic hindered this possibility,[29] a "Court appointed expert deliver[ed a] report on the 1st question of proof" in august 2023.[30] As of September 2024, "[b]*oth parties to the proceedings have submitted their responses to the expert opinion on the flood risk to the court*" and they are waiting for the Hamm Higher Regional Court to set a the date for the hearing.[31]

While *Milieudefensie* resorts to a tort-law approach and originally led to the obtention of an order to curb down emissions (unaccompanied with any request as to compensation) and *Lliuya* resorts to a rights-in-rem approach in order to obtain compensation for "protective" purposes, *Falys v. Total Energies* combines certain elements from both approaches.[32] Hugues Falys has been a farmer for around 30 years in Lessines, Belgium, and during this time he has suffered the effects of climate change; specifically, the impact of several extreme weather events (amongst which heatwaves and droughts), resulting in "*significant losses, extra workload, constant stress and immense worry for the years to come*".[33] Supported by three organisations Ligue des droits humains, FIAN Belgium and Greenpeace he has filed a lawsuit with the Commercial Court of Hainau, Tournai division (Belgium) against French petrol multinational TotalEnergies. On the basis of a tort-law reasoning, Mr. Falys is demanding compensation for the damage he has suffered as well as an order to "*the company to move away from fossil fuels in order to prevent future damage*".[34] The lawsuit was filed in March 2024 and is, as of December 2024, pending at trial level.

Having briefly sketched the approaches that PICCL may take, let us analyse the specific rules that sustain the international jurisdiction and choice-of-law dimensions of PICCL in the European Union.

(C) EU RULES ON INTERNATIONAL JURISDICTION OF COURTS

EU rules on international jurisdiction relevant to private international climate change litigation are thought to be the "gold standard"[35] of rules of international jurisdiction

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28 <https://www.germanwatch.org/en/15999> accessed 24 September 2024 ("*The decision by the Higher Regional Court Hamm to enter into the evidentiary stage is a historic breakthrough: it is the first time that a court has recognised that "a private company is in principal* [sic] *responsible for its share in causing climate damages in other countries* ").

29 < https://rwe.climatecase.org/en/legal#timeline > accessed 24 September 2024.

30 < https://rwe.climatecase.org/en/legal#timeline > accessed 24 September 2024.

31 "Current status of the lawsuit" in <https://rwe.climatecase.org/en> accessed 24 September 2024.

32 < https://www.thefarmercase.be/en/ > accessed 24 September 2024.

33 < https://www.thefarmercase.be/en/the-court-case/> accessed 24 September 2024.

34 Ibid.

35 E. Álvarez-Armas has not coined the referred expression (with which he strongly agrees) but cannot recall in which conference he heard it used, or who the author was. E. Álvarez-Armas apologizes to the author of the expression for this memory lapse.

over human-rights-related torts (a broader category, in which PICCL belongs). This is largely due to two core reasons: firstly, the relevant rules on international jurisdiction are generally available for any potential plaintiff anywhere in the world, irrespective of their nationality, domicile, habitual residence, place of harm, or any other possible characteristic, as long as the defendant is domiciled in a Member State of the European Union.[36] Secondly, legal mechanisms, such as the Anglo-Saxon doctrine of *forum non conveniens*, that would restrict the resort to existing and available grounds of jurisdiction on the basis of expediency or convenience of having cases tried elsewhere in the world are not acceptable within the EU system of international jurisdiction.[37]

These two considerations entail that, generally, provided that the relevant GHG emitter is domiciled in the EU, access to justice is unrestrictedly available for any potential climate-change-related tort victim anywhere in the world. The relevant grounds of jurisdiction are to be found in the so-called Brussels I bis Regulation,[38] specifically in Article 4, the general rule of the system, conferring jurisdiction to the courts of the country of the domicile of the defendant; and Article 7(2), a special rule of jurisdiction on "*matters relating to tort, delict or quasi-delict*", conferring jurisdiction to the courts of the place where the "*harmful event occurred or may occur*". The latter provision is to be interpreted according to the *Mines de Potasse* ruling,[39] which reflects the so-called "ubiquity principle": in a nutshell, in cases of complex non-contractual obligations (i.e. when an action/omission in country A gives rises to a damaging result in country B), the plaintiff may freely choose to submit their claim in the place where the event giving rise to damage occurred or may occur, or else in the place where the damage occured or may occur.

Overall, the referred elements yield three different jurisdictional possibilities: suing EU-domiciled GHG emitters in their country of domicile (Article 4); suing EU-domiciled GHG emitters in the EU location where victims suffer damage (Article 7(2), first option per *Mines de Potasse*); or suing EU-domiciled GHG emitters in the EU location of the event giving rise to damage (Article 7(2), second option per *Mines de Potasse*). Irrespective of the nature of the action under the applicable (domestic private) law (i.e. irrespective of the underlying pure-tort or rights-in-rem approach), the relevant heads of jurisdiction will always be Articles 4 and/or 7(2): per the Čez[40] case-law of the CJEU, the rule of exclusive jurisdiction in Article 24 is not relevant for cases where the very substance of a right in rem is not in question and, typically, climate litigation will not delve into those themes.

The openness of the EU system and its various positive aspects, as just described, in terms of facilitating access to justice do not mean, however, that the system does not feature limitations, both structural and practical.

