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District Court of Essen
Zweigertstraße 52

45130 Essen

Advance copy by fax - (without attachments)

In the case of

Lliuya	***v***	**RWE AG**
/ RAe Günther /		/ RAe Freshfields pp./

the plaintiff wishes to thank the court for rescheduling the appointment and responds as follows to the opposing party's submissions, dated 28 April 2016, and to the court order of 6 May 2016 (both received by the plaintiff on 12 May 2016), by stating his legal position (I) and clarifying his complaint and submitting alternative claims (II).

With regard to the question posed by court, this submission emphasises that the plaintiff disagrees with a decision taken in the written procedure. If the court would find his attendance helpful, the plaintiff will appear in person as scheduled on 24 November 2016. The plaintiff requests notice to this effect.

The plaintiff also hereby requests

an extension of the deadline until 30 September 2016,

in particular with regard to the statements of the facts (facts of the case).

This extension is necessary in order for the plaintiff to obtain and prepare the evidence required by the defendant, particularly regarding the current risk situation in Huaraz.

A bathymetric study on the volume of water in Lake Palcacocha was prepared this year by the National Glacier Authority (UAC)—part of the *Autoridad Nacional del Agua* (ANA)—but is not yet available, despite the plaintiff's request. However, initial consultations with the authors of the study indicate that the volume and water level of the lagoon are similar to 2009 measurements (despite the implementation of emergency measures).

In addition, the plaintiff commissioned a report on the causes of the specific flood risk (demanded by the defendant) and will prove in the course of this presentation that, among other things, the assertions made by the defendant on page 30 et seqq. of its statement of defence are inaccurate (i.e., the risk was tolerated by the Peruvian authorities or only resulted from emergency measures implemented at the dam).

The plaintiff will also prove, through scientific opinions to this effect, the inaccuracy of the allegation, made in the statement of defence (para. 130), that there is no acute risk of flood and therefore no legal impact on the plaintiff's property. Due to the current workload of the relevant scientists, and in the absence of the above-mentioned study, it is impossible to prepare the document in a timely manner.

Please note, however, that, on this point, the study by the National Institute of Civil Defense [*El Instituto Nacional de Defensa Civil* (Indeci)] (B 29), submitted by the plaintiff and translated by the defendant, states the following (p. 58):

> The Palcacocha lagoon is the most dangerous lagoon in the Cordillera Blanca [mountain range], as it could cause a flood at any time.

Not even the defendant itself can support the allegation that there is no acute risk.

In view of the summer recess and the new date of the hearing, now scheduled for 24 November 2016, the defendant's extension of the deadline, in our opinion, leaves sufficient time to produce a further response or prepare for the oral proceedings. After receiving the claim, the defendant also requested a prolonged extension, which was granted.

In detail:

I. On the motion for judgment:

1. Stated request

The plaintiff announced his intention

> **to establish that the respondent is obligated to pay, in an amount proportional to its responsibility for the interference (i.e., its contribution to global greenhouse gas emissions), the costs of implementing measures appropriate to protect the plaintiff’s property against glacial flooding from Lake Palcacocha.**

The defendant has stated that this claim is too imprecise and that, more fundamentally, the plaintiff has no legitimate interest in the action, in which case his claim would be inadmissible.

The court stated in its notice of 6 May 2016 that it ‘shares’ the defendant’s skepticism ‘on the admissibility of the action, particularly with regard to the specificity of the claim’.

The plaintiff, however, still does not share this concern.

The above claim is not too imprecise, nor does the plaintiff lack a legitimate interest in the declaratory judgment:

a) Legitimate interest

A declaratory action is admissible if the interference is ongoing and the plaintiff cannot qualify his claim fully or partially as a result (BGH, BeckRS 2013, 11005, BGH, NJW 1984, 1552). This principle applies even if the interference has ceased but how and at what cost it can be remedied is not yet clear (BGH NJW-RR 2008, 1520).

The plaintiff submits that he does have a legitimate interest because the exact costs of the measure that would protect the plaintiff most effectively--i.e., pumping the water from Lake Palcacocha--have not been determined. In 2010, the authorities estimated the costs at $4 million (€3.5 million) (Appendix K 7); the defendant has not contested this cost estimate. On the contrary, in paragraph 118 et seqq. of the response to the claim, the defendant itself refers to the study on which this estimate is based.

