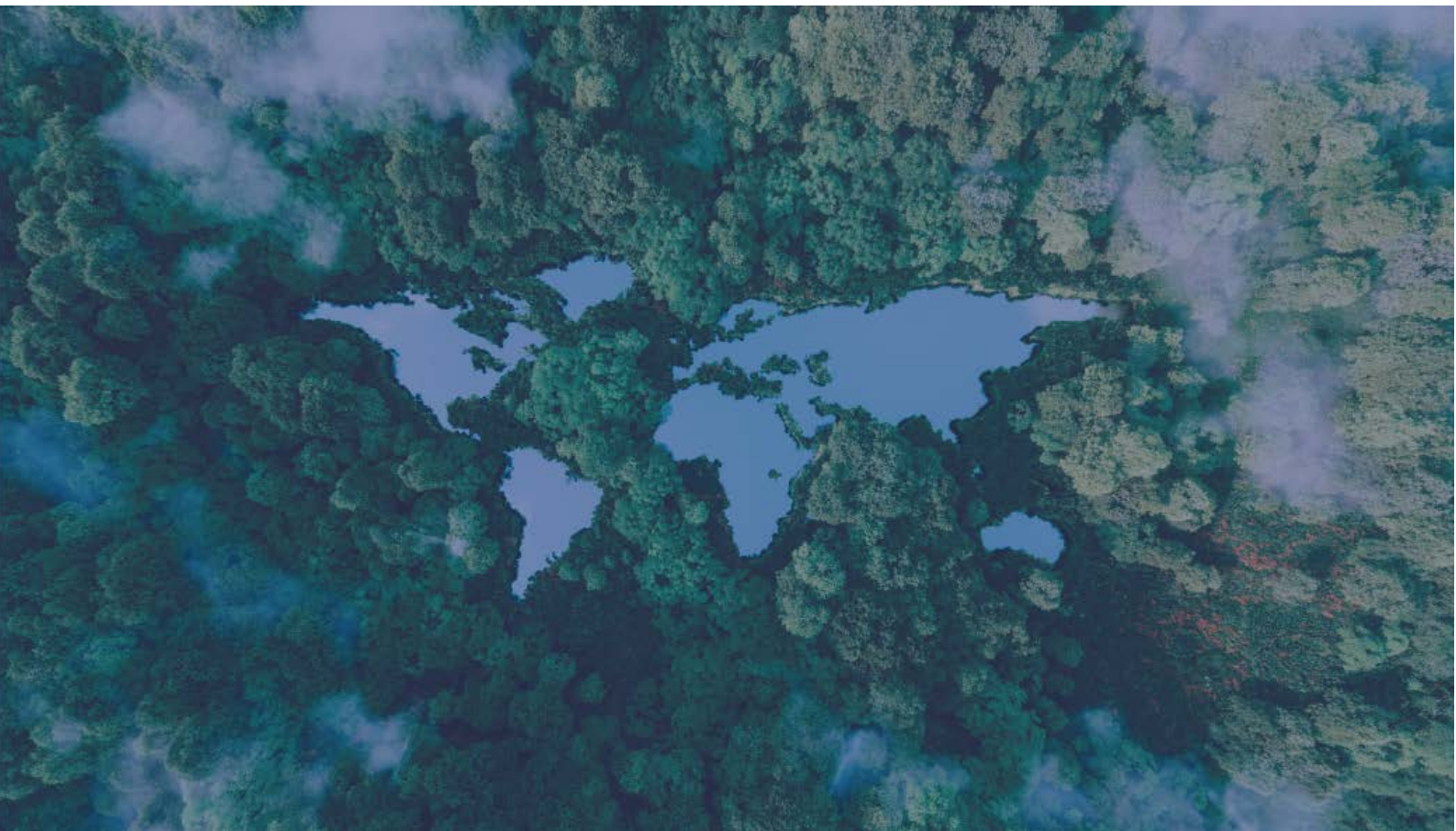




**British Institute of
International and
Comparative Law**

Global Perspectives on Corporate Climate Legal Tactics: Brazil National Report

Dr Caio Borges





**British Institute of
International and
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Mission Statement

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Vision

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Introduction

Corporate litigation in Brazil has become an increasingly important legal tool for individuals and communities seeking to hold corporations accountable for environmental and climate damages, and human rights. Despite its significant potential, access to justice in corporate litigation cases remains challenging, with various legal barriers and procedural hurdles faced by plaintiffs seeking to establish corporate liability.

In recent years, there has been a growing interest in Brazil in holding corporations accountable for their contribution to climate change. Brazilian courts have seen an increasing number of climate litigation cases against corporations, particularly those in the energy, mining, and agricultural sectors. As of February 2024, there were 31 climate cases against corporations in Brazil.¹ These cases are generally brought by the Public Prosecutor's Office, and civil society organisations seeking to establish corporate liability for greenhouse gas emissions, deforestation, and other activities that contribute to climate change.

Although there are numerous definitions of climate litigation, in this report we define it as cases that have been filed before the Brazilian judicial system and are directly and explicitly related to climate change, whether in the core of the argument or in a peripheral way. Based on this premise, the cases we identify as corporate climate litigation involve companies (both public and private) primarily as defendants, but we also include in the analysis cases in which companies are plaintiffs. Moreover, we assess cases where businesses intervene as a third party.

This research report aims to provide an analysis of the Brazilian legal system's key aspects of corporate litigation, including standing, justiciability, and procedures. It also explores relevant Brazilian legislation that could be used as the legal basis for corporate litigation cases in the areas of consumer law, environmental law, corporate law, capital markets law, antitrust law, contract law, human rights law, and civil law. In order to give concrete examples, the report also explains some corporate climate litigation that has been already brought to courts, and shows some non-climate cases that could be used as paramount to build a climate action.

Finally, this report also covers the types of remedies available in the Brazilian legal system, especially in Brazilian civil, environmental, consumer, and corporate law, to hold corporations accountable for environmental, social, and climate damages.

¹ JUMA, *Climate Litigation Database in Brazil* (2024) <<https://www.litiganciaticlimatica.juma.nima.puc-rio.br/listagem/visualizar>>.

1. Causes of Action

General Overview

Corporate litigation in Brazil is governed by a complex legal framework, which includes several legal instruments and regulatory bodies. The Brazilian legal system provides various avenues for individuals and communities to sue corporations, as discussed below. Several causes of action may be used to bring corporate litigation cases in Brazil, which may use consumer law, environmental law, corporate law, capital markets law, antitrust law, contract law, human rights law, or civil law.

For instance, the Brazilian Consumer Protection Code establishes the right of consumers to seek redress for damages caused by defective or dangerous products or services. Similarly, the Brazilian Environmental Crimes Act imposes criminal and civil liability on individuals and corporations who cause environmental damage. In addition, the Brazilian Civil Code and the Brazilian Corporation Act provide for civil liability of corporations for harm caused by their actions or omissions. Other relevant legislation includes the Brazilian Securities Law, which regulates the Brazilian capital markets and imposes disclosure requirements on corporations, and the Brazilian Competition Law, which prohibits anti-competitive behaviour by corporations.

Although there is a range of possibilities in Brazil, not all avenues have been explored by litigants. Most of the current corporate climate litigation focuses on Climate Change Law and Environmental Law Statutory Provisions, Civil Liability, and licensing/permitting. There are a few cases where human rights provisions were also brought especially in relation to indigenous and traditional peoples' rights. We understand that the corporate climate litigation movement in Brazil is still being explored, and there may be changes in this scenario over the next few years.

A. Climate Change Law / Environmental Law Statutory Provisions

i. The Brazilian Constitution of 1988

The Brazilian Constitution recognises the right to an ecologically balanced environment, underscoring its significance by dedicating a specific chapter to environmental protection (Article 225). This constitutional safeguard is further reinforced by its designation as a perpetual clause, immune to dilution through constitutional amendments (Article 60, fourth paragraph). Complementing this constitutional provision, Brazil boasts a comprehensive environmental legal system that has evolved over the span of four decades. This system encompasses statutory and administrative laws, legal principles, and judicial precedents, forming a robust foundation for

environmental governance.² Through the analysis of climate cases in Brazil, it is evident that Article 225 is one of the main legal bases utilized to support legal actions in climate-related matters.

The constitution places a dual mandate on both the state and society to safeguard and preserve the environment for present and future generations. Notably, environmental concerns are interwoven throughout the constitutional text, emphasizing its crosscutting significance.³ For instance, Article 170 of the Brazilian Federal Constitution imposes that the owners of a property must exercise their property rights in line with environmental protection and social justice. This provision is interpreted together with item XXIII of article 5 of the Constitution, which states that property must fulfill its social function. This is the basis for the principle of the socio-environmental function of property.

ii. National Environmental Policy

Article 3, IV, of the National Environmental Policy (PNMA - Federal Law 6,938/1981) defines the term "polluter" as encompassing both individuals and legal entities, regardless of their public or private status, who bear direct or indirect responsibility for activities resulting in environmental degradation. This definition underscores the inclusive nature of accountability, wherein both direct and indirect polluters are held equally liable for environmental harm. This principle of joint and several liability mandates that polluters share responsibility for restitution. Consequently, a company engaging in polluting activities can be compelled to fully indemnify for damages incurred, irrespective of whether its involvement in environmental degradation was direct or indirect.

The PNMA also offers a comprehensive perspective on environmental issues, going beyond mere natural resources. Its definition of the environment encompasses a broad spectrum of physical, chemical, and biological elements that influence and sustain life in all its forms. Moreover, the law's characterisation of environmental degradation and pollution extends to adverse changes in environmental quality resulting from activities that directly or indirectly affect public health, social and economic activities, biota, aesthetic or sanitary conditions, and adherence to environmental standards. These expansive concepts, enshrined in the Brazilian Constitution of 1988, acknowledge the

² Moreira, D. d. A., Nina, A. L. B., Garrido, C. d. F., and Neves, M. E. S. *Rights-Based Climate Litigation in Brazil: An Assessment of Constitutional Cases Before the Brazilian Supreme Court* (Journal of Human Rights Practice, 2023) <https://academic.oup.com/jhrp/advance-article/doi/10.1093/jhuman/huad023/7237274?utm_source=authorollfreelink&utm_campaign=jhrp&utm_medium=email&guestAccessKey=63f8c9f0-e85f-45a6-a0c1-11236173c672&login=false>.

³ Moreira, D. A., and D. M. C. Oliveira, *Direito das futuras gerações e meio ambiente: utopia ou distopia* (Revista de Direitos Difusos 72(2), 2019)

complexity of the climate crisis. Consequently, they underscore the relevance of applying the normative provisions of the law in climate litigation actions.

Financial institutions may be held accountable for environmental harm resulting from the activities they finance. Their environmental duty in the PNMA arises from Article 12, along with Article 3, IV – which provides the definition of polluter – as the financier may fall into the category of indirect polluter. This understanding has been reinforced by STJ considering that those who finance activities are responsible for the resulting environmental damage.⁴

Article 12 of PNMA mandates that entities and agencies of financing and governmental incentives must condition the approval of projects eligible for such benefits to the presentation of a valid license and to regular compliance with the rules, criteria, and standards issued by National Environment Commission (CONAMA). Additionally, these entities and agencies are required to incorporate into projects measures aimed at controlling environmental degradation and enhancing environmental quality.

iii. Forest Code

The Native Vegetation Protection Law, known as the Forest Code (Law no. 12,651/2012), protects native vegetation nationwide. The legislation imposes restrictions on the expansion of production inside Permanent Preservation Areas (*Áreas de Preservação Permanente*) and Legal Forest Reserves.⁵ Additionally, it offers incentives for rural producers to embrace agricultural technologies that promote modernisation and adopt practices aimed at increasing productivity.⁶

Article 7 of the Forest Code, combined with the principle of the socio-environmental function of property, establishes that the liability for the environmental damage on a property extends to any new owner, irrespective of their direct involvement in its causation. This transfer of obligation stems from the inherent duty to conserve the area, known as the *propter rem* principle, which binds ownership of the property along with its corresponding environmental responsibilities and liabilities.

Article 7 unequivocally mandates that the owner, possessor, or occupant of areas designated as Permanent Preservation Areas must maintain the vegetation therein, regardless of their legal status as individuals or legal entities, public or private.

⁴ STJ. 2nd Panel. REsp 1.071.741/São Paulo. Justice Herman Benjamin. 24 March 2009.

⁵ The Brazilian Forest Code requires rural landowners to set aside a percentage of their property to be maintained as Legal Reserve. The aim is to protect native vegetation on rural lands and conserve biodiversity. Sustainable use of the forest is allowed in these areas. The percentage protected will vary depending on the type of vegetation and the location of the rural property. For instance, as a rule, a landowner located in a forested area within the “Legal Amazon” needs to designate 80% of the property as Legal Reserve. In the other geographical regions, 20% of the rural property area must be preserved, regardless of the type of vegetation (Art. 12, Law No 12.651/2012).

⁶ Chiavari, J., Lopes, C. L., and Araujo, J. N. d. *Where Does Brazil Stand With The Implementation Of The Forest Code? A Snapshot Of The Car And Pra In Brazilian States (Executive Summary)* <https://www.climatepolicyinitiative.org/wp-content/uploads/2021/12/SUM-EX-Onde-Estamos-2021_EN.pdf>.

Furthermore, it stipulates that the obligation to restore vegetation, in cases of unauthorized removal, is of a real nature and is transmitted to successors in the event of property transfer.

In line with this legal framework, the Superior Court of Justice has reinforced this understanding through Precedent (*Súmula*) 623, affirming that environmental obligations carry a *propter rem* nature. Accordingly, these obligations can be enforced against both current and previous owners or possessors. Thus, when an individual or company acquires a property burdened with environmental and climate liabilities, they are bound by law to address and remedy the damage, regardless of its originator.

*IBAMA*⁷ v. *Minerva Ribeiro de Barros and Genesisagro S/A*⁸ exemplifies the importance of the Legal Reserve for environmental protection. The plaintiff argues that there has been deforestation of 190,960 hectares of native Cerrado (one of the legally protected biomes in Brazil) forest, situated in an area designated as a legal reserve, without prior authorisation from the competent environmental agency. IBAMA emphasizes the significant importance of the Cerrado biome and highlights how ongoing illegal deforestation exacerbates the climate crisis. According to remote sensing imagery, the plaintiff alleges that the area continues to be exploited, even after being embargoed by IBAMA, with no measures for regeneration being implemented.

iv. National System of Conservation Units

Another important environmental provision in Brazil is the National System of Conservation Units (SNUC – Federal Law 9,985/2000), that seeks to contribute to the conservation of biological diversity and genetic resources, to preserve the restoration of the diversity of natural ecosystems, to attribute economic and social value to biological diversity, to promote sustainable development from natural resources, and to protect the culture and knowledge of traditional populations, promoting them socially and economically. Art. 36 of the law is a relevant provision for corporate actors as it establishes that all enterprises that can potentially cause significant degradation must compensate for their impacts and must maintain the preservation of an environmental area. These resources can be directed to a strategic area for the maintenance of the balance of the climate system.

v. Atlantic Forest Law

The Atlantic Forest Law (Federal Law 11,428/2006) provides for the conservation, protection, regeneration, and use of the Atlantic Forest Biome, which is a national heritage. It establishes several measures regarding the suppression of the Atlantic Forest vegetation. This legislation is especially relevant for climate litigation, as this biome is

⁷ Brazilian Institute of Environment and Renewable Natural Resources.

