

**STATE CLIMATE LITIGATION IN BRAZIL: ANALYSIS OF THE REQUEST
FOR NON-COMPLIANCE OF BASIC PRINCIPLES 708**

*LITIGÂNCIA CLIMÁTICA ESTATAL NO BRASIL: ANÁLISE DA ARGUIÇÃO DE DESCUMPRIMENTO
DE PRECEITO FUNDAMENTAL 708*

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RESUMO

Este artigo, no contexto do Direito Ambiental, tem por objetivo explanar panoramicamente a litigância climática estatal, concedendo especial relevância à que ocorre em território brasileiro, sublinhando ações ajuizadas, em especial a Arguição de Descumprimento de Preceito Fundamental (ADPF) 708, por ser a primeira reivindicação climática apresentada ao Supremo Tribunal Federal (STF). Para isso, utilizando-se do método hipotético-dedutivo, foi realizada uma revisão bibliográfica e de decisões judiciais que compila, avalia e integra criticamente as informações relevantes. O artigo demonstrou a presença da litigância de cunho climático no Brasil e concluiu que ela vem sendo utilizada para garantir que as políticas públicas sejam efetivadas.

Palavras-Chave: Litigância Climática. Clima. Mudanças Climáticas. Fundo Clima.

ABSTRACT

This article, in the context of Environmental Law, aims to provide an overview of state climate litigation, giving special emphasis to what occurs in Brazilian territory. It highlights actions filed, particularly the *Arguição de Descumprimento de Preceito Fundamental* (ADPF) 708, as it is the first climate-related claim presented to the Federal Supreme Court (STF). To achieve this, a hypothetical-deductive method was employed, involving a literature review and an analysis of judicial decisions that compiles, evaluates, and critically integrates relevant information. The article demonstrated the presence of climate-related litigation in Brazil and concluded that it is being used to ensure the implementation of public policies.

KEYWORDS: Climate Litigation. Climate. Climate Change. Climate Fund.

INTRODUCTION

Research into climate change involves the study of technical knowledge about global warming, but nowadays the agenda has been asked to deal with the practical consequences of this change, such as: prolonged droughts; heat waves; floods; cyclones; storms; ocean acidification; rising sea levels.

Issues that used to be treated as a “problem for future generations” have become a problem for the current generation, which, every year, catalyzed by the unbridled search for unsustainable development and the acquisition of capital, suffers from the impacts of climate instability.

Apparently, after centuries of exploration, the planet is reaching its limit, and the observation of this is already noticeable. In September of 2024, in various regions of Brazil, the phenomenon of the “orange sun” occurred, which, although “aesthetically beautiful”, demonstrates a reality that is not at all charming, since this fact is due to the fires that plague Brazilian territory, enhanced by the drought, and demonstrates that there is a lot of pollution in the air (Correia, 2024).

The aim of this paper is to demonstrate one of the ways that has been used to mitigate climate change, namely state climate litigation. It addresses litigation in a broad and especially nationalized way, highlighting paradigmatic

actions. With regard to Brazil, the Argument for Failure to Comply with a Fundamental Precept (ADPF) 708, which was the first climate claim brought before the Brazilian Supreme Court (Lehmen, 2021).

As a methodology, the analytical method is used, carrying out a review of the literature and court decisions that compiles, evaluates and critically integrates the relevant information. In other words, it is a research approach that focuses on breaking down a phenomenon into its component parts for a more in-depth understanding. When applied to a literature review and the analysis of court decisions, this method allows for a detailed investigation of the topic. The analysis provides insights to enrich knowledge in the field.

1 STATE CLIMATE LITIGATION

Climate change as a result of global warming, driven by anthropogenic actions that have been destroying the planet at an accelerated rate, has been warned about by researchers for a long time. Scientists have pointed to rising greenhouse gas emissions, large-scale deforestation and pollution as critical factors exacerbating the situation.

Research warning about the rise in the temperature of the Earth has been emerging since the end of the 19th century. In 1896, a promising study, led by Nobel Prize winner Svante Arrhenius, already highlighted the influence of carbon dioxide (CO₂) in the atmosphere, considering that an increase in the concentration of this gas could result in an increase in the temperature of the Earth and possible climate change (Junges, Massoni, 2018).

Unfortunately, the scientists were – and are – right. The Earth is suffering from the effects of climate change. In her book on climate justice, Mary Robinson (2021) shares stories of people around the world who are suffering from these changes, such as the inhabitants of the Republic of Kiribati, who, due to rising ocean levels, risk the disappearance of their country in the coming years.