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36 CJEU, case C-412/98, *Group Josi Reinsurance Company SA*, ECLI:EU:C:2000:399

37 CJEU, case C-281/02, Andrew Owusu v N. B. Jackson, trading as "Villa Holidays Bal-Inn Villas" and Others, ECLI:EU:C:2005:120

38 Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), [2012] OJ L351/1

39 Case 21-76 *Handelskwekerij G.J. Bier B.V. & the Reinwater Foundation v. Mines de Potasse d'Alsace S.A.*, ECLI:EU:C:1976:166.

40 Case C-343/04 *Čez*, ECLI:EU:C:2006:330

Structurally, a first extremely prominent limitation should immediately become clear from the description provided so far: the relevant rules confer jurisdiction over EU-domiciled GHG emitters but cannot be used to assert jurisdiction over non-EU-domiciled GHG emitters whose activities have an impact on the territory of the EU. In other words, the way that the Brussels I bis system is currently configurated entails the need to resort to domestic rules on international jurisdiction vis-à-vis third-country defendants, if available at all. This configuration has historically been an issue when trying to bring a third-country subsidiary to court alongside an EU parent company, for instance in respect of conventional environmental torts and/or human-right-related torts. At first sight, these scenarios are unlikely to take place in climate litigation, as per its typical structure, climate litigation targets parent companies only. Still, even when focusing on parent companies alone, trying to bring to court a non-EU-domiciled Carbon Major is currently outside the scope of the Brussels I bis Regulation, and therefore not a given, as it is fully dependent on domestic rules of international jurisdiction. Thus, the geographical restriction on the application of the Regulation's rules[41] may not be a problem in those Member States where domestic rules based on the crystallization of damage exist,[42] but it is a very significant shortcoming where there is a lack of jurisdictional criteria based on the impact of the tort/the materialisation of the result. Significantly, several EU countries have rules based only on the place of action or do not have domestic rules on jurisdiction over torts at all.[43]

Beyond this, there are practical limitations that may arise from the very application of current provisions or their interaction with other rules. Amongst these, two examples deserve to be mentioned.

Firstly, there is a relative risk of fragmentation of jurisdiction in cases where the latter would be based on the notion of the place of action/event giving rise to the damage. An Example of this can be easily drawn by analogy from the choice-of-law aspects of the Lliuya case: when trying to identify the place of acting for choice-of-law purposes, the claimant mentions in his statement of claim that (only) "*two thirds of* [RWE's] *greenhouse gas emissions occur within Germany*",[44] which is likely related to the fact that RWE has premises in other countries.[45] On a purely technical level, this should have likely determined the impossibility to apply German law alone to the full extent of the controversy, and the need to apply on a distributive basis the law(s) of the (various) place(s) where the remaining third of GHG emissions originates (It would seem, however, that the point was not raised in order not to further complexify an already technically complex legal situation). If one was to transpose these ideas to the realm of jurisdiction, the fact that RWE has got emitting structures both in Germany and other countries should lead to a kind of "reverse mosaic"

41 Articles 4 and 6(1).

42 European Commission, *Green paper on the review of council regulation (EC) No. 44/2001 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters* [2009] COM(2009) 175 final, 3ff.

43 A Nuyts and K Szychowska, *Study on residual jurisdiction (Review of the Member States' Rules concerning the "Residual Jurisdiction" of their courts in Civil and Commercial Matters pursuant to the Brussels I and II Regulations) – General report*, JLS/C4/2005/07-30-CE, Université libre de Bruxelles (2007) 32-33.

44 <https://www.germanwatch.org/sites/germanwatch.org/files/announcement/20822.pdf> p. 21; accessed 1 November 2024.

45 <https://www.rwe.com/en/the-group/countries-and-locations/?locationType=ob515186-8541-45fa-8de3-50a449c731cc> accessed 1 November 2024.

scenario,[46] where jurisdiction could not have been asserted at a single place on the basis of Article 7(2). However, this fragmentation risk at the level of jurisdiction is merely potential, on two accounts: firstly, choosing to assert jurisdiction at the domicile of the EU-domiciled defendant will likely allow averting the issue and, secondly, *Milieudefensie 2019* opened the door to interpreting that the place of action is the place where the decision-making process took place.[47]

Secondly, the lack, within Brussels I bis, of a ground of international jurisdiction allowing the cumulation of related actions may be a practical obstacle to NGO-driven climate change litigation, environmental litigation, and business and human rights litigation more generally. Bringing this kind of claim to court requires having the capacity to face significant expenses, even when a party litigates within their own jurisdiction. The costs associated with conducting proceedings outside of one's own jurisdiction may entail a very significant hindrance in accessing justice in certain cases, even within the European Union. Thus, costs may be more easily dealt with if potential plaintiffs can concentrate their resources by building a joint case out of their related actions. Against this reality, however, Brussels I bis approaches the topic of related claims from a totally different perspective. Article 30 Brussels I bis establishes that when "*related actions*" (i.e. actions "*so closely connected that it is expedient to hear and determine them together to avoid the risk of irreconcilable judgments resulting from separate proceedings*") are "*pending in the courts of different Member States, any court other than the court first seised may stay its proceedings*". *The article moreover establishes that "[w]here the action in the court first seised is pending at first instance, any other court may also, on the application of one of the parties, decline jurisdiction if the court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof.*" As it may be seen, Article 30 is a provision that only facilitates the coordination of pending proceedings on related actions. There is no provision in the Regulation that would "create" jurisdiction as such on the basis of connexions between claims, as it is the case in the domestic procedural law of certain countries, with respect to internal/territorial jurisdiction. *De lege lata*, the only existing possibilities for plaintiffs to cumulate their claims would be to try to build a joint case, if possible at all, before the courts of the domicile of the GHG emitter, on the basis of Article 4 Brussels I bis, or else, potentially, before the courts of the place where the event giving rise to the damage occurred, on the basis of Article 7(2). It would not be possible, however, to cumulate related actions by various victims at any given place where damage occurred or would have occurred for a given specific victim (Article 7(2), first option per *Mines de potasse*, as described above). *De lege ferenda*, the possibility of drafting a rule that would create jurisdiction in the sense described should be explored. This is so even when in such endeavor careful consideration would need to be given to factors that may determine the appropriateness and logic of allowing the cumulation, such as the nature of the actions to be cumulated — compensatory, injunctive, etc — and the influence of various concerns: proximity, proper administration of justice, easy access to evidence,

