KONRAD ADENAUER STIFTUNG

“Whitewashing issues related to climate protection can be dangerous under liability law.”

A conversation about climate change litigation against companies and the role private law can play in advancing climate protection

Interview with Marc-Philippe Weller

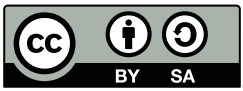
www.kas.de

Imprint

Published by:
Konrad-Adenauer-Stiftung e. V. 2021, Berlin

Translation: Dr. Naomi Shulman
Cover page image: © iStock by Getty Images/Oliver Oltmanns
Design and typesetting: yellow too, Pasiek Horntrich GbR
The print edition of this publication was climate-neutrally printed by Druckerei Kern GmbH, Bexbach, on FSC certified paper.
Printed in Germany.

Printed with financial support from the German Federal Government.



ISBN 978-3-95721-988-6

At a Glance

Climate activists are increasingly going to court against energy and industrial groups. Recently, Greenpeace and Deutsche Umwelthilfe e. V. announced climate lawsuits against the German automotive industry. Marc-Philippe Weller, Director of the Institute for Foreign and International Private and Commercial Law at the University of Heidelberg, discusses climate change litigation in Germany and abroad. He answers questions on jurisdiction, corporate duties of care and causality issues, as well as the courts' role in the fight against climate change. Professor Weller, who specialises in business law, concludes that while model cases have an important sensitising function, only politics can provide a comprehensive solution.

Climate change litigation addresses those responsible for climate change, aiming to hold them accountable. Energy companies that operate internationally are among the main defendants. Is it possible to quantify their contribution to man-made climate change?

Various studies have dealt with this issue. The most well-known of these was published in 2014 by Richard Heede and stated that the so-called "carbon majors" – that is, the 90 largest producers of fossil fuels worldwide – were responsible for two-thirds of man-made greenhouse gas quantities in the period from 1854 to 2010. But there are constantly new, more detailed calculations. The "Carbon Disclosure Project", a non-profit organisation whose objective is to induce companies as well as municipalities to disclose environmental data, including greenhouse gas emissions, published a report in 2017 focusing on the period from 1988 onward. This was the year in which the international community recognised man-made climate change and established the *Intergovernmental Panel for Climate Change*. The report concludes that 25 companies producing fossil fuels were responsible for 50 per cent of the industrial greenhouse gases released globally between 1988 and 2015. Finally, data analysis by the US Climate Accountability Institute in 2020 showed that the 20 largest oil, coal and gas groups emitted approximately 35 per cent of global CO_2 emissions in the period from 1965 to 2018.

How "Big Oil" Contributes to Causation

How would you summarise climate plaintiffs' accusations against energy groups?

Criticism is mainly levelled against emissions as such, which serve as the basis for claims related to the past and those directed towards the future. The first category includes actions for damages for climate-induced adaptation measures, such as flood protection. Claims directed towards the future seek to bring about court-imposed duties for companies to limit their emissions.

But there are many controversial issues, for instance, to what extent energy suppliers should be held liable. Various forms of emission are distinguished. Those emitted by the energy suppliers themselves are so-called Scope 1 emissions. Then, there are Scope 2 emissions, which result from the fact that a group consumes energy that it obtains from suppliers. In some cases, emissions further on in the value chain, all the way to the final consumer, are also attributed to the energy suppliers. These are downstream or Scope 3 emissions. In addition to the main charge of emissions, fossil producers also face other charges, for instance, that they did not invest in the conversion to alternative energy sources in a timely and adequate fashion.

Energy groups argue that producing fossil energies is a legitimate business model. How well-founded is this argument?

Groups certainly have legitimate arguments in this case. Of course, it is undisputed that fossil fuels played an important role in industrialisation. It is also undisputed that the transition phase towards climate neutrality still requires fossil fuels, since renewable energy cannot yet cover the energy needs of the world population. In addition to these factual arguments, there are also legal arguments. For example, in its Agenda 2030, the United Nations determined that "access to affordable, reliable, sustainable and modern energy for all" constitutes one of the objectives for sustainable development under international law. Thus, it

Fossil Fuels Are Still Needed

is an important criterion whether energy is affordable, and this affordability is currently still ensured by the combination of fossil and renewable energy.