At this critical moment, it is essential to mobilize states, companies, organizations and individuals so that we can act and guarantee a viable future for the generations that will succeed us – and for our own tomorrow. This mobilization must include the implementation of effective public policies that encourage sustainability, the adoption of responsible business practices and raising public awareness of the importance of environmental preservation.

One of the ways to put this issue on the agenda has been climate litigation. According to Delton Carvalho and Kelly Barbosa (2019), climate



litigation is a proposal on the rise, which emerged in the United States of America, but which today already inspires and influences other judicial systems.

Climate litigation aims, in short, to hold states, companies and entities liable for damages related to climate change. Presenting itself

como uma estratégia promissora para compelir e impulsionar as grandes empresas, indústrias e, principalmente, o Poder Público em sua função legislativa e executiva, a assumirem e se responsabilizarem pelo controle e impactos do aquecimento global antropogênico e mudanças climáticas (Carvalho, Barbosa, 2019).

As an example of climate litigation, on April 9th, 2024, the European Court of Human Rights ruled on the emblematic case of Verein KlimaSeniorinnen Schweiz and others v. Switzerland. This was the first litigation in which a regional international court expressly declared a duty of the government to meet climate targets on the basis of the human rights legal framework (Wedy, Iglecias, 2024).

In summary, the case dealt with the claim of Swiss women aged 64 and over who alleged that the Swiss country violated their right to health by not doing enough to mitigate global warming (Wedy, Iglecias, 2024).

The trial ruled in favor of the elderly women, understanding that the Swiss government was effectively violating the human rights of its citizens by failing to implement the necessary policies to mitigate the effects and cope with climate change (Wedy, Iglecias, 2024).

Regarding the probable impact of the pioneering judgment, Wedy and Iglecias note that,

Provavelmente, a referida decisão vai encorajar outros grupos ao ajuizamento de novas ações para compelir nações ao cumprimento de suas metas de emissões, tendo a demanda aqui abordada, por certo, futuros reflexos estratégicos para a litigância climática em níveis nacional e internacional

[...]

É de se esperar que este precedente sirva para fundamentações sofisticadas em outras decisões nas Cortes Internacionais a começar pelo Tribunal Internacional de Justiça. Omissões do estilo, por certo, realçam um dos vetores do princípio da proporcionalidade, que veda a proteção insuficiente dos direitos, e também a Convenção Europeia dos Direitos Humanos (Wedy, Iglecias, 2024).

Therefore, the relevance of this judgment for global climate litigation is demonstrated, as it was the first to address the issue of climate litigation before a regional court – the European Court of Human Rights – and to hold a State responsible for its omissions, highlighting that the issue of climate rights is intertwined with the very issue of human rights.

It is also possible to illustrate the issue of climate litigation by explaining the case of Urgenda Foundation v. The Kingdom of Netherlands. The litigation consisted of the first decision by a local court that obliged a State to adopt effective measures against climate change (Wendy, 2021).

At the end of 2019, the Dutch Supreme Court ruled that the Dutch government must reduce greenhouse gas emissions in the country by 25% compared to levels of 1990 by the end of 2020 (Wendy, 2021).

According to Wendy (2021), this judgment is a paradigm for other proposals regarding climate litigation aimed at “holding governments and private entities responsible for carbonizing the economy and the atmosphere”.

It can be seen, then, that significant decisions have already been made in the field of climate law, proving the relevance of the issue, which calls for immediate and unstoppable measures, since it is no longer possible to delay this debate and its actions.

It is also worth noting that some authors believe that even when climate litigation results in the claim being dismissed, it has positive consequences, as it has had political repercussions and has drawn the attention of the general public to the issue, sometimes being instruments of change (Carvalho, Barbosa, 2019).

In this sense, state climate litigation is not only related to protecting the environment and promoting climate justice, but is also a means of promoting sustainable policies, encouraging collective accountability, acting as a precedent and mobilizing civil society. This highlights the importance of these disputes, which have been gaining ground worldwide and also in the Brazilian judiciary.

2 STATE CLIMATE LITIGATION IN BRAZIL

As has been the case in other countries, Brazil has also been hit by the effects of climate change, with increasingly devastating events affecting the country. Therefore, due to the urgent need to improve public policies on the subject on Brazilian soil, climate litigation has gained relevance in recent years.

According to the overview of Brazilian climate litigation, drawn up by the Law, Environment and Justice Research Group (Juma), by March of 2024, Brazil

had eighty lawsuits on the subject accounted for by the platform of the group, making it the fourth country in the world for climate litigation, behind only the United States, Australia and the United Kingdom (Moreira et al., 2024).