[46] The Mosaic theory is featured in the CJEU's decision in *Shevill* (CJEU, case C-68/93, Fiona Shevill, Ixora Trading Inc., Chequepoint SARL and Chequepoint International Ltd v Presse Alliance SA, ECLI:EU:C:1995:61)

[47] See footnote 17 (The court's reasoning refers to choice of law, but may be transposed to jurisdiction *mutatis mutandis, even if the trial decision has been overturned*).

etc. Allowing the cumulation of actions aiming at injunctive relief would not be the same as allowing the cumulation of actions aiming at compensation.

Having sketched the basic features of the EU jurisdiction system and some of its limitations, let us explore the basic traits of the choice-of-law dimension of PICCL.

(D) EU RULES ON CHOICE OF LAW

Putting aside any consideration that may potentially arise from the existence, within the EU legal order, of the corporate sustainability due diligence directive,[48] the following lines present the core traits of the EU framework on choice of law in climate-related matters. The law governing liability for and/or injunctive relief over climate-change-related damage occurred or that may occur is determined by EU courts (save in Danemark) by resorting to the so-called Rome II Regulation.[49] The regulation contains in Article 7 a specific choice-of-law rule on "Environmental damage" (A). However, it also contains a further provision, Article 17, on "Rules of safety and conduct" which, allegedly, should play a role in private international environmental litigation generally, and PICCL specifically (B). The interaction between these two articles is complex: as will be explained, Article 17 may potentially undermine the effectiveness of Article 7 and the environmental policies that it is meant to embody.

(1) Article 7 Rome II, on the law applicable to "environmental damage"

Article 7 of the Rome II Regulation reads as follows:

> "*The law applicable to a non-contractual obligation arising out of environmental damage or damage sustained by persons or property as a result of such damage shall be the law determined pursuant to Article 4(1), unless the person seeking compensation for damage chooses to base his or her claim on the law of the country in which the event giving rise to the damage occurred*"

The provision offers victims of environmental damage (both environmental damage in the strictest sense and environmental damage "lato sensu"; damage sustained by persons or property as a result of environmental damage) the choice between two potentially applicable laws to govern the liability arising from environmental damage:[50] the law of the place where the damage materializes (the general rule of the Rome II regulation, found in Article 4(1)) and the law of the place where the "causal" event giving rise to the damage occurred. This entails a strategic privilege justified by the *favor laesi* principle ("*discriminating in favour of the person sustaining the damage*") and by the principles of environmental law of the EU, according to recital 25. The underlying assumption is

[48] Directive (EU) 2024/1760 of the European Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, O.J. L, 2024/1760, 5.7.2024.

[49] Regulation (EC) 864/2007, of the European Parliament and of the Council, of 11 July 2007, on the law applicable to non-contractual obligations (Rome II), O.J. L 199, 31.7.2007, p. 40.

[50] According to Articles 2.3.b and 15.b of the Regulation, damage "*that is likely to occur*" *and* "*measures […] to prevent […] injury*" *are also covered.*

that victims will use the choice offered to maximize the reparation to be paid by the polluter, by choosing the legal system that will lead to a more substantial economic compensation. This is (allegedly) meant to produce an enhanced deterrent effect upon potential polluters, thus amounting to an increase in the level of environmental protection in force in the international scene:[51] "*the point is not only to respect the victim's legitimate interests but also to establish a legislative policy that contributes to raising the general level of environmental protection*".[52]

(2) Article 17 Rome II, on "Rules of safety and conduct"

As announced, Article 7 may potentially encounter difficulties in respect of fulfilling its environmentally protective functions due to its potential interaction with Article 17. The latter reads:

> "*In assessing the conduct of the person claimed to be liable, account shall be taken, as a matter of fact and in so far as is appropriate, of the rules of safety and conduct which were in force at the place and time of the event giving rise to the liability*."

According to Recital 34, the latter provision is to be approached from the following coordinates:

> "*In order to strike a reasonable balance between the parties, account must be taken, in so far as appropriate, of the rules of safety and conduct in operation in the country in which the harmful act was committed, even where the non-contractual obligation is governed by the law of another country. The term 'rules of safety and conduct' should be interpreted as referring to all regulations having any relation to safety and conduct, including, for example, road safety rules in the case of an accident*".

