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Decision delivered on 30 November 2017  
xxxx, Clerk of the Office of the District Court of Essen*

**Higher Regional Court of Hamm  
Indicative Court Order and Order for the Hearing of Evidence**

In the legal matter of

Mr. Saúl Ananías Luciano Lliuya, Provincia de Huaraz, Peru

-Plaintiff/Appellant-

Counsel: Rechtsanwälte Günther, Mittelweg 150, 20148 Hamburg

v.

RWE AG, represented by the Chairman of the Executive Board, Dr. Rolf Martin Schmitz, Opernplatz 1, 45128 Essen,

-Defendant/Respondent-

Counsel: Rechtsanwälte Freshfields Buckhaus, Feldmühleplatz 1, 40545  
Düsseldorf

the *5. Zivilsenat des Oberlandesgerichts Hamm* [Fifth Division for Civil Matters of the Higher Regional Court of Hamm],

consisting of the judge of the Higher Regional Court Dr. Meyer, the judge of the Higher Regional Court Uelwer, and the judge of the District Court Dr. Kothes,

on 30 November 2017

**held as follows:**

I. In the view of the Senate, the defendant, in its legal pleading submitted on 27 November 2017, has given no cause to reconsider the Senate's detailed legal assessment presented at the oral hearing on 13 November 2017:

1. Concerns regarding the admissibility and conclusiveness of the plaintiff's claim presented in the oral hearing (the *Hauptantrag* [main claim]) are not justified on the basis of the current factual and legal situation. In particular, there is no lack of sufficient legal interest to bring proceedings, because the present case does not concern an amount of 33 cents, but an amount of roughly €17,000.00, assessed in accordance with the defendant's alleged contribution to the cause of damage, which, the plaintiff has stated, would be required to avert potential damages to his property.

2. In addition, contrary to what the defendant has argued, the Senate's current legal position is not incompatible with other legislation, including, in particular, the provisions of German Immission Control Act (Bundesimmissionsschutzgesetz, BImSchG). Specifically, the plaintiff has not sought to restrict the activities of the defendant, still less to decommission power plants that operate in the public interest.

Rather, in his main claim, the plaintiff seeks a judgment requiring pro rata compensation of expenses for protective measures taken to benefit his property. It comports with the principles of the legal system that even a party who acts lawfully must be liable for property damage caused by him. This fundamental legal concept is also encapsulated in (§) section 14(2) of the BImSchG and (§) section 906(2)(2) of the BGB, which the defendant itself has cited. Why corresponding principles would not apply in the context of (§§) sections 1004 and 1011 of the BGB is unclear and does not reflect the intention of the legislature nor the principles of the teleological interpretation. In particular, contrary to the defendant's argument, civil protection of the plaintiff in the present case is not to exceed the limits indicated under section 14(2) of the BImSchG and section 906(2)(2) of the BGB. The above provisions on compensation are not relevant to the present case.

3. Contrary to the view expressed by the defendant, this case, unlike the decisions on mildew and mealybugs (BGH NJW-RR 2001, 1208; BGH NJW 1995, 2633 *et seq.*), does not concern natural events caused by improper omission, because the starting point of the chain of causation, as identified by the plaintiff, is not an omission by the defendant, but rather the role of the energy companies' operations as an active (contributory) cause of the flood risk. In this context, the alleged threat to the plaintiff's property is attributable to the defendant's actions, *i.e.*, to the active operation of the power plants by the subsidiaries controlled by the

defendant. For the same reason, the *Kaltluftsee* decision on cold-air pools (BGH NJW 1991, 1671 f.) cited by the defendant is not relevant here.

4. The question of the statute of limitations is addressed in the asserted claim (section 194(1) of the BGB). The issue relevant to the present case is that the defendant, despite the emissions resulting from its operations, has consistently failed to take protective measures that would at least reduce the risk of flooding. The statute of limitations does not apply under such circumstances because the conditions threatening the plaintiff's property will persist so long as no protective measures are implemented (see BGH MDR 2015, 1176 *et seq.*).

II. The request to postpone or defer the date of the ruling was rejected. It is not appropriate to defer or postpone the date on which the decision is announced.

First of all, the defendant's legal considerations, as outlined by the Senate at the oral hearing on 13 November 2017, should not have been entirely new, because the plaintiff had already presented them, at least in substance. The sole consideration that could have been new to the defendant was the assessment presented by the Senate adjudicating the case, and the deadline to file a responsive pleading was extended to account for this.

The Senate then undertook a comprehensive analysis of the legal arguments submitted by the defendant in its pleading of 27 November 2017 (which contained, in essence, the arguments presented in its previous statements), reviewed these and the cases cited therein, and incorporated these into its careful deliberations prior to the announcement of this decision.

III. Expert opinions should be obtained to provide evidence for the following allegations by the plaintiff:

1.

A flood and/or mudslide resulting from the significant expansion and increase in the volume of water in Lake Palacocha poses a serious threat to the plaintiff's property, which is situated below the glacial lake in the city of Huaraz in the Ancash region of Peru.

2.

a) The CO<sub>2</sub> emissions released by the defendant's power plants rise into the atmosphere and, in accordance with physical laws, lead to a higher concentration of greenhouse gases throughout the Earth's atmosphere.

b) The result of the increased concentration of greenhouse gas molecules is a reduction in the global emission of thermal radiation and an increase in global temperature.

c) The resulting increase in average local temperatures accelerates the melting of the Palcaraju Glacier; as the glacier loses mass and recedes, the volume of water in Lake Palcacocha rises to a level that can no longer be contained by the natural moraine.

d) The defendant's share in the contributory causation, as shown in the causal chain outlined in a) through c), is measurable and calculable, and accounts for 0.47% of the total. If, on further assessment of the defendant's share in the contributory causation, a different percentage is identified, the expert will quantify the correct proportion.

IV. The plaintiff is required to make an advance payment of EUR 20,000 to the central court cashier's office.

V. The parties are requested to designate appropriate experts, preferably from German-speaking countries, to respond to the above questions regarding the required evidence. In order to expedite the process, it would be preferable for the parties to reach an agreement before making these selections.

The Senate assumes that, in light of the different disciplines relevant to the case, the expert appointed to respond to the request for evidence in 1. will not be the same as the expert appointed for evidence requested in 2.

Dr. Meyer

Uelwer

Dr. Kothes

*Certified*

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Court Clerk