Nevertheless, a cost estimate from 2010 (reproduced in Appendix K7 (release date 2014)) can be updated, and the plaintiff continues to consider it right that the defendant pay only the costs that are actually incurred.

The reasons cited by the defendant are also not persuasive (para. 136).

The plaintiff's claim for reimbursement of costs does not constitute a claim for damages or 'for compensation in money'. On the contrary, he requests only a 'fraction' of the costs incurred to eliminate the interference—not damage compensation. In any case, there is likely unanimous agreement (see, for example, Palandt, preliminary remarks on section 249, margin no. 5) that the 'norm transformation' of the law on damages (section 249 et seqq. of the BGB) is also applicable to section 1004 of the BGB. (See, for example, AG Bremen, judgment of 21 February 2013, reference: 9 C383/12.)

In fact, section 1004 of the BGB could present grounds for cost reimbursement if an owner eliminates an interference him- or herself; in that case the owner has provided a service for the 'disturber' (sections 683, 684 of the BGB) (see BGH NJW 2005, 1366.1367). Similarly, under the present circumstances, there are no legal obstacles to a claim for reimbursement.

The plaintiff makes no reference to section 906(2) of the BGB or section 14 of the Federal Immission Control Act [*Bundes-Immissionsschutzgesetz* (BImSchG)]. These provisions apply specifically to cases in which the interference or disturbance cannot or should not be eliminated because a duty to tolerate an act or situation [*Duldungspflicht*] applies.

The plaintiff, however, is explicitly and steadfastly interested in eliminating the flood risk that threatens his property.

b) Specificity of the claim [*Bestimmtheit*]

In the plaintiff's opinion, the claim does not lack specificity. As the statement of claim makes clear, it is possible to specify the proportion of the contribution to the cause. Otherwise, in accordance with section 287 of the ZPO, this contribution can be determined by the court.

If, in the court's opinion, the claim lacks specificity on this point, the claim can be supplemented as follows:

> **to establish that the respondent is obligated to pay costs, in an amount proportional to its responsibility for the interference (i.e., its contribution to global greenhouse gas emissions), as determined by the court in accordance with section 287 of the ZPO, for measures appropriate to protect the plaintiff's property against glacial flooding from Lake Palcacocha.**

The plaintiff requests judicial notice to this effect.

The facts regarding the causal contribution will be presented in greater detail.

2. Alternative claims

a)

If the court continues to disagree with this view, the plaintiff hereby gives notice of his intention to seek,

in the alternative:

> **to order the defendant to take measures appropriate to ensure that the volume of water in Lake Palcacocha is reduced by an amount corresponding to the defendant's contribution to the cause of the interference, to be determined by the court in accordance with section 287 of the ZPO.**

Grounds:

The primary legal consequence intended under section 1004 of the BGB is the 'elimination of the interference'. The usual claim asserted on the basis of section 1004(1) of the BGB seeks a judgment demanding the implementation of 'suitable measures' (see Gursky, in Staudinger (1999), sections 985-1011 BGB, section 1004 BGB, marg. no. 228).

In the present case, the interference that affects the plaintiff's property is the acute risk of flooding. Because the plaintiff is holding the defendant responsible only for its contribution to the cause, the plaintiff merely requests the defendant's participation in eliminating its proportionate share of the interference.

This is also practically possible, for example by draining melt water through a pipe system and into the existing receiving water, which will lead the water downhill. The defendant, as a global company, can implement this measure (or others, if appropriate) itself, or it can delegate the task to a contractor.

Even if concrete implementation is not requested, one argument against it might be that the option of the disturber must be preserved. A judgment obligating a party to implement a specific measure is unobjectionable, however, if it does not violate the disturber's right to choose, especially if there is only one specific measure that would eliminate the interference (BGHZ 67, 252/254) or if it was the only one taken into account by the parties (BGHZ 29, 314/317, see Gursky, in Staudinger (1999), sections 985-1011 BGB, section 1004 BGB, marg. no. 227). This is the case here.

Regarding the percentage of the contribution to the cause, we refer to the statement of claim, and will present further details on it in the next submission.

b)
If the court also considers this alternative claim inadmissible, the plaintiff will seek,

further in the alternative,

> **to order the defendant to pay its share, in the amount of €17,000, to the Waraq association of municipalities to pay for the measures appropriate to protect the defendant.**

Grounds:
The primary legal consequence intended under section 1004 of the BGB is the 'elimination of the interference'. In the present case, this is the acute flood risk. A cost estimate for a measure that would eliminate the interference has already been submitted by the plaintiff.