⁸ <https://climatecasechart.com/non-us-case/ibama-vs-minerva-ribeiro-de-barros-e-genesisagro-s-a/>

strongly threatened by deforestation and climate change. Many activities have advanced over the biome illegally, contributing to deforestation and, consequently, to the increase of greenhouse gas emissions.

vi. National Policy for Solid Waste

The National Policy for Solid Waste (PNRS – Federal Law 12,305/2010) provides that its measures apply to ‘individuals or legal entities, public or private, directly or indirectly responsible for the generation of solid waste and those who develop actions related to the integrated management or the management of solid waste’ (Art. 1, §1).⁹ The policy provides for shared responsibility for the product life cycle, defined as ‘a set of individualised and chained attributions of manufacturers, importers, distributors and traders, of consumers and of the holders of public services for urban cleaning and solid waste management, to minimize the volume of solid waste and rejects generated, as well as to reduce the impacts caused to human health and environmental quality resulting from the life cycle of products, pursuant to this law’.¹⁰ (Art. 3, XVII). It is the basis for the obligation of Reverse Logistics. These mechanisms are foreseen in Brazilian environmental law as a requirement for the integrated management of solid waste, also requiring the diligence of the private sector.

vii. Environmental Crimes Act

The Environmental Crimes Act (Federal Law 9,605/1998) establishes both criminal and administrative penalties for conduct and activities detrimental to the environment, holding legal entities accountable for their involvement. Article 2 stipulates that individuals involved in the commission of crimes under the law will be subject to penalties commensurate with their level of culpability. This article has been used in claims against directors, administrators, board members, technical advisors, auditors, managers, agents, or representatives of a legal entity who, despite being aware of criminal activities, fail to prevent them when they could have intervened.

Article 3 outlines the comprehensive liability of legal entities, stating that they can be held administratively, civilly, and criminally responsible if infractions are committed by their authorised representatives or bodies, to the benefit of the entity. Moreover, it clarifies that the liability of legal entities does not absolve individuals — be they perpetrators, accomplices, or accessories — from their responsibility.

Additionally, Article 4 empowers authorities to disregard the legal personality of an entity if it impedes the restitution of environmental damages. Consequently, partners or administrators may be personally liable for administrative fines and environmental reparations.

⁹ Translated by the authors.

¹⁰ Translated by the authors.

Hence, the law not only imposes accountability on the legal entity and implicated individuals but also enables the piercing of the corporate veil to access the assets of partners or administrators. This underscores the potential for significant repercussions faced by large corporations for environmental damages, including offences linked to climate change.

Through the research, no corporate climate litigation based on criminal law was found, but the Act has been used in climate cases against individuals – which shall be extended for corporations. *Federal Public Prosecutor’s Office v. Rogério*¹¹ questioned the alleged commission of crimes as provided for in Articles 50-A (deforestation, exploitation, or degradation of public forest) and 41 (causing fire in woodland or forest) of the Environmental Crimes Act. The plaintiff states that between 24/09/2010 and 27/10/2010, the defendant purportedly deforested 111.0675 hectares of native forest in the Amazon biome, using fire, within an area under the jurisdiction of the Union, without authorisation from the competent environmental agency. The Court found the defendant guilty, yet the prosecution appealed the decision, arguing that the penalty should be increased due to its impacts on climate change and the health and subsistence of indigenous peoples. The appeal is still pending.

viii. National Policy on Climate Change

The National Policy on Climate Change (PNMC), established by Federal Law 12,187/2009, aims to reconcile economic and social development with climate system protection. It seeks to reduce anthropogenic greenhouse gas emissions from various sources while enhancing greenhouse gas removal through sinks within the national territory. The PNMC also focuses on implementing adaptation measures to climate change, with the active participation of economic and social stakeholders, particularly the vulnerable ones. Furthermore, it emphasises the preservation, conservation, and restoration of environmental resources, as well as the expansion of legally protected areas and the development of carbon market in Brazil (Article 4).

These objectives are meant to guide both governmental and private sector activities. The law outlines crucial provisions related to climate change, including various instruments such as the National Fund on Climate Change, Action Plans for Deforestation Prevention and Control in biomes, fiscal and tax measures to incentivise emissions reduction, specific credit and financing lines from public and private financial institutions, greenhouse gas emissions inventories, environmental impact assessments, and more (Article 6). These instruments are mandatory for both the private sector and the Public Power.

¹¹ <https://climatecasechart.com/non-us-case/federal-public-prosecutors-office-vs-rogerio-forest-fire/>

The case of *Instituto Preservar, AGAPAN, and Núcleo Amigos da Terra v. Federal Union et al.*¹² uses the PNMC as a legal basis. It underscores how the climate crisis has worsened water scarcity in the municipality of Candiota, a situation officially recognised by a municipal decree. Meanwhile, the lawsuit claims that local coal-fired power plants are exacerbating this issue by utilising water for cooling, leading to adverse impacts on the water system, local biome, and the climate. Allegations of negligence toward climate policy have been raised against the defendants regarding their management of licensing and renewal processes for these enterprises within the state. Moreover, they argue that the Federal Government has been actively promoting coal-fired power projects through energy auctions authorised by the National Electric Energy Agency (ANEEL). The plaintiffs sustain that CRM – responsible for the Candiota coal mine – and CGT Eletrosul – operating the Candiota III Thermal Power Plant, which is acknowledged as the most polluting and least efficient plant in the country – have operated in violation of environmental climate laws. They draw upon Article 4 of the PNMC, which advocates for the compatibility of economic and social development with climate system protection, emissions reduction from various sources, and preservation, conservation, and restoration of environmental resources. Furthermore, they highlight Article 5 to argue for the need to move beyond coal usage as a fuel for electricity generation to fulfill international commitments made by the Brazilian state regarding climate change, in alignment with sustainable development guidelines. Ultimately, they seek the condemnation of the defendants to fully compensate for climate, environmental, social, and economic damages resulting from non-compliance with the PNMC, Paris Agreement, and the State Climate Change Policy, through plans, projects, and actions. A preliminary decision was issued, denying the requested injunction relief because, although the emergency of climate measures is recognised, it does not meet the urgency required for the granting of preliminary relief, as of Article 300 of the Civil Procedure Code. Such relief must involve a risk to the effective outcome of the process itself, in other words, those measures that would no longer be effective if granted only in the final judgment. The final decision is still pending.

Additionally, the legislation mandates official financial institutions to offer credit lines and financing for actions aligning with the PNMC objectives, thereby encouraging private agents' compliance with the policy within their social responsibilities (Article 8). This provision imposes obligations on financial institutions to support activities contributing to climate change mitigation and adaptation.

¹² <https://climatecasechart.com/non-us-case/instituto-preservar-agapan-and-nucleo-amigos-da-terra-vs-federal-union-and-others-climate-emergency-in-rio-grande-do-sul-state/>

ix. National Biofuels Policy

The National Biofuels Policy, known as RenovaBio (Federal Law 13,576/2017), aims to advance energy efficiency and mitigate fuel-related greenhouse gas emissions. It introduces several regulatory instruments that have an impact on the production and trade of fuels, which companies are obligated to adhere to. These include targets for reducing greenhouse gas emissions in the fuel matrix, as outlined in Chapter III of the law, as well as the issuance and trading of Decarbonisation Credits detailed in Chapter V. Additionally, the policy mandates Biofuel Certification, outlined in Chapter VI, along with compulsory blending requirements of biofuels with fossil fuels. Tax, financial, and credit incentives are also provided to incentivise compliance. Moreover, the policy emphasises actions aligned with the Paris Agreement under the United Nations Framework Convention on Climate Change, further solidifying its commitment to global climate objectives.

The legislation has been the subject of at least 2 lawsuits challenging the obligation to acquire Decarbonisation Credits – known as CBios¹³. In the case of *Flexpetro Distribuidora de Derivados de Petróleo Ltda. v. National Petroleum Agency (ANP) and Federal Union*¹⁴, the plaintiff company alleges that the ANP, responsible for establishing individual decarbonisation targets, acted in contravention of the RenovaBio by publishing the targets without any parameters regarding the availability of CBios in the market and without regulating the certification process for these assets. Therefore, it requested exemption from the obligation to acquire CBios, as well as the prohibition of any penalties by the ANP against the plaintiff for not acquiring the credit. The Court deemed the claim unfounded, as it determined that there was no impediment to regularly acquiring the CBios.

B. Human Rights Law

The Brazilian Constitution of 1988 enshrines a robust framework of fundamental rights. Within its framework, Articles 5, 6, 7, and 8 emerge as cornerstones of Brazilian human rights, encompassing fundamental rights, social welfare, labour protections, and the freedom to associate. In Brazilian constitutional system, human rights are viewed as dynamic and expandable, a principle explicitly outlined in Article 5, §2. Building upon this notion, the Constitution also recognises the right to a healthy environment,

¹³ The CBios is a key instrument adopted by RenovaBio to achieve Brazil's target of decarbonizing the fuel sector by increasing the share of bioenergy in the Brazilian energy matrix. It is issued by producers and importers of biofuels certified by the ANP. A central aspect of RenovaBio involves setting annual national decarbonisation targets for the fuel sector. These targets are established each year for fuel distributors, who are required to achieve them by acquiring CBios available on the Stock Exchange (B3). Non-compliance with these obligations incurs penalties as specified by law.

¹⁴ <https://climatecasechart.com/non-us-case/flexpetro-distribuidora-de-derivados-de-petroleo-ltda-v-anp-and-federal-union-acquisition-of-cbios/>

delineated in the chapter on Environmental Protection (Article 225), thereby integrating environmental concerns seamlessly into the broader human rights discourse.

According to Article 225 of the Brazilian Federal Constitution, everyone is entitled to an ecologically balanced environment, recognised as a common asset crucial for a healthy quality of life. This mandates both public authorities and the community to uphold and preserve it for present and future generations. The right to an ecologically balanced environment, as upheld by the Brazilian Supreme Court, is considered a fundamental human right. The right to climate integrity, in turn, is embedded within the notion of an ecologically balanced environment.

Constitutional Amendment 45/2004 introduced the third paragraph to Article 5 of the Brazilian Constitution, allowing for the incorporation of international human rights treaties as constitutional amendments, subject to specified approval criteria. The Federal Supreme Court has established the principle that international human rights treaties incorporated into Brazilian law without meeting these criteria possess supra-legal status, positioning them below the Constitution but above infra-constitutional legislation. Recognising the ecologically balanced environment as a human right, environmental treaties also enjoy this special status. The Federal Supreme Court has affirmed this aspect of environmental treaties, including climate agreements like the Paris Agreement, as highlighted in the ruling of Action for breach of fundamental precept (ADPF) 708 (Climate Fund).

Additionally, the Brazilian Federal Constitution extends special protection to indigenous peoples, quilombolas, and traditional communities. Article 68 of the Transitory Constitutional Dispositions Act recognises the land ownership rights of remaining quilombolas communities in Brazil. Article 231 of the Constitution ensures the recognition of indigenous peoples' social organisation, customs, languages, beliefs, and traditions, along with their original rights over traditionally occupied lands, which must be delimited, protected, and respected by the Union. Moreover, the article mandates that affected indigenous communities be consulted regarding water resource exploitation on their lands, with assured participation in mining outcomes (paragraph 3). The International Labour Organisation's (ILO) Convention 169, incorporated into domestic law through Decree 10.088/2019, further safeguards these rights. Among other provisions, it mandates that indigenous peoples be consulted prior to decisions affecting them, ensuring informed consent. These rights are equally applicable to Brazilian traditional communities, given the Convention's expansive definition. Consequently, if a project is anticipated to impact a community, advance consultation is necessary, and their perspectives should be respected.

The climate case *Arayara Association of Education and Culture et al. v. FUNAI, Copelmi Mineração Ltda. and FEPAM*¹⁵, which questions the Mina Guaíba Project and affected indigenous communities, specifically challenges the lack of free, prior, and informed consultation of indigenous peoples within the environmental licensing of an open-pit coal mining project, known as Mina Guaíba, located in the state of Rio Grande do Sul (RS). The indigenous peoples of the Guajayvi Village (TeKoá) from the MByá Guarani tribe, situated near the mine project, were not included in the consultation process, leading to a violation of constitutional norms and the ILO Convention No. 169. The Federal Court of Rio Grande do Sul granted the plaintiff's requests to declare the environmental licensing process for the Mina Guaíba project null, citing violations of indigenous peoples' rights. However, the company appealed, and the case has not yet reached a final judgment.

Another case involving the violation of the ILO Convention No. 169, due to the lack of consultation and respect for the will of traditional communities, is *AMOREMA and AMORETGRAP v. Sustainable Carbon et al.*¹⁶ The class action claims that the defendant companies traded carbon credits without prior authorisation from the Mapuá Extractive Reserves (RESEX Mapuá) and Terra Grande-Pracuúba Extractive Reserves (RESEX Terra Grande-Pracuúba). These are public domain areas whose real right of use is granted to the traditional extractive population living there. The suit claims the population is the true holder of the carbon credits from within or surrounding the RESEX Mapuá and Terra Grande-Pracuúba, as their livelihoods and subsistence relies on extractivism, a sustainable exploitation system of natural resources that contributes to forest conservation. The plaintiffs alleged that companies had improperly appropriated these credits and gained economic advantage from the environmental preservation efforts of the traditional extractive population, without providing fair compensation for the work they performed. The case is still pending a decision.

C. Tort Law

The Brazilian Civil Code (2002) delineates two modalities of civil liability: subjective and strict. Subjective liability, as articulated in Articles 186 and 927, is fault-based, while strict liability, outlined in the sole paragraph of Article 927, does not hinge on fault. Environmental damages are subject to strict liability, as stipulated in Article 14, paragraph 1, of Law No 6.938/81. This implies that the polluter bears liability irrespective of fault, requiring only proof of the conduct, causal link, and damage.

¹⁵ <https://climatecasechart.com/non-us-case/arayara-association-of-education-and-culture-and-others-v-funai-copelmi-mineracao-ltda-and-fepam-mina-guaiba-project-and-affected-indigenous-communities/>

¹⁶ <https://climatecasechart.com/non-us-case/amorema-e-amoretgrap-vs-sustainable-carbon-and-others-carbon-credits-and-extractive-reserves/>

In Brazil, the Absolute Risk Liability Theory (*Teoria do Risco Integral*) is also applied to environmental damages. Apart from being non-fault-based, environmental liability does not recognise the classic Brazilian exclusions such as fortuitous events, force majeure, or third-party factors. In cases where damage arises from or is related to potentially degrading activities, the party responsible must compensate for any harm inflicted, with the possibility of regressive action. Hence, engaging in economic activities entails assuming the role of guarantor for environmental preservation.

The numerous precedents on this issue are consolidated in the statement of the Brazilian Superior Court of Justice in "Jurisprudência em teses" No. 119, which determines that the causal link is the essential factor that incorporates the risk into the action, making it unreasonable for the responsible company to invoke exclusions from civil liability to evade their obligation to provide compensation.

Environmental liability is also underpinned by the principle of full reparation, which strengthens these functions and underscores the cumulative nature of the polluter's obligations. Consequently, achieving full reparation for environmental damage may necessitate the simultaneous fulfillment of duties such as natural restoration (obligation to act), environmental compensation, and award of damages (obligation to provide), as well as refraining from further harm (obligation to abstain).

Drawing upon the extensive provisions for environmental damage repair, one can make a compelling argument for the obligation to restore illicit ecological "value-added" and to reimburse economic profits gained from environmentally degrading activities – often referred to as disgorgement of profits. In the case of *IBAMA v. Dirceu Kruger*¹⁷, the plaintiff argues that the defendant caused climate damage due to the illegal exploration of agriculture. In the lawsuit, it is requested that the defendant compensate the amount related to disgorgement of profits. Another important matter in environmental liability is the understanding of causality and damage along with the precautionary principle. As the results of a potentially degrading activity are not known primarily, it is necessary to decide in favour of the environment (*in dubio pro ambiente*).