If we consider German law, specifically the Energy Industry Act, energy supply companies are obligated to supply the domestic population with electricity. Since renewable energy sources currently cannot yet meet these needs, companies must resort to fossil fuels as well in order to fulfil their legal obligations.

In addition, we should take the case law of the German Federal Constitutional Court into account. In 1994, in their judgment on the so-called coal penny, the justices of the Karlsruhe Court emphasised that the population's interest in the electricity supply is "as common today as the interest in one's daily bread". Later, in the Garzweiler judgment of 2013, the Court stressed that supplying energy was a public service task. The Court described this service as "indispensable for ensuring that citizens can lead a dignified life". Thus, both the law and the justices of the Constitutional Court prescribe the use of fossil fuels as long as renewable energies are not sufficient. Therefore, energy companies have good reason to argue that they employ a legitimate business model.

But there are also counter-arguments …

Climate activists object that producers of fossil fuels should have begun transitioning to renewable energies much earlier. After all, since 1998, when the Intergovernmental Panel on Climate Change was established, it has been common knowledge that the greenhouse effect and fossil fuels are linked. What is more, German lawmakers have now made it clear that it is vital to ensure not only an affordable but also an environmentally friendly energy supply. The Energy Industry Act explicitly formulates the objective that the electricity and gas supply should be "based increasingly on renewable energies". Thus, there is a clear *legal* requirement to move away from fossil energy sources.

The Facts Have Long Been Known

The findings of attribution science, which analyses the connections between extreme weather events and climate change, are an important element in climate change litigation. What role do scientific chains of causality play in climate actions against companies?

The question of causality demands that we distinguish between the political law-making process and climate change litigation. The legislature is subject to fewer causality requirements. It is sufficient if the lawmaker prescribes measures that seem suited, ex ante, to achieving the objective of climate neutrality. Litigation is a different matter. Pursuant to German tort law, at any rate, the injured party must prove, in principle, the causality between the damaging action – in this case, the emission of greenhouse gases – and the damage to his or her legal interests – for example, the flooding of his or her property. In order to fully convince the court, there must be proof that, for example, the greenhouse gas emissions of the sued company led to the flooding that caused the destruction of the property. Providing this evidence is not an easy task. The challenge, above all, is to demonstrate how a specific company's business activities are implicated in the global consequences of climate change.

This is why the outcome of the civil case brought by a Peruvian farmer against RWE before the Higher Regional Court of Hamm is so eagerly anticipated. The plaintiff holds the German energy group jointly liable for the fact that his house is threatened by a glacial flood and demands compensation. What do you think of this trial?

I, too, am eagerly awaiting the court's decision. It has already caused quite a stir that the Higher Regional Court of Hamm issued an order for evidence to inspect the Peruvian plaintiff's village on site. The court therefore implicitly assumes that the lawsuit is conclusive, that is to say, that the Peruvian farmer's claim for compensation against RWE is well-founded, provided that there is evidence of the facts presented by the plaintiff. We will wait to see what the collection of evidence reveals about this issue. The plaintiff has asserted that RWE's share in man-made climate change is 0.47 per cent. But in order for the action to be successful, there must be proof that RWE's emissions specifically led to the risk that

Difficult Proof of Causality

the plaintiff's property would flood, which then caused the Peruvian farmer to take protective measures. Therefore, the Higher Regional Court of Hamm must undertake a very complex examination of causation in this case. I would also warn against weakening the requirements of causation that have applied to date. Otherwise, there is the risk that there would no longer be any limits to liability for the consequences of climate change and that it would also be directed against final consumers. Just imagine that someone who dislikes his neighbour sues him or her for emitting greenhouse gases.

Do the proceedings before the Higher Regional Court of Hamm show that the German judiciary and German private law are out of their depth when asked to address the global dimension of climate change?

I think that this statement is too broad. There are difficult and complex collections of evidence in other judicial proceedings as well. I would argue that the Higher Regional Court of Hamm's order of the on-site visit to the Peruvian village was appropriate. The matter would be even more complicated had the plaintiff sued RWE under Peruvian law. Then the Higher Regional Court of Hamm would have had to collect evidence on questions of Peruvian law. It could also be risky for German companies if they were sued under foreign law, since liability rules might then apply that are much more generous than those of German law, with its strict requirements of causation. In my view, climate actions such as the proceedings before the Higher Regional Court of Hamm present a different problem. They address individual cases that only concern a small segment of the entire complex of climate change. While these model cases certainly fulfil an important function by raising awareness, they do not provide a comprehensive solution. I maintain that a political approach is needed. Politics can offer a holistic view of the task of reducing CO_2 emissions and should then decide on how to distribute the burden, taking into account the difficult conflictual situation.