The estimated amount (€17,000) is a share of the total costs (€ 3.5 million). Should the causal contribution identified in the claim (previous: 0.47%, current: 0.45%) change as a result of the submission of additional facts, the claim will be amended accordingly.

However, the plaintiff does not demand a payment to himself, but to the competent authority that would carry out the measures. Upon payment, however, the defendant would be released from its responsibility towards the plaintiff, and therefore could not oppose payment to third parties.

In a letter dated 21 May 2015 (N 001-2015-MMW/P), the Waraq association of municipalities confirmed the following:

> The Waraq association of municipalities, consisting of the provincial administration of Huarez and the district administration of Independencia, with territory including the Quillcay River Valley, where Lake Palcacocha is located, has set as one of its objectives the 'risk management of disasters as a strategy to promote sustainable territorial development with a focus on rural development', and hereby pledges that, if a third party provides the Waraq association of municipalities with means to reduce the flood risk originating from Lake Palcacocha, such means will be used for the purpose indicated.

Appendix K 29,
submitted in Spanish and German translation

Because the defendant has not contested the cost estimate in Appendix K 7, this can also be used as the basis for the payment claim.

The admissibility of a claim for a contribution to costs has already been discussed above. Again, it should be noted that the line of argument pursued by the defendant on page 36 (para. 136), with regard to the analogous application of section 906(2) of the BGB, is erroneous, because, rather than a claim for compensation in money, the plaintiff requests a conversion of the claim for action (i.e., elimination of the interference) into a claim for money, because he can only demand action on a pro rata basis.

c)
The plaintiff also reserves the right, if necessary, to claim costs for measures to reinforce and alter his house. In the meantime, he has carried out alterations to better protect the house (and the family residing therein) against the acute flood risk.

II. Legal position

This section first addresses the defendant's legal arguments. The other remarks on the constituent elements of section 1004 concern the offers to provide evidence and supplements to the facts in the submission within the new time limit.

1. General applicability of section 1004

The defendant states on page 37 et seqq. that section 1004 of the BGB is generally excluded as an *actio negatoria* from any application to the issue of climate change and its consequences:

> Personal liability for global climate change and its possible consequences is excluded *a limine* for individuals and emitters under civil law. (para. 140)
>
> As a result, consequences of this kind, arising from general environmental impacts, cannot be attributed to an individualisable person. (para. 145)
>
> There is no legal basis for holding an individual liable for the alleged consequences of climate change. (para. 155)

On this point, the defendant presents a number of arguments, all of which can be invalidated:

a) not applicable to distance damage
(decision of the BGH on forest damage [*Waldschadensurteil*])

b) not applicable to situations in which a large number of parties have an indirect causal role

c) not applicable to 'global issues' such as climate change (*Kivalina* decision)

Ultimately, the defendant demands that the court give a highly restrictive interpretation of the constituent elements of the legal standard—an interpretation that is inadmissible in view of the legislative intention. Section 1004 of the BGB has been created as a standard for compensation in order to afford compensation for uses of a property.

Section 1004 of the BGB does not distinguish between near and long-distance effects; it merely states that unreasonable interferences should be prevented or terminated. The prevailing opinion continues to support a broad application of section 1004 (see Gursky, in Staudinger (1999), BGB, section 1004, marg. no. 228).

The defendant, however, ultimately wishes to continue its economic activities without restriction and to avoid responsibility for the consequences of this activity,

while the plaintiff is to accept the consequences of the activity, even though it (through cumulative interactions with all other emitting activities) poses an acute danger to his property.

Even if the defendant's activity itself is not prohibited, the consequences for the plaintiff are unreasonable. Section 1004 of the BGB applies to precisely these circumstances.

In detail:

a) *Waldschaden* decision

In paragraph 142 et seqq., the defendant uses the so-called *Waldschaden* decision of the BGH (10 December 1987) to support its view that civil liability is excluded for damage arising from cumulative immissions and incurred at a substantial distance from the issuers (III ZR 220/86 - juris);

> previous: OLG Stuttgart, judgment v. 22.10.1986, 1 U 38/86 - juris and LG Stuttgart, judgment v. 29.01.1986, 15 O 213/85 - juris.)

