

First Climate Lawsuit Against Energy Company Before German Courts

Loss and Damage also has a civil law dimension. Can for instance large greenhouse-gas emitters such as energy suppliers be held liable for safety measures necessary to protect against dangers to life and property of other people caused by the consequences of climate change such as the accelerated melting of glaciers and the rising water level of glacier lagoons? The first climate lawsuit in Germany addresses this question.



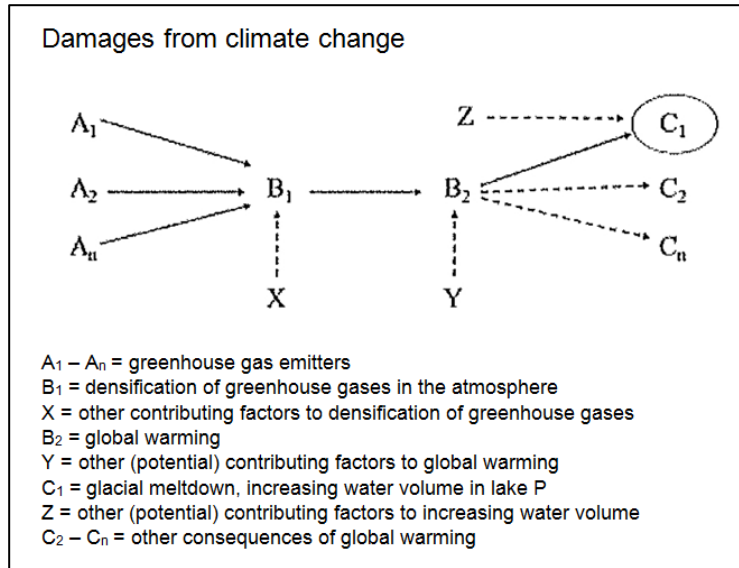
Palcacocha Glacier Lake © Noah Walker-Crawford

The lawsuit: Saúl Luciano Lliuya owns a house in the city of Huaraz in the Andes below a glacier lake. Global warming has led to a dangerous increase of the lake's volume. An avalanche of glacial ice could cause an outburst flood from the lake. Saúl Luciano Lliuya's house along with large parts of the city of Huaraz would be affected by this wave. To prevent this danger, the water level of the glacier lake has to be reduced and the dam strengthened. With his climate lawsuit against the energy company RWE, Saúl Luciano Lliuya wants the company to make a contribution to safety measures at the lake to reduce the risk of flooding commensurate to the causal contribution of the company's share in historical CO₂ emissions which is approximately 0.5%. As an affected landowner, Saúl Luciano Lliuya bases his claim against RWE on § 1004 of the German Civil Code (BGB), which reads as follows: *If the ownership is interfered with by means other than removal or retention of possession, the owner may require the disturber to remove the interference. If further interferences are to be feared, the owner may seek a prohibitory injunction.*

The question of causality: For a claim based on § 1004 BGB there has to be a legally relevant causal link. The claim asserts that such a causal link can be established between the CO₂ emissions of the power plants operated by RWE and the imminent harm to the claimant's property. In German Civil Law the test for causality is the "conditio sine qua non" rule: Accordingly causality is established if a certain consequence would not have occurred fully or partially "but for" the said activity. Additionally, the principle of "adequacy" has to be fulfilled. Consequences which are so unlikely that their occurrence reasonably cannot be anticipated are not imputed.

The first-instance judgement: The district court Essen dismissed the case in the first instance and denied a legally relevant causation between the greenhouse gas emissions from RWE and the endangerment of the claimant's property. The court argued basically that the processes of climate change and its consequences are so complex that it is virtually not possible to prove an individual causal link between the CO₂ emissions of single emitters and specific climate change consequences. The court further argued with reference to the principle of "adequacy" that because there are so many contributors to the overall greenhouse-gas burden in the atmosphere the share of an individual emitter is irrelevant for the causation of climate change impacts.

The appeal: The claimant asserts that the court misjudged the issues concerning causality. He argues that there is a scientifically provable causal chain between the CO₂ emissions from RWE power plants and the increasing danger of the claimant's property being exposed to a tidal wave caused by glacial ice avalanches. This causal chain consists of four clearly definable steps: (1) A certain definable proportion of CO₂ emissions from RWE power plants end up in the atmosphere. There they lead to a higher density of greenhouse gases in the entire atmosphere - irrespective of the place where they are emitted - as described by physical laws (Boyle/Marriot).



(2) Due to the thickening mantle of greenhouse gases in the atmosphere the Earth's heat emission is getting lower which correlates with an increase in global temperature. In the Peruvian Andes no other reasons are known for the rising of the average temperature. (3) The increased temperature leads to an accelerated glacial retreat and heavily increases the probability of glacial ice avalanches. (4) Due to the accelerated glacial melting, the glacial lake's volume increases which consequently further raises the risk of harm to the claimant's property by a tidal wave caused by glacial ice avalanches. Additionally, the claimant - referring to the principle of adequacy, as used by the court - asserts that the contribution of RWE, the largest emitter in Europe, to climate change, is not so low that it carries no weight. Accordingly the claimant demands only a contribution from RWE to security measures at the lake in accordance with the company's contribution to global CO₂ emissions. He asserts that there is no legal reason why a large emitter as RWE should be exempted from its climate-related legal responsibility and should be treated like the numerous collectively irresponsible small emitters.

The outlook: The lawsuit raises the issue of responsibility of large energy companies to climate change in terms of liability for loss and damage. It acts as a model for similar lawsuits in other countries. The lawsuit was dismissed in the first instance is now being appealed. Beside the claimant's concrete concern about climate change impacts, the lawsuit, which is supported by Germanwatch, addresses as a legal test case the possible burden of energy suppliers in regard to externalised costs of using fossil fuels. It shows investors that they have to incorporate the assessment of potential costs of such legal liabilities when dealing with large emitters. It also increases the pressure to reach political solutions addressing loss and damage.