

# **BRAZIL'S CLIMATE ACTIONS CAN BECOME A TIPPING POINT FOR THE ENFORCEMENT OF INTERNATIONAL ENVIRONMENTAL LAW**

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The current Brazilian Federal Government has been dismantling the structure for the protection of the environment that has been put together in the past twenty years, by freezing national funds, firing the personnel responsible for the surveillance of protected forest areas and by speaking in favor (therefore incentivizing) the reduction of indigenous land and protected areas. In this context, different lawsuits have been filed before the Federal Supreme Court, aiming at *i)* impeding further dismantling of national structures; *ii)* restoring federal efforts towards preserving the environment and *iii)* recognizing the *conditioning* of Brazil's environmental public policies to its commitments on the matter at the global level.

I have so far identified eight major lawsuits (by the end of the post I offer a charter with all cases), all filed by a group of center-left and leftwing political parties before the Federal Supreme Court, having as objects the actions and omissions of the Federal Government regarding its duty to preserve the environment, the climate and the national structures oriented towards environmental protection. Two of these lawsuits are, for theoretical reasons, the ones that interest us the most from the perspective of international law. They are the ADPF n° 708, filed on June 30<sup>th</sup> 2020 and the ADPF n° 760, filed on November 12<sup>th</sup> 2020. On a side note, it is important to mention that two other noteworthy cases have been filed before the federal courts of the States of Amazonas and Paraná, North and South regions respectively, which means that, symbolically speaking, there are climate related lawsuits pending in three out of five national regions so far.

Back to the Federal Supreme Court cases: ADPF translates, literally, “arguing for the transgression of a fundamental precept and it is the procedural instrument to be invoked, when in absence of a specific type of action, to avoid and/or repair the violation of fundamental rights provisions of the Brazilian Constitution (art. 102, §1º; Law n° 9.882/99). Both ADPFs seek to

repair the damages already done and to avoid further damages by the Federal Government, whom did not abide by the existing normative framework on matters of environmental protection from deforestation and mitigation of the effects of climate change.

The ADPF n° 708, seeks to declare as unconstitutional the Government's omission to release the national "Climate Fund", which has so far strangled activities aimed at mitigating the harms of climate change. The ADPF n° 760, in turn, seeks a writ to command the Government to fulfill its duty to apply the "Action Plan for Prevention and Controlling of Amazon Deforestation" (PPCDAm), for it has not been employed in the past two years, thereby blocking all national measures aimed at preventing deforestation of the Amazon forest.

Both lawsuits go beyond the invocation of the relevant national normative framework and argue, in a nutshell, that when it comes to deforestation prevention and climate change mitigation, Brazil has a commitment not only to itself, under Article 225 of the Constitution, but also with (and to) the international sphere. In order to do so, the plaintiffs invoked *i*) the Paris Agreement; *ii*) the United Nations' Sustainable Development Goals; *iii*) the "Rio Declaration on Environment and Development" of 1992; *iv*) the UN's Framework Convention on Climate Change and the UN's Intergovernmental Panel on Climate Change and; *v*) the UN's Convention on the Rights of the Child.

The plaintiffs argue that the current Federal Government's actions and omissions are not only blatantly harmful to the environment immediately situated on the Brazilian territory but also deleterious beyond national borders for they accelerate climate change. As a consequence, it is argued, they are not only precluded by the domestic law but also by international law. That is, the Federal Government's (in)actions violate both the national and international normative frameworks. This brings up the composite character of the normativity of the cases at hand, shedding light at the intertwinement between legal spheres.

Said "composite character" images the entanglement of the national and international legal spheres, which, in the present cases, is being argued by the plaintiffs through, on the one hand, the weaving of the preservation of the forest and the mitigating of climate change as *sine qua non* conditions to guarantee the fundamental rights (for example, of the next generation of children, indigenous people and the ecologically balanced environment) under the Brazilian

Constitution, and on the other, the fulfilment