In Brazil, joint and several liability is a key aspect of legal the regime on responsibility for environmental damages. When several authors are involved in damages, any of the authors or all of them can be required to repair it (provided for in Article 942 of the Brazilian Civil Code). It is assumed that the causal link is common given the indivisibility of the damage. A significant precedent from the Brazilian Superior Court of Justice regarding this issue asserts that to ascertain the cause of environmental damage and hold co-defendants jointly and severally liable, the individuals must be treated equally, including 'those who take action; those who fail to act when they should have; those

¹⁷ <https://climatecasechart.com/non-us-case/ibama-v-dirceu-kruger-illegal-deforestation-in-the-amazon-and-climate-damage/>

who are indifferent to the actions of others; those who remain silent when they should have spoken out; those who finance the actions of others; and those who benefit from the actions of others'¹⁸.

In 2020, the Brazilian Supreme Court issued a ruling asserting that there is no statute of limitations in claims for civil reparation of environmental damage (STF. Plenary. RE 654.833/Acre. Reported by Justice Alexandre de Moraes. June 24, 2020). This interpretation has long been established by the Brazilian Superior Court of Justice as well, with numerous precedents consolidated in the document known as "Jurisprudência em teses" No. 119.

By 2023, there had been 21 climate-related lawsuits seeking recognition of civil liability for climate damage.¹⁹ These lawsuits involve both reparatory and preventive measures, representing about one-third of Brazilian climate litigation. For example, in the case of *Federal Public Prosecutor's Office v. INEA and Karpowership Brasil Energia Ltda.*²⁰ the plaintiff intends to obtain the defendants' conviction to the obligation of recovering the already deforested areas and the existing environmental liability, as well as compensation for the damages caused, considering their material and non-material nature, including collective moral damages.

Some of the lawsuits explicitly mentioned the climatic dimension of environmental damage and, consequently, demanded its respective quantification. However, there is still no widely accepted methodology in the country's courts for such quantification. For example, there are a few lawsuits regarding climate damages from the deposition of wood logs without proven origin, proposed by IBAMA, that apply value estimates according to the Amazon Fund. Established by Decree 6.527/2008, the Fund has a Technical Committee responsible for evaluating the methodology for calculating deforestation area and the amount of carbon per hectare used in emission calculations. Thus, the value of 100 tC/ha (tons of carbon per hectare) of biomass was used, which is equivalent to 367 tCO₂e/ha (tons of carbon dioxide equivalent per hectare).

On the other hand, in the *Federal Public Prosecutor's Office v. Rezende*²¹ case, it was argued that the unauthorized emissions of Greenhouse Gases (GHG) caused by the illegal deforestation of the area are part of the environmental liabilities of the activity and were calculated at almost 1.5 million tons of carbon dioxide. The Federal Public Prosecutor's Office relied on a Technical Note from the Amazon Environmental Research Institute (IPAM). According to this document, the deforestation of one hectare

¹⁸ Translated by the authors. STJ. 2nd Panel. REsp 1.071.741/São Paulo. Justice Herman Benjamin. 24 March 2009.

¹⁹ Moreira, D. d. A. et. al, *Boletim da Litigância Climática no Brasil – 2023* <https://www.juma.nima.puc-rio.br/files/ugd/a8ae8a_297d7c0470044a49bba5c325973675cb.pdf>.

²⁰ <https://climatecasechart.com/non-us-case/federal-public-prosecutors-office-mpf-vs-inea-and-karpowership-brasil-energia-ltda/>

²¹ <https://climatecasechart.com/non-us-case/ministerio-publico-federal-v-de-rezende/>

of Amazon Forest is equivalent to the emission of 179.25 tons of carbon. The plaintiff mentioned the strict environmental civil liability, based on article 225 of the Federal Constitution and the National Environmental Policy, related to the broad concept of polluters. It was argued that the nature of the environmental damage in the rural property is *propter rem*, since it is inseparable from the property itself, for which reason the civil liability for remediation is attributed to the owner of the property. The plaintiff argued that the environmental damage involves the reconstitution or restoration of the damaged environment, that is, restoration to the *status quo ante*, and compensation, whether the recovery of the damage is possible or not. It was raised the possibility of compensation for (i) the intermediate environmental damage (that remains between its occurrence and the full restoration of the affected environment) and for (ii) the residual damage (environmental degradation that persists despite all restoration efforts), including climate damage.

A preliminary injunction decision was issued confirming the jurisdiction of the Federal Court and granting the request for urgent relief. The court validated the method for calculating the amount of climate damages, considering that the claimant pointed out how it arrived at the calculations based on technical documents.

Even more important than choosing the most appropriate methodology for quantifying the stock of carbon in each deforested area is the exercise of 'pricing' the ton of CO₂-eq released in the atmosphere as a result of the illegal deforestation (or another environmental conduct contrary to the law which results in carbon release to the atmosphere). The court cases on climate damages are using multiple methods for calculating the "value" of the ton carbon. Some cases use the OECD's social cost of carbon (SCC) method, while others use as a proxy the reference value for the compensation established under REDD+ mechanisms such as the Amazon Fund. This lack of a uniform methodology has resulted so far in significant discrepancies in the amount of compensation claimed, because the price of each ton of carbon can vary from USD 5 to approximately USD 60.

The CNJ established a Working Group (WG)²² to implement Resolution 433/2021²³, focused on defining guidelines for quantifying environmental and climate damages. Comprised of representatives from the Judiciary, State and Federal Public Prosecutors' Offices, Public Advocacy, the Brazilian Bar Association (*Ordem dos Advogados do Brasil* - OAB), and academia, the WG convened a public hearing to discuss key issues, such as acknowledging the discrepancy in climate damage valuation methodologies within Brazilian cases. Looking ahead, the WG is expected to play a pivotal role in establishing

²² CNJ, *Portaria da Presidência 176* (2023) <<https://atos.cnj.jus.br/atos/detalhar/5195>>

²³ The resolution establishes the National Policy of the Judiciary for the Environment and underscores the importance for judges to consider, in cases of environmental damage sentencing, the impact on climate change. <<https://atos.cnj.jus.br/files/original14041920211103618296e30894e.pdf>>

guidelines to assist judges in understanding the different methodologies which can be used to quantify climate damage. This includes defining parameters for measuring and quantifying greenhouse gas emissions in judicial proceedings.²⁴

D. Company and Financial Laws

In a context of increasing concern over possible financial risks related to environmental and climate issues, Company and Financial Laws can become a useful tool in future corporate climate litigation.

The Brazilian Corporations Law (Federal Law No 6,404/1976) establishes various duties for corporations and their directors, including, in the case of the latter, the duty of care and diligence (article 153). Directors can be held liable in the civil sphere for damages caused if they act with fault or intent or in violation of the law or the bylaws (article 158). This norm can possibly be used to try to hold directors liable for environmental damages caused by the company.

Under the law, companies can sue directors for damages caused to its assets, by means of a prior resolution of the general assembly (article 159, caput), by any shareholder if it has not been filed within 3 months of the resolution of the general assembly (article 159, paragraph 3), or by shareholders representing at least 5% of the share capital, if the assembly decides not to sue (article 159, paragraph 4). If a shareholder or third party is directly harmed by an act of a director, he or she is entitled to sue (article 159, paragraph 7). These provisions can possibly be a tool for a company or shareholders to file for damages against their directors if they fail to comply with environmental laws.

Controlling shareholders hold fiduciary duties and must exercise their powers in consideration of the company's social function (article 116 of the Brazilian Corporations Law). Therefore, the consideration of externalities that may affect stakeholders – including environmental risks – may be seen to be part of the fiduciary duties of controllers and managers, given the social function of the company. Breaches of this duty may lead to the liability of the controller to repair damages to the company (article 246), if the controller acts with abuse of power (article 117). If there is any damage to the company related to the failure to disclose or manage climate risks, one could seek to use these provisions in the context of corporate climate litigation. Directors are also required to act in consideration of the company's social function.

Directors, board members and company administrators can also be held accountable based on different other norms. For example, Law No 7,942/1986 establishes that to disclose false or prejudicially incomplete information about a financial institution; to

²⁴ Moreira, D. d. A, Gonçalves, V. L. d. C., Segovia, M. E. *Aspectos Conceituais e Práticos Da Responsabilização Por Dano Ambiental* (forthcoming).

fraudulently manage a financial institution; and to mislead or mislead a partner, investor, or competent public authority regarding a financial transaction or situation, by withholding information or providing it falsely, among other actions, are crimes against the national financial system (articles 3, 4 and 6). The Brazilian Environmental Crimes Law (Law No 9605/1998) also determines that directors, administrators, and board members can be administratively, civil, and criminally liable for environmental crimes committed by their company (article 2 and 3), and may face fines, imprisonment, or both, apart from the duty to compensate damages.

The Anti-Corruption law (Law No 12,846/2012) also stipulates that the liability of the company does not exclude the individual liability of its directors or managers or of any natural person who is the author, co-author or participant in the unlawful act to the extent of their culpability (articles 3 and 4), which can be relevant to environmental crimes involving corruption. However, in practice, liability of board members and administrators for environmental crimes is seldom recognised by Brazilian courts.

The Public Prosecutor's Office and the Securities and Exchange Commission (*Comissão de Valores Imobiliários* - CVM) also have standing to file a Civil Public Action to prevent losses or to obtain compensation for damages to holders of securities and investors, especially when they arise from fraudulent transactions and unfair practices; from the purchase or sale of securities by directors and controlling shareholders using privileged information; from the omission of relevant information by those obliged to disclose it, or its provision in an incomplete, false or biased manner (article 1 of Law No 7,913/1989). This last case can be relevant in the failure to disclose financial risks related to the environment and climate change.

CVM has been regulating the obligation to disclose ESG (including climate) related information. In December 2021, it published Resolution 59, which stipulated that companies must present information related to environmental, social, and corporate governance aspects (ESG). The Resolution came into force in January of 2023. Additionally, Resolution 80, of 2022, in its article 32, requires that some companies send in a briefing on the Brazilian Corporate Governance Code, reporting on whether they follow its principles. One of the principles of the code is that the executive board shall, (i) implement the risk management policy and, whenever necessary, propose to the board of directors any need to revise this policy as a result of changes in the risks to which the company is exposed; (ii) implement and maintain effective mechanisms, processes and programs for monitoring and disclosing financial and operational performance and the impacts of the company's activities on society and the environment.

Curbing greenwashing practices in the real estate market, for example, is one of the guidelines of the Securities and Exchange Commission of Brazil Sustainable Finance

Policy, launched in 2023.²⁵ A Sustainable Finance Action Plan was launched in June of the same year, including, among its actions, the supervision and the fight against greenwashing; regulation; investor education; and active transparency of sustainable initiatives promoted by the capital market regulator.²⁶ In October 2023, CVM approved Resolution 193, which determines the adoption of the norms of the International Sustainability Standards Board – ISSB for the preparation and disclosure of financial information related to sustainability. These norms will be mandatory for publicly traded companies from 2026 on and that can be adopted voluntarily in 2024 and 2025.

The Superintendence of Private Insurance (SUSEP), the federal body responsible for controlling and supervising the insurance, open-ended private pension, capitalisation, and reinsurance markets, has also regulated sustainability requirements to be observed by insurance companies, open complementary pension entities (EAPCs), capitalisation companies, and local reinsurers (Circular 666/2022). SUSEP's rule provides for the implementation of sustainability risk management (physical climate, transition and litigation risks; environmental risks; and social risks), sustainability policy, and sustainability report. The risk of climate litigation refers to the possibility of losses caused by claims in liability insurance or direct actions against the supervised company, both due to failures in managing climate risks and due to failures in the management of physical or transitional climate risks.

The Central Bank of Brazil has equally released a set of regulations that strengthen the rules for the management of social, environmental and climate risks, and the preparation of the Social, Environmental and Climate Responsibility Policy (PRSAC) by the institutions belonging to the National Financial System (SFN), as well as the regulation of the disclosure, by these institutions, of information about risks and opportunities in this area. These include the following resolutions by the National Monetary Council (*Conselho Monetário Nacional* - CMN): CMN Resolutions No. 4,943/2021 and CMN Resolution 4,944/2021 (which improved the rules for the management of social, environmental and climate risks); CMN Resolution 4,945/2021 (which established new rules about PRSAC and about the actions for its effective implementation), as well as the Central Bank of Brazil's (BCB) Resolutions 139/2021 (which established requirements for the disclosure of the Report on Social, Environmental and Climate Risks and Opportunities – GRSAC), Normative Instruction 153/2021 (which established the standardized table for the disclosure of the GRSAC Report).

²⁵ BRASIL, CVM, *Portaria CVM/PTE Nº 10/2023*, Available at:

https://conteudo.cvm.gov.br/legislacao/portarias/portaria2023_010.html

²⁶ BRASIL, Agência Gov, *CVM lança Plano de Ação de Finanças Sustentáveis para 2023-2024*. Available at:

<https://agenciagov.ebc.com.br/noticias/202310/cvm-lanca-plano-de-acao-de-financas-sustentaveis-para-2023-2024>

The Central Bank has also provided for the adoption of socio-environmental criteria by financial institutions when granting credit (BCB Resolution No. 4,327/2014); imposed restrictions on financial institutions regarding the granting of credit based on environmental criteria, providing for the consolidation of principles, basic concepts and operations applicable to rural credit (CMN Resolution No. 4,883 / 2020); and provided for the creation of a Social, Environmental and Climatic Impediments section in the Rural Credit Manual – MCR (Resolution BCB nº 140/2021).

Restriction on credit for environmental preservation is also established by the New Forest Code (Law 12.651/2012, article 78-A), which restricted the granting of agricultural credit, in any of its forms, only to rural landowners who are enrolled in the Rural Environmental Registry (CAR) and who prove to be in compliance with the obligations of the Forest Code; the National Environmental Policy (Law No. 6,938 1981, article 12), which determined that the approval of government funding and incentives is conditional on obtaining environmental licensing, and with the compliance of the norms, criteria and standards issued by the National Environmental Council (CONAMA - *Conselho Nacional do Meio Ambiente*); and the Industrial Zoning Law (Law No. 6,803 / 1980, article 12), which determined that the granting of governmental incentives and financing by federal banks is subject to proving that environmental licensing was obtained. All these norms are proof that the financial system is increasingly incorporated into environmental policies.

In this context, NGO Conectas filed a landmark case against the Brazilian Development Bank. In the *Conectas Direitos Humanos v. BNDES*²⁷ and *BNDESPAR*²⁸, the plaintiff argued that the Bank had an obligation to establish a net-zero plan and to make efforts to decarbonize its equity portfolio. The main arguments of the defendants were (i) the Paris Agreement has long-term norms, considering the propositional perspective, the dimension of the complexity of the targets, and the differentiated position for developing countries, in disagreement with what was presented by the claimant, (ii) domestic norms are not a source of International Law and the emissions mitigation targets in the PNMC are voluntary, (iii) it is not up to BNDES or BNDESPAR to decide, in an isolated manner and based solely on their vision of reality, what to do, since in their capacity as a state-owned enterprise, they must obey the implementation of Policies directly defined by the Federal Government, (iv) the request that the defendants be judicially obligated to perform and fulfill environmental obligations that are not previously supported by the Federal Union alters the order of the claim, since the implementation of National and Federal Public Policies is the exclusive competence of the Union, and not of the defendants, (v) the claimant cannot file suit against two business companies for them

²⁷ Brazil's Development Bank.

²⁸ <https://climatecasechart.com/non-us-case/conectas-direitos-humanos-v-bndes-and-bndespar/>

to implement governmental Public Policies, being obliged to practice conducts or abstain from activities that evidently are of a public nature, based especially on articles 170 and 173 of the Federal Constitution, the State Companies Law, and the Economic Freedom Law, (vi) violation of the constitutional separation of powers by intending to construct climate governance through climate litigation, proposing the intrusion of the Judiciary into political issues that are constitutionally the responsibility of the Legislative and Executive branches.

E. Consumer Protection Laws

The Consumer Protection Code (Law no. 8,078/1990) safeguards consumers' lives, health, and safety from potential risks associated with hazardous or harmful products and services (Article 6, I). Similarly, it stipulates that products and services should not pose risks beyond what's considered normal and foreseeable, while suppliers must furnish adequate information about them (Article 8). Suppliers of potentially hazardous or dangerous products and services are obliged to disclose their hazardous nature (Article 9). Failure to do so constitutes a criminal offence (Article 63).