The report highlights that there are two main types of Brazilian lawsuits that deal with this issue: Public Civil Action (ACP) and constitutional actions for concentrated control of constitutionality. These actions have the Public Prosecution as the main plaintiff, followed by organized civil society and political parties (Moreira et al., 2024).

Of the eighty cases on the platform, at least thirty questioned environmental setbacks, dismantling and state omissions (Moreira et al., 2024).

Leves, Stoll and Schonardie (2023) highlight the so-called Green Package or Green Agenda as an example of a climate dispute, since it consisted of a set of climate and environmental actions.

The judgment of this package of actions by the Federal Supreme Court (STF) was concluded on March 14th, 2024. Among the deliberations were extremely relevant actions, such as the Direct Action of Unconstitutionality by Omission (ADO 59), ADPF 760, ADO 54 (Carvalho, 2024).

In the ADO 59, reported by Justice Rosa Weber, filed by the Party of Workers (PT), the Socialism and Freedom Party (PSOL), the Sustainability Network and the Brazilian Socialist Party (PSB) against the Federal Government, the challenge was, in short, the failure to implement normative and material measures to protect the Legal Amazon. In its decision on the case, the Supreme Court ordered the Federal Government to reactivate the Amazon Fund within sixty days; ruled that decrees that altered the format of the Fund and prevented the financing of new projects were unconstitutional – stating that the previous model should be resumed – and recognized the configuration of governmental omission in the preservation of the Amazon due to decisions that had been made (Supreme Federal Court, 2022).

ADPF 760 and ADO 54 were also part of this package of environmental and climate actions. These two constitutional actions, initiated in 2020 by the Brazilian Socialist Party (PSB) and Sustainability Network, due to the common questioning, were judged together in early 2024 (Supreme Federal Court, 2024).

The lawsuits dealt with the need to draw up a government plan for the preservation of the Amazon and called for a declaration of an unconstitutional state of affairs with regard to environmental policy to protect the biome. The plaintiffs claimed that, as of 2019, the federal government had abandoned the

policy of preventing deforestation in the Legal Amazon, set out in the Action Plan for the Prevention and Control of Deforestation in the Legal Amazon (PPCDAm), arguing that, due to this neglect, there had been an increase in deforestation, burn-offs and fires, with painful consequences for the environment (Supreme Federal Court, 2024).

In the judgment, the Plenary unanimously decided that the Union should take the measures stipulated, within the scope of the PPCDAm and other programs, with the aim of reducing deforestation, determining some actions such as: (I) reducing the rate of deforestation; (II) presenting a plan to strengthen environmental protection agencies; (III) continuing to reduce the rate of illegal deforestation in indigenous lands and preservation areas; and (IV) presenting reports that allow these measures to be monitored. It also ordered the National Congress to open an extraordinary credit in the financial year of 2024 to ensure government actions and decided to prohibit the budgetary blocking of funds earmarked for programs to combat deforestation (Supreme Federal Court, 2024).

However, with regard to the request for a declaration of an unconstitutional state of affairs, the Plenary concluded, by a majority, that the request should be denied, since, led by the vote of Justice André Mendonça, the majority of the Justices of the Supreme Court understood that there is no massive violation of fundamental rights in the Brazilian environmental policy, since it has been shown that the Brazilian state is making progress on the issue (Supremo Tribunal Federal, 2024).

It should be noted that Justices Edson Fachin, Luiz Fux and Cármen Lúcia were defeated on this point, as they understood that, despite the progress Brazil has been making on environmental issues, there is still a widespread violation of rights relating to this issue (Supreme Federal Court, 2024).

These disputes expose a reality: Brazilian governments must – as a matter of urgency – act to effectively protect the environment and the climate.

The actions of the Green Package have shown that Brazil lacks policies to implement the legislation and international commitments it has made, as it has been violating the law and ignoring fundamental rights by failing to provide the right to climate stability to which it has committed (Leves, Stoll, Schonardie, 2023).

It is imperative that arguments about the profound complexity and costliness of the issue do not hinder the debate. The policy on the subject must be drawn up as a state guideline, and not just as a temporary policy adopted by a

particular public manager (Pereira, 2022). Public policies should aim to formulate actions to mitigate and adapt to change, given the irreversibility of our actions (Leves, Stoll, Schonardie, 2023). The fight against climate change should not be tied to a particular candidate or political party, but should be seen as a collective commitment, a shared responsibility that transcends governments and ideologies and aims to achieve a fair – and possible – future.

In addition to policies by those elected by Brazilian citizens, the judiciary also needs to be aware of and act positively when it comes to climate disputes.