In this judgment, the BGH dealt intensively with the question of attributability of immissions and rejected the premise with regard to forest damage occurring in the 1980s. The defendant argues that this should also apply in the present case.

That is not so.

The attempt to disallow attribution in the present case on the basis of jurisprudence on forest damage fails for several reasons. In fact, the BGH confirms on the merits the assertion of civil claims for consequences caused by remote immissions.

aa)
Contrary to what the defendant's reference to 'civil liability' (para. 142) would indicate, the forest damage judgments concerned state liability law, not civil claims. The defendant in the case was the state, not private emitters.

In the decision cited, the plaintiff, a forest owner, sought reimbursement from the defendants (the Federal Republic of Germany and a single federal state) as compensation for a confiscatory/expropriating intervention and a breach of official duty.

According to the plaintiff, the damage to his forest was primarily the result of air pollution—in particular, sulfur dioxide, its transformation

products, and nitrogen oxides—which were caused by emissions from commercial and industrial plants; emissions from private combustion plants; and emissions from motor vehicles, aircraft, and rail vehicles. However, because emissions in these three areas were all approved, authorised, or permitted by state officials, the interference was one through sovereign action, which, despite a lack of knowledge of the overall chemical context, was directly attributable to the state.

Which pollutants had been involved in the damage-causing events, and to what extent, was left entirely unaddressed in the case and was not further substantiated by the plaintiff. The contribution of foreign emissions to the cause of damage was also not contested. Nevertheless, the plaintiff brought the action against the Federal Republic of Germany and the federal state as the allegedly responsible parties.

bb)

The liability for damages was assessed with regard to state liability. As a result, the grounds for the claim were not assessed within the context of civil law, but with regard to the catalogue of claims arising from public law.

This is because the government liability law arising from article 34 of the Basic Law [*Grundgesetz* (GG)] and section 839 of the Civil Code [*Bürgerliches Gesetzbuch* (BGB)] is not ‘civil law’ (i.e., law between equals); it becomes accessible ‘only if the provisions of section 839 of the BGB are considered and interpreted as one element of the right to compensation under public law—though an element with an influence on the structure and content of the entire system’ (MüKoBGB, 2013, paper, section 839 marg. no. 1, beck-online).

The basis for assessment was therefore entirely different from that in the present case; for this reason alone, the same assessment criteria for attributability that are used when establishing the nature of interference through state action cannot be applied to attributability under civil law.

cc)

The passage from the BGH judgment on *Waldschaden*, cited by the defendant, makes no reference to civil liability for damage that arises from aggregate immissions and is incurred at a distance from the issuers. In the cited passage, the BGH considers the possibility of an analogous application of section 14(2) of the BImSchG to state liability. As clearly stated in the sentence preceding the quotation, the BGH is addressing the fact that this standard governs only the injured party’s compensation claim against the plant operator—ultimately the very circumstances of the present case.

However, in the case before the court at that time, the dispute concerned the liability of the state for damage caused by emissions, given only that the state had permitted, or at least not prohibited,

these emissions, which, like the issuers, were not further specified by the plaintiff.

In this context, the BGH concluded that the reviewed statute of section 14(2) of the BImSchG (not section 1004 of the BGB or section 906 of the BGB) invalidates 'individualisable' causal relations to one or more specific issuers. This is not disputed. Section 14(2) of the BImSchG emphasises the legal relationships between neighbours on the properties in question—as is apparent from the wording of the statute. As a result, the BGH held that the basis for this claim—the law governing neighbours—could not apply by analogy to state liability for emissions by private parties.

However, apart from the fact that these considerations concerned an entirely different statute, the arguments of the BGH on attributability cannot be applied because, in the present case, the plaintiff is bringing the action specifically against the plant operator itself rather than a governmental entity alleged to be an indirect cause of the emissions.

The explanations cited by the defendant are of no relevance to the present case because of the differing circumstances. However, it is essential to specify the reasons that the BGH provides (following the cited passage) for rejecting an analogous use of neighbour law or government liability law. The BGH was concerned that 'by doing so, the party against which the claim is, by law, directed—the plant operator and issuer—would be replaced, through the process of interpretation, with another party, namely the State. This would transform a private law norm into a provision of state liability law' (marg. no. 14).

The BGH therefore starts with the premise that the affected forest owners are entitled on the merits to bring claims for damages against the operators of the emitting facilities (see marg. no. 15 et seq.); it even states explicitly that it 'considers the damage to the forest to be worthy of, and to require, compensation on the merits' (marg. no. 34).

