

Climate Change Litigation in Brazil and Latin America: An Increasing Trend That Companies Must Be Prepared For

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Summary *Climate change litigation is already a firmly established trend in North American and European countries, but it is still not widespread in Brazil and Latin America. However, recent developments—as recently as June and August 2020 in Brazil—suggest that an increase in climate-related lawsuits is just around the corner and that companies should get prepared.*

The year of 2020 will certainly be remembered as a landmark to the strengthening of global awareness regarding climate change, as the COVID-19 pandemic and the resulting confinement measures proved that reducing carbon emissions is possible. Data gathered during the first months of the pandemic showed that decline in ground transportation, airline traffic and electricity use were the main factors that contributed to the reduction of greenhouse gas (“GHG”) emissions, causing them to drop by 8.3 percent in the first four months of 2020 in relation to 2019.¹

Climate change, of course, is not a new concern. Governments, corporations and society have long ago come to recognize climate change risk as a social and financial issue, and several steps have been taken during the past 30 years to address the issue. Just to name a few: the United

Nations Framework Convention on Climate Change (“UNFCCC”); the Kyoto Protocol; the 17 Sustainable Development Goals (one of which is climate action, along with others that also relate to environmental matters); the Paris Agreement and its nationally determined contributions (“NDCs”); and the incorporation of environmental, social and corporate governance (“ESG”) indicators to measure the sustainability and societal impact of businesses.

In January 2020, the World Economic Forum published *The Global Risks Report 2020*², listing the major global risks in terms of likelihood and impact. For the first time in almost two decades, the top five most probable risks were related to environmental matters,³ and climate action failure occupied the distinct position of second-most probable risk and first-most significant risk in terms of impact. On a side note, it is remarkable that the risk of “rapid and massive spread of infectious diseases” appeared only at the 10th position in terms of impact and did not even appear in the likelihood list—at the time the report was published, COVID-19 was already a reality in China.

This sends a clear message on how non-financial matters can cause

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devastating impacts to corporations, countries, their people and economies, especially when it comes to environmental issues and, in particular, climate change. Still, despite international efforts to push forward a global response, governments and major companies are failing to provide concrete and integrated measures to ensure GHG reduction goals are met and climate change is slowed down.

For this reason, the last few years have seen a surge in climate-related litigation worldwide, a relatively new class of litigation seeking that governments and companies adopt and ramp up effective measures to address climate change, such as complying with NDCs, reducing carbon footprint and controlling deforestation, human rights being commonly used as grounds for several of these claims. One example of successful climate litigation is the landmark ruling issued in *Urgenda Foundation v. Dutch government*, where the Dutch Supreme Court upheld previous lower court decisions and established that, by the end of 2020, the Dutch government must reduce emissions by at least 25 percent compared to 1990 emissions, in line with its human rights obligations.

Climate litigation can also be cross-border. In 2015, Saúl Luciano Lliuya, a Peruvian farmer, filed a claim in a German court against RWE AG, the largest electricity producer in Germany, seeking compensation for damages caused by the rising of Lake Palcacocha, a glacial lake located above his town of Huaraz, Peru. According to Lliuya, RWE, as a major GHG emitter in Europe, contributed to the melting of Peruvian mountain glaciers. Although a lower court dismissed the claim due to the impossibility of establishing a “linear causal chain” between alleged damages and RWE’s activities, in 2017 the Higher Regional Court of Hamm overruled such decision and allowed the claim to continue and advance to discovery.⁴ Regardless of its outcome, the fact that the court of appeal allowed *Lliuya v. RWE AG* to continue shows a horizon of possibilities to impose liabilities on companies resulting from GHG emissions.

Although prominent and far more common in the United States and Europe, climate change litigation is a trend that has already set foot in Brazil and Latin America in general, which are taking their first steps in learning from international experience and trying to replicate and translate such efforts to their local

realities. One of the first successful cases of climate litigation in Latin America is Colombian: represented by Dejusticia, a think tank focused on promoting human rights in Colombia, a group of 25 young people, from seven to 26 years old, filed a lawsuit against the Colombian government seeking the protection of the Colombian Amazon against deforestation. In 2018, the Supreme Court of Justice of Colombia acknowledged the government’s omission in preventing deforestation and its impacts on climate change and the protection of future generations, demanding the government to take appropriate measures to protect the forest and meet its NDC, pursuant to the Paris Agreement.

In Brazil, climate litigation cases are more incipient and begin to take form as courts, public prosecutors and NGOs become aware of the matter. The first signs of climate change awareness in Brazilian courts began to appear in the background of rulings, such as when the São Paulo State Court of Appeals prohibited the use of fire in sugar cane plantations due to its implication in global warming, and when the Paraná State Court of Appeals acknowledged the obligation to preserve mangroves, considering their important role against climate change.

Nevertheless, even though Brazilian courts are yet to issue decisions in actions directly related to climate change, Brazil has been increasingly showing significant signs that climate litigation is a trend that cannot be ignored. As early as 2010, the São Paulo State Public Prosecutor’s Office filed actions against more than 30 airline companies seeking compensation for GHG emissions. Ten years later, none of the companies were considered liable, but one of those actions, filed against KLM Royal Dutch Airlines, is pending analysis by the Superior Court of Justice⁵.

In 2019, IBAMA, which is the Brazilian equivalent of the United States Environment Protection Agency (“EPA”), filed an action against a steel company and its shareholders seeking compensation for climate damages caused by the burning of illegal coal in the production of steel. In June 2020, opposition political parties filed lawsuits against the Brazilian government due to its lack of action in connection with the Climate Fund and Amazon Fund, which in practice has been leading to the suspension of the funds’ operations, impacting projects, research and

activities that seek to mitigate climate change and that otherwise could be benefited by the fund's reserves. Public hearings are expected to be held soon by the Brazilian Supreme Court to discuss these actions.

Lastly, as recently as August 2020, the Brazilian Association of Environmental Public Prosecutors partnered with the Institute for Climate and Society to promote a climate litigation capacitation course for prosecutors, for purposes of discussing and aligning strategies for combating climate change in the Brazilian context.

There is no doubt that climate-related litigation has come to stay and presents itself as an additional tool for compelling governments and companies to tackle climate change with effective measures. As

global warming, ESG and climate change awareness increasingly occupy global agenda, it is natural that Brazil and Latin America follow the same path of North American and European nations. Particularly in Brazil, recent developments suggest that it is fairly reasonable to expect a steep increase of climate change litigation, both against the Brazilian government, which is currently widely perceived to neglect environmental and climate change matters, as well as major corporations from carbon-intensive industries. The fact that Brazilian prosecutors are being capacitated nationwide to that end speaks volumes about the perspectives of climate litigation in Brazil, and it is just a matter of time before climate-related actions become a top priority issue in the agenda of companies with a presence in Brazil and Latin America.

Endnotes

- ¹ Liu, Z. et al. COVID-19 causes record decline in global CO2 emissions. Preprint at <https://arxiv.org/abs/2004.13614> (2020).
- ² World Economic Forum, *The Global Risks Report 2020*, at http://www3.weforum.org/docs/WEF_Global_Risk_Report_2020.pdf (2020).
- ³ In order of likelihood: extreme weather, climate action failure, natural disasters, biodiversity loss and human-made environmental disasters.
- ⁴ Climate Case Chart, *Luciano Lliuya v. RWE AG*, at <http://climatecasechart.com/non-us-case/liuya-v-rwe-ag/> (last visited on August 25, 2020).
- ⁵ Appeal No. 1856031, Proceeding No. 0046991-68.2012.4.03.9999 / SP (2020/0001750-7).

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