It is the duty of members of the Judiciary to take into account, in their decisions, the threats that climate change poses to the planet, such as droughts, floods, storm surges and rising sea levels. The Brazilian Constitution, the National Climate Policy and the Paris Agreement – to which Brazil has committed itself – “are important legal instruments for judicial decisions favorable to the realization of the fundamental right to a stable climate” (Wedy, 2024).

Leves, Stoll and Schonardie (2023) highlight the relevant role of the judiciary, as it has been a resource for environmental and climate protection in the absence of public policies. For the authors, “the judicialization of issues related to the maintenance of environmental and climate public policies is extremely important in order to guarantee at least the existential minimum”.

Climate litigation in Brazil is still in its infancy – when compared to American litigation, for example. However, courageous and avant-garde decisions by judges and courts have also opened up a path of reflection on the issue, demonstrating the fragilities surrounding the issue (Hupffer, Barbosa, Sbaraine, 2023).

ADPF 708 is one of the most important actions ever to have been brought in Brazil, as it dealt with the importance of the proper use of the resources of the Climate Fund, addressing issues of the utmost importance to the population.

2.1 Analysis of the Fund Climate Case

To illustrate the issue of state climate litigation in Brazil, we will look at the ADPF 708, filed on June 30th, 2020 and judged on July 1st, 2022. The plaintiffs in this constitutional action were the PT, PSOL, PSB and Sustainability Network. The defendant was the Union.

Initially, the mentioned parties filed an ADO claiming that, since 2019, the Federal Government has been omitting its constitutional obligations to protect the environment, since it has failed to invest the necessary resources in the

National Fund on Climate Change (Climate Fund), aimed at mitigating climate change.

However, Reporting Justice Luís Roberto Barroso saw fit to accept the action as an ADPF because he understood that the issue involved, in fact, a description of actions and omissions which, taken as a whole, had an impact on the duty of public authorities to provide a healthy environment for present and future generations.

Here, it should be noted that this act of acceptance by Justice Luís Roberto Barroso is constitutional and possible, since constitutionality control actions are fungible, unless there is a gross error, as expressed in a similar judgment in the ADPF 314, of December 11th, 2014.

A ADPF e a ADI são fungíveis entre si. Assim, o STF reconhece ser possível a conversão da ADPF em ADI quando imprópria a primeira, e vice-versa. No entanto, essa fungibilidade não será possível quando a parte autora incorrer em erro grosseiro. É o caso, por exemplo, de uma ADPF proposta contra uma Lei editada em 2013, ou seja, quando manifestamente seria cabível a ADI por se tratar de norma posterior à CF/88. STF. Plenário. ADPF 314 AgR, Rel. Min. Marco Aurélio, julgado em 11/12/2014 (Info 771) (Supremo Tribunal Federal, 2014).

The lawsuit also included the participation of the Climate Observatory, the Alana Institute, the National Front of Mayors, Conectas Human Rights and the Brazilian Association of Members of the Environmental Public Prosecution (Ambrapa) as Amici Curia.

The allegation of the petitioners basically consisted of stressing that the Federal Government kept the Climate Fund inoperative during 2019 and part of 2020, failing to allocate significant resources to tackle climate change, and that such behavior would represent an offense against the constitutional protection of the environment and the international commitments made by the Brazilian State.

The request of the ADPF consisted of three main points: I) the resumption of the operation of the Climate Fund; II) a decree that the Federal Government must allocate these resources and refrain from any further omissions; and III) a ban on the contingency of amounts, based on the constitutional right to a healthy environment.

It is worth noting that public hearings were held during the course of the trial in order to gain a better understanding of the case, to provide a solid basis for the judgment of the justices and for the population to be heard before



deciding on an issue of paramount social importance – listening to society being one of the foundations of a democratic State.

The case was finally judged on July 1st, 2022, and the decision was by majority – with Justice Nunes Marques dissenting.

In short, it: I) recognized the omission of the Union due to the failure to fully allocate the resources of the Climate Fund for 2019; II) ordered the Union to refrain from omitting the operation of the Climate Fund or the allocation of its resources; and III) prohibited the practice of contingency of the revenues that make up the Fund.

The decision was also published in the Jurisprudential Newsletter of the Court No. 1061, as follows

O Poder Executivo tem o dever constitucional de fazer funcionar e alocar anualmente os recursos do Fundo Clima, para fins de mitigação das mudanças climáticas, estando vedado seu contingenciamento, em razão do dever constitucional de tutela ao meio ambiente (CF, art. 225), de direitos e compromissos internacionais assumidos pelo Brasil (CF, art. 5º, § 2º), bem como do princípio constitucional da separação dos poderes (CF, art. 2º c/c art. 9º, § 2º, LRF). STF. Plenário. ADPF 708/DF, Rel. Min. Roberto Barroso, julgado em 1º/7/2022 (Info 1061) (Supremo Tribunal Federal, 2022).