The BGH has therefore confirmed the basic applicability of general civil law to such matters.

dd)

It is equally untenable that, as the defendant alleges, the Federal Constitutional Court [*Bundesverfassungsgericht* (BVerfG)] proved, through its decision to reject a case on 26 May 1998 (1 BvR 180/88 - juris), that any claim for the abatement or removal of a disturbance and any claim for damages presupposes an individualisable causal relationship with a specific causal agent, which is absent in the case of long-distance immissions.

The issue subject to constitutional review was the state liability claim in dispute, not the existence of civil claims for damages, or for the abatement or removal of a disturbance, in the case of long-distance immissions. Accordingly, the BVerfG addressed the role of the property guarantee, ensured under article 14(1)(1) of the GG, to protect the right to eliminate or remove a disturbance. The statements on attributability also concerned the extent to which emissions released by private parties could be attributed to the state and regarded as an interference in the constitutional sense.

The BVerfG even stated, with regard to the state regulation of private emissions, that ‘state “approval” of the identified uses does not limit the potential for forest owners affected by remote immissions to assert claims for damages or claims for the elimination or removal of a disturbance’ (marg. no. 17), thereby confirming the availability of civil claims in principle, even in the case of long-distance immissions.

For the BVerfG, it was also significant that the plaintiff had brought its claim against the Federal Republic of Germany as the sole defendant when there was no doubt that foreign emissions had contributed to the cause of the ‘acid rain’ falling on the plaintiff's property, which bordered France. These air pollutants ‘imported’ from abroad could be the result, at most, of official actions in foreign states, but were not attributable to the Federal Republic of Germany (see BVerfG, loc. cit., marg. no. 14). In the present case, however, the plaintiff seeks to hold the defendant liable only for an amount proportional to its contribution to the cause, not for the total amount.

ee)

Both courts concluded that the difficulty in asserting civil claims against the issuers was not of a legal nature, but concerned the actual feasibility of the claims. However, this difficulty was due to the peculiar nature of the particular case, in which the plaintiff could neither identify the plant operators responsible for the damage nor explain the causal mechanism of the immissions contributions from certain facilities.

Nevertheless, it was rightly pointed out at the time that it is not legally necessary to be able to prove which means or chemical processes release which pollutants and what effects these have on which plants. The only decisive factor should be whether it is possible to prove that the immissions affecting the forests are a condition necessary for, or at least contributing to, the cause of the damage incurred

(see, for example: Murswiek, *Entschädigung für immissionsbedingte Waldschäden*, in: NVwZ 1986, 611).

However, the difficulties in furnishing proof in the case of forest dieback do not apply in the present case, because contributory causation is indisputable; even the defendant's submission indicates that the dispute can concern, at most, the level or degree of contributory causation. A scientific opinion will be provided, and evidence offered, on this point in the course of the further written statement.

As regards the scientific principles, however, the following is already emphasised:

The defendant's statement in paragraph 147 fails to recognise the fundamentally different effects of airborne pollutants with local effects on ecosystems (like SO2) and greenhouse gasses, like CO2, that exert their effects after accumulating in the atmosphere. Due to this accumulation, proportionate causation among greenhouse gasses is entirely 'identifiable', even if the chemicals are 'intermingled'.

The cause-effect chains for CO2 emissions, which are responsible for climate change, are fundamentally different from those for SO2 emissions, which were relevant to the forest damage case.

SO2 emissions do not accumulate with all other released emissions. Unlike CO2 emissions, SO2 emissions remain close to the Earth's surface. The 'acid rain' that damages forests is formed through chemical reactions that occur when (specific) SO2 molecules rise into the clouds. Changing air movements in the relevant altitude layers are just one factor that makes it difficult to trace the SO2 emissions causing acid rain in a specific region back to the exhaust gas of a specific power plant. However, because not every emission is represented in the 'acid rain' that falls to the ground in a given area, not every power plant operator necessarily contributes to the specific disturbance or concrete forest damage. For this reason, the forest owners encountered a problem: the case required them to identify the plant operator that had caused the damage and prove that emission contributions from a certain plant had had a causal impact, but, at the time, there were no technical methods for doing so.

