



INTRODUCTION

| OUTLOOK FOR THE PRIVATE SECTOR

| OUTLOOK FOR THE PUBLIC SECTOR

| WHAT TO WAIT FOR?

E S G

ESG TRENDS: ENVIRONMENTAL

# ESG LITIGATION CASES AND OUTLOOK

1ST EDITION

PINHEIRONETO  
ADVOGADOS





# TABLE OF CONTENTS

INTRODUCTION

4

OUTLOOK FOR THE  
PRIVATE SECTOR

6

OUTLOOK FOR THE  
PUBLIC SECTOR

9

WHAT TO  
WAIT FOR?

10





# INTRODUCTION

ESG (Environmental, Social and Governance) principles have transformed the manner how companies and investors do business. Anticipating trends, our lawyers have kept a close watch on the matter to bring you the latest discussions on the matter that should have an impact in Brazil.

This is the first chapter of our e-book series that will indicate the trends identified in the environmental pillar. We will address the expected growth of climate-environmental cases in Brazil, a movement that should be accompanied by a corporate awareness that goes beyond Brazilian rules and regulations.

In the next chapters of the Environmental Edition, we will address ESG boom amid the COVID-19 pandemic and transparency in climate-related disclosures to investors.





Climate-environmental cases grounded on ESG criteria and associated to sustainable policies are certainly a trend that should increasingly gain ground at the Brazilian courts.

The ESG practice is perceptively increasing and, as it seems, has come to stay. The internal demands from companies and external demands from governments and civil society have required the corporations to adopt policies in order to bring their activities in line with several aspects related to the environment and society. Moreover, the failure to satisfactorily implement an ESG policy has been questioned not only by civil society and governments, but also dealt with in lawsuits before the Judiciary. This movement has given rise to ESG litigation.

The factors that contribute to the growth of ESG litigation are, among others, the increase in inspection activities, in ethical attitudes by consumers and society towards ESG issues, and greater corporate awareness of the systemic and financial consequences of climate change and environmental damage. Hence, the effects of this questioning have not been just about financial issues. The concern about the companies' image and reputation has also carried a considerable weight in the implementation of social, environmental and corporate policies.