Article 17 is one of the Regulation´s general provisions, and, consequently, is meant to intervene in any situation concerning non-contractual obligations (not only climate litigation or environmental torts) where "*rules of safety and conduct*" happen to be involved. As explained by the European Commission in the Explanatory memorandum to the Rome II proposal, at the root of Article 17 lies the understanding that a tortfeasor needs to respect the rules of safety and conduct in force in the country where they deploy their activities "*irrespective of the law applicable to the civil consequences of his action*", and, therefore, "*these rules must also be taken into consideration when ascertaining liability*".[53]

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[51] See Article 7, recital 24, and recital 25 Rome II Regulation, and the Explanatory Memorandum to the Commission´s Proposal for a Regulation of the European Parliament and the Council on the law applicable to non-contractual obligations ("Rome II"), COM(2003) 427 final, 19-20. L Enneking ('The Common Denominator of the Trafigura Case, Foreign Direct Liability Cases and the Rome II Regulation An Essay on the Consequences of Private International Law for the Feasibility of Regulating Multinational Corporations through Tort Law' (2008) 2 *European Review of Private Law* 283, 289-291) describes explicitly the law and economics reasoning underlying the rule, which is not explicitly addressed in the above-referred documents, but it very clearly transpires from them.

[52] Explanatory Memorandum, op cit, 19.

[53] Ibid, 25: "[…] *Taking account of foreign law is not the same thing as applying it: the court will apply only the law that is applicable under the conflict rule, but it must take account of another law as a point of fact, for example when assessing the seriousness of the fault or the author's good or bad faith for the purposes of the measure of damages*".

Thus, judges may solely apply the legal order designated by the choice-of-law rule, but "*must*" take into account the other law as an element of fact. In other words, according to the European Commission, within the framework of international disputes on non-contractual obligations, rules on safety and conduct do not intervene as legal elements; they are not applied as legal rules, but they are taken into account as factual elements, as data.[54]

The above-announced potential to interfere with Article 7 may crystallize, whenever the applicable tort law is fault-based,[55] as follows: on the basis of Article 17, certain authors argue that the public (administrative) law provisions[56] that regulate environmentally damaging activities (like emitting GHGs) in the state where the action takes place should nuance or discard liability altogether even when the applicable law chosen by the victim is the *lex loci damni*.[57] This conclusion, reportedly,[58] should extend to situations where an administrative permit/authorisation allows the activity in the state where the action takes place, as could allegedly be the case of the European emission allowances under the European emission Trading Scheme (hereinafter EETS).[59]

A series of arguments run against this stance, however. They may be summarized as follows:[60] firstly, the legal nature of the EETS is uncertain, and it is thus difficult to determine whether it creates "permits"/"authorizations";[61] secondly, strictly speaking, a permit"/"authorization" is not a "rule" of safety and conduct; thirdly, "permits"/"authorizations" have varying legal significance within different legal orders (it cannot be presumed that the permit/authorization would necessarily have protective

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54 As explained by A Dickinson (*The Rome II Regulation: the law applicable to non-contractual obligations* (OUP 2008) 640-41), "[t]*hey provide part of the context within which the conduct of the person liable must be judged, and their significance will vary according to the nature of that conduct and the other surrounding circumstances, as well as the content of legal rules underlying the non-contractual obligation in question. If liability under the applicable law is strict, the conduct of the person liable may not fall to be assessed at all*".

55 Ibid.

56 The term "*rules of safety and conduct*" is not confined to the realm of administrative-law provisions. However, the bulk of this kind of category are indeed administrative-law rules (M Vinaixa, *La responsabilidad civil por contaminación transfronteriza derivada de residuos*, (Universidad de Santiago de Compostela 2005) 427).

57 See, amongst others, S C Symeonides, 'Rome II and Tort Conflicts: A Missed Opportunity' (2008) 56(1) *The American Journal of Comparative Law* 173, 212 215; M Lehmann and F Eichel, op cit.

58 M Lehmann and F Eichel, op cit, 98.

59 The scheme is built on the basis of multiple legal texts and amendments, but it ultimately stems out of Directive 2003/87/EC of the European Parliament and of the Council of 13 October 2003 establishing a scheme for greenhouse gas emission allowance trading within the Community and amending Council Directive 96/61/EC [2003] OJ L275/32.

60 For detailed explanations of these points, see E. Álvarez-Armas, "Le contentieux international privé en matière de changement climatique à l'épreuve de l'article 17 du règlement Rome II : enjeux et perspectives" (2020) 3 RDIA 109; and E. Álvarez-Armas & O. Boskovic, "Climate change litigation: Jurisdiction and Applicable law" in A. Frąckowiak-Adamska & G. Rühl (eds), *Private international law and global crises* (Edward Elgar 2025 - upcoming).