It should be mentioned, as an aside, that this situation would probably be different today, because emission dispersion models can now provide very precise estimates of the emission plumes of individual power plants and the deposition due to precipitation.

These difficulties do not arise, however, when identifying the CO2 emitters responsible for contributions to climate change and its effects. Unlike SO2 emissions, CO2 emissions rise to high altitude layers, where they mix indistinguishably, like substances introduced into a body of water in different places. However, these emissions are 'individualisable' in that the amount that they contribute to an increase in the concentration of environmentally harmful greenhouse gasses depends on the quantities emitted. Even if portions of the emissions are taken up in sinks (oceans, vegetation), they affect the climate, because, when combined with the other tonnes of greenhouse gasses emitted, they have a cumulative impact that intensifies the greenhouse effect—simply put, the space that they take up in the natural sinks would otherwise be filled by other emissions.

A causal linkage can therefore be affirmed for all CO2 emissions, because according to the *conditio sine qua non* formula, none could be 'theoretically eliminated' without decreasing the temperature by a corresponding amount—regardless of where exactly the emissions are released and how great the distance between the emission source and climate impacts. In other words, every CO_2 emitter is a contributor to anthropogenic climate change and its consequences and is accordingly the responsible disturber in accordance with section 1004 of the BGB.

> See the following (cited above):
>
> Frank NJOZ, Climate Change Litigation – *Klimawandel und haftungsrechtliche Risiken*, NJOZ 2010, 2296 (2 v.9) = NJW 3691, 3691; Frank, *Klimahaftung und Kausalität— Urteilsanmerkung zur Entscheidung des* US Court of Appeals *for the* Ninth Circuit *vom 21. 9. 2102 im Verfahren* Native City of Kivalina v Exxon Mobil et al., ZUR 2013, 28, 30
>
> Staudinger/Kohler, BGB 2002, *Einleitung zum Umwelthaftungsrecht*, marg. no. 185, 197

b) Not applicable to situations in which multiple parties make indirect causal contributions

In several sections of the statement of defence, the defendant argues that civil law cannot be applied to phenomena that are as complex and cumulative as climate change, because too many parties have a causal role and causation is 'too' indirect (for example, para. 145, 151, 167 et seqq.).

The plaintiff responds to this argument as follows:

First, even if protections were restricted to ‘the neighbourhood’ in a claim brought in connection with section 1004 of the BGB, this term would be interpreted broadly. It has already been established under RGZ 167, 14, 24 that: ‘The concept of neighbourhood should be extended as far as damaging effects carry.’ As the world becomes more global, liability claims are becoming more global as well, but these circumstances have not affected such claims alone; the entire economy has been impacted, as has the defendant’s business activity. This globalism is apparent from the fact that emissions from Germany are now detectable as far away as Peru, but this does not mean that provisions protecting property have ceased to apply.

An indirect causal relationship is also not grounds to exclude the claim.

Indirect disturbers are regularly recognised as disturbers in accordance with section 1004 of the BGB. However, the question is whether the defendant is in fact an indirect disturber—because the party whose actions qualify it as an indirect disturber causes the interference through a third party, satisfying the principle of adequate causation, and is able to prevent or put a stop to it (settled case law, e.g., BGHZ 49, 340 347 = NJW 1968, 1281; BGH NJW 1982, 440 with further reference; BGHZ 144, 200 = NJW 2000, 2901 2902, e.g., an owner letting property as an indirect disturber).

In the present case, the interference is only ‘indirect’ to the extent that natural processes—here, those of the climate system—are ‘interconnected’; it does not involve a third party as interpreted in settled case law.

On both questions, however, the commentary [*Motiven*] on the Civil Code indicates a clear position:

> Above all, a certain kind of outward impact cannot be constrained within specific limits. We live at the bottom of a sea of air. This circumstance makes it necessary for human activity to extend into the distance.
>
> If, however, such emissions must be determined to be lawful or unlawful, it is not only the relationship between one neighbor and another that must be taken into account; rather, the scope of the property owner’s right must be established against that of all other persons.

In summary:

> He who causes the emergence or spread of imponderables must know that these go their own way. Their transmission over the border is therefore attributable to him as an effect of his action, and thus direct and indirect immissions cannot be separated one from another.