Additionally, the Code shields consumers from deceptive and exploitative advertising practices (Articles 6, IV, 36, 37, 38). Misleading advertising encompasses any form of communication — whether wholly or partially false, or through omission — that has the potential to mislead consumers regarding various aspects of products and services (Article 37, § 1). Omission in advertising becomes misleading when crucial product or service information is concealed (Article 37, § 3). Advertisers are accountable for proving the accuracy and integrity of their content (Article 38). In cases of misleading or abusive advertising, the Code provides for corrective measures such as counter-advertising to rectify misleading information (Articles 56, XII and 60). Furthermore, it delineates criminal offences including making false or misleading statements, withholding relevant product or service information, and promoting advertising that may jeopardize consumer health or safety (Articles 66, 68). Failure to substantiate advertising claims with factual evidence is also considered a criminal offence (Article 69).

Even though there hasn't been a climate-related case directly invoking the Consumer Code, genetically modified organisms (GMOs) have been subject to corporate litigation in Brazil. These cases have focused on consumer rights, encompassing labelling information regarding GMO usage, the right to be informed about potential risks and impacts, and efforts to prevent and mitigate environmental impacts.

In the *Federal Public Prosecutor's Office v. Bunge Alimentos S/A and Federal Union*²⁹ case, the plaintiff alleged that the defendants violated the Consumer Defence Code (CDC) by inadequately labelling genetically modified food products. They argued that clear labelling is essential to enable consumers to make informed decisions about purchasing and consuming such products. The Court determined that consumers have the right to receive all necessary, clear, precise and pertinent information to make informed decisions regarding genetically modified food products, regardless of the proportion of GMOs present. This enables consumers to choose whether to purchase these products. The Court concluded that guaranteeing consumers' right to choose is essential, as outlined in Article 6, II, of the CDC, which emphasises education and disclosure for proper consumption of products and services, ensuring freedom of choice and equality in contracts. Therefore, it was ruled that foods and food ingredients containing less than 1% GMOs must be labelled as of transgenic origin, thereby safeguarding consumers' freedom of choice and their right to information.

Building upon the Brazilian legal framework and jurisprudence, climate-washing practices and the failure to disclose product information hold the potential for legal repercussions under the Brazilian Consumer Protection Code.

F. Fraud Laws

Different laws prohibit fraudulent practices in Brazil. They have not been widely used as the basis for corporate climate litigation in Brazil. A few norms, however, could serve as a cause of action in future endeavours.

Fraud against the Public Administration, for example, in bids and contracts, is penalised for natural persons by the Brazilian Penal Code (Decree-Law No. 2848/1940, articles 337-F, 337-I, and 337-L). Regarding corporations, the new Law of Bidding and Administrative Contracts, Law n. 14,133/2021, reinforced the administrative liability for bidders and contractors who commit fraud in public bids or the execution of contracts or commit fraud of any kind (article 155, IX and X).

Importantly, the Brazilian Anti-Corruption Law (Law No 12,846/2013) establishes the strict administrative and civil liability of legal entities for acts against the national or foreign public administration (article 1). These acts are defined as those that violate the national or foreign public assets, against principles of public administration or against international commitments assumed by Brazil, including, among others, offering an undue advantage to a public official, financing, funding, sponsoring or subsidising the practice of illicit acts set forth in the law, manipulating or defrauding, in different ways, public bids and contracts or fraudulently obtaining an undue advantage in these

²⁹ <https://www.trf1.jus.br/sipi/noticias/justica-federal-obriga-rotulagem-de-produtos-contendo-transgenicos>

processes, and hindering investigation or inspection activities by public agencies, entities or agents, or intervening in their activities, including in the scope of the regulatory agencies and the inspection agencies of the national financial system.

The law also establishes that legal entities shall be held objectively liable, in the administrative and civil spheres, for the harmful acts practised in their interest or benefit, whether exclusive or not (Article 2) and that this liability does not exclude the individual liability of its directors or managers (Article 3), to the extent of their culpability. The liability subsists in the event of contractual alteration, transformation, incorporation, merger, or corporate split, limited, in the case of mergers and incorporations, to the payment of fines and the full compensation for the damage caused, in the limit of the assets transferred (Article 4). The controlling, controlled, affiliated or, consortium companies shall be jointly and severally liable for the practice of acts provided for by the Law, with the liability also limited to the obligation to pay a fine and fully compensate the damage caused (Article 4, paragraph 2). These provisions can possibly be applied to companies that practice acts against the Public Administration and public patrimony, including those related to environmental and climate issues.

Another provision that can be used in corporate climate litigation lies within Law No 9,605/1998, the Environmental Crimes Act. The law determines that fraud or breach of trust is one of the circumstances that triggers a penalty when not constituting or aggravating the crime (article 15, (n)). This law also establishes that preparing or submitting, in the licensing, forest concession or any other administrative procedure, a study, report or environmental report that is totally or partially false or misleading, including by omission, is considered a crime, if there is significant damage to the environment as a result of the use of the false, incomplete or misleading information (Article 69-A caput and paragraph 2).

Fraud definitions can also be found – and eventually be applied to climate litigation against companies – in cases involving consumer law. Fraudulent products are defined as unfit for consumption in Article 18, paragraph 6, II of the CDC, and suppliers are liable for them (Article 18, caput). These norms could perhaps be used in litigation against fraudulent off-share companies, for example, with the rise of the consumer’s interest regarding voluntary carbon markets. Abusing and misleading advertising is also prohibited by Article 37 of the same code, a provision that can be considered to protect consumers from fraudulent and false claims and that could eventually be the basis of greenwashing cases.

As mentioned in section 1.D., CVM has issued resolutions (159/2022 and 193/2023) requiring companies to disclosure information on environmental, social and corporate governance aspects (ESG). Fraud regarding information of this kind can possibly serve as the basis for corporate climate litigation and administrative procedures before CVM. CVM can also penalise corporations for fraudulent operations, applying fines, for example. CVM, together with the Public Prosecutor’s Office, can file Civil Public Actions

against companies to avoid losses or to obtain compensation for damages caused to the holders of securities and investors in the market, especially when they arise from fraudulent transactions, unfair practices, price manipulation or the creation of artificial conditions for the demand, supply or price of securities or from the omission of relevant information by those obliged to disclose it, or its provision in an incomplete, false or biased manner (article 1, I and III of Law No 7,913/89).

Fraud norms related to the illegal occupation of public lands, with the use of false documents or illegal procedures can also be useful in corporate climate litigation. A number of laws can apply in these cases (for example, Law 6,015/1973 – the Public Records Law, Law 6,739/1979 - which provides for the enrolment and registration of rural properties, Law 4.947/1966 - on Land Law; Law 11,952/2009 – which provides for the land regularisation of occupations on lands located in Federal areas, within the scope of the Legal Amazon; Law 11.952/2009, which established norms on the Rural Environmental Registry (*Cadastro Ambiental Rural* - CAR), among others,³⁰ as well as the regulations from the Brazilian National Institute of Colonisation and Agrarian Reform (INCRA).

Recently, in October 2023, the Public Defender's Office of the state of Pará filed several Public Civil Action lawsuits against companies that operate carbon market projects in Portel, Pará, as well as the local municipality,³¹ alleging they committed fraud illegally using public lands destined to the use and enjoyment of traditional communities to make profits by selling carbon credits to big multinational companies, such as AirFrance, Boeing, Braskem, Toshiba, Samsung UK, Kingston, Barilla, Bayer and Takeda.³²

³⁰ A non-exhaustive list of several other applicable norms can be found in pages 101 to 104 of BRASIL, Ministério do Meio Ambiente, Instituto de Pesquisa Ambiental da Amazônia – IPAM, *A Grilagem de Terras Públicas na Amazônia Brasileira*, available at https://antigo.mma.gov.br/estruturas/225/arquivos/9_a_grilagem_de_terras_publicas_na_amazonia_brasileira_225.pdf

³¹ (a) TJPA, Vara Agrária de Castanhal, ACP 0806505-59.2023.8.14.0015. Defensoria Pública do Estado do Pará vs. Brazil Agfor, LLC, Michael Edward Greene, Jonas Akila Morioka, Amigos dos Ribeirinhos Assessoria Ambiental Ltda, Associação dos Ribeirinhos e Moradores, BLB Florestal Representação no Brasil Ltda, Município de Portel; (b) TJPA, Vara Agrária de Castanhal, ACP 0806631-12.2023.8.14.0015. Defensoria Pública do Estado do Pará vs. Floyd Promoção e Representação Ltda, Michael Edward Greene, Brazil Agfor, LLC, Jonas Akila Morioka, Avoided Deforestation Project (Manaus) Limited; (c) TJPA, Vara Agrária de Castanhal, ACP 0806582-68.2023.8.14.0015. Defensoria Pública do Estado do Pará vs. RMDLT Property Group Ltda., Brazil Property Group Compra Venda e Locação de Imóveis Ltda, Brazil Agfor, LLC, Agfor Empreendimentos Ltda., Michael Edward Greene, Município de Portel; (d) TJPA, Vara Agrária de Castanhal, ACP 0806464-92.2023.8.14.0015. Defensoria Pública do Estado do Pará vs. Associação dos Ribeirinhos e Moradores, Sindicato dos Produtores Rurais de Portel, Amigos dos Ribeirinhos Assessoria Ambiental Ltda, Brazil Agfor, LLC, Município de Portel; (e) TJPA, Vara Agrária de Castanhal, ACP 0806592-15.2023.8.14.0015. Associação dos Moradores do Rio Piarim para o Extrativismo vs. Michael Edward Greene, Brazil Agfor, LLC; Amigos dos Ribeirinhos Assessoria Ambiental Ltda.

³² Many news articles reported the accusation of fraud, for instance, *Empresas de crédito de carbono são denunciadas por grilagem no Pará* (available at <https://agenciabrasil.ebc.com.br/geral/noticia/2023-10/empresas-de-credito-de-carbono-sao-denunciadas-por-grilagem-no-para>) and *Fraude na Amazônia: empresas usam terras públicas como se fossem particulares para vender créditos de carbono a gigantes*

The Public Defender's Office claimed the companies violated the rights of local communities living in the settlements, entailing socio-environmental risks, as well as risks to biodiversity and traditional knowledge. Ten companies were involved in the lawsuits. The Public Defender's Office requested the the carbon credit projects be invalidated and the prohibition on companies' transactions stemming from these projects. They also asked for compensation for collective moral damages, in the amount of R\$20 million, to revert this resource into socio-environmental, socio-economic, and land-use planning projects, in favour of the traditional communities of the state settlements in Portel.

G. Contractual Obligations

Contractual obligations in Brazil are primarily governed by the Brazilian Civil Code (Law 10.406/2002), especially in Book I of its Special Part, which encompasses the Law of Obligations. Title V of this Book deals more directly with Contracts and their rules. Specific legislation and regulations apply to certain industries and sectors (for instance, those of government agencies such as IBAMA and ANEEL). The above-mentioned Consumer Protection Code, on the other hand, governs contracts with consumers, and establishes that contractual clauses related to the supply of products and services that violate or allow the violation of environmental norms are null and void (article 51, XIV). Norms of the Brazilian Code of Civil Procedure (Federal Law 13,105/2015) can be used to enforce such obligations.

These norms are not commonly used in Brazil for climate litigation, but they can serve as ground, for example, for lawsuits regarding the failure to comply with contractual obligations concerning carbon offset credits, ensuring, among others, liability, and termination for breach of contracts in voluntary carbon markets.

In the *Carbonext Tecnologia em Soluções Ambientais Ltda. v. Amazon Imóveis*³³, for instance, the plaintiff, Carbonext, had purchased 331,080 carbon credits from Amazon Imóveis, which should be transferred in five business days. Only 5.000 credits were transferred, despite different requests from the buyer. Carbonext eventually filed a lawsuit to enforce the contractual obligation based on the signed contract and on norms of the Code of Civil Procedure, requesting the transfer of the remaining credits and a daily fine. The Court ordered the debtor to satisfy the obligation, under penalty of a daily fine. The defendant, however, did not fulfil the court order and filed motions questioning the debt. The plaintiff then requested that the credits be transferred from Amazon Imóveis by the carbon credits' custodian, Carbonfund.org Foundation. The

multinacionais (available at <https://g1.globo.com/pa/para/noticia/2023/10/02/fraude-na-amazonia-empresas-usam-terras-publicas-como-se-fossem-particulares-para-vender-creditos-de-carbono-a-gigantes-multinacionais.ghtml>).

³³ <https://climatecasechart.com/non-us-case/carbonext-tecnologia-em-solucoes-ambientais-ltda-v-amazon-imoveis-voluntary-carbon-market/>

court accepted the request. The lawsuit was subsequently thrown out by the court in the first instance, although the defendant filed a motion and an appeal questioning these decisions.

H. Planning and Permitting Laws

Environmental licensing and environmental impact assessment is provided for in the Federal Constitution (art. 225 § 1, IV and V) and statutes and administrative regulations (primarily the PNMA, Supplementary Law 140/2011, CONAMA Resolution 1/1986, CONAMA Resolution 237/1997) for activities using environmental resources, effectively or potentially polluting or capable, in any way, of causing environmental degradation. The norms inform a broad concept of environmental degradation, environmental impact, and pollution (e.g. PNMA, article 3 and CONAMA Resolution 1/86 article 1 and 6), which enables the identification of implicit references to include climate impact analysis in environmental licensing.

Among the various norms that regulate the environmental licensing process in Brazil, some provide for the simplification or prioritisation for licensing projects that, although potentially polluting, contribute to climate mitigation and therefore have a positive climate impact. They include projects related to the Clean Development Mechanism (CDM), carbon capture, solar, and wind energy generating projects. One example is the CONAMA Resolution 462/2014, which establishes procedures for the environmental licensing of wind energy generating projects. There are 19 other norms at the state level, between Laws, Decrees, Ordinances, Resolutions and others, that provide for this simplification. This shows that positive climate impacts of projects subject to environmental licensing are a relevant factor to be considered in environmental impact assessment.

Brazilian environmental licensing regulation includes the concern with the distribution of an activity's social burdens and benefits, which is a relevant aspect in the decision-making regarding the installation and operation of potentially polluting activities. It necessarily arises from the reading of the PNMA in conjunction with CONAMA Resolution 1/1986. These rules impose the consideration of direct and indirect impacts; cumulative and synergistic effects; positive and negative consequences in the short-, medium- and long-term ranges, as well as the distribution of socio-environmental burdens and benefits, in the environmental impact statement (CONAMA Resolution 1/1986, article 6, II; III). The same concern is expressly provided for in the National Climate Policy Act (Law 12.187/2009, article 3, III).

There are also norms that provide for the explicit insertion of the climate variable. This is the case in IBAMA Normative Instruction 12/2010, which requires IBAMA's Licensing Board to evaluate, in the process of licensing activities capable of emitting GHG, the mitigating measures described by the proponent. This is also the case in several state

regulations, with licensing included as an instrument in at least 17 State Climate Change Policies.⁶

Cases challenging alleged shortcomings in the environmental impact assessment (EIA) and/or decisions authorizing projects with adverse environmental and social impacts are common in Brazil. However, the climate aspect was not invoked in such cases until recently. As studies have demonstrated, there are identifiable legal grounds in Brazilian law to challenge projects which did not consider the mitigation and adaptation aspects of climate change.

One may see a growing trend in adding the climate argument into traditional environmental licensing and permit cases. So far, courts have meaningfully engaged with climate-related legal and factual arguments in very few cases. Most of the cases where plaintiffs have succeeded in stopping the licensing process have relied on classic issues, such as the lack of consultation to local communities. However, the few cases in which courts have meaningfully engaged with the climate argument reveal the potential of climate change to shape the future of litigation concerning the EIA/licensing of relevant projects.