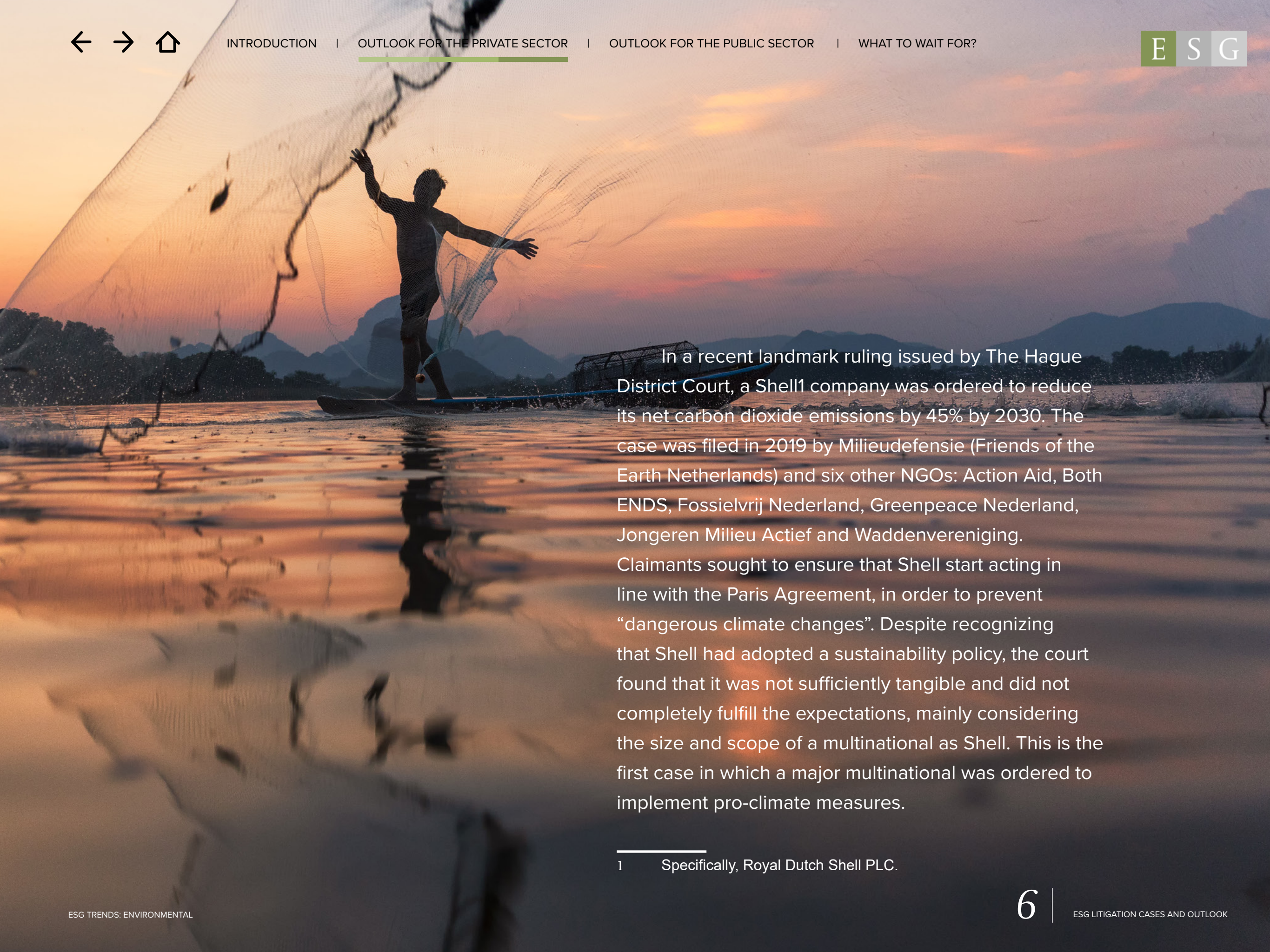


## OUTLOOK FOR THE PRIVATE SECTOR

In the private corporate sector, and specifically from an environmental perspective, there is a trend of judicialization of innovative issues – which are still not regulated –, mainly associated to climate change and sustainability.

- One notes a trend to hold companies liable not only for the occurrence of an environmental damage per se, and their duty to redress, but also for the lack or insufficiency of sustainable policies that could avoid this environmental damage.





In a recent landmark ruling issued by The Hague District Court, a Shell<sup>1</sup> company was ordered to reduce its net carbon dioxide emissions by 45% by 2030. The case was filed in 2019 by Milieudefensie (Friends of the Earth Netherlands) and six other NGOs: Action Aid, Both ENDS, Fossielvrij Nederland, Greenpeace Nederland, Jongeren Milieu Actief and Waddenvereniging. Claimants sought to ensure that Shell start acting in line with the Paris Agreement, in order to prevent “dangerous climate changes”. Despite recognizing that Shell had adopted a sustainability policy, the court found that it was not sufficiently tangible and did not completely fulfill the expectations, mainly considering the size and scope of a multinational as Shell. This is the first case in which a major multinational was ordered to implement pro-climate measures.

<sup>1</sup> Specifically, Royal Dutch Shell PLC.



Another case that should be pointed out is a lawsuit filed with the Regional Court in Essen, Germany, by a Peruvian farmer against the German company RWE. The farmer seeks recognition of RWE's liability for greenhouse gas emissions that had caused the melting of glaciers located near the city of Huaraz, Peru. Besides the recognition of the company's liability for the damage, the farmer claimed damages in an amount equivalent to 0.47% of the total value of RWE's estimated contribution to global greenhouse gas emissions since the beginning of industrialization. The Court in Essen dismissed the case, stating there was no demonstrable causal link between the damage suffered by the property owner and the glacial melting in the Peruvian Andes and RWE's actions. An appeal was filed with the Higher Regional Court in Hamm, which ruled that the case was admissible and should move on to the evidentiary phase, to mainly determine whether (i) the farmer's home is actually threatened by flooding as a result of the recent increase in the volume of the glacial lake, and (ii) RWE's greenhouse gas emissions contributed to said risk.

Another relevant case in the international setting is the lawsuit filed by Greenpeace against the oil company British Petroleum – BP before Scottish Courts. The claim was filed in 2018 and aims to question the regularity of the permit issued on behalf of BP, which authorizes the company to exploit 30 million barrels of oil in the North Sea. Greenpeace claims that the license was issued without considering the negative climate effects that the enterprise could cause.



It is the first time a permit for oil exploitation will be questioned within the judicial sphere based on its expected climate impacts. The case has been put under the spotlight in a particularly interesting moment, given the proximity of COP26, hosted by the United Kingdom, in Glasgow, Scotland, through which the British Government seeks to establish itself as a global leader in climate protection.