(See Mugdan, *Die gesammelten Materialien zum Bürgerlichen Gesetzbuch (Motive)*, volume III, *Sachenrecht*, 1899, p. 146)

Cumulative impacts of this kind were also present in the early stages of industrialisation—the same era in which the Civil Code was created. Staudinger/Kohler (2001, Environmental HG, section 3 marg. no. 6) refers to the following passage:

> The above-mentioned phenomena do not need to have brought about the violation of rights directly and on their own; it is sufficient that they are one link in a multi-stage causal chain, even if they change form, such as when water vapour is converted into condensate that produces black ice (OLG Cologne NJW-RR 1995, 1177).

It is not clear to the plaintiff why the present case should be fundamentally different.

c) Not applicable to 'global issues' like climate change (*Kivalina* decision)

The defendant states that there is no direct, linear causal relationship between the defendant's (uncontested) act (i.e., emitting millions of tonnes of greenhouse gasses in the course of business activities), climate change, and the effects on the plaintiff. The defendant alleges that this comports with the decision of a US court in the case *Kivalina v ExxonMobil Corporation et al.* (para. 153).

Even apart from the fact that the *Kivalina* decision has not set a precedent in the legal system of the Federal Republic and contains no findings of a general nature (unlike the *Urgenda* decision from the Netherlands, Appendix K 27 and K 28), the defendant misinterprets the decision.

It is apparent from the first sentence of the court's grounds for the decision in the case cited by the defendant (*Native City of Kivalina v Exxon et al.*, 2012, Annex B 39) that the appeals court (US Court of Appeals of the Ninth Circuit) did not reject the claim by invoking the 'political question doctrine'. It rejected the case because the US Clean Air Act took precedence over the general common law of torts (see Frank, *Klimahaftung und Kausalität*, ZUR 2013, 28, 29). It should be pointed out, in this context, that, in accordance with section 18 of the Environmental Liability Act [*Umwelthaftungsgesetz* (UmweltHG)], German environmental liability law—unlike US law—does not displace general liability law, and an owner can assert claims for protection against a polluter even in connection with approved emissions, if the immissions are unreasonable.

2. Criteria for a ‘disturber’

Due note is taken of the fact that the defendant does not deny having caused a disturbance through its action or omission [*Handlungsstörung*], nor does the defendant dispute the evidence that, through its facilities, it has accounted for approximately 0.45% of global emissions (or industrial emissions) in recent years (i.e., since 1990).

The defendant merely contests the calculation basis for the historical emissions of the RWE Group and the capacity to attribute emissions to individual power plants. The plaintiff will explain this in greater detail.

At present, however, the plaintiff submits the following note:

The extent of the causal contribution is a question of the scope/amount of the claim to which section 287 of the ZPO applies. Accordingly, if the parties dispute ‘the amount of the damage or an interest to be replaced’, the Court of First Instance shall decide on the merits after considering ‘all circumstances and at the discretion and conviction’ of the court. This is also expressly applicable to section 1004 of the BGB as a standard outside of tort law:

> (2) The provisions of subsection (1) sentences 1, 2 shall also apply *mutatis mutandis* in other disputes, insofar as the parties disagree on the amount of a claim and the complete clarification of all relevant circumstances is associated with difficulties that are disproportionate to the importance of the disputed part of the claim.

This is precisely the case here.

It is technically possible to calculate the share of the RWE Group’s contribution to the increased glacier melt by conducting a special study. However, this ‘full disclosure of all relevant circumstances’ would, in fact, present considerable difficulties, which would likely significantly exceed the monetary claim (alternative claim) of €17,000 and the plaintiff’s economic interest (the value of his house).

In addition:

Even the data presented by the RWE Group itself shows a CO2 output of 155.2 million tonnes in the 2014 financial year—an amount roughly equivalent to the annual emissions of the Netherlands. The defendant’s reference to a ‘minimal contribution’ (para. 141 of the statement of defence) is therefore incomprehensible to the plaintiff.

The plaintiff will address questions of the causal contribution and attributability in even greater detail in a future submission. However, the following is an initial response to the defendant’s attempt to present climate change as a ‘natural phenomenon’ (para. 169, 170 of the statement of defence).