This judgment is extremely important, since it consists of the first climate claim brought before the Brazilian Supreme Court (Lehmen, 2021) and it will therefore be examined in greater detail below.

2.1.1 The Climate Fund

In order to fully understand what was discussed in the ADPF 708, it is essential to briefly explain the Climate Fund, which is the subject of this constitutional action.

The Climate Fund – the National Fund on Climate Change – is an instrument of the National Policy on Climate Change, whose purpose is basically to ensure resources to support projects, studies and the financing of undertakings aimed at mitigating and adapting to climate change and its effects (Ministry of the Environment and Climate Change, 2024).

These funds are made available in two forms: reimbursable and non-reimbursable. The reimbursable funds are administered by the National Bank for Economic and Social Development (BNDES) and the non-reimbursable funds by

the Ministry of the Environment itself (Ministry of the Environment and Climate Change, 2024).

The BNDES (2024) points out that the aim of the Fund is to encourage the implementation of projects, the purchase of machinery and equipment, and technological advances aimed at reducing greenhouse gas emissions, as well as adapting to climate change and its impacts. To this end, the program has modalities such as: resilient and sustainable urban development; green industry; transport logistics, public transport and green mobility; energy transition; native forests and water resources; green services and innovation; and green machinery.

These modalities have their own objectives, for example, in the case of green machinery, the aim is to “support the acquisition of machinery and equipment related to reducing greenhouse gas emissions and adapting to climate change and its effects” (BNDES, 2024).

The National Climate Change Fund was created by the Law No. 12,114 of 2009, which established the nature, purpose, source and use of the resources of the fund and amended articles of related legislation (Brazil, 2009).

The mentioned law is regulated by the Decree No. 9,578 of 2018, which “consolidates normative acts issued by the Federal Executive Branch that provide for the National Fund on Climate Change [...] and the National Policy on Climate Change” (Brazil, 2009).

The Climate Fund is linked to the Ministry of the Environment and Climate Change and administered by a Management Committee, chaired by the executive secretary of the Ministry of the Environment (Ministry of the Environment and Climate Change, 2024).

The importance of this Fund in catalyzing measures that seek to mitigate the consequences of climate change and provide the means to adapt to it can therefore be seen.

2.1.2 The Argument for Failure to Comply with a Fundamental Precept (ADPF) 708

Regarding the trial of the ADPF 708, which concluded in July of 2022, it is imperative to point out that it is one of the emblematic cases of the STF, since it is highly debated and a matter of profound relevance to society as a whole.

As mentioned at the beginning of the chapter, the judgment was passed by a majority, with the votes of Justices Luís Roberto Barroso (rapporteur); André Mendonça; Alexandre de Moraes; Edson Fachin; Luiz Fux; Dias Toffoli; Rosa

Weber; Cármen Lúcia and Gilmar Mendes winning on the merits, while the vote of Justice Nunes Marques was defeated.

Due to the depth and some peculiarities present in the votes, we will briefly discuss the decisions of the rapporteur, Justice Luís Roberto Barroso; Justice Edson Fachin – who, despite following the majority vote, has a broader position – and Justice Nunes Marques, who voted alone to dismiss the ADPF.

The rapporteur of the ADPF 708, Justice Luís Roberto Barroso, voted in favor of the constitutional action, pointing out that the documents submitted proved that the Federal Government failed to allocate the resources of the Climate Fund during 2019 and part of 2020. He demonstrated that the “non-allocation of resources constituted a deliberate decision by the Executive, until it was possible to change the constitution of the Management Committee of the Fund, in order to control the information and decisions pertinent to the allocation of its resources”, and pointed out that the Fund was resumed by the Executive only after the filing of this constitutional action, releasing the resources that had been restricted (Supreme Federal Court, 2022).

Barroso pointed out that it is the constitutional, supra-legal and legal duty of elected representatives to protect the environment and combat climate change, and that such issues are not a matter of political choice, but of compliance with principles and the law (Supreme Federal Court, 2022).

At the beginning of his vote, the minister put the issue in context, discussing climate change, the transnational commitments made by Brazil and environmental setbacks (Supreme Federal Court, 2022).

Barroso pointed out that climate change is a consequence of global warming, which is the result of a society that makes unrestricted use of fossil fuels – such as coal and oil – agriculture, livestock farming and promotes deforestation. The consequences of these actions are being felt in various parts of the planet, including: rising global temperatures, warming oceans, melting polar ice caps, rising sea levels, extinction of species and an increase in extreme climatic situations (Supreme Federal Court, 2022).