61 It is not completely clear whether the operation of the EETS actually amounts to creating permits or authorizations under administrative law. There is an academic controversy as to the legal nature of the "allowances" created by Directive 2003/87/EC, for there are strong terminological divergences in its various linguistic versions (C Cheneviere, *Le système d'échange de quotas d'émission de gaz à effet de serre – Protéger le climat, préserver le marché intérieur* (Bruylant 2018) 200).

effects for the GHG emitter under the relevant private law);[62] fourthly, precedents to Article 17 ultimately plead for a pro-victim not pro-polluter interpretation thereto.[63]

Ultimately, even if these considerations were discarded, a simple *effet utile* reasoning leads to understanding that preserving the effectiveness of Article 7 requires blocking Article 17, not only in climate cases, but in environmental tort cases, generally. The panorama described clashes against the environmentally protective objectives of Article 7 in the following sense: even the simple qualification of liability (reduction of the quantum of the compensation), not to say its exclusion, is against the economic rationale described above. Critically, within this context, Article 7 Rome II should be considered a *lex specialis* vis-à-vis Article 17. Thus, if it was deemed that trying to "*strike a reasonable balance*" between GHG emitters and victims, as a general policy, amounted to being incompatible with favouring climate and environmental victims, as a special policy (as sustained by the *favor laesi* principle and the principles of EU environmental law), then the latter should prevail. As a consequence, interpretations that do not favour the victims, and even more so, interpretations that disfavour the victims need to be discarded. Therefore, either through mere coherent interpretation or else through amendment, access to the benefits of Article 17 needs to be blocked for GHG emitters, and arguably for all potential polluters.[64]

(E) ADVANCED CONSIDERATIONS

Previous pages have sketched the core features of the EU rules on international jurisdiction of courts and on applicable law relevant for compensatory and/or injunctive actions over cross-border climate-change-related damage. Upcoming pages will present some more advanced considerations on certain specific issues, to better understand the contribution that EU private international law makes to PICCL, using as a point of departure certain priorly presented elements.

(1) On the complex nature of climate change phenomena and the notion of "environmental damage" under Rome II

Climate change and its related phenomena are complex from a scientific perspective, and this may entail difficulties regarding how legal systems may apprehend them. Specifically, climate change is per essence a global phenomenon that knows no geographic limitation, to which multiple emitters contribute, and that may potentially impact a very significant number of victims, anywhere in the world. This global and unrestricted nature should

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62 Different national substantive laws may confer different effects to authorization/permits, which may vary from no effect at all under private law (thus allowing victims to resort to all sorts of actions under private law) to a full shielding from liability, ranging through various intermediate possibilities.

63 As acknowledged in the Explanatory Memorandum to the Rome II proposal (op cit, 25) the provision is directly inspired by Article 7 of the Convention of 4 May 1971 on the Law Applicable to Traffic Accidents, and Article 9 of the Convention of 2 October 1973 on the Law Applicable to Products Liability. See the explanations on these precedents provided in the work referenced supra note 59.

64 Also in favour of the exclusion of Article 17 in environmental matters: O Boskovic 'L'efficacité du droit international privé en matière environnementale' in O Boskovic (dir), *L'eficcacité du droit de l'environnement* (Dalloz T&C 2010) 53, 62.

not make us lose sight, however, of the fact that inasmuch as an individual victim may identify individual damage that they have suffered as a consequence of climate-change-related phenomena their situation may be "translated" into private law, and they would be *prima facie* entitled to use private law tools (where available) to bring to justice a Carbon Major of their choosing on the basis of the best available science.[65] Any witty lawyer will understand, nevertheless, that difficulties do not stop here: after establishing jurisdiction, PICCL may face significant difficulties to proceed further, coming notably from the realm of substantive tort law. Notably, establishing causal links between action (greenhouse gas emission) and result (climate-related damage) may prove to be challenging.[66] Specifically, the traceability of "*non-degradable, anthropogenic*" surpluses of greenhouse gases to any specific emitter is complicated at least by two factors: on the one hand, *"the greenhouse effect also takes place without human intervention and is subject to natural fluctuations that vary in space and time"*; on the other hand, anthropogenic greenhouse gases emissions are absorbed by so-called (natural) *"CO2 sinks" (such as land surface or water)*".[67] Moreover, reportedly, establishing a causal link/chain in respect of material or financial damage attributable to global warming is further complexified by the fact that the specific material or financial damage suffered by a person is preceded by impacts on two "environmental goods": first, changes in the atmosphere (greenhouse gases not "absorbed" by water or soil intensify the natural greenhouse effect, leading to increases in the mean temperature on Earth); second, changes in the environment that result from the latter, as for instance, rising sea levels, severe droughts or the melting of glaciers. Therefore, overall,

> "*the damage suffered by the plaintiff is not directly and monocausally attributable to an act of the defendant, but is mediated through general global warming. This distinguishes it from actions for directly caused environmental disasters […]. At the level of national law, this leads to challenges in proving causality and in selecting the liable debtor […]*".[68]

But not only. These comparative-tort-law difficulties may also be accompanied by private-international-law ones. The scientific and structural complexities described above could potentially be used by defendants to try to contest the characterization of climate-change-derived damage as "environmental damage" caused by a tortfeasor to a victim under the Rome II Regulation. However, according to Recital 24:

> *'Environmental damage' should be understood as meaning adverse change in a natural resource, such as water, land or air, impairment of a function performed by that resource*

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65 See notably footnote 14: the percentages of GHG emissions attributed to each Carbon Major in the Heede report served as the basis of the lawsuit in Lliuya.

66 It is worth noting that defendants may feel tempted to use the causal link "upstream" as an excuse to try to contest the assertion of jurisdiction. This comes within the tendency to try to transform the jurisdiction stage of proceedings into a mini-trial, which has been proscribed, for instance, by the UK Supreme Court (See, *inter alia*, *Vedanta Resources PLC and another (Apellants) v Lungowe and others (respondents)* [2019] UKSC 20, at 9). In this sense, it is worth recalling that even authors who may take pro-defendant stances are against this practice, and say that only a "*prima facie*" causal link may be required: establishing causality is part of the substance of the case, after jurisdiction is asserted (See, for instance, F Giansetto, "Changement climatique - Le droit international privé à l'épreuve des nouveaux contentieux en matière de responsabilité climatique" (2018/2) *Journal du droit international* 505, 519.