Political Attention is Required

But climate change litigation obviously puts pressure on politicians. In May of this year, a Dutch district court ordered the energy group Royal Dutch Shell to reduce its CO_2 emissions by a net 45 per cent by 2030 compared to 2019. How would you assess this judgment?

This decision is certainly a milestone. The Dutch court decided several questions that are very controversial in international legal scholarship in favour of the environmental protection organisations bringing the claim. The judges set forth the grounds for their decision in 45 pages. By contrast, the German Federal Constitutional Court’s climate decision is 110 pages long. But the Dutch court addressed some problematic issues very briefly. Let me offer two examples: In only a few lines, the Court brushed off Shell’s argument that it produced energy under valid operating licences, remarking that Shell had not received permission to emit CO_2. The second noteworthy aspect concerns emissions trading. The question that arises is whether companies can be held liable for making use of the right to purchase emission certificates. In my opinion, the court did not provide a clear and convincing answer to this question. On the whole, the interface between public and private law was treated somewhat superficially.

A central interface in the Shell judgment is the one between private law and international law. What would you say about this issue?

The court used standards of international law, which are intended to protect human rights and the environment, to concretise duties of care under private law that it imposed on Shell for its greenhouse gas emissions. That was a valid option. But it is important to note that the court referred to the UN Guiding Principles on Business and Human Rights, which are recognised as an instrument of soft law, that is, as non-binding rules. Nevertheless, the court applied the principles in binding form and did so to Shell’s detriment. It is equally problematic that the court took human rights into account, Articles 2 and 8 of the European Convention on Human Rights and Articles 6 and 17 of the International Covenant on Civil and Political Rights, since international law and international human rights catalogues address states and not companies. There has been a

debate about extending the provisions of international climate law to companies – not directly but indirectly, by way of the individual states. This means that a specific act makes the principles of international law binding for companies, as was the case in Germany with the Act on Corporate Due Diligence in Supply Chains of 11 June 2021.

Criticism of the Shell Judgment

But as far as the Shell decision is concerned, there is no specific act directly linking companies to international climate law. Rather, the court took a general rule of private law, that is, the tort-liability rule, and interpreted this general clause in light of international environmental law. This obscures the limitations of liability under private law. Even the greenhouse gas emissions of final consumers who, for instance, fill up with Shell fuel, are attributed to Shell itself. This is problematic because the group cannot exert legally binding influence on the behaviour of final consumers. Here, in my opinion, the Dutch court certainly goes too far. The judgment would have been more convincing had the judges drawn a line at the question of attribution.

German climate lawyers, motivated by the Shell judgment, have announced that they will bring climate actions in Germany and against German companies. Should we expect German courts to decide similarly to the court in the Netherlands?

The Dutch judgment will surely serve as a source of inspiration, especially since it is not the only momentous court decision on questions concerning the responsibility of European companies for climate and environmental damage. For instance, two cases from Great Britain are also noteworthy: The Vedanta case and the Okpabi case. In the Okpabi case, tens of thousands of residents of the Niger Delta won the right, before the UK Supreme Court, to sue the parent group Shell – a British-Dutch group – and a Nigerian subsidiary in British courts for environmental damage caused by oil production in the Niger Delta.

Climate Change Litigation in Great Britain

In the Vedanta case, the British Supreme Court decided that British courts could have jurisdiction over claims brought by Zambian citizens seeking damages from the British natural resources group Vedanta, as the majority shareholder of the Zambian copper producer “Konkola Copper Mines”, and from the company itself for the poisoning of rivers and agricultural areas. The cases in the UK have not yet been decided on the merits, and in the Dutch case, it remains to be seen whether the judgment of the Hague District Court will prevail on appeal. But it is already evident that climate plaintiffs have won important partial victories in cases against natural resources groups.

Against this background, how would you assess the chances of success for climate actions against companies under German private law?

