

Challenges in the Use of Scientific Data in Climate-Related Lawsuits in Brazil

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1. Overview

- ▶ Brazilian context on climate-related litigation: before and after the Climate Fund case.
- ▶ Climate Fund Case (July, 2022): “The failure to address key sources of GHGs – such as deforestation and land use changes – over time, and the consequent failure to mitigate climate change, may lead to future judicial intervention on the matter, in order to ensure that resources fulfill the purposes for which they were allocated by law and/or to prevent the violation of the principle of proportionality due to inadequate protection.” – *Obiter Dictum*
- ▶ “The Curtain Rises”.
- ▶ Brazil has made significant progress in climate change litigation, although it faces notable challenges.

2. Some important data

- ▶ Brazil has around 18.000 judges responsible for something around 84 mi lawsuits.
- ▶ Environmental related lawsuits: around 294.000.
- ▶ The National Justice Council (CNJ) is striving to adopt a special approach to this type of case in light of the climate crisis.
- ▶ CNJ published the protocol for the adjudication of environmental cases.

One of the documents

PROTOCOLO PARA JULGAMENTO DE AÇÕES AMBIENTAIS

PARÂMETROS PARA MENSURAÇÃO DO IMPACTO DO DANO NA MUDANÇA GLOBAL DO CLIMA (ART. 14 DA RESOLUÇÃO CNJ N. 433/2021)

Diretrizes para ações judiciais sobre danos à flora: desmatamento e incêndio florestal

SEGUNDO ESCOPO

- ▶ Within this protocol, the CNJ established parameters to define and quantify climate damage.
- ▶ Definition: “Conduct (whether active or passive) that is harmful to the overall functionality of the climate system. Climate damage is, therefore, a specific type or dimension of harm to the broader environmental good, directly affecting the legal asset of the climate system and, more diffusely, the collective well-being”.
- ▶ It may not be a direct path to corporate cases, but it is a step forward.

3. Challenges to overcome

- ▶ The language of science is extremely complex. I.e.: glossary for IPCC.
- ▶ Judges have a heavy caseload and few incentives to deepen their knowledge of climate change.
- ▶ Misinformation in the Climate Change Agenda: A Battle in the Public Arena.
- ▶ The overall discussion is overly focused on pecuniary aspects.
- ▶ Legal challenges in order to apply Science data in corporate lawsuits.

- ▶ Science as an Argument of Authority: The Judiciary often relies on science as an authoritative argument, but this approach remains limited and context-dependent, requiring careful integration in legal reasoning.
- ▶ Climate-Related Damage vs. Legal Activities: It is still essential to identify legal avenues that allow for holding carbon majors accountable for the environmental impacts of their regular business activities.
- ▶ Burden of Proof: It is easier to defend against claims of damage when the link to legal activities is unclear or ambiguous. Example: Conectas vs. BNDES PAR.
- ▶ Causal Nexus: Establishing the causal connection between corporate actions and climate-related damage remains the greatest challenge in climate litigation.

4. silver linings

- ▶ The Judiciary is still largely focused on using science as an argument of authority, but the CNJ and the STF have been working to establish jurisprudential lines that, if properly managed, will aid in corporate litigation.
- ▶ A portion of Brazilian judges are dedicated to finding better ways to adjudicate cases involving the use of science.
- ▶ Climate science is becoming more prominent, despite still being largely inaccessible.
- ▶ Brazilian Justice is becoming more aware of the problem. I. e.: guidelines of Federal Justice Council in climate-related lawsuits.

Enunciado 16: Nos casos de litigância climática, o magistrado deve aplicar, em regra, com base no princípio constitucional da precaução, a inversão do ônus da prova contra o poluidor/emissor, tendo obrigatoriamente que justificar os casos de não aplicação do art. 6º, VIII, do CDC.

Justificativa: Em tempos de aquecimento global, com o Acordo de Paris em vigor no Brasil e com a estrita observância do ODS13 da Agenda 2030 para o desenvolvimento sustentável, o julgador precisa dar efetividade à prestação jurisdicional que visa limitar as poluições e as emissões de gases de efeito estufa.

Enunciado 17: O juiz, ao decidir casos de litigância climática, pode declarar o direito ao sistema climático estável como um direito fundamental de terceira geração ou novíssima dimensão em virtude da emergência climática e suas catastróficas consequências.

Justificativa: O *Emissions Gap Report* 2024 da ONU demonstra a necessidade de rápida e efetiva ação climática tendo em vista o aumento das catástrofes e desastres causados por ações antrópicas.

In English...

- ▶ **Statement 16:** In cases of climate litigation, the judge should, as a general rule, apply the shifting of the burden of proof against the polluter/emitter, based on the constitutional principle of precaution, and must provide a justification when Article 6, VIII of the Consumer Protection Code (CDC) is not applied.
- ▶ **Justification:** In the context of global warming, with the Paris Agreement in effect in Brazil and strict adherence to SDG 13 of the 2030 Agenda for Sustainable Development, the judiciary must ensure the effective administration of justice aimed at limiting pollution and greenhouse gas emissions.
- ▶ **Statement 17:** In climate litigation cases, the judge may recognize the right to a stable climate system as a fundamental right of the third generation, or as a new dimension of rights, in light of the climate emergency and its catastrophic consequences.
- ▶ **Justification:** The UN's 2024 Emissions Gap Report underscores the urgent need for swift and effective climate action, given the growing frequency of catastrophes and disasters caused by human activities.

Thank you

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