All current corporate climate litigation pertaining to permitting laws focuses on projects related to fossil fuels. These projects encompass various endeavours, including the establishment and operation of open-pit coal mines, therm-electric power plants, and complexes for thermal power generation.

Plaintiffs usually enumerate a long list of violations to the environmental laws and licensing/permitting regulations, both on the merits of the decisions and concerning the procedural aspects such as consultation with local communities. The substantive aspects comprise issues such as incomplete EIAs, which allegedly do not consider the full extent of the E&S risks and impacts including critical aspects such as water scarcity, pollution of springs, diversion of water courses, lowering of water tables, drainage of aquifers, deforestation, air pollution, loss of agricultural output, and impacts to marine life. Amongst the social issues often raised are the absence of consultation with local communities, including free, prior and informed consultation (FPIC) with indigenous peoples and traditional communities (IPTCs), loss of income suffered by fishermen, loss of livelihoods, and exacerbation of poor air quality which affects public health.

In the *Associação Gaúcha de Proteção ao Ambiente Natural (AGAPAN) et al. v. Copelmi Mineração Ltda. et al.*³⁴, it was argued that the construction of the Nova Seival Thermo-electric Plant (UTE) would compromise the fulfilment of the Brazilian Nationally Determined Contribution (NDC) under the Paris Agreement, and violated the provisions of the PNMC and the State Policy on Climate Change of Rio Grande do

³⁴ <https://www.litiganciaclimatica.juma.nima.puc-rio.br/visualizacao/RyIq6Lygn0Bzqka8yMvj;data=noEdit>

Sul – PGM (State Law 13.594/2010). It was argued that the construction of the Nova Seival Thermo-electric Plant should be preceded by a Strategic Environmental Assessment (*Avaliação Ambiental Estratégica - AAE*) considering the project is inserted in a complex network of developments that have environmental impacts and that must be analysed together. It was argued that the federal and state climate legislations made the AAE a mandatory requirement for the Terms of Reference (TRs) of the EIAs of thermos-power plants in Rio Grande do Sul.

While the defendants raised in their defence the lack of clear legal provisions authorising the environmental agency to impose climate-related obligations or requirements, the court endorsed the plaintiffs' arguments. It emphasised the importance of measuring the synergistic and cumulative impacts arising from the two challenged projects – the Nova Seival thermo-power plant and the Seival Coal Mine – as environmental licensing cannot be split up. It mentioned the Paris Agreement, the United Nations Framework Convention on Climate Change (UNFCCC), the PNMC, and the PGM to recognise the need for mitigating or compensatory measures for GHG emissions. Regarding the AAE, the ruling recognised that the applicable subnational law required its implementation, also as a means to safeguard the principle of the integrity of the climate system. Finally, it granted the plaintiffs' requests and concluded that the environmental licensing of the project was not observing technical, regulatory, and legal norms and with the commitments signed internationally by Brazil, because it ignored the issues of trans-generational health and climate change.

Another example is the *Arayara v. Global Participações em Energia S.A. et al.*³⁵, in which the plaintiffs requested the elaboration of a climate diagnostic of the project, including a GHG inventory. The case invoked precedents from the Brazilian Supreme Court which recognised climate change as a human rights issue (ADPF 708). The defendants argued that the AAE or the proposed climate diagnostic, or water resources plans, were not a requirement for environmental licensing since there are no rules mandating them. They argued that requiring such instruments would be an innovation in the legal system and an undue interference by the Judiciary in the licensing process. The court has not issued a ruling yet.

I. Public Health

Brazilian courts have made progress in advancing civil liability of corporate actors concerning their impacts to the environment, the public health, and individuals. A paramount example of cases involving the relation of environmental damages and public health is the cases of asbestos in Brazil.

³⁵ <https://climatecasechart.com/non-us-case/instituto-internacional-arayara-vs-ibama-and-others/>

The cases focus mainly on the conflict between federal and state legislations. In many of them, there are economic arguments to allow its commercialisation. On the other hand, those who defend the banning of asbestos aim mainly at the protection of the environment and health. Brazil has adopted the position of controlled use through the approval of federal legislation. However, since the matter falls under the concurrent legislative competence of the Union and the states, the states began to legislate differently. Unlike the Federal Union, the states chose to ban it. One of the cases, known as the *Asbestos Case (ADI 4066/DF)*, involves labour issues, considering the alleged existence of a medical-scientific consensus on the harmful effect of the exploitation of chrysotile asbestos on the health of industrial and mining workers, which is a matter of occupational health, hygiene, and safety. In this paradigmatic case, the Court recognised that there is medical consensus, beyond any reasonable doubt, regarding the contraction of several serious diseases as a direct result of exposure to asbestos, and states that this causal link is recognised by the Ministry of Health and the World Health Organisation.

The risk to the population justifies the adoption of regulatory instruments, at the domestic and international levels, aimed at controlling and progressively eliminating the use of this mineral. It also points out that the Court's function - of a normative nature - is based on the conclusions of the scientific community - of a descriptive nature.

The Court emphasises article 225 of the Federal Constitution and international instruments such as ILO Convention 139 concerning the Prevention and Control of Occupational Hazards Caused by Carcinogenic Substances or Agents, ILO Convention 162 concerning the use of asbestos, ILO Resolution on Asbestos (2006), and The Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal. It further states that these treaties are protective of human rights, having the status of supra-legality.

Considering the scientific knowledge on the extent of the harmful effects of asbestos on health and the environment, the Court concluded that the control measures contemplated are ineffective. Therefore, the tolerance for the use of chrysotile asbestos, as set forth in article 2 of Federal Law 9,055/1995, does not adequately and sufficiently protect the fundamental rights to health and to a balanced environment (articles 6, 7, XXII, 196, and 225 of the Federal Constitution), nor does it align with the international commitments assumed by Brazil.

On February 23, 2023, the Supreme Court concluded the joint trial of the appeals filed against the effects of the ban on chrysotile asbestos exploration in the country, concerning Direct Actions of Unconstitutionality (ADIs) 3356, 3357, 3937, 3406, 3470, and in the ADPF 109. The Plenary confirmed the declaration of unconstitutionality of the federal rule that allowed the extraction, industrialisation, commercialisation, and distribution of chrysotile. It affirmed that the Constitution authorises the imposition of limits on fundamental rights when necessary to conform with other equally protected

fundamental rights. The fundamental right to free enterprise (articles 1, IV, and 170, caput, of the Federal Constitution) must be made compatible with the protection of health and the preservation of the environment.

The Court relied on scientific evidence that proves the hazardous nature of asbestos to deem unconstitutional the rules that allow the use of the mineral. With the advance of science-based climate litigation, it can be considered that the Courts, according to their normative function, should increasingly base their decisions on the conclusions of the scientific community - of a descriptive character.

There are also some recent climate cases regarding public health. In the case of *Verdeluz Institute, Indigenous Council of the Anacé People of Japiman, and Indigenous Association of the Anacé People of Planalto Cauipe Village v. Portocem Power Generation S.A. et al.*³⁶, the plaintiffs base their argument that the Portocem Thermal Power Plant itself is a large-scale project already recognised as impactful to health. During the installation phase, the impacts and consequent repercussions on human health are likely to increase due to the realisation of territorial alterations. Due to the quantitative displacement of workers for the construction, it is estimated that there will be increased production and amplification of health problems. Beyond the potential impacts associated with the displacement of construction workers, the project tends to modify the environment, thus affecting ecological relationships and the use and appropriation of space and natural resources. Therefore, it will reverberate in public health, especially for populations that have a closer bond with the territory, such as the Anacé People.

³⁶ <https://www.litiganciaclimatica.juma.nima.puc-rio.br/visualizacao/IDqhSlm9XP8q8Dj5Pmf5;data=noEdit>

2. Procedures and Evidence

A. Actors Involved

i. Claimants

When looking at the totality of the documented cases of climate litigation in Brazil, the Public Prosecution's Office (Federal and State) and civil society stand out as the most frequent plaintiffs in, appearing in at least 20 cases each by 2023³⁷. The Public Prosecution's Office has long been a significant player in environmental litigation and remains so in the realm of climate litigation. Meanwhile, civil society has been increasingly asserting itself in climate-related cases. Political parties are also gaining prominence as active participants in climate actions, especially in constitutional lawsuits. Government agencies such as IBAMA, individuals, and the Public Defender's Office also appear as plaintiffs in some of the identified cases. Companies are also plaintiffs in some climate cases. For example, in *Flexpetro Distribuidora de Derivados de Petróleo Ltda. v. National Petroleum Agency (ANP) and Federal Union*³⁸, the author seeks to challenge the carbon credit acquisition target stipulated by Brazilian law.

In corporate climate litigation, the scenario is slightly different. Most actions are brought by civil society organisations (12 cases), followed by IBAMA (10 cases), up to February 2024.³⁹ There are a few cases brought by the Public Prosecution's Office, the Public Defender's Office, individuals, and companies.

While there are currently limited examples of actors involved in climate litigation, numerous possibilities exist depending on the type of action utilized (see section 2.B.iv. Group litigation/class actions). There is even a movement in Brazil to establish the standing of non-human actors. Although it cannot be classified as a corporate climate action, a pragmatic lawsuit has been brought by the Doce River (Rio Doce) basin against the Federal Union and the state of Minas Gerais⁴⁰. The Rio Doce basin, represented by the Pachamama Association, advocated for the development of the Disaster Prevention Plan for Minas Gerais and adherence to the guidelines outlined in the National Plan for Climate Change Adaptation. This initiative marked the first attempt to recognise a natural element as a legal entity in Brazil. However, the lawsuit was later dismissed by the Court on the grounds of the absence of procedural prerequisites, as the legal

³⁷ Moreira, D. d. A. et. al, *Boletim da Litigância Climática no Brasil – 2023* <https://www.juma.nima.puc-rio.br/files/ugd/a8ae8a_297d7c0470044a49bba5c325973675cb.pdf>.

³⁸ <https://climatecasechart.com/non-us-case/flexpetro-distribuidora-de-derivados-de-petroleo-ltda-v-anp-and-federal-union-acquisition-of-cbios/>

³⁹ JUMA, *Climate Litigation Database in Brazil* (2024) <<https://www.litiganciaticlimatica.juma.nima.puc-rio.br/listagem/visualizar>>.

⁴⁰ Instituto Humanitas UNISINOS, *Ação inédita no país, Rio Doce entra na Justiça contra desastre de Mariana* (2017), <<https://www.ihu.unisinos.br/categorias/186-noticias-2017/573741-acao-inedita-no-pais-rio-doce-entra-na-justica-contra-desastre-de-mariana>>

framework does not grant legal personality to the applicant 'Rio Doce Basin'. Although the case did not succeed, it highlights a possible path in Brazil towards allowing non-human entities to actively participate in legal proceedings.

ii. Defendants

On the defendant side of climate cases, entities such as companies, federal entities (Federal Union, states, or municipalities), individuals, public administration bodies, and legislative bodies may be involved. The cases usually have entities, administration bodies, and companies together as defendants. These may be both those who directly carried out the activity resulting in environmental damage and those who are indirectly responsible for the degrading activity of the environment (as stated at the PNMA).

The most frequently sued defendants in climate cases are federal entities, companies, and public administration bodies. Companies are defendants in at least 31 cases up to February 2024 in Brazil.⁴¹ They are often sued in environmental licensing lawsuits, typically those involved in fossil fuel production.

Some cases also have car manufacturers as defendants. For instance, *Institute of Health and Sustainability v. Federal Union et al.*⁴² aim to hold vehicle manufacturers accountable as they participated in lobbying IBAMA's decision-making process. This involvement led to the issuance of Normative Instruction No. 23/2021, which extended the deadlines for the manufacture and commercialisation of more polluting vehicles.

Additionally, there are cases such as *Clara Leonel Ramos et al. v. State of São Paulo, João Doria, and Henrique Meirelles*⁴³, which, although it is not explicitly against a company, challenge the state policy "IncentivAuto" - Automotive Regime for New Investments, that provides concessional financing to automobile manufacturers for expanding their industrial plants, establishing new factories, or developing new products - potentially impacting greenhouse gas emissions.

iii. Third-party intervenors

In Brazil, the friends of the Court (*amicus curiae*) are significant third-party intervenors. The involvement of amicus is relevant when the interested party successfully demonstrates (i) the importance of the matter and (ii) the adequate representativeness and thematic closeness of the entity seeking to intervene.

⁴¹ JUMA, *Climate Litigation Database in Brazil (2024)* <<https://www.litiganciadimatica.juma.nima.puc-rio.br/listagem/visualizar>>.

⁴² <https://climatecasechart.com/non-us-case/health-and-sustainability-institute-v-the-federal-union-and-others-emission-of-pollutants-by-motor-vehicles-instituto-saude-e-sustentabilidade-vs-uniao-federal-e-outros-emissao-de-poluente-por/>

⁴³ <https://climatecasechart.com/non-us-case/clara-leonel-ramos-and-bruno-de-almeida-de-lima-vs-state-of-sao-paulo-families-for-the-climate-and-incentivauto-program/>

While more commonly seen in constitutional actions, this mechanism can also be applied in class actions, such as environmental Public Civil Actions in Brazil (Article 138, Civil Procedure Code – CPC). There has been a notable presence of NGOs and associations as *amici curiae* in climate-related cases.

The institution is in "TITLE III - Intervention of Third Parties" of the Civil Procedure Code. The rationale is that *amici curiae* can assist judicial bodies in deliering more accurate judicial protection, in accordance with Article 5, XXXV, of the Brazilian Constitution of 1988. Its participation can be spontaneous or prompted by the court, with no legal limitation as to the stage of the proceedings in which it can be admitted, as long as it can contribute factually or legally to the instruction of the case.⁴⁴

Article 138 of the CPC outlines the prerequisites for its intervention, which are: i) the subject matter, ii) the specificity of the subject matter of the lawsuit, or iii) the social repercussion of the controversy. In other words, it is applicable when there is a transcendence of the dispute, which should not be limited to the involved parties. The natural or legal person, body, or specialized entity with adequate representation seeking to act as *amicus curiae* must demonstrate in their petition the ability to assist in the case.

Intervention by *amicus curiae* in constitutional cases, including in judicial review, is provided for by Federal Law 9.868/1999, Article 7, §2 in the direct action of unconstitutionality and the declaratory action of constitutionality before the Brazilian Supreme Court.

Subject to meeting the formal requisites, business industry and their associations can also intervene as *amicus curiae*. For instance, in the case *Rede Sustentabilidade v. CONAMA* (ADPF 749)⁴⁵, the Brazilian Agriculture and Livestock Confederation, the Brazilian Chamber of Construction Industry, the AELO-Brazil - Association of Urban Development Companies of Brazil, and the National Industry Confederation intervened as *amicus curiae*.

iv. Other actors in corporate climate litigation

Following the global movement, particularly observed in the USA, cities may also become involved in climate-related litigation. However, such engagement has not yet been observed in Brazil.

⁴⁴ Neto, F. L. R. C., Marinho, N. d. M. *O papel do amicus curiae no sistema jurídico brasileiro* (Consultor Jurídico, 2019) <<https://www.conjur.com.br/2019-jan-23/opiniaopapelamicuscuriaesistemajuridicobrasileiro/>>.

⁴⁵ <https://climatecasechart.com/non-us-case/workers-party-vs-national-environment-council-adpf-749-on-conama-resolutions/>

B. Elements of the Procedural Framework

i. Standing

In Brazil, standing is not generally seen as a major barrier to corporate climate litigation, since the country boasts a vast legal system that guarantees environmental rights (including in articles 225 and 170 of the Constitution) and recognises a vast range of entities that are entitled to file lawsuits in that realm.