It is certainly conceivable that duties of care towards third parties could also be interpreted in light of climate and human-rights protection under German law. Expectations of care towards third parties change, and so the corresponding duties are also of a dynamic nature. But I consider it rather unlikely that German courts will go as far as the Dutch district court in attributing climate damage. As I see it, under private law in Germany, no one suggests holding companies liable for consumer behaviour, that is, for Scope 3 emissions. I would also find it a daring move to extend liability to all subsidiaries. If we look at the Supply Chain Act, it only orders compliance with duties of care related to human rights and the environment with regard to the first downstream level, that is, for direct suppliers. I think it would hardly be convincing, from an argumentative standpoint, if a German court were to gloss over the legislature’s decision in favour of limited private-law liability under the Supply Chain Act by following the Dutch example and holding a company accountable for greenhouse gas emissions in the entire value chain.

In terms of numbers alone, the United States is considered a pioneer when it comes to climate change litigation. What developments there could become relevant in climate actions in Germany?

The United States as Pioneer

Indeed, globally, most climate actions are brought in the United States. Last year, there were 1,200 proceedings in the United States, compared to approximately 350 in all other countries, according to the UN Environment Programme's Global Climate Litigation Report of 2020. But we must also take into account that the American courts have possibilities of rejecting climate actions, possibilities that do not exist in Germany. For example, American courts have used the instrument of the political question doctrine to dismiss many climate actions, arguing that it is the task of politics to solve the problem of climate change. In German civil procedure, there is no comparable instrument that would allow courts to dismiss climate actions at the level of admissibility on political grounds.

In Germany, the discussion takes place at the substantive level, especially in assessments of causation. Yet despite these differences, there are developments in climate change litigation in the United States that we should monitor. These include shareholder lawsuits alleging misrepresentation of the risks of climate change for the company's corporate policy. In Germany, too, there will surely be similar investor lawsuits against companies sooner or later. In Poland, an environmental organisation that is a shareholder in an energy group has already chosen this route to prevent the construction of a controversial coal-fired power plant. In the United States, there are also climate actions in which companies are accused of misleading consumers, for example about production processes that are harmful to the climate. Similar actions based on competition law are imaginable in Germany, too. Finally, there are so-called design defect cases in the United States. These are climate actions that are based on product liability law. In one form or another, such cases are also conceivable in this country.

The Misleading of Consumers

For years now, in the United States, states like California and cities such as Baltimore have also been involved in climate actions against companies. Can we expect a similar trend in Germany or Europe?

In France, proceedings are pending against the French mineral-oil group Total. In addition to environmental organisations, French cities, among them Grenoble, are suing as well. The plaintiffs accuse Total of not doing enough to protect the climate. They cite a French law from 2017 that imposes duties of care on companies to avoid human rights violations and environmental damage. Would proceedings like this be possible in Germany? I would point out that the state has instruments of authority at its disposal when it recognises problems related to climate protection. In my view, it would be a contradiction to allow state institutions to bring actions under private law for more climate protection. Critics might object that the state has failed to adopt measures of authority in time. However, cities are part of the state. Therefore, it strikes me as problematic if they were to participate in climate litigation. But there are certainly still issues here that could be examined and discussed in further detail.

So far, we have spoken about proceedings under private law. In some US states – New York and Massachusetts – the public prosecutors’ office is conducting investigations against Exxon Mobil for deceiving investors and shareholders about the risks of climate change to the company’s business activities. Could companies face similar criminal proceedings in this country?

In Germany, this would not be possible because companies cannot be held criminally liable here. In principle, German criminal law only provides for the criminal liability of natural persons, that is, board members and CEOs. There was a political project to comprehensively revise sanctions for companies. But despite intensive debates, no agreement was ultimately reached. In addition, criminal law requires compliance with the principle of certainty. The German Criminal Code does include environmental offences. For instance, anyone who pollutes water

is criminally liable. But there are no criminal offences that penalise greenhouse gas emissions. And I doubt that the Criminal Code will be amended accordingly in the foreseeable future.

The German Federal Constitutional Court made a great stir when it demanded, this spring, that Germany's climate protection law be tightened in order to protect future freedoms. The Karlsruhe Court's climate decision addressed the German legislature. Do you believe that this will nonetheless have consequences for climate litigation against companies?

Yes, it certainly will. First of all, the German Federal Constitutional Court uses lines of argument that can also be productively utilised for private law. For one thing, there is the responsibility for future generations, which plays a role in private law in cases where dangers that could become real in the future must be minimised.