67 The entirety of the remainder of the paragraph is a translation/paraphrasis of M Lehmann & F Eichel, op cit, 79-80.

68 Ibid.

> *for the benefit of another natural resource or the public, or impairment of the variability among living organisms*.

Moreover, Article 7 establishes that, beyond "*environmental damage*" as described in recital 24 (i.e. *stricto sensu* environmental damage, ecological damage, damage to nature as such) it also covers "*damage sustained by persons or property as a result of such damage*" (i.e. *lato sensu* environmental damage). From this standpoint, it seems clear that climate-related damages in the cases referred in the "samples cases" section above are indeed environmental damages for the purposes of Rome II, inasmuch as anthropogenic GHG emission constitute an "*adverse change in a natural resource, such as* […] *air*, [inter alia]" and the damages "*sustained*" by the relevant victims are "*a result*" thereto.

Notwithstanding this very clear conclusion, contesting the characterization of climate-related damage as environmental damage would only be interesting for Carbon Majors in two specific senses. Firstly, in cases where victims chose the application of the law of the place where the event giving rise to the damage occurred (as in Lliuya, where the law of Germany was chosen) and defendants wanted to try to avoid this. Should a court (mistakenly) decide that a PICCL case is not a case of "environmental damage" and that Article 7 does not apply, the general rule of the Rome II regulation, Article 4(1), would come into play, leading to the application of the law of the place of damage (result). Secondly, in cases where victims chose the application of the law of the place of damage (result) and defendants wanted to try to avoid this and obtain the application of the law of the place where the event giving rise to the damage occurred. In these instances, beyond misleading the court into deciding that Article 7 does not apply, the defendant would need to persuade the court that the climate tort is manifestly more closely connected with the country where they acted, i.e. resort to Article 4(3), the "escape clause". However, the escape clause is exceptional in nature and requires proof that the case is "manifestly" more closely connected with a State other than the one designated by article 4(1). This seems impossible in cases like Lliuya where connecting factors with equal weighting and significance are equally distributed between the two relevant countries in the case (Germany and Peru).

All in all, the understanding that climate-related damage is indeed "environmental damage" covered by Article 7 Rome II is supported by academia[69] and by the District Court of The Hague in *Milieudefensie 2019*.[70]

(2) On Article 30 Brussels I bis and the mandatory respect for plaintiff's choice of forum

It was referred above that NGOs will not necessarily have it easy to try to cumulate climate-cases against a given same Carbon Major. The opposite, however, is also true (and should so

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[69] See amongst others O. Boskovic, « La localisation du dommage en matière d'atteinte à l'environnement », 2022 Int'l Bus. L.J. 697 (2022) 697; Y. Nishitani, Localization of Damage in Private International Law and Challenges of Climate Change Litigation, 2022 Int'l Bus. L.J. 697 (2022) 707 ; E-M Kieninger, 'Conflicts of jurisdiction and the applicable law in domestic courts' proceedings', in: Wolfgang Kahl & Marc-Philippe Weller (eds.), *Climate Change Litigation. A Handbook* (München 2021) 119.

[70] Milieudefensie 2019, op. cit., point 4.3.2.

remain): NGOs cannot and should not be forced to cumulate different proceedings against a single given Carbon Major by the latter, notably to the detriment of their jurisdictional choices. In other words, the above-referred Article 30 Brussels I bis on "related actions" cannot be used to try to short-circuit a plaintiff's choice of a forum whenever they start litigation against a given Carbon Major and there was another "related" climate lawsuit pending in a different Member State against the same defendant but by a different claimant.

Let us illustrate this point through an example: CarbonMajor1 is a corporation with its domicile in Spain, and NGO1 and NGO2, both established in the Netherlands, submit a lawsuit to Dutch courts on the basis of Article 7(2) Brussels I bis, since their climate-related damage materializes in the Netherlands. In their law suit they request injunctive relief (i.e. that CarbonMajor1 be ordered to curb down its GHG emissions in accordance with the best available science to a level that will contribute to not surpassing 1.5 degrees Celsius of increase in global average temperature) and monetary compensation (i.e. recovery of damages to then invest them in reforestation, for instance, or other carbon offset projects), both under Dutch law (including International and European law as embedded in the Dutch legal order). When NGO1 and NGO2 submit their lawsuit, NGO3, established in Spain, had already started climate-change litigation in Spain against CarbonMajor1, also on an injunctive and on a compensatory basis (both under Spanish law, including International and European law as embedded in the Spanish legal order). In this scenario, CarbonMajor1 could not use Article 30 Brussels I bis to contest the jurisdictional choice by NGO1 and NGO2 and force a cumulation of proceedings in Spain. Firstly, because Article 30 does not impose an obligation on any court to stay proceedings or decline jurisdiction (the latter possibility being moreover dependent on whether "*court first seised has jurisdiction over the actions in question and its law permits the consolidation thereof*"); obligations of such nature would only exist in situations leading to *lis pendens* (which is not the case). But secondly, and more significantly, because the purpose of Article 30 is "*to avoid the risk of irreconcilable judgments resulting from separate proceedings*" and there is no true risk of irreconcilable judgments: i) CarbonMajor1 may be ordered to pay damages to NG1 and NG2 but not NG3; or viceversa; or to all or to none of the claimants; none of those possibilities entail any sort of contradiction, as the Dutch decision will depend on the subjective situation of NGO1 and NGO2 and the applicable Dutch private law, while the Spanish decision will depend on the subjective situation of NGO3 and the applicable Spanish private law. ii) CarbonMajor1 may be ordered to curb down its emissions by the Dutch decision and not by the Spanish one or viceversa; or by both or by none; and, again, none of those possibilities entails any sort of contradiction, as each decision will depend on the application of a different legal order. If both decisions order a curbing down of GHG emissions but by different percentage, by respecting the most restrictive percentage CarbonMajor1 will be also respecting the most lenient one (i.e. if you comply with an order to curb down by 50% you are simultaneously also complying with an order to curb down by 30%).