Law 7,347/1985, which governs the Public Civil Actions, created legal avenues to remedy property damage caused to the environment; to consumers; to goods and rights of artistic, aesthetic, historical, tourist and landscape value; to any other diffuse or collective interest, for the violation of the economic order; to the urban order; to the honor and dignity of racial, ethnic or religious groups; to public and social heritage (article 1). Legal standing to file the main and the precautionary lawsuits is granted to the Public Prosecutor's Office; the Public Defender's Office; the Union, the States, the Federal District and the Municipalities; an autarchy, state-owned enterprise, foundation; and to associations established for at least one (1) year under civil law and includes, among its institutional purposes, the protection of public and social heritage, the environment, the consumer, the economic order, free competition, the rights of racial, ethnic or religious groups or artistic, aesthetic, historical, tourist and landscape heritage. Regarding the Public Prosecutor's Office, in fact, the Constitution itself established as one of its institutional functions to promote civil inquiry and public civil action, for the protection of public and social heritage, the environment and other diffuse and collective interests (article 129, III).

Popular Actions are another kind of lawsuit that can be useful in climate litigations involving public entities. It is recognised by the Constitution, in Article 5, LXXIII, which allows any citizen to figure as a legitimate party to bring a popular action that aims to annul an act harmful to public patrimony or that of an entity in which the state participates, to administrative morality, to the environment and to historical and cultural heritage, with the plaintiff being exempt from legal costs and the burden of loss, unless proven in bad faith.

The Popular Action is regulated by Law 4,717/65 and, according to its article 6, it shall be brought against the authorities, officials or administrators who have authorized, approved, ratified or carried out the impugned act, or who, by omitting to do so, have given rise to the damage; against the direct beneficiaries of these acts, and against the public or private persons and entities whose assets were harmed (those are set forth in article 1, and include all spheres of government, autonomous public entities – autarchies, mixed-capital companies, mutual insurance companies in which the Federal government represents absent policyholders, public companies, autonomous social services, institutions or foundations for whose creation or funding the public treasury has contributed or contributes more than fifty percent of the assets or annual revenue,

companies incorporated into the assets of any sphere of government, and any legal entities or entities subsidized by the public treasuries).

Furthermore, the Consumer Protection Code (Law no. 8,078/1990), in its article 82, gave standing to the Public Prosecutor's Office; the Union, the States, the Municipalities and the Federal District; entities and bodies of the Public Administration, direct or indirect, even if without legal personality, specifically aimed at defending the interests and rights protected by this code; and associations that have been legally constituted for at least one year and that include among their institutional purposes the defence of the interests and rights protected by the code, without the need for authorisation from the assembly. These entities can file all types of lawsuits capable of providing adequate and effective protection are admissible (article 83) and the interests and rights of consumers and victims can be defended in court individually or collectively, in the latter when it includes diffuse interests and rights (trans-individual indivisible interests or rights owned by undetermined persons); collective interests or rights (trans-individual, indivisible interests and rights that are property of a group, category or class of people), and homogeneous individual interests or rights (arising from a common origin), as set forth in article 81.

The general rule for standing, in civil courts, is that a plaintiff must have an interest and legitimacy to sue (articles 17, 330 II and III, 337, XI, 485, VI of the Brazilian Code of Civil Procedure (Federal Law 13,105/2015)). This can be applied to proceedings that have not been traditionally used for corporate climate litigation, but that may eventually be filed, for example, between corporate entities in carbon voluntary markets, as we discussed in the Contractual Obligations sections. Other standing rules may vary according to the statute in question. The Anti-Corruption Law, discussed in the Fraud Laws section, for instance, grants standing to the Federal Government, the State, and the Municipalities, through their respective Attorney's Offices or judicial representation bodies, and the Public Prosecutor's Office. In another example, the company itself and shareholders can file civil liability lawsuits against the companies' administrators for damages caused (article 159, caput and paragraph 3 of Law 6,404/1976) or proceedings before the Securities and Exchange Commission of Brazil (CVM). Other entities can have standing depending on the applicable laws and norms.

ii. Justiciability

Justiciability is also not seen as a considerable hindrance to corporate climate litigation. As previously mentioned in the chapter on Statutory Provisions, Brazil has a robust legal system that protects environmental rights, which includes statutory and administrative law, legal principles and judicial precedents, as well as, most importantly, constitutional norms, through articles 225 and 170. Paragraph 3 of article 225 of the Constitution also establishes that "conduct and activities considered harmful to the environment will subject offenders, whether individuals or legal entities, to criminal and administrative sanctions, regardless of the obligation to repair the damage caused". The Constitution

also ensures that rules defining fundamental rights and guarantees have immediate applicability, and it stipulates that the law shall not exclude from the consideration of the Judiciary any injury or threat to rights (Article 5, paragraph 1 and Article 5, XXXV, respectively). Other laws previously mentioned, such as the Environmental Crimes Act (Federal Law 9,605/1998), provide for administrative, civil, and criminal liability for acts against the environment. As commented in the previous section, entities like the Public Prosecutor's Office have as their mission to promote civil inquiries and public civil actions to protect the environment. Therefore, environmental rights are, in general, considered judicable, although, within certain lawsuits, questions regarding proof that damages to the environment effectively occurred may arise.

iii. Jurisdiction

Brazil has both ordinary and special courts (the latter include employment, electoral and military courts). Ordinary courts ('the Common Justice') can be thematically specialized, such as Civil Courts, Criminal Courts, Business or Commercial Courts, Family Courts, and Public Finance Courts. Ordinary courts are also divided into state and federal instances. The jurisdiction of federal courts is established by the Constitution in its article 109, and includes, among others, those cases in which the Federal Government, an autarchic entity or a federal public company are interested as plaintiffs, defendants, assistants or opponents, except for bankruptcy cases, cases involving accidents at work and those subject to the Electoral Court and the Labour Court; cases based on a treaty or contract between the Federal Government and a foreign state or international organisation; political crimes and criminal offences committed to the detriment of goods, services or interests of the Federal Government or its autarchic entities or public companies; disputes over indigenous rights.

If the Federal Government is the plaintiff, the jurisdiction is that of the court where the other party is domiciled. On the other hand, claims brought against the Federal Government may be filed in the judicial district where the plaintiff is domiciled, in the judicial district where the act or fact giving rise to the claim occurred or where the property is located, or even in the Federal District. If it is not one of the cases that entails federal jurisdiction, the local state court will hear the case.

State and federal courts have two instances. Rulings in the first instance (*Varas*) come from a single judge, whereas in the second instances, which are the States' Courts of Justice (*Tribunais de Justiça Estaduais*) and the Regional Federal Courts (*Tribunais Regionais Federais*), a panel of normally three judges decides the appeals. Subsequent appeals that challenge rulings from second instance courts – state and federal – can be filed to the Superior Court of Justice (if they violate federal law or an interpretation of federal law handed down by other appellate courts) and/or to the Federal Supreme Court (if they violate the constitution, among other possibilities).

In the case of Public Civil Actions, perhaps the most important type of lawsuit in the case of corporate climate litigation, they shall be brought in the jurisdiction of the place

where the damage occurred, whose court shall have functional jurisdiction to prosecute and judge the case (article 2 of Law No. 7.347/1985). If they are filed by or against a federal entity, they should be heard by the federal court that has jurisdiction over that particular area (Vara Federal). In that case, appeals are made to the regional federal court (Tribunal Regional Federal) that presides over that local federal court. Otherwise, if there is no motive to involve federal courts, the local state court will hear the case.

For popular actions, as a general rule, the jurisdiction is defined by the origin of the challenged act, and it will belong to the local judicial branch that has jurisdiction to hear cases that involve an interest of the Union or the Federal District (federal courts), the State or the Municipality (state courts), although the place of residence of the author can also be applied (for example, in cases against the Federal government, article 109, paragraph 2 of the Constitution).

In civil lawsuits, the general rule is that the jurisdiction belongs to the court of the place where the defendant resides (article 46 of the Brazilian Civil Code of Procedure, Law 13,105 / 2015). However, jurisdiction can vary according to the rights involved, and most rules are provided for in articles 42 to 66 of the Civil Code of Procedure. In article 53, III, for example, the jurisdiction is that of the place where the headquarters is, for lawsuits against a legal person (such as a private company). Lawsuits for the compensation of damages should be heard by the court of the place of the act or fact that serves as the cause of action (article 53, IV, a).

Besides, if the federal, state, or local government are the plaintiffs, the jurisdiction will belong to the court that rules over the place where the defendant resides (articles 51 and 52). If the Federal government, a State or the Federal District is the plaintiff, the lawsuit can be brought before the court that has jurisdiction over the plaintiff's place of residence; the court that has jurisdiction over the place where the act or fact giving rise to the claim occurred; the court that has jurisdiction over the place in which the thing or property is located; or the court of the Federal District (for cases involving the federal government or the Federal District itself), or the court the capital of the State involved (articles 51 and 52, sole paragraphs). It is important to note that specific laws applied to the case may also provide for special rules of jurisdiction.

For criminal lawsuits, generally, jurisdiction is determined by the place where the offence is committed. In addition, lawsuits filed by consumers may be heard by the courts of the place where the author resides.

iv. Group litigation / class actions

Group litigation is a fundamental tool for corporate climate litigation. Its most important instrument is the Public Civil Action (the Brazilian version of Class Actions), which, as previously mentioned, are liability lawsuits for moral and property damage caused to the environment; to consumers; to goods and rights of artistic, aesthetic, historical, tourist and landscape value; to any other diffuse or collective interest, for the violation

of the economic order; to the urban order; to the honor and dignity of racial, ethnic or religious groups; to public and social heritage (Article 1 of Law 7,347/1985). Specific standing rules are provided for by this law and was discussed in section 2.B.i.

Furthermore, the Consumer Protection Code (Law 8.078 / 1990), in article 81, determines that the interests and rights of consumers and victims can be defended in court individually or collectively, if they involve diffuse or collective interests or rights, or homogeneous individual interests or rights. Standing for these lawsuits was also described in section 2.B.i., and other aspects in the subsequent sections.

Additionally, although the Popular Action (Law 4,717/ 1965), equally mentioned in section 2.B.i., can be filed by any citizen (so it may not literally fit in the group litigation category), it can be used to annul acts that harm public property, administrative morality, the environment or historical and cultural heritage (Constitution article 5, LXXIII). Therefore, its object surpasses individual rights, and it can be a useful tool to protect diffuse and collective rights – including those related to the environment – when a public entity (or a private one with connections with the public administration) is involved.

In civil proceedings, the general rules for more than one entity litigating together can be found in articles 113 to 118 of the Code of Civil Procedure (Law 13,105 / 2015).

v. Costs

As a rule, outlined in Article 82 of the Civil Code of Procedure, parties are responsible for covering the costs associated with the actions they undertake or request during the proceedings, and these costs must be paid in advance. The plaintiff is also responsible for covering the expenses associated with any act ordered by the judge *ex officio* or at the request of the Public Prosecutor's Office. The final ruling, however, orders the loser to pay the costs the winner has paid in advance (paragraph 2). Therefore, the loser bears the costs of procedural expenses and lawyer's fees.

If each litigant is partly winner and partly loser, the costs will be distributed proportionally between them (article 86). If there are several plaintiffs or several defendants, the losers will be proportionally liable for the costs and fees (article 87), and the ruling must expressly distribute the proportional liability for the payment of these amounts among the joint litigants (article 87, paragraph 1). If a ruling is handed down based on a withdrawal, waiver or acknowledgment of the claim, the costs and fees will be paid by the party who withdrew, waived, or acknowledged (article 90). Finally, if there is a settlement and the parties have not agreed on the costs, they will be divided equally (article 90, paragraph 2).

There are, however, a few exceptions. Article 98 of the Civil Code of Procedure determines that a natural or legal person, Brazilian or foreign, with insufficient resources to pay costs, procedural expenses and attorney's fees is entitled to free legal services, in accordance with the law. Article 4 of Law 9,289/1996 guarantees that the

Union, the States, the Municipalities, the Federal Territories, the Federal District and the respective municipalities and foundations; those who prove insufficient resources and beneficiaries of free legal aid; the Public Prosecutor's Office; and plaintiffs in popular actions, public civil actions and collective actions under the Consumer Defence Code, except in the event of bad faith litigation are exempt from procedural expenses. However, the public entities can be condemned to reimburse the costs incurred by the winning party (article 4, sole paragraph).

For Public Civil Actions, there are generally no procedural costs, according to article 18 of Law 7,347/1985, that determines there will be no advance payment of costs, emoluments, expert fees or any other expenses, nor will the plaintiff association be condemned, except in case of proven bad faith, to pay lawyer's fees, costs and procedural expenses. Therefore, if the federal government files a Public Civil Action and it loses the case, it is not required to pay fees. By the symmetry principle, if the action is won by the plaintiff, the defendant does not have to pay lawyer fees.⁴⁶ Similarly, if a private association files this kind of lawsuit and loses, it does not have to pay fees. However, the rulings of the Superior Court of Justice have established, over the last fifteen years, that when the plaintiff is a private association and it wins the Public Civil Action, the defendant can be condemned to pay procedural expenses and lawyers' fees (the symmetry principle does not apply).⁴⁷

For Popular Actions, the Constitution guarantees that the plaintiff is exempt from legal costs and the burden of loss, unless proven he or she acted in bad faith (article 5, LXXIII). For consumer law cases, article 87 of the Consumer Protection Code determines that for group actions there will be no advance payment of costs, emoluments, expert fees or any other expenses, nor will the plaintiff association be condemned, unless bad faith is proven, to pay lawyers' fees, costs and procedural expenses.

vi. Apportionment of liability

The concept of apportionment generally refers to assigning liability and damages to the respective parties that can be liable for the harmful acts. In Brazil, the liability regime for environmental damages is of "objective" (or strict) liability – the polluter is obliged, regardless of fault, to compensate or repair the damage caused to the environment and to third parties affected by its activities (article 14, paragraph 1 of Federal Law 6,938/198, which encompasses the National Environmental Policy – PNMA). It is also considered to be joint and several liability, based on the interpretation of the previous article, together with article 3, IV of PNMA, which defined the polluter is a natural or legal person, whether a public or private law entity, directly or indirectly responsible for an activity that causes environmental degradation.

⁴⁶ Superior Court of Justice (STJ), Case EAREsp 962250/SP, Rel. Ministro Og Fernandes, j. 15/08/2018.

⁴⁷ Superior Court of Justice (STJ), Case REsp 1.974.436-RJ, Rel. Min. Nancy Andrighi, j. 22/03/2022.

According to article 264 of the Civil Code (Law 10,406/2002), there is joint and several liability when more than one creditor or more than one debtor concurs in the same obligation, each with the right or obligation to the entire debt. Besides, article 275 determines that the creditor is entitled to demand and receive from one or some of the debtors, in part or in full, the common debt; if the payment has been partial, all the other debtors remain jointly and severally (solidarity) liable for the rest. The debtor who has paid the debt in full has the right to demand his share from each of the co-debtors, and, if there is an insolvent debtor, its share will be divided equally among the co-debtors (article 283). The shares of all the co-debtors being presumed to be equal in the debt (article 283).

The Superior Court of Justice has ruled that “environmental liability is objective and solidary due to the application of the theory of integral risk to the polluter/payer provided for in article 14, paragraph 1 of Law 6. 938/81, combined with article 942 of the Civil Code.”⁴⁸ Article 942 determines that the property of the person responsible for the offence or violation of another's right shall be subject to reparation for the damage caused; and if the offence has more than one perpetrator, all shall be “jointly and severally liable” (jointly liable) for reparation. Therefore, if more than one entity is responsible for the harmful acts, damages can be claimed from any of them, in full, regardless of fault (and then that entity could request the other entities’ shares).