The Climate Decision of the Karlsruhe Court

A second important aspect of the climate decision is the Federal Constitutional Court's argument that everyone must begin with their own area of responsibility so as to come to grips with the global problem of climate change. By contrast, in the Dutch case, Shell argued that it would not be conducive to the objective of climate neutrality if the group had to produce less energy from fossil fuels, since other companies would then become all the more active in this business area. Following the climate decision of the Karlsruhe Court, companies sued in German civil courts would be unlikely to succeed with a similar objection.

I would argue that the courts have given climate protection the greatest momentum, and the Karlsruhe Court's decision has propelled this development in a powerful way. It might encourage other German courts to make progressive decisions to curb climate change as well. Furthermore, it is remarkable that the German Federal Constitutional Court refers, in its decision, to foreign court decisions on climate protection and draws on them as a source of inspiration. I find this significant in view of the

Dutch Shell judgment and the remarks there on duties of care towards third parties. With its climate decision, the Karlsruhe Court provided an important building block for an increasingly dense mosaic of decisions on corporate liability for the consequences of climate change. Taken as a whole, these cases could lead German civil courts, too, to establish case law on companies' duties of care towards third parties regarding climate protection.

To date, plaintiffs in climate cases have primarily targeted internationally active energy groups. How would you assess the litigation risks for other companies?

I think that the car industry in particular faces such risks. After all, the transport sector accounts for 13 per cent of fossil energy use. Following the district court's line of argument in the Shell case, car drivers' greenhouse gas emissions would be attributed to the car companies as Scope 3 emissions. As I mentioned earlier, I find this case law questionable, but we cannot rule out the possibility that it will inspire the German courts as well. If the arguments relating to questions of causality are as generous as they were in the Shell judgment, liability risks could also arise for small and medium-sized supplier companies to the car industry.

Litigation Risks for the Automobile Industry

Are companies sufficiently aware of these risks?

It seems to me that the challenges posed by climate change have reached the highest levels of corporate management. There is now an awareness that each company must reconsider its business policy and institute compliance systems. Of course, this requires first evaluating the risks in one's own company. What is more, companies would be well advised to review their public statements on climate protection. For these belong to the factors that play a role in reestablishing duties of care. If claims differ from reality, there is a greater risk that courts

Reviewing Statements on Climate Protection

will assume that duties of care have been breached, as was the case in the Shell judgment. In other words, whitewashing issues related to climate protection can be dangerous under liability law. The Supply Chain Act probably also exerts a sensitising influence, since environmental standards, like human rights, must also be respected in the supply chain.

Private law could propel legal development concerning climate protection, just as it does with human rights protection. Indeed, private law could help ensure that climate protection has a broader impact. If a company is sued in a model case, other companies pay careful attention and, if necessary, change their business processes as needed in anticipation to avoid being sued as well. This is precisely the aim of "strategic litigation" as pursued by NGOs. Climate protection vividly illustrates the interplay between public law, international law and private law. Public law and international law provide the guidelines, but in order to transform climate protection on a grand scale, we need private law, which regulates countless legal relationships in everyday life. These legal relationships create responsibility, perhaps also liability, in the event of a breach of duties. In any case, private law animates climate protection.

Marc-Philippe Weller

Prof. Dr. Marc-Philippe Weller has been the Director of the Institute for Comparative Law, Conflict of Laws and International Business Law at the University of Heidelberg since 2014.

Before that, he studied law in Heidelberg and Montpellier (*licence en droit*), completed his habilitation in Cologne (2008) and held chairs at the Universities of Mannheim (2008–2011) and Freiburg (2011–2014). He had visiting professorships in The Hague, Gothenburg, Paris, Taipei, Washington and Vienna.

Since 2019, he has been Vice-Rector for International Affairs at Heidelberg University. He is co-editor of the journals *Zeitschrift für Unternehmens- und Gesellschaftsrecht* (ZGR) and *Zeitschrift für Europäisches Privatrecht* (ZEuP) and, together with Prof. Dr. Wolfgang Kahl, editor of the handbook Climate Change Litigation (2021).

Many thanks to research assistant *Ms Mai-Lan Tran*, who is writing her dissertation on climate change litigation at the University of Heidelberg, for her help in preparing the research for this interview.

For further information, see
https://www.ipr.uni-heidelberg.de/personen/weller.