(3) On the appropriateness of the ground of jurisdiction of the place where the damage occurs

As mentioned above when Article 30 Brussels I bis was first presented, *de lege lata* there would be no possibility to cumulate related actions by various victims at any given

place where damage occurred for a given specific victim, should this be necessary. This idea leads to introducing a point that may be controversial: certain authors question the appropriateness of the ground of jurisdiction of the place where the damage occurred, notably as regards actions aiming at the reduction of greenhouse gas emissions.[71] They consider that proximity concerns recommend that the action be tried by a court close to greenhouse gas emitter's headquarters, as the relevant court may potentially issue orders that are aimed at the modification of the general policy of the whole company. Against this stance, proximity concerns alone (but potentially and significantly in cumulation with the points on costs raised when Article 30 was presented), also sustain that the case be heard by a court that is close to the materialization of the damage, to facilitate obtaining evidence (equally relevant in cases on injunctive relief). In this respect, one of the key elements in *Mines de Potasse* in relation to proximity and proper administration of justice as regards the jurisdiction of the court of the place where the damage occurred is the ease with which evidence can be obtained, which is indisputable. As an illustration of the importance of this point, and of the difficulties that may ensue if a "remote" court hears a case, in Lluiya the Court of Appeal of Ham (Germany) was forced to seek permission from Ecuadorian authorities to travel physically to the Andes in order to examine and obtain evidence of the claimant's precise situation, thus delaying the procedure significantly.[72]

Moreover, critically, the court of the place of damage is not necessarily unable to issue injunctive relief, if necessary. The "*sic utere tuo ut alienum non laedas*" principle, that constraints States under public international law in such a way that "*no State has the right to use or permit the use of its territory in such a manner as to cause injury* […] *in or to the territory of another or the properties or persons therein* […]"[73] should be construed as framing the understanding and the exercise of international jurisdiction by courts in these matters. Specifically, this obligation on States should be interpreted as not rendering inappropriate or inadequate the assertion of jurisdiction over actions aiming at the reduction of greenhouse gas emissions (and the potential subsequence issuance of an order) by the courts of the place of damage. In other words, an assumption of jurisdiction with a view to potentially issuing an order would not entail an inappropriate assertion of sovereign authority by one State over the territory of another (especially within the EU) because, ultimately, the State of the place of action does not have "*the right to use or permit the use of its territory in such a manner as to cause injury*".

Overall, calling into question the appropriateness of the ground of jurisdiction of the place where the damage arises entails calling into question *Mines de Potasse* and the effect utile of Article 7(2) that the referred case preserves. Sovereignty and proximity concerns do not suffice to do so (they were already factored into the CJEU's decision back in 1976, the latter very explicitly). Nevertheless, one further aspect deserves to be analysed: foreseeability, which also runs transversally through concerns on the appropriateness of the application of the law of the place where the damage occurs.

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71 O. Boskovic (with whom I have respectful and amicable disagreements) in E. Álvarez-Armas & O. Boskovic, op. cit.

72 https://theconversation.com/a-peruvian-farmer-is-trying-to-hold-energy-giant-rwe-responsible-for-climate-change-the-inside-story-of-his-groundbreaking-court-case-218408 <accessed 10 December 2024>

73 Trail Smelter award (United States of America v Canada (Award) (1941) 3 RIAA 1905) para. 1965

(4) On the appropriateness of the application of the law of the place where the damage occurs, and on foreseeability, generally

There is a further concern underpinning the referred contestation to the suitability of the place of materialization of damage as a ground of jurisdiction: its potential lack of foreseeability. Such lack of foreseeability would arise from climate change's above-mentioned global and geographically unlimited nature (a phenomenon to which multiple emitters contribute and that may potentially impact a very significant number of victims, anywhere in the world). This concern is extended by certain authors to its suitability as a connecting factor in choice-of-law: reportedly, the referred absence of foreseeability of the place of materialization of damage would disqualify the latter as a connecting factor, for it would render the applicable law equally unforeseeable. This is taken as far as questioning the adequacy of the legislative policy behind Article 7 Rome II in PICCL, for, allegedly, the fact that damage may arise anywhere in the world may lead to the application of the law of any potential place of damage anywhere, which would run against the "*legitimate expectation of companies*".[74] These considerations would be taken even one step further as regards injunctive relief for the curbing down of GHG emissions: the law of the place of damage would allegedly be even less adequate to issue orders aiming at the modification of the general policy of the relevant corporation, since that would raise concerns in terms of proximity.[75] Similar considerations are presented by other authors when analysing the above-referred issues on permits/authorizations: as the emitter "[…] *could not foresee the effects of his actions in other countries, he should be able to rely on the permissibility of his activities at the place of action […].*"[76] Therefore, they advocate, within the framework of Art. 17 Rome II, for an extension of the effects that the permit/authorization would have in the country of the event giving rise to damage, thus allegedly protecting the emitter.[77]