At the time of the trial, the climate disaster that struck the state of Rio Grande do Sul in April and May of 2024 had not yet occurred, but it is interesting to note the frequency and intensity with which these cases are occurring. In the event, the heavy rains caused flooding, landslides and ended up affecting four hundred and seventy-five of the four hundred and seventy-nine municipalities in

the state of Rio Grande do Sul, i.e. approximately 96% of the State was affected (Escuri, 2024).

Also in 2024, the Pantanal and the Amazon are facing one of the worst fires in the last seventeen years, with the smoke from this event reaching the other side of the Atlantic Ocean. It is estimated that in the month of September of 2024 alone, the fires that have been ravaging the country have already released sixty-five megatons of carbon (Welle, 2024).

This demonstrates the need to address the issue of climate change, especially by the Supreme Court of the country, since the subject has unfortunately become a current concern in homes around the world and in Brazil.

With regard to transnational commitments, Barroso pointed out that these agreements are signed by countries in order to establish a consensus on issues that go beyond the territorial limits of each State. In the environmental field, the following stand out: the Framework Convention, ratified by one hundred and ninety-seven countries, which established principles, general obligations and negotiation processes to be detailed at subsequent meetings; the Kyoto Protocol, ratified by one hundred and ninety-two countries, which established specific targets for reducing greenhouse gas emissions for industrialized countries and the European Union, with developing countries being left out of this specific obligation; and the Paris Agreement, which was joined by one hundred and eighty-five countries and seeks to ensure that all countries – whether developed or developing – act to reduce the greenhouse effect (Supreme Federal Court, 2022).

Finally, still putting the issue into context, Barroso underlined the regression in environmental matters that Brazil is experiencing. He pointed out that, between 2004 and 2012, the country managed to improve its public policies, reducing deforestation – which, in the previous period, was gigantic. However, from 2013 onwards, deforestation rates began to rise again, and by 2018 there had already been a 65% increase compared to 2012. With this data, the minister stressed that environmental degradation was not exclusive to the current administration (government of Jair Bolsonaro), but it was already present in previous ones (Supreme Federal Court, 2022).

However, although he pointed out that the problem of environmental regression was not restricted to the current administration, he stressed that the problems had been aggravated by it, since, as of 2019, “deforestation has increased even more compared to the previous decade”, with the rate of

deforestation in the Amazon, for example, returning to the levels of 2006–2007, even affecting protected areas, such as indigenous reserves and conservation units (Supreme Federal Court, 2022).

Regarding the principle of the prohibition of retrogression, especially in the environmental field, Barroso understood that “it is violated when the level of protection of the environment is reduced through inaction or when relevant public policies are suppressed without due replacement by others that are equally adequate” (Supreme Federal Court, 2022).

He also pointed out that when the executive branch fails to act on such important issues, it is “the role of the supreme courts and constitutional courts to act to prevent retrogression” (Supreme Federal Court, 2022).

In order to facilitate understanding of the principle of the prohibition of retrogression, it is worth highlighting the explanation of Paulo Affonso Leme Machado, which states that this precept aims to constantly improve regulations and legislation, stating that the “good environment” can only be changed to the “great environment” and never to the “worse environment” (Machado, 2024).

Following on in his vote, Barroso pointed out that, although the Presidency of the Republic and the Federal General Attorney had claimed that the matter was not of a constitutional nature, and that for this reason it should not be under the analysis of the Supreme Court, this is not the case, since the issue of climate change is a matter of Constitutional Environmental Law, supported by the article 225 of the Federal Constitution (Supreme Federal Court, 2022).

Following the vote, the rapporteur underlined the importance of the Climate Fund, pointing out that this Fund is the main federal instrument for funding the fight against climate change, and it is also related to the meeting of the compliance with greenhouse effect reduction targets (Supreme Federal Court, 2022).

He pointed out that despite its importance, the Fund remained inoperative by deliberate decision of the Union throughout 2019 and part of 2020, returning to the allocation of resources only after the ADPF in question was filed (Supreme Federal Court, 2022).

He emphasized that the Executive Branch has a duty to make the Climate Fund work, allocating the resources for the intended purposes, noting that the allocation itself materializes the constitutional duty to protect and restore the environment. As a result, it pointed out that it was impossible to set aside such amounts (Supreme Federal Court, 2022).

Finally, Barroso addressed the issue raised by the plaintiffs and the amici curi. For them, the resources used in the course of this ADPF were applied in the wrong way, since they were preferentially intended for the urban environment, despite the fact that the most relevant part of greenhouse gas emissions stems from deforestation and changes in land use in rural areas (Supreme Federal Court, 2022).