On this point, the defendant refers to two decisions of the BGH:

BGH BGH, V ZR 213/94, decision of 7 July 1995 (regarding lice)
BGH, V ZR 422/99, decision of 16 February 2001 (regarding mildew [*Mehltau*])

The two cases decided by the BGH refer, however, to property owners for the condition of their property alone—liability that, according to the BGH, does not apply to the mere effects of natural events. However, the plaintiff has not filed his claim against the defendant simply by virtue of its position as the owner or occupier of the property on which the disturbance takes place [*Zustandsstörung*], but because it caused the disturbance through actions or omissions [*Handlungsstörung*], the consequences of which can be attributed to activities that were undertaken on its corporate properties and that have caused the danger threatening the security of the plaintiff's property. This liability also includes the natural consequences brought about by the effects of the disruptive activities.

In its 1995 decision, the BGH, in a restrictive interpretation of the wording of section 1004, stated:

> The mere circumstance of ownership of the land from which an influence emanates is not sufficient; the interference must be due, at least indirectly, to the will of the owner (see BGHZ 28, 110, 111; 90, 255, 266; 114, 183, 187; 120, 239, 254; 122, 283, 284, each with further reference).

The defendant's action that is at issue here is a positive, deliberate one: namely, emitting greenhouse gasses in the course of producing electricity and heat from coal. The BGH's exclusion of liability was based primarily on its conclusion that in this case, the defendant should not be held responsible for a 'general risk':

> The effects to which the plaintiff objects are the result of an extraneous and chance natural event that constitutes a general risk assumed by all property owners and is a unique feature of planting of any kind. (BGH, judgment of 7 July 1995 - V ZR 213/94 - para. 8 (juris).

These are ultimately evaluative points of view, which in the present case must be assessed completely differently, because, at least since 1990, the defendant has consciously tolerated, and continued to engage in, the release of greenhouse gas, even though it was aware of the dangers of climate change. In addition, the *Mehltau* decision concerned an interference that was in no way the result of deliberate action, nor was it tolerated; in fact, the vermin were just as damaging to the defendant as to the plaintiff (both winegrowers).

In addition, in a case in which the owner had ‘facilitated’ the infestation through his own actions (and thus become a *Handlungsstörer*), the RG explicitly affirmed the claim on the basis of section 1004 of the BGB, as noted by the BGH:

> Contrary to the opinion of the appellate court, the present case [i.e., mealybug infestation] cannot be compared with matters in which the owner of the property causing the interference facilitated the vermin infestation through a particular use (see RGZ 160, 381 on the fly infestation; Dehner, *Nachbarrecht*, B section 16 II 3).
> (BGH, judgment of 7 July 1995 - V ZR 213/94 -, para. 8, juris).

The plaintiff’s case is similar to the case cited above regarding the conversion of water vapour into condensate that produces black ice (OLG Cologne, NJW-RR 1995, 1177). It is also similar to a case, brought by a neighbour against a municipality, that resulted in a generally positive decision by the BGH because, as a result of hydro-engineering activities and changes in use, a stream no longer provided sufficient water for fish farming, which affected the neighbouring property (BGH, III ZR 61/93, judgment of 5 October 1995 - juris).

3. Limitation period

The claim is also not time-barred in accordance with sections 195, 199(1) of the BGB.

The plaintiff initiated this claim for abatement or removal due to a disturbance resulting from a continuing action by the defendant. The action to which the plaintiff’s claim refers is the defendant’s release of carbon dioxide emissions. As long as the defendant’s power plants continue to release emissions, the limitation period cannot begin (BGH, NJW-RR 2015, 781, LG Hamburg, BeckRS 2013, 15014).

Even if the claim were based on repetitive rather than continuous actions, there would be no limitation period (BGH, NJW-RR 2015, 781). The plaintiff’s claim is initiated anew with each of the defendant’s repeated emissions. This applies not only to the claim for injunctive relief, but also to the claim for abatement or removal (see Higher Regional Court of Brandenburg, judgment of 17 August 2015 - 5 U 109/13 -, marg. no. 24 - juris).

Irrespective of this, even if one were to assume that the claim for abatement or removal could become time-barred, under section 199(1)(2) of the BGB, the limitation period does not begin until the creditor—i.e., the plaintiff—becomes aware of the circumstances giving rise to the claim and the identity of the debtor.

Without prejudice to the question of the burden of proof, the plaintiff could have known of the facts on which the claim is based (i.e., glacier melt in the tropical Andes, attributed with a high degree of confidence to anthropogenic climate change) no earlier than the publication date of the IPCC Fifth Assessment Report, i.e., April 2014 (the date on which Cambridge University Press published the English edition).

Before that date, he could have had no knowledge of the appropriate party against which to file his claim.

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