The Court has also determined that “for the purpose of determining the causal link in environmental damage, those who do it, those who don't do it when they should, those who let them do it, those who don't mind them doing it, those who finance them doing it, and those who benefit when others do it, are treated equally”.⁴⁹

Additionally, the Superior Court of Justice ruled that the Public Administration is jointly and severally (solidarity) liable for damages to the environment arising from its failure to fulfil its duty to supervise, but its liability is enforceable on a subsidiary basis.⁵⁰ In its words, ‘the State is jointly and severally (solidarity), objectively and unlimitedly liable, under the terms of art. 14, § 1, of Law no. 6.938/1981, for environmental damage resulting from the omission of its duty to control and supervise, in cases where it contributes, directly or indirectly, both to the environmental degradation itself and to its aggravation, consolidation or perpetuation. In cases where the Government contributes to the damage by omission, its joint and several liability is subsidiary (or in order of preference)’.⁵¹ Therefore, in these cases, the State can also be required to pay for the full amount of the damages, if the main debtors do not pay.

⁴⁸ STJ, 2ª Turma, AgInt no AREsp 277.167/MG, Rel. Min. Og Fernandes, j. 14/03/2017, DJe 20/03/2017.

⁴⁹ STJ, 2ª Turma, REsp 650.728/SC, Rel. Min. Herman Benjamin, j. 23/10/2007, DJe 02/12/2009.

⁵⁰ STJ, 1ª Seção, Súmula 652, DJe 7.12.2021.

⁵¹ Translated by the authors. STJ, 2ª Turma, Rel. Min. Francisco Falcão, j. 18/10/2022; DJe 21/10/2022.

Environmental obligations are also considered by the Superior Court of Justice to be *propter rem* obligations, meaning that it ties the current, or any of the previous and even the future owner or possessor, according to the creditor's choice.⁵²

C. Arguments, Defences, and Courts' responses

Based on the analysis of corporate climate cases in Brazil, six main legal arguments can be grouped into themes due to their relevance to the objectives of this research, their recurrence, and depth in the analysed cases. Many cases address more than one argument, in a complementary manner. The key themes are as follows:

i. Climate Damages

a. Environmental damage due to the emission of greenhouse gases by aircrafts

Although there is not a variety of cases that use the argument of aircraft liability, it is significant as it represents one of the earliest instances of climate-related damage, with more than 30 cases against airlines operating at São Paulo International Airport (starting in 2010).

Most Important Plaintiffs' Arguments: The Public Prosecution's Office of São Paulo argues that the defendant's activity is polluting, since the airline industry's contribution to greenhouse gas emissions exceeds 3%. Moreover, it relies on the principle of strict civil liability in environmental matters, stating that although the defendant engages in a legal and regulated activity, this does not grant it the right to pollute or harm the environment. Therefore, the principles of prevention and precaution must be applied. The plaintiff bases its arguments on articles 170 and item IV, 196, and 225 of the Federal Constitution, the National Environmental Policy, and the PNMC.

Most Important Defences: The defendants argue that they cannot be sued (appear as defendants), considering that they operate their activities in accordance with the determinations of the National Civil Aviation Agency of Brazil, and that they cannot be held liable for complying with what is authorized and imposed by the Government. Therefore, there is a legal impossibility of the request since they incur unlawful activity.

Court's Response: In the decision, the Court highlighted the regulation of aviation activities by the National Civil Aviation Agency of Brazil and its efforts regarding the measurement and mitigation of emissions by the airline industry. It was understood that there would be no wrongdoing by the companies (or even pollution). The requests were dismissed.

⁵² STJ, 1ª Seção, Tema Repetitivo 1204

b. Climate damages and deforestation

In recent years, there has been a surge in cases against corporations involving climate liability due to deforestation. We have identified at least ten cases within this theme. The following analysis is based on the most common and frequently used arguments.

Most Important Plaintiffs' Arguments: Based on the polluter-pays principle, considering that the negative climate externality represents a social cost that has not been internalized by the activity of illegal deforestation. The climate damage can be calculated through different methodologies used to determine the compensation value (see section 1.C). Holding actors accountable for climate damage, therefore, involves the necessary legal correction due to the distortion of environmental burdens and benefits.

Most Important Defences: The defence line based on lack of causality is common to all lawsuits. In some cases, there is an allegation that there is no demonstration of the causative factor of the alleged environmental damage. It is also asserted that there is no causal link between the alleged environmental damage and the defendant's conduct, as well as between the defendant's activity and global warming, especially due to the difficult assessment of the extent of the damage. In one of the actions, where the managing partner occupies the defendant's position (*IBAMA v. Siderúrgica São Luiz Ltda., Geraldo Magela Martins, and GMM Participações Societárias Ltda.*⁵³), the impossibility of naming the person as defendant was alleged. In this case, the defendants argue that the civil liability of the natural person and the legal entity are distinct, and there is no basis for holding the partners responsible for acts allegedly committed by the company. They assert that the managing partner would only be jointly liable with the defendant if he had full knowledge of the criminal conduct being adopted by the charcoal plants at the time of product sale, which – as they argue – was not proven by the plaintiff in the records, nor administratively during the investigations.

Court's Response: The cases are in different stages, and there is a variety of court positions on this issue. Nevertheless, there is recognition that strict civil liability must be applied when related to environmental damages. The case *IBAMA v. Siderúrgica São Luiz Ltda., Geraldo Magela Martins, and GMM Participações Societárias Ltda.*⁵⁴ has not yet had a decision on the merits.

⁵³ <https://climatecasechart.com/non-us-case/federal-environmental-agency-ibama-v-siderurgica-sao-luiz-ltda-and-martins/>

⁵⁴ <https://climatecasechart.com/non-us-case/federal-environmental-agency-ibama-v-siderurgica-sao-luiz-ltda-and-martins/>

ii. Environmental licensing, environmental impact assessment, and the consideration of climate impacts

There have been in Brazil several initiatives to advocate for the consideration of the climate dimensions in the environmental licensing process.⁵⁵ Following this scenario, many cases were brought to courts arguing that the climate impact must be considered in the environmental impact assessment and in the licensing procedure. We have identified at least nine cases within this topic, all of them are related to fossil fuels. The following analysis is based on the most common and frequently used arguments.

Most Important Authors' Arguments: Thermoelectric power plants are generators of Greenhouse Gas (GHG) pollution. To keep the limit of planetary temperature increase at 1.5°C and to fulfill the commitments made by Brazil in the Paris Agreement, COP 26 and its NDCs, the installation of new projects that use fossil fuels cannot be allowed. Therefore, the Environmental Impact Assessment presents an incomplete and incorrect analysis, especially because it does not consider climate impacts. The plaintiffs base their arguments on article 225 of the Federal Constitution; PNMA; PNMC; Complementary Law 140/2011; Paris Agreement; UNFCCC; and sometimes on states' policies on climate change.

Most Important Defences: There are no irregularities in the procedure of environmental licensing and environmental impact assessment. The defendants also usually base their arguments on the principle of separation of powers. By introducing a requirement not foreseen in the federal legislation for all the licensing of thermoelectric plants, the court would be acting as a positive legislator, or the Executive Power, as the Court would be judging the merits of the environmental licensing procedure.

Court's Response: While some decisions are still pending, there have been a few rulings on the merits. However, several decisions have not addressed this specific issue, instead they based their conclusions on different topics (such as the absence of public participation in the process, as discussed below). In the case of *AGAPAN et al. v. IBAMA et al.*⁵⁶, which questions the construction of the Nova Seival Thermoelectric Plant, the court issued a decision emphasizing the importance of measuring synergistic and cumulative impacts resulting from the enterprise. It established that the environmental impact assessment must include climate impacts. Moreover, the court highlighted the

⁵⁵ E.g, Moreira, D. d A. et al., *Summary Of Rationales For Climate Litigation In Brazil /Legal Arguments For The Inclusion Of The Climate Variable In Environmental Licensing* (2022) < http://www.editora.puc-rio.br/media/Sum%C3%A1rio%20executivo%20expandido%20-%20ingl%C3%AAs_P6.pdf>; ABRAMPA, *Avaliação De Impactos Climáticos Em Empreendimentos De Energia Fóssil: Estratégias Jurídicas Para O Licenciamento Ambiental* (2022) < <https://abrampa.org.br/wp-content/uploads/pdfs/Avaliacao%20de%20impactos%20climaticos%20em%20empreendimentos%20de%20energia%20fossil%20-%20estrategias%20juridicas%20para%20o%20licenciamento%20ambiental.pdf>>.

⁵⁶ <https://www.litiaganciaclimatica.juma.nima.puc-rio.br/visualizacao/RyIq6Lygn0Bzqka8yMvj;data=noEdit>

principle of the integrity of the climate system, based on the legislation brought by the plaintiffs.

iii. Public participation and the consideration of impacts on indigenous communities in the environmental licensing procedure

Numerous cases have arisen questioning the environmental licensing procedure due to insufficient public participation. We have identified at least six cases within this theme. The following analysis is based on the most common and frequent arguments.

Most Important Plaintiffs' Arguments: National and international norms relating to indigenous peoples' rights and traditional communities have been violated. The absence of consultation with affected communities leads to the nullity of the Environmental Impact Assessment. The public participation stage was inadequate. The project will directly and permanently affect the community, violating their rights established by the constitution and international standards and generating several impacts. The defendants did not adopt measures aimed at allowing the maintenance of the community's ways of life. The plaintiffs base their arguments on articles 170, 225 and 231 of the Federal Constitution; PNMA; PNMC; ILO Convention No. 169; and sometimes on states policies on climate change.

Most Important Defence's: There are no irregularities in the environmental licensing procedure and environmental impact assessment. The damages claimed by the plaintiffs do not exist, and the impacts were duly considered and integrated into the licensing process. Public hearings were conducted in the municipalities directly affected by the project, in accordance with environmental regulations. There is no basis for an action seeking to nullify the licensing procedure. In the case of *Association Arayara for Education and Culture and Fishermen's Colony Z-5 vs. Copelmi Mineração Ltda. and FEPAM*⁵⁷, the defendants argued that ILO Convention 169 does not apply to the artisanal fishermen, since they do not qualify as tribal people.

Court's Response: Most of the cases in this group are related to the Guaíba Mine Project, that would be the largest open pit coal mine in Brazil. The Court issued a decision on the case *Association Arayara for Education and Culture et al. v. FUNAI, Copelmi Mineração Ltda., and FEPAM*⁵⁸, in which it recognised the rights of indigenous communities to participate in decisions that may affect their way of life and culture. Therefore, the defendants carried out an environmental impact assessment that disregards the existence of an indigenous community, justifying its nullity. Following this, other cases related to the project were suspended.

⁵⁷ <https://climatecasechart.com/non-us-case/instituto-internacional-arayara-and-fishermens-colony-z-5-v-copelmi-mineracao-ltda-and-fepam-mina-guaiba-project-and-affected-communities/>

⁵⁸ <https://climatecasechart.com/non-us-case/instituto-internacional-arayara-and-fishermens-colony-z-5-v-copelmi-mineracao-ltda-and-fepam-mina-guaiba-project-and-affected-communities/>

iv. Questioning carbon market projects

There has been a growing number of cases questioning carbon markets in Brazil, as the installation of these projects is also on the rise in the country and there is no established regulation. We have identified at least five cases within this theme. The following analysis is based on the most common and frequent arguments.

Most Important Authors' Arguments: The projects were implemented without prior study. The defendants acted in violation of the right to traditional territory, the right to prior, free, and informed consultation of traditional communities, failed to comply with federal legislation on climate change, payments for environmental services, and the concession of public forests. The communities affected were not directly benefited by the project. The companies are named defendants in the lawsuit for being responsible, developers of the project, or bought the assets. It is asserted that there is a kind of "green land grabbing" of these assets. Some of the legal bases are articles 170 and 225 of the Federal Constitution; ILO Convention No. 169; and the SNUC.

Most Important Defence's: No defence has been presented yet.

Court's Response: As the cases are very recent, there are no decisions on the merit yet.

v. Flexibility in environmental regulation

This group of cases have companies as plaintiffs. We do not have many examples of this kind of actions in Brazil. All of them (2 cases) challenge the obligation to acquire CBios.

Most Important Plaintiffs' Arguments: In the case of *Biostratum Distribuidora de Combustíveis S.A. v. Federal Union*⁵⁹, the company argues that the obligation to acquire CBios constitutes the imposition of a new tax, as CBios function essentially as a residual tax and do not meet the requirements for the creation of a new tax outlined in the Brazilian Constitution and the National Tax Code. The company also contends that as a fuel distributor, it is not responsible for emitting pollutants, but only for the commercialisation of fossil fuels, and thus the obligation to acquire CBios should fall on fuel producers. Additionally, the company asserts that fuel distribution is a relatively low-polluting activity. In the case of *Flexpetro Distribuidora de Derivados de Petróleo Ltda. v. National Petroleum Agency (ANP) and Federal Union*⁶⁰, the company alleges that the ANP did not observe the RenovaBio by publishing the targets without any parameters regarding the availability of CBios in the market and without regulating the certification process for these assets.

⁵⁹ <https://climatecasechart.com/non-us-case/biostratum-distribuidora-de-combustiveis-sa-v-federal-union-acquisition-of-cbios/>

⁶⁰ <https://climatecasechart.com/non-us-case/flexpetro-distribuidora-de-derivados-de-petroleo-ltda-v-anp-and-federal-union-acquisition-of-cbios/>

Most Important Defences: The Federal Union argues that CBios' creation aligns with environmental regulations, incentivizing nature preservation. CBios convert fossil fuel environmental costs into revenue for biofuel producers, fostering sustainable growth. They provide market solutions without tax changes and promote competitive balance between fossil and renewable fuels. There's no delay in disclosing annual targets, and distributors had ample time to acquire CBios. There's no direct tax relationship with the Public Administration, and distributors cannot waive compulsory decarbonisation targets. The Federal Union further argues that there is no delay in disclosing annual targets and that there has been sufficient time for acquiring CBios, with full availability in the market. It asserts that granting the plaintiff's requests would negatively impact international carbon emission reduction agreements and could be seen as judicial interference in Executive branch actions.

Court's Response: In both cases, the initial requests were denied. In the first case, the Court ruled that: (i) constitutional principles for environmental protection mandate the reduction of human impact, whether in fossil fuel production or distribution; (ii) setting CBios acquisition targets constitutes an administrative environmental regulation, not a tax norm, aligned with constitutional and international mandates for pollution reduction; (iii) the argument that the distributing company doesn't pollute was deemed implausible. In the second case, the Court concluded that (i) there were no hindrance in CBios acquisition by industry players, with most companies meeting the target; and (iii) there is jurisprudence recognising the legitimacy of compulsory targets, therefore it deemed it inappropriate to reassess the criteria set by the Public Administration.

D. Relevant sources of evidence⁶¹ procedures (and standards) related to causation

In line with Article 332 of the Civil Procedure Code, which states that 'all legal means, as well as morally legitimate ones, are capable of proving the truth of the facts upon which the action or defence is based'⁶² various forms of evidence are recognised by the law. These include personal testimony, confession, presentation of documents or objects, witness testimony, expert testimony, and judicial inspection.

The production of evidence encompasses a wide range of elements, such as written documents, photographs, or maps, with the essential characteristic of a document lying in its ability to demonstrate the occurrence of a fact. In environmental matters, the National Council of Justice (CNJ) has issued Recommendation 99/2021, which advises on the use of remotely sensed data and satellite-derived information as evidence in civil and criminal environmental actions.

⁶¹ See R Stuart-Smith et al, 'Filling the evidentiary gap in climate litigation' (2021) 11 Nat Clim Chang 651.

⁶² Translated by the authors.

Concerning the presentation of documents or objects, it is important to note that both the Law of Popular Action and the Law of Class Action allow individuals to request certificates or photocopies of documents from public entities or authorities even before initiating legal proceedings. If there is a refusal to provide them, the action can proceed without the presentation of these documents, with the judge empowered to order the compulsory presentation if necessary.

Judicial inspection is another means of evidence, wherein the judge personally examines people, objects, or locations, particularly when other forms of evidence are insufficient to form a conviction on a particular matter.