For the minister, the issue was beyond the limits of the ADPF as originally formulated, since the fund was functioning again, and the requests for the Executive not to omit and for no contingency were also granted (Supreme Federal Court, 2022).

However, by way of obtaining dictum, he made some brief observations, pointing out that the courts must, in principle, respect the choices made by the representatives elected by the population when it comes to allocate resources. However, if there is a deviation of purpose, distortion of the determining motives or violation of proportionality, which implies damage to fundamental rights, the Judiciary can – and should – act to protect the allocation of capital (Supreme Federal Court, 2022).

However, Barroso warned that

embora tal controle escape dos limites da presente ação, a persistência no não enfrentamento de fontes importantes de GEEs – tais como o desmatamento e as alterações de uso do solo – ao longo do tempo, e a consequente frustração da mitigação das alterações climáticas poderá ensejar a atuação futura do Judiciário no tema, de modo a assegurar que os recursos cumpram os fins a que foram destinados pela norma e/ou a evitar a violação do princípio da proporcionalidade por vedação à proteção deficiente (Supremo Tribunal Federal, 2022).

Finally, he concluded by upholding the action, (I) recognizing the omission of the Union related to the resources from the Climate Fund of 2019; (II) ordering the Union to make this Fund work by allocating its resources; and (III) refraining from making the funds contingent (Supreme Federal Court, 2022).

The next prominent vote analyzed is that of Justice Edson Fachin, who begins his decision by pointing out that he accepts the report issued by Justice Luís Roberto Barroso.

First, Fachin highlighted the issue of the climate emergency and the urgency of implementing mitigation measures. He used the reports of the Intergovernmental Panel on Climate Change (IPCC) to base his initial



considerations, stressing that no more time can be wasted in tackling climate change. For him, the judgment should recognize that “we are facing a climate emergency” (Supreme Federal Court, 2022).

A questão climática é a questão do nosso tempo. É a pergunta interrogante que nos lança o destino e as respostas que nós pudermos formular decidirão qual futuro terá a humanidade – ou se haverá algum futuro. Não há outra pauta, não há outro problema, não há outra questão. A emergência climática é a antessala de todas as outras (Supremo Tribunal Federal, 2022).

It also included a discussion on the constitutional responsibility to protect the environment, since, for Fachin, article 225 of the Federal Constitution must be interpreted in such a way as to understand the right to the environment as a fundamental right (Supreme Federal Court, 2022).

In this sense, it is worth illustrating that Fachin is supported by scholars such as Frederico Amado (2021), who corroborate that the article 225 recognizes the ecologically balanced environment as a fundamental, intangible, third generation, trans individual right of immediate applicability.

Fachin went on to say that “there is no talk of separation of powers when public policies are used to undermine environmental protection”, as he understood that there is no discretion for public policies or government programs to ignore the issue of climate change, since this issue comes from the constitutional text, which states that the public authorities and the community have a duty to defend and preserve the environment (Supreme Federal Court, 2022).

To corroborate his view, he stressed that environmental litigation is not something exclusive to Brazil, but rather a global trend, highlighting cases from Canada and Germany, where lawsuits relating to the climate crisis have reached the Supreme Courts. Fachin pointed out that it is also the duty of the Judiciary to respond to the climate emergency (Supreme Federal Court, 2022).

With specific regard to the Climate Fund, Fachin corroborated the requests of the plaintiffs, which were accepted by the rapporteur, but, more broadly, he also felt that points such as the determination that the Federal Government should publish a quarterly statistical report, prepared by the IBGE/MCTI, showing the percentage of spending by the Climate Fund, and that it also formulate, at reasonable intervals, a National Inventory of Greenhouse Gas

Emissions and Removals, segmented by state and municipality and widely publicized (Supreme Federal Court, 2022).

Thus, it is clear that Justice Edson Fachin followed the vote of the rapporteur, Justice Roberto Barroso, but still felt that the decision should be more comprehensive than it was.

In his vote, therefore, Fachin upheld the action, (I) recognizing the failure of the Federal Government to allocate the resources of the Climate Fund for 2019; (II) ordering the Federal Government to refrain from omitting the operation and allocation of the resources of the fund; and (III) the Federal Government not to prohibit the contingency of these resources. More broadly, it also deemed it necessary (IV) for the Federal Government to publish a quarterly report drawn up by the IBGE/MCTI, showing the percentage of spending by the Climate Fund; and (V) for the Federal Government to draw up a National Inventory of Greenhouse Gas Emissions and Removals, including the segmentation of municipalities and States, with wide publicity for the consolidated data (Supreme Federal Court, 2022).