Within a judicial claim ongoing in Australia, a shareholder of the Commonwealth Bank is seeking a judicial order to gain access to all documents related to the bank's decision to finance oil and gas projects. The shareholder's intention is to have access to the document to assess if the projects are in accordance to the goals established in the Paris Agreement and aligned with sustainable social and environmental standards. More specifically, the idea is to evaluate the quality of the assessment of the projects carried out by the bank. The case, still in its early stages, is ongoing before the Federal Court of Australia.

- To date, most lawsuits brought in Brazil seek redress for already consolidated environmental damage, based on the civil environmental liability of the duty to redress. However, there are more than a few cases where a company is held liable for not following the ESG practices or for not collaborating in implementing them.



For instance, a public civil action<sup>2</sup> filed by the Federal Public Prosecutor's Office (MPF) against a farmer, due to the illegal deforestation of more than 2.4 thousand hectares, in the south of the State of Amazonas, for intensive cattle-raising activity, without proper authorization. Besides the traditional civil-environmental liability for the damage caused by the irregular deforestation, MPF also sought the recognition of liability for the damage caused by disproportional greenhouse gas emissions resulting from the felling of trees.

In brief, MPF adduces that unauthorized emissions of said gases resulting from the deforestation go against the Brazilian State's commitment to meet its climate targets, which were established under international treaties, such as the Paris Agreement, and in internal rules. The case reaches millionaire figures, and MPF requested that the farmer be ordered to pay a total of R\$ 90,399,448.70, of which almost half is associated to residual property damage and climate impacts.

<sup>2</sup> Case No. 1000590-12.2019.5.02.0713, Case No. 1000686-37.2019.5.02.0063, Case No. 1000618-68.2019.5.02.0037, Case No. 1000641-81.2019.5.02.0047, Case No. 1000639-03.2019.5.02.0083, Case No. 1000620-60.2019.5.02.0062, and Case No. 1000645-23.2019.5.02.0014 (BB).



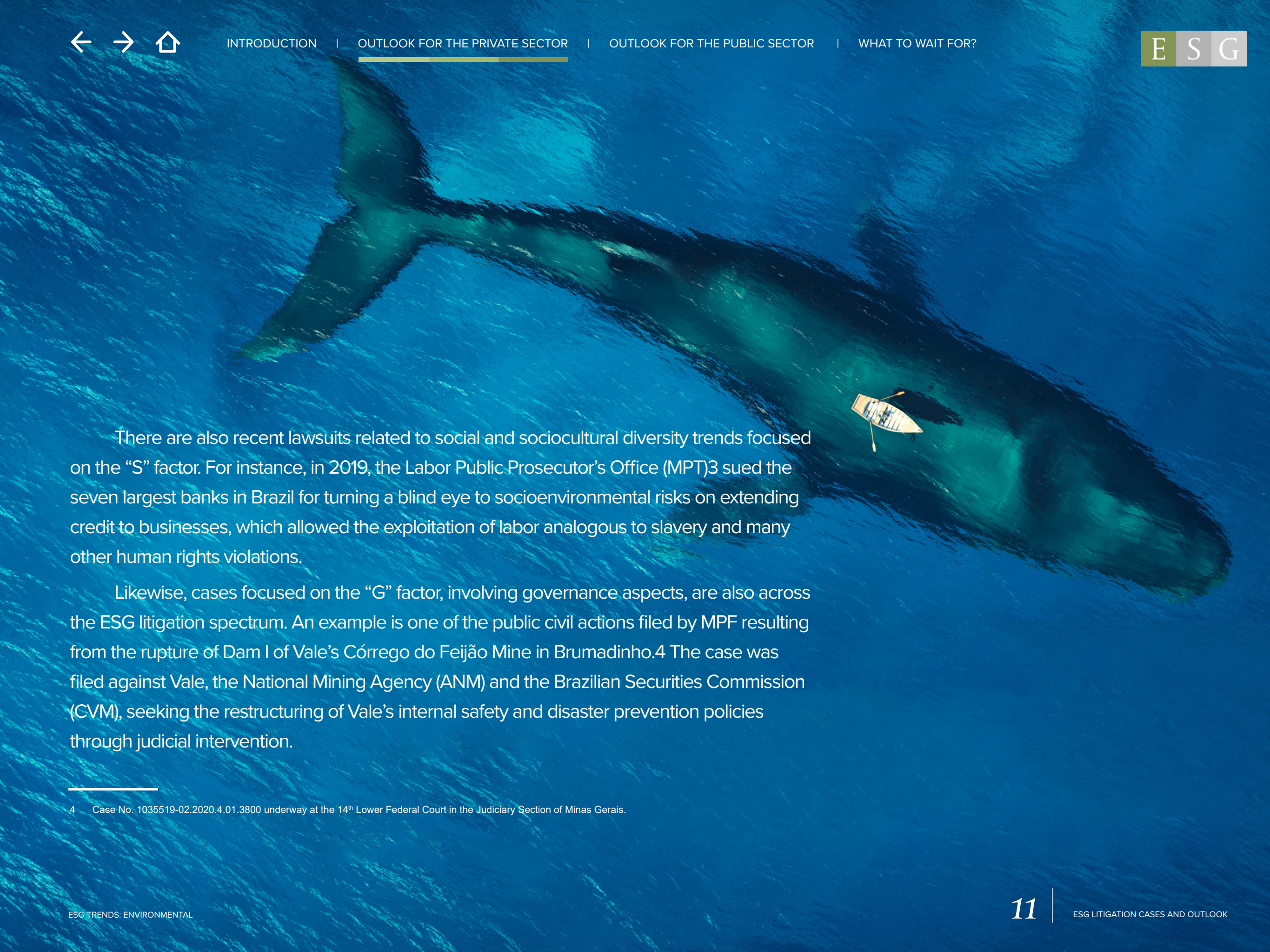




Also based on the effects of climate change, an injunction recently issued by the Federal Court of Porto Alegre/RS established the inclusion of climate legal guidelines in the environmental licensing procedures of thermal power plants. The decision was issued within Public Civil Action No. 5030786-95.2021.4.04.7100, filed by several associations and institutes of the civil society which act for the environmental protection against the Brazilian Environmental Institute (IBAMA) and Copelmi Mineração Ltda., questioning the feasibility of the open-pit mineral coal mining project for the construction of the Nova Seival Thermal Power Plant (UTE Nova Seival).

Among other requests related to the regularity of the environmental licensing procedure of the UTE, the Plaintiffs requested IBAMA to include, in the Reference Terms that pertain to the environmental licensing procedures of thermal power plants in the State of Rio Grande do Sul, aspects related to the compliance with the legal guidelines set forth in Federal Law No. 12.187/2009, which created the Climate Change National Policy (PNMC) and State Law No. 13.594/10, which instituted the Rio Grande do Sul (“Gaúcha”) Climate Change Policy (PGMC).





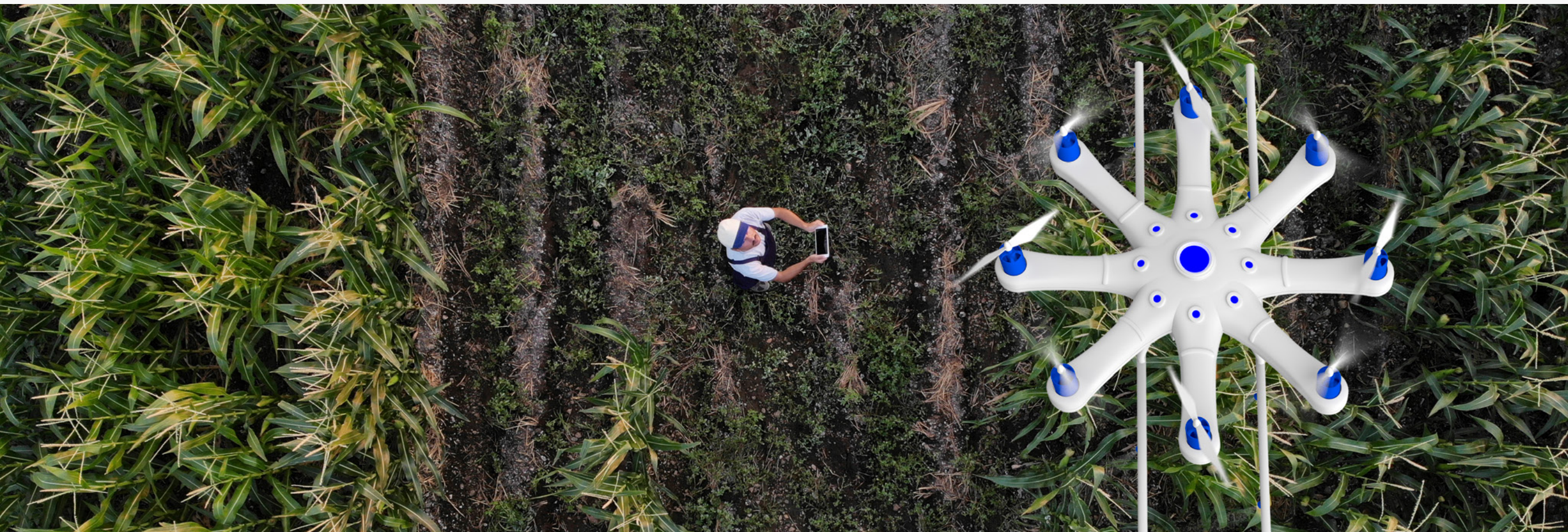
There are also recent lawsuits related to social and sociocultural diversity trends focused on the “S” factor. For instance, in 2019, the Labor Public Prosecutor’s Office (MPT)<sup>3</sup> sued the seven largest banks in Brazil for turning a blind eye to socioenvironmental risks on extending credit to businesses, which allowed the exploitation of labor analogous to slavery and many other human rights violations.

Likewise, cases focused on the “G” factor, involving governance aspects, are also across the ESG litigation spectrum. An example is one of the public civil actions filed by MPF resulting from the rupture of Dam I of Vale’s Córrego do Feijão Mine in Brumadinho.<sup>4</sup> The case was filed against Vale, the National Mining Agency (ANM) and the Brazilian Securities Commission (CVM), seeking the restructuring of Vale’s internal safety and disaster prevention policies through judicial intervention.

---

<sup>4</sup> Case No. 1035519-02.2020.4.01.3800 underway at the 14<sup>th</sup> Lower Federal Court in the Judiciary Section of Minas Gerais.





According to MPF, Vale's internal policies were not appropriate and had only fostered an internal culture of underestimation of risks to the environment and human health inherent to the mining activities. By alleging that Vale had no conditions to reestablish the necessary internal governance policy, MPF suggested the judicial intervention as an alternative to design and implement the restructuring of internal policies.

The first-instance court dismissed the case, ruling that there were no legal grounds supporting MPF's claims. Moreover, the court found that, if there were judicial intervention, in case of a new accident caused by Vale's activities, the State could be held jointly and severally liable for the damage caused, because it had intervened in the company's internal prevention policy. Despite being dismissed at the first instance and being pending the appellate court's review, the simple existence of this case is an important sign that the society is alert to this type of conduct and that public agencies can judicialize matters involving governance.



# OUTLOOK FOR THE PUBLIC SECTOR

In 2020, climate litigation reached the Federal Supreme Court (STF), following the international trend and associating climate changes to urgent socioenvironmental problems confronting the Brazilian society, such as deforestation and dismantling of public policies. The claims may be summed up in requests for the Judiciary to voice and adopt a stand on these constitutional violations, specifically regarding the Federal Government's omission as to the freezing of the Amazon Fund and of the National Fund on Climate Change (*Fundo Nacional sobre Mudança do Clima* - Climate Fund)<sup>5</sup>.

---

<sup>5</sup> Available at: <http://portal.stf.jus.br/noticias/verNoticiaDetalhe.asp?idConteudo=445224&tip=UN>. Direct Suit for Unconstitutionality by Omission (ADO) 60 subsequently converted into Action against the Violation of a Constitutional Fundamental Right (ADPF) 708.





On the other hand, at local courts, one of the emblematic cases of this new trend is the public civil action filed by Instituto de Estudos Amazônicos against the Federal Government,<sup>6</sup> in 2020, before the Federal Courts in the State of Paraná. According to the institute, the Government should be compelled to meet the greenhouse gas (GHG) emission reduction targets and the deforestation reduction targets set in the National Climate Changes Policy. Alternatively, if the request is not fulfilled, the institute claims that the Federal Government provides for the restoration of all deforested area exceeding the annual legal limit within at maximum one year.

At the moment, the discussion on the competent jurisdiction to rule over the case is ongoing, whereas it is also being discussed if the case would be connected to Public Civil Action **No. 1007104-63.2020.4.01.3200**, filed by the MPF against the Federal Government, IBAMA, the Biodiversity Chico-Mendes Institute (ICMBio) and the National Indigenous Foundation (FUNAI).

<sup>6</sup> Citizen Suit underway at the 11<sup>th</sup> Lower Federal Court in Curitiba, which is specialized in environmental matters: <https://www.jfpr.jus.br/noticias/jf-recebe-acao-civ-il-publica-sobre-mudancas-climaticas/>



Within this public civil action, filed before the Federal Court of Amazonas, the MPF seeks that defendants be obliged to execute command and control actions to contain and prevent deforestation in the Amazon, specifically in spots under a bigger threat of destruction, called “ecological hotspots”. The main goal is to have a stronger inspection of the infractions committed specially by loggers, prospectors and land invaders, agents deemed as the main environmental offenders and cause to the frantic deforesting in the Amazon. The Federal Court of Amazonas granted the injunction relief and established that defendants be obliged to execute command and control actions in the ten main ecological hotspots, identified by IBAMA, specifically during the pandemic.

Another significant case involves former ministers Ernesto Araújo and Ricardo Salles. Six young activists filed a citizen suit against the then ministers and the Federal Government questioning the new Nationally Determined Contribution (*Contribuição Nacionalmente Determinada* - NDC) proposed by Brazil.<sup>7</sup> The youngsters argue that the Federal Government had presented a NDC that will allow Brazil to emit more GHGs than it had previously committed, violating the requirements under the Paris Agreement. Therefore, they claim the declaration of nullity of the administrative act and that the defendants are required to submit a new NDC with percentages of GHG emissions within the limits imposed by the Paris Agreement.

---

<sup>7</sup> Citizen Suit No. 5008035-37.2021.4.03.6100 underway at the 14<sup>th</sup> Lower Federal Court in São Paulo.





## WHAT TO WAIT FOR?

As seen, the compliance imposed by the ESG practices has been increasingly required at international and Brazilian courts and, once questioned, has built a corporate awareness to protect the environment and civil society that goes beyond Brazilian rules and regulations.

- The effects of ESG litigation have demonstrated that the mere compliance with legal requirements is insufficient to satisfy the civil society's desires in relation to socioenvironmental matters.

In other words, ESG litigation draws out the concern that companies start having about their internal policies, especially to bring them in line with the new sustainability and social responsibility trends required by investors. Whether due to financial or reputational impacts related to ESG issues, the implementation of these practices should be seen not only as a major tool in the competitive corporate world, but also as a way to avoid the judicialization of socioenvironmental issues due to the new stand on what sustainable practice means.



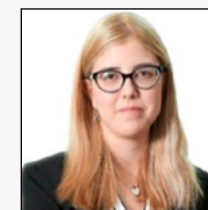
# CONTACTS



**Werner Grau Neto**  
Partner  
[wgrau@pn.com.br](mailto:wgrau@pn.com.br)



**André Vivan de Souza**  
Partner  
[avivan@pn.com.br](mailto:avivan@pn.com.br)



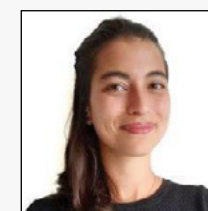
**Natália Azevedo Carvalho**  
Associate  
[ncarvalho@pn.com.br](mailto:ncarvalho@pn.com.br)



**Leticia Elizeu Duarte**  
Associate  
[lduarte@pn.com.br](mailto:lduarte@pn.com.br)



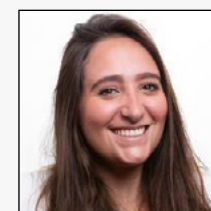
**Milena Carrasco Bastos**  
Associate  
[mbastos@pn.com.br](mailto:mbastos@pn.com.br)



**Clara Amoroso de Andrade**  
Associate  
[candrade@pn.com.br](mailto:candrade@pn.com.br)



**Maria Roxo Bachá**  
Associate  
[mbacha@pn.com.br](mailto:mbacha@pn.com.br)



**Paula Gianotti Duarte Gonçalves**  
Associate  
[pgianotti@pn.com.br](mailto:pgianotti@pn.com.br)



**Luana Passos Dell'Erba**  
Legal advisor  
[ldellerba@pn.com.br](mailto:ldellerba@pn.com.br)





PINHEIRONETO  
ADVOGADOS



WE IMPROVE YOUR BUSINESS AND  
SOCIETY THROUGH OUR LEGAL PRACTICE.

São Paulo

Rio de Janeiro

Brasília

Palo Alto

Tokyo

[www.pinheironeto.com.br](http://www.pinheironeto.com.br)