Expert evidence plays a crucial role in climate litigation, as it helps analyse complex facts requiring specific scientific knowledge. Expert testimony serves as a means of evidence intended to clarify technical or scientific aspects related to disputed facts.

Regarding the assessment of evidence, the National Council of Justice has enacted Resolution 433, emphasizing the importance for judges to consider, in cases of condemnation for environmental damages, the impact of the damage on climate change. Due to the challenging nature of quantifying these damages, the CNJ has initiated a public consultation for the development of studies and discussion of applicable parameters in judicial proceedings concerning environmental and climate damages resulting from deforestation and other polluting activities.

Contributing to the discussion, the Amazon Environmental Research Institute (IPAM) presented the Carbon Calculator (CCAL - Amazon), a tool that calculates the average carbon stock contained in a specific forested area located in the Amazon per hectare. This calculator has been used by the Federal Public Office in lawsuits against land grabbers who illegally deforested public areas. A method used in some lawsuits to value the climate damage is using the social cost of carbon, which seeks to quantify the additional harm - marginal damage - caused by each extra ton of carbon emitted into the atmosphere. This approach is based on the "polluter-pays" principle and aims to ensure that the party responsible for the polluting activity internalizes the negative externalities, understood here as the cost imposed on society by greenhouse gas emissions. This approach has been employed by the Attorney General's Office in actions against major deforesters (see section 1.C).

Finally, when there is compelling evidence linking environmental damage to the activity of the polluter, the burden of proof must be shifted, requiring the potential degrader to demonstrate the absence of a causal or environmental damage relationship in the case. This principle is outlined in the binding rule of the Brazilian Superior Court of Justice, approved on October 24, 2018, known as Precedent (*Súmula*) 618.

E. Limitation Periods

Brazilian Constitution, in its third paragraph of Article 225, stipulates that actions and activities deemed harmful to the environment shall subject offenders, whether individuals or legal entities, to both criminal and administrative sanctions, irrespective of their obligation to redress the damages caused. Hence, the same action can lead to consequences in civil, criminal, and administrative domains, illustrating what is commonly referred to as triple environmental accountability.

Limitation periods operate differently within each domain. Brazilian jurisprudence and prevailing doctrine have established that civil liability for environmental damages is not bound by time limitations. The reasoning behind this is that environmental damage is seen as an intrinsic fundamental right, and its effects can persist long after the initial incident. Consequently, there's no time bar for civil claims aiming to recover environmental damage, which can be pursued at any time.

When discussing limitation periods in the administrative domain, it's important to consider Federal Decree No. 6.514/2008, which addresses environmental infractions and sanctions. The administration has a five-year window to conduct investigations into environmental infractions, starting from the date of the act, or, in the case of continuing offences, from the day they cease. Exceeding this period will result in losing the right to punish the alleged offender. However, when the infraction is also deemed a crime, the limitation period shall be governed by the timeframe established in criminal law (Article 21, §3). This represents the limitation period in its punitive form (Article 21).

Additionally, there is the intercurrent limitation period (*prescrição intercorrente*), which applies when the procedure investigating the infraction report is halted for more than three years, pending judgment or dispatch (Article 21, §2). It's worth noting that the infraction report serves as the starting point for the environmental administrative investigation. The intercurrent limitation period will be interrupted by any unequivocal act of the administration that involves investigating the offence or by the issuance of an appealable condemnatory decision (Article 22, I, II, III, Federal Decree No. 6.514/2008). 'Unequivocal act' does not refer to just any action taken by the Public Administration. The decree itself specifies that these acts are those implying instruction of the process. The Administration's intent to pursue the investigation of the harmful practice under review must be clear, to avoid it being considered merely delaying tactics. However, if the three-year period is interrupted, it must be restarted (Article 202, Brazilian Civil Code). It is important to note that the expiration of the administrative right to punish the alleged offender does not affect the civil obligation to repair the damage caused (Article 21, §4).

The limitation periods for criminal actions targeting environmental crimes are directly tied to the prescriptions outlined in Articles 109 and 110 of the Brazilian Penal Code.⁶³

⁶³ Art. 109. The limitation period, before the final judgment becomes final, except as provided in the § 1 of article 110 of this Code, is regulated for the maximum of the custodial sentence imposed for the crime, checking:

- I - in twenty years, if the maximum of the penalty is more than twelve;
- II - in sixteen years, if the maximum of the penalty is more than eight years and does not exceed twelve;
- III - in twelve years, if the maximum of the penalty is more than four years and does not exceed eight;
- IV - in eight years, if the maximum of the penalty is more than two years and does not exceed four;
- V - in four years, if the maximum of the penalty is equal to one year or, being higher, does not exceed two;
- VI - in 3 (three) years, if the maximum penalty is less than 1 (one) year.

Art. 110 - The limitation period after the judgment has become final condemnation is regulated by the penalty applied and occurs within the time limits set out in the article previous, which are increased by one-third, if the convict is a repeat offender.

§ 1 The limitation period, after the sentence of conviction with *res judicata* for the prosecution or after his appeal has been dismissed, it is governed by the penalty applied, and may not, under any circumstances, have as its initial term date prior to the complaint or complaint. (Translated by the authors).

3. Remedies for corporate cases in Brazil

General Overview

Plaintiffs seeking redress for corporate-related human rights, environmental and/or climate harms and impacts may select from a number of available remedies under Brazilian law.

Article 927 of the Brazilian Civil Code establishes the general rule of civil liability in Brazil. According to this article, anyone who causes harm to another person, either intentionally or negligently, is required to compensate the injured party for damages suffered (fault-based liability). The sole paragraph of Article 927 specifies that in cases where the act that caused the harm violates a legal norm, the obligation to compensate for damages arises even if there is no fault or negligence on the part of the person who caused the harm. This is known as strict liability. Although fault-based liability is typically the rule under the legal system, there are situations where strict liability applies. These situations may be explicitly identified by law (such as consumer rights under Law No. 8,078/1990, and environmental regulations under Law No. 6,938/1981), or they may involve activities where the potential for harm to third parties is inherently present (such as the transportation of hazardous or flammable materials).

The victim of harm is entitled to seek damages under two main categories: **moral or non-patrimonial (*punitive*) damages**, which results from a violation of personality rights (intimacy, privacy, honor, and image), and **material or patrimonial damages**, which includes not only compensatory damages (such as proven and immediate losses resulting from wilful misconduct, such as a decrease in the value of a trademark), but also loss of profits (meaning the earnings that the victim would have reasonably expected to receive if the harmful behaviour had not taken place).

As the ecologically balanced environment is a diffuse fundamental right, when environmental damage occurs, its reparation must be made to the fullest extent, both in terms of patrimonial (financial) aspects and in the extra patrimonial (non-financial) sphere. In the non-financial realm, we encounter the concept of **collective moral damage to the environment**.

In order to compensate for **material damages**, there are two possible approaches: restoring the original state through *in natura* restoration or providing **monetary compensation** that is equivalent to the damaged property.

In summary, the legal remedies for environmental damages are:

- 1) **Compensatory damages:** monetary compensation paid to the injured party to make up for the harm caused.

- 2) **Injunctions (preliminary or permanent)**: court orders that require a party to either do or not do something, to prevent harm or to ensure the enforcement of a legal right.

The public civil action (*Ação Civil Pública*) is a crucial legal mechanism in Brazil for safeguarding diffuse and collective rights, such as the rights to a healthy environment and consumer rights. It enables compensation (*indenização*) to be awarded, and the obligation to perform an action (*obrigação de fazer*) or refrain from engaging in certain actions (*obrigação de não fazer*) to be imposed, whenever these rights are violated (Article 3, Law No. 7,347/1985). Furthermore, Article 4 of the law permits injunctive relief to prevent damages from occurring.

A. Pecuniary Remedies

When the plaintiff is seeking compensation for **moral damages**, the court will examine the specific details of the case to determine the appropriate compensation to be awarded to the victim. This compensation must take into account the financial capabilities of both parties and must be reasonable and proportional to the extent of the harm suffered.

On the other hand, when unlawful behaviour affects fundamental interests, exceeding the limits of individualism, it constitutes a violation of diffuse rights, which gives rise to **condemnation for collective moral damages**. The occurrence of collective moral harm is self-sufficient and can manifest itself regardless of whether there has been damage to an individual's financial or physical well-being.

Recently, a federal judge acknowledged the possibility of charging **climate damages** in compensation actions for damages resulting from **deforestation**, recognised as an autonomous category of damage (e.g. *Federal Public Prosecutor's Office v. Rezende* case⁶⁴).

In the case of *IBAMA v. Dirceu Kruger*⁶⁵, the plaintiff demands the payment of R\$ 292 million from the rancher to ensure financial compensation for climate damages caused by the destruction of the Amazon. IBAMA indicates that environmental damage resulted in the emission of 901 thousand tons of greenhouse gases. The value should be directed to the National Fund on Climate Change (FNMC). The decision is still pending.

Other norms provide for fines and warning, such as Anti-Corruption law (Law No 12,846/2012) and the Environmental Crimes Act (Law No. 9,605/1998).

⁶⁴ <https://climatecasechart.com/non-us-case/ministerio-publico-federal-v-de-rezende/>

⁶⁵ <https://www.litiganciaclimatica.juma.nima.puc-rio.br/visualizacao/VUmdb9ZdIO94sPH7xZvn;data=noEdit>

B. Non-pecuniary Remedies

i. Environmental and Climate Laws

For environmental damage, the *in natura* restoration is the most ideal form of restitution as it involves replacing the damaged property with a material equivalent. However, natural restoration is rare, as it is often impossible to fully return to the state prior to the damage – as a result, monetary compensation is usually preferred as it provides a more practical solution for compensation.

The court may impose obligations to either take action or refrain from taking certain actions, in order to ensure the restoration of the damaged environment. These obligations may include the replanting of native species, the decontamination of bodies of water, and the installation of filters and pollution containment systems, in addition to payment of compensation to cover non-material losses (Article 225, Constitution; PNMA; Law No. 7,347/1985).

Article 14 of the PNMA also establishes that the failure to comply with measures for preserving or rectifying damages stemming from environmental degradation carries significant repercussions for offenders. Firstly, they may face the loss or restriction of tax incentives and benefits provided by governmental entities. This could entail the revocation of tax breaks or other financial advantages. Secondly, transgressors may find themselves ineligible for participation in financing lines offered by official credit institutions.

In *IBAMA v. Madeira Nova Aliança Ltda.*⁶⁶, the Court granted the plaintiff's preliminary requests to suspend the defendant's participation in financing lines offered by official credit institutions and to suspend or revoke any tax incentives or benefits granted to the defendant due to compelling evidence of environmental damage. The plaintiff seeks compensation for environmental and climatic damages caused by the deposition of timber logs without environmental licensing.

As in the Environmental Crimes Act (Law No. 9,605/1998), the penalties to legal entities shall be applied singly, cumulatively, or alternatively. Besides the fines, the penalties may include restrictive measures and/or community service (Article 21).

The restrictive measures are outlined in Article 22 of the law, which include:

- 1) Partial or total suspension of activities when companies fail to comply with legal or regulatory provisions regarding environmental protection.

⁶⁶ <https://climatecasechart.com/non-us-case/federal-environment-agency-ibama-v-madeira-nova-alianca-ltda/>

- 2) Temporary closure of establishments, works, or activities when operating without proper authorisation, in violation of granted authorisation, or in violation of legal or regulatory provisions.
- 3) Prohibition from contracting with the Public Administration, as well as from receiving subsidies, grants, or donations (for a maximum of 10 years).

Community service is outlined in Article 23 of the law, which involves:

- 1) Funding environmental programs and projects.
- 2) Undertaking the restoration of degraded areas.
- 3) Maintenance of public spaces.
- 4) Contributions to public environmental or cultural entities.

The Law also established that penalties shall be enhanced – up to one-third higher – in cases where crimes against flora result in alterations to the climate regime (Article 53, I).

ii. Company and Financial Laws

Companies shall also be held accountable for failure to disclose ESG and climate-related information as required by CVM Resolution 59/2021. CVM has the authority to impose penalties on violators of corporate and financial regulations, such as Law No. 6,404/1976 (Brazilian Corporations Law) and CVM Resolution 59/2021. In addition to fines and warnings, it can apply isolated or cumulatively (Article 11, Law No 6,385/1976):

- 1) Temporary disqualification, for up to 20 years, from holding positions as an administrator or fiscal council member of publicly traded companies, entities within the distribution system, or other entities requiring authorisation or registration from CVM.
- 2) Suspension of authorisation or registration for engaging in activities in the securities market.
- 3) Temporary disqualification, for up to 20 years, from engaging in activities in the securities market.
- 4) Temporary prohibition, for up to 20 years, from engaging in certain activities or transactions for members of the distribution system or other entities requiring authorisation or registration from CVM.
- 5) Temporary prohibition, for up to 10 years, from directly or indirectly participating in one or more types of transactions in the securities market.

iii. Consumer Protection Laws

The CDC also offers specific legal remedies or obligations that can be imposed on companies for violation of consumer rights. In addition to compensation for damages, they also include:

- 1) **Product Recall:** the CDC provides for product recalls in cases where a product presents a risk to the health or safety of consumers. Companies are required to issue a recall notice and take measures to repair or replace the defective product (Article 10, Law No. 8,078/1990).
- 2) **Corrective Advertising:** Companies that engage in false or misleading advertising may be required to issue corrective advertising to inform consumers of the truth about their products or services (Article 60, Law No. 8,078/1990).
- 3) **Suspension or Revocation of License:** the CDC authorizes the suspension or revocation of licenses for companies that repeatedly violate consumer rights or engage in fraudulent or illegal activities.
- 4) **Piercing the Corporate Veil:** the judge may disregard the legal personality of a company if its actions harm consumers through the abuse of rights, excessive use of power, violation of the law, or other illicit acts or violations of its articles of incorporation or bylaws. Disregard of the company's legal status may also be applied when it goes bankrupt, becomes insolvent, closes down, or becomes inactive due to mismanagement. Or whenever their legal personality constitutes an obstacle to compensate for damages caused to consumers.

iv. Anti-Corruption Law

As provided for in the Anti-Corruption law (Law No 12,846/2012), the Federal Government, States, and Municipalities, through their respective Attorney's Offices or legal representatives, alongside the Public Prosecutor's Office, are empowered to initiate legal actions seeking the forfeiture of assets, rights, or gains directly or indirectly derived from the offence, as well as the suspension or partial cessation of activities. This could also entail the compulsory dissolution of the legal entity, prohibition from receiving public incentives, subsidies, grants, donations, or loans for a period ranging from 1 to 5 years (article 19), and the freezing of assets to ensure payment of fines or full restitution for damages (article 6). Conviction entails obligatory restitution for damages caused by the unlawful act (article 21). These provisions hold particular significance in combating fraud in environmental licensing and other interactions with the Public Administration that contribute to deforestation and other violations of climate rights within the country.

Additionally, Federal Decree 11,129/2022, which regulated the Anti-Corruption Law, provided for the creation of integrity programs, encompassing a set of internal mechanisms and procedures for integrity, auditing and encouraging the reporting of irregularities and the effective application of codes of ethics and conduct, policies, and guidelines, with one of its objectives being preventing, detecting, and remedying frauds against the Public Administration. This provision can be applied to companies that practice acts against the public patrimony related to environmental and climate issues, and environmental and climate integrity plans may be required.

Another relevant institute related to this norm is the Leniency Agreement. It is established in conjunction with the legal entities responsible for the harmful acts as defined in the Anti-Corruption Law (Law No. 12,846/2013) and the administrative offences outlined in the Public Procurement and Administrative Contracts Law (Law No. 14,133 of 2021), aiming for potential exemption or mitigation of sanctions, if the company effectively cooperates with the investigations and the Administrative Accountability Process (Federal Decree 11,129/2022, Chapter IV).

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