These arguments can be countered on several accounts:[78]

Firstly, regarding the assertion of jurisdiction specifically: the CJEU already had "*atmospheric pollution*"[79] and its geographically unrestricted nature in mind when it decided *Mines de potasse*. Hence, other than considering sovereignty and proximity (as mentioned), the CJEU also factored foreseeability into the solution provided in the decision. This, therefore, makes *Mines de Potasse* a perfect precedent to the above-referred climate cases that needs to stand. The ensuing conclusion, that in matters of climate-related damage the courts of each EU Member State could potentially have jurisdiction over the same Carbon Major inasmuch as damage is suffered within their jurisdiction, is further comforted by *Shevill*[80] and *eDate*:[81] while it is true that those decisions deal with "mosaic" situations,

74 Y. Nishitani, op. cit., 707.

75 O. Boskovic (with whom I have respectful and amicable disagreements) in E. Álvarez-Armas & O. Boskovic, op.cit.

76 M Lehmann and F Eichel, op cit, 100-101.

77 As mentioned above, these positions presume that the permit/authorization would necessarily have protective effects under private law for the GHG emitter, which is not necessarily the case.

78 For further arguments, see E. Álvarez-Armas, "Le contentieux … », op.cit., 136-138.

79 *Mines de Potasse*, op. cit., paragraph 13.

80 See footnote 46.

81 CJEU, joined cases C-509/09 and C-161/10, *eDate Advertising GmbH v X and Olivier Martinez and Robert Martinez v MGN Limited, ECLI:EU:C:2011:685.*

it is equally true that the potential geographically unrestricted reach of the underlying defamatory acts, and the ensuing lack of jurisdictional foreseeability, did not put into question the solutions enshrined therein. Since such jurisdictional results are deemed to be acceptable in terms of foreseeability in defamation cases, they ought to be acceptable in PICCL too.

Secondly, neither the assertion of jurisdiction nor the identification of the applicable law on the basis of the place of materialization of damage are to be approached from the standpoint of the potential geographically unrestricted scope of the impact of the tortfeasor's activities. Instead, they need to be approached from two interlinked standpoints: i) for each victim, their damage is not global or diffuse, but identifiable, specific and geographically limited; and ii) save where collective redress is available, each individual victim brings an action in respect of their own individual damage. Consequently, jurisdiction and applicable law need to be framed within the individual procedural relationship built between victim and tortfeasor, as parties to the proceedings (i.e. independently from the damage suffered by other potential victims).

Thirdly, if a lack of foreseeability remains for the defendant within the referred framing, then it stems from the very nature of their activities and the way in which they carry them out, which they control and may thus potentially change. Reportedly, certain Carbon Majors have known about the impact of their activities since the early 1970's[82] and *Mines de Potasse* dates back to 1976. Hence, at the very least in terms of jurisdiction, but also in terms of choice of law, it has been foreseeable for Carbon Majors for almost 50 years now that, as their activities have a wider impact than the country where they are established, they could be taken to court elsewhere and see a foreign legal system applied to their liability. They could have even tried to avoid liability by changing their behaviour over the last 5 decades.

Finally, and critically, the above-referred academic opinions do not consider that foreseeability (in all environmental torts, not only in climate-related ones) is a two-way street that concerns victims as well: if defendants are supposed to lack sufficient foreseeability as to where damage may arise, victims are "weak parties" that have no foreseeability at all as to the fact that a damage may arise to begin with. Defendants, however, by being engaged in industrial activities, have at least the understanding that should anything go wrong with respect to their business, they are exposed to lawsuits.

(F) CONCLUSIONS

This "private" and "international" penchant to climate change litigation is a relatively new category within "business and human rights", transnational environmental litigation, and, more specifically, (broader) climate change litigation. Consequently, it is very likely that significant developments are still to come. These pages have presented the basic features (advantages and limitations) of EU rules on international jurisdiction and choice of law on liability for and/or injunctive relief over climate-change-related

[82] C Bonneuil, P-L Choquet & B Franta, "Early warnings and emerging accountability: Total's responses to global warming, 1971 2021", 71 (4) Global Environmental Change 2021.

damage, before providing some more advanced considerations. The latter have amounted to demonstrating that: i) despite complexities, climate-related damage fits into Rome II's notion of "environmental damage"; ii) despite potential contestation, a plaintiff's choice of forum needs to be mandatorily respected; iii) despite clear contestation, the place where the damage occurs is an appropriate ground of jurisdiction and an appropriate connecting factor for choice of law. Finally, these pages have countered some transversal concerns about foreseeability for the greenhouse gas emitter of the potential assertion of jurisdiction over and of the law applicable to liability for climate-related damage. This has been done on the basis of various arguments, including the fact that foreseeability is bilateral, and if defendants are supposed to lack sufficient foreseeability as to where damage may arise, victims are "weak parties" that have no foreseeability at all.