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Wave of litigation and mitigation projects likely to follow Brazil's climate ruling

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Brazil's supreme court recognition of the Paris Agreement as a human rights treaty grants it 'supralegal' status under the country's judicial framework.

After years of setbacks in which deforestation rates reached new records, Brazil – which accounts for nearly 60 per cent of the Amazon rainforest – is likely to introduce industry-specific climate mitigation plans while seeing a flow of climate litigation against both public and private sectors, say local experts.

In July, Brazil's supreme court ruled that the federal administration had failed to ensure the allocation and use of funds from the Brazilian Climate Fund, which was established to support climate change mitigation projects in the country. As part of this case, the court also made the decision to grant the Paris Agreement "supralegal" status, meaning it prevails over other ordinary laws and regulations.

This decision also implies that the state cannot create new laws that conflict with the Paris treaty, or continue to adopt norms that violate or are incompatible with its goals.

As Brazil prepares for a general election scheduled for October, Sustainable Views asked lawyers at leading practices in the country to assess how climate policy and litigation is likely to evolve following the landmark ruling.

Impact on public policy

Although the lawsuit dealt with a specific issue, its ruling may have a broader impact on the direction of the country's climate and environmental policies, says Vladimir Abreu, who leads the climate change and carbon market practice at TozziniFreire Advogados. The decision is relevant as it shows the court's understanding that the international climate responsibilities assumed by Brazil are incorporated into the legal system as a way to guide the country, he says. "And these must be respected and followed regardless of the opinions, interests, and beliefs of those in power," he adds.

However, Fernanda Stefanelo, a partner in the environmental team at Demarest, cautions that the court only attributed supralegal status to the Paris Agreement, not extending this interpretation to other existing environmental regulations. And since the Paris Agreement was not the main focus of the lawsuit, more time may be needed to assess how the other branches of power (executive and legislative) will interpret the ruling, she says.

At present, Brazil's main law addressing climate change is the country's National Policy on Climate Change from 2009, which identified carbon-intensive industries that needed to reduce greenhouse gas emissions. This mentions, among other sectors: public transport; manufacturing and durable consumer goods; mining; civil construction; health services; and agriculture and livestock.

Later decrees from the executive branch were set to define specific sector plans for the mitigation of climate change. The latest decree additions from this year mention that sector plans may be subject to future regulations from the relevant ministries. The decree also establishes for the first time a national system for reducing greenhouse gas emissions, known locally as SINARE, to stimulate the voluntary carbon market.

Supreme court's 'green agenda'

This year, Brazil's supreme court has been dealing with a number of lawsuits where climate change, while not the core of the issue, features as a supporting argument. According to Stefanelo, these lawsuits can therefore be considered as "indirect climate litigation cases". She expects their outcomes will set significant precedents in imposing the type of

measures the Brazilian government will have to implement in the fight against climate change.

The supreme court's so-called 'pauta verde', or green agenda, has predominantly focused on public policies related to environmental governance and the tackling of deforestation. There is a consensus among the legal community in Brazil that the main impact from the ruling will be on public policies but that the private sector will also be indirectly affected.

Paula Susanna Amaral Mello and Natália Azevedo de Carvalho, partner and senior associate respectively in the environmental practice of Pinheiro Neto Advogados, say pressure on government could incentivise the rapid development of public policy structures, to accelerate the role of Brazil as a key player in the chain of economic activities necessary to meet the goals of the Paris Agreement.

They clarify that certain carbon-intensive sectors could face more stringent changes in applicable environmental standards, while companies operating in more sustainable industries could get easier access to resources, potentially

generating innovative projects and activities – some of these, like green hydrogen and carbon capture and storage projects, currently still face barriers due to a lack of specific regulatory frameworks.

More lawsuits to come

All experts agree that the supralegal status of the Paris Agreement is set to trigger new climate litigation against organisations both in the public and private sectors.

The supreme court's decision will be vital in the case of normative conflicts with ordinary laws and can influence the filing of new climate lawsuits on the argument that the case at hand needs to be consistent with commitments assumed under the Paris treaty, says Rômulo S. R. Sampaio, a partner who specialises in ESG at MattosFilho.

Equally, the team at Pinheiro Neto argues there will be a spotlight for enacted regulation and possible policy omissions to be judicially contested if these are not aligned with Brazil's nationally determined contributions under the Paris Agreement.

Stefanelo at Demarest says she has noticed an increase in climate litigation that challenges environmental licensing processes related to carbon-intensive projects in Brazil. “Companies operating in high carbon-intensive sectors may be [especially] at risk of direct litigation attempts, resulting in an increased difficulty [in obtaining] public financing for carbon-intensive endeavours.”

Indicative is last year's decision by the federal court that Ibama, the Brazilian ministry of the environment's administrative arm, must include in the environmental licensing processes for thermoelectric power plants some specific guidelines established in the national policy on climate change, notes Stefanelo.

Moreover, she says, the recent ruling may also be used as a precedent for direct litigation attempts against carbon-intensive corporations in order to hold them liable for the effects of climate change or for failure to adhere with the principles set forth in the Paris Agreement.

Room for interpretation

However, the supreme court's ruling leaves plenty of room for interpretation and clarification on how the country intends to further expand its legislative framework in order to reach its climate commitments.

A necessary step is to debate if and how the Paris Agreement and international standards on climate change will be enforceable on the private sector, says Clara Serva, partner at TozziniFreire Advogados and head of the business and human rights practice.

According to Serva, one question arising from labelling the Paris Agreement a human rights treaty is whether any prior or future environmental and climate agreement should also gain supralegal status, or if private companies now need to assess their financial flows to also incorporate low carbon and climate-resilient pathways, regardless of local legislation?

As far as international climate legislation is concerned, lawyers agree Brazil's supreme court has set an international precedent that could have repercussions elsewhere. In fact, a month after the ruling in Brazil, the UN General Assembly adopted a resolution recognising access to a clean, healthy and sustainable environment as a universal human right.

“Despite [being] applicable only in Brazil, the ruling could inspire other courts to follow the same path, potentially influencing decisions in other countries and jurisdictions,” said Sampaio at MattosFilho.

So while Brazil in general is preoccupied with politics ahead of the election, its courts will be busy digesting issues centred around climate that will direct the nation's path on the subject in the years ahead.