Finally, with regard to the judgement of the ADPF 708, it is interesting to analyze the vote of Justice Nunes Marques, since he was the only one to vote against upholding the action, understanding that there was no omission on the part of the Union alleged by the plaintiffs.

Nunes Marques began his vote by congratulating the vote of the rapporteur, but clarifying that he understood the request to be unfounded. For Marques, there was no alleged omission

visto que o Fundo Clima é apenas um dos vários instrumentos à disposição da Administração Pública para execução de política pública de proteção ao meio ambiente, a qual, aliás, tem sido realizada por atuação primeira, integrada e consistente do Ministério do Meio Ambiente, Do Ministério da Defesa e do Ministério da Ciência, Tecnologia e Inovações, entre outros (Supremo Tribunal Federal, 2022).

With the trial concluded on July 4th, 2022, the decision was fixed:

O Tribunal, por maioria, julgou procedente a ação para: (i) reconhecer a omissão da União, em razão da não alocação integral dos recursos do Fundo Clima referentes a 2019; (ii) determinar à União que se abstenha de se omitir em fazer funcionar o Fundo Clima ou em destinar seus recursos; e (iii) vedar o contingenciamento das receitas que integram o Fundo, fixando a seguinte tese de julgamento: "O Poder Executivo tem o



dever constitucional de fazer funcionar e alocar anualmente os recursos do Fundo Clima, para fins de mitigação das mudanças climáticas, estando vedado seu contingenciamento, em razão do dever constitucional de tutela ao meio ambiente (CF, art. 225), de direitos e compromissos internacionais assumidos pelo Brasil (CF, art. 5º, par. 2º), bem como do princípio constitucional da separação dos poderes (CF, art. 2º c/c art. 9º, par. 2º, LRF)". Tudo nos termos do voto do Relator, vencido o Ministro Nunes Marques. O Ministro Edson Fachin acompanhou o Relator com ressalvas. Falaram: pelo requerente Partido Socialista Brasileiro – PSB, o Dr. Felipe Santos Correa; pelo requerente Partido Socialismo e Liberdade (P-SOL), o Dr. André Maimoni; pelo requerente Partido dos Trabalhadores, Dr. Miguel Novaes; pela requerente Rede Sustentabilidade, o Dr. Rafael Echeverria Lopes; pela interessada, a Dra. Jucelaine Angelim Barbosa, Advogada da União; pelo amicus curiae Observatório do Clima, a Dra. Suely Mara Vaz Guimarães de Araújo; e, pelo amicus curiae Instituto Alana, a Dra. Angela Moura Barbarulo. Plenário, Sessão Virtual de 24.6.2022 a 1.7.2022. (Supremo Tribunal Federal, 2022).

One can see the care taken by all the Ministers of the Constitutional Court when judging the case, gathering data and providing important information and considerations, thus demonstrating the relevance attributed to the issue.

FINAL CONSIDERATIONS

This article analyzes the issue of the state climate litigation, first in a broad way and then with a focus on Brazilian litigation.

At first, we sought to conceptualize state climate litigation and illustrate the issue with paradigmatic cases, such as Verein KlimaSeniorinnen Schweiz and others v. Switzerland and Urgenda Foundation v. The Kingdom of Netherlands.

Subsequently, the issue was analyzed in Brazil, highlighting how the issue has been dealt with and important decisions, such as the Green Package and the ADPF 708.

ADPF 708 was analyzed particularly closely because it is one of the main decisions on climate law. In it, the STF ruled, by a majority, that it is the duty of the Executive Branch to give full effect to the Climate Fund, avoiding contingency or omissions and allocating resources annually in order to mitigate climate change.

In order to fully clarify the ADPF, the purposes of the Climate Fund were explained, and the main votes in the constitutional action were analyzed, namely:

Justice Luis Roberto Barroso (rapporteur); Justice Edson Fachin (followed the rapporteur, but extended his vote); and Justice Nunes Marques (dissenting vote).

ADPF 708 reinforces the idea that environmental protection is a human rights issue, especially by recognizing the responsibility of the State to adopt effective measures against climate change. It also serves as an important precedent for other lawsuits seeking to hold the government and private entities responsible for environmental damage.

Furthermore, it can be reflected that this decision stimulates awareness of the importance of climate protection and the need for collective action. ADPF 708 represents a significant step forward and is a vital tool for improving climate conditions and promoting social and environmental justice.

It can be concluded that state climate litigation has been used in many countries, including Brazil, and it aims to hold governments, private companies and other polluters responsible for the negative changes the planet is facing.

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