

Kluwer Arbitration Blog

Towards Climate Change Arbitrations in Latin America

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This contribution comments on growing global trends in climate change and the important role arbitration can play in the settlement of this type of dispute, specifically in the future dispute resolution landscape in Latin America.

In June 2022, the Center for Climate Change Economics and Policy (CCCEP) and the Grantham Research Institute on Climate Change and the Environment published a report authored by Joana Setzer and Catherine Higham entitled the “Global trends in climate litigation: 2022 snapshot” (the “2022 snapshot Report”). This report reviews developments in climate change litigation from May 2021 to May 2022 and is based on information collected by two databases: [Climate Change Laws of the World](#) and the [United States Climate Litigation Database of the Sabin Center for Climate Change Law](#) (“Databases”).

The 2022 snapshot Report first acknowledges that the definition of climate change litigation is a matter of academic debate, but for the Report’s purposes, this concept includes “*cases before judicial and quasi-judicial bodies that involve material issues of climate change science, policy or law*”. Although arbitration isn’t specifically mentioned within this scope, the 2022 snapshot Report refers to cases brought before international or regional courts and tribunals, including “*arbitration cases filed before Investor-State Dispute Settlement (ISDS) panels hosted at the International Centre for Settlement of Investment Disputes, the International Chamber of Commerce, and the Permanent Court of Arbitration.*” To date, the Databases registered 9 ICSID arbitrations, 1 PCA arbitration and 3 SCC arbitrations.

The 2022 snapshot Report then concludes that climate change litigation can either favor or delay effective action on climate change, and it is understood as an instrument to enhance or enforce climate commitments by governments. Among its findings, the 2022 snapshot Report concludes that climate change litigation is on the rise since 2015, reaching a total amount of 2002 cases in 2022 (almost one-quarter of these cases were filed between 2020 and 2022) . The 2022 snapshot Report also highlights the fact that the majority of these cases have been filed in the United States, but notes that the number of cases in the Global South countries (which includes cases in Latin America and the Caribbean) increased over the past year. These trends are expected to continue along with a growing diversification of claimants and defendants, as well as a rise in international litigation to prevent and redress climate change.

Climate change litigation is expected to keep expanding in the years to come and Latin America will certainly partake of this trend. In fact, 47 new cases were reported in Latin America and the

Caribbean in the 2022 snapshot Report. This implies that 15 new cases were reported since the 2021 snapshot Report was made publicly available. Similarly, the database “*Plataforma de Litigio Climático en América Latina y el Caribe*”, which is led by the *Asociación Interamericana para la Defensa del Medio Ambiente* and seeks to gather information on main climate litigation cases in Latin America and the Caribbean, also reported over 50 related disputes in the region between 2019 and 2021.

What role, if any, can arbitration play in climate change litigation?

In 2019, an ICC task force issued the ICC Commission Report “Resolving Climate Change Related Disputes through Arbitration and ADR” (“[ICC Report](#)”). The ICC task force defined climate change related disputes broadly to include those disputes arising out of or in relation to the effect of climate change and climate change policy. Three categories of disputes were identified, all of which required a valid and binding dispute resolution mechanism between the Parties. They are as follows:

1. contracts relating to the implementation of energy or other systems transition, mitigation or adaptation in line with the Paris Agreement commitments;
2. contracts that don’t have a specific climate subject matter but where a dispute involves or gives rise to an environmental issue; and
3. specific agreements entered into to resolve existing climate change or related environmental disputes, potentially involving impacted groups or populations.

The ICC Report also listed areas in which arbitration and ADR could potentially be used in disputes that touch upon climate related matters (see also [previous post](#) explaining why arbitration is an ideal dispute resolution method for climate change). The ICC Report noted, on the one hand, that sectors impacted by transition of the energy, such as urban and infrastructure, land use and industry systems, accounted for the majority of ICC awards. On the other, it stated that arrangements enacted for investments in the climate transition might tend to include arbitration agreements. Further, the ICC Report pointed out that arbitration had already been serving as a forum to resolve environmental disputes at least since 2007, considering that for the last twelve years prior to the ICC Report, the ICC had in its docket an average of three new cases per year. Accordingly, this data suggests that arbitration already has an important role in resolving climate change disputes.

Where does Latin America stand?

Other factors enhance the important role played by Latin America in climate change disputes. According to the United Nations Conference on Trade and Development – [UNCTAD](#), in 2021, Foreign Direct Investment grew by 56%. In certain cases, these investments flew back into mining and energy sectors, which are generally related to measures to address climate change challenges.

Over the past years, several countries have issued new legislation to enforce climate change commitments. For example, Colombia issued the Law on Climate Action in 2021 ([Law 2169 of 2021](#)) and Chile recently enacted a [Framework Law on Climate Change in June 2022](#). Moreover, climate change issues are being debated in other disputes involving consumer and human rights,

such as disputes revolving green-washing.

Conclusion

In conclusion, climate change litigation will be certainly one of the main drivers of the dispute resolution landscape in Latin America over the coming years. And, as seen above, arbitration has an important role to play in settling these disputes. Indeed, we can certainly expect: (i) more climate change related disputes to be resolved through arbitration in a near future, (ii) adapted rules and procedures for this type of claim (related coverage [here](#)), and (iii) a growing number of specialized arbitration practitioners. On this same vein, specific data related to climate change arbitration disputes may become more widely available, through further reports and initiatives, such as the Climate Change Arbitration Monitor, recently launched by Science Po Law School and Squire Patton Boggs to record data on an annual basis on climate change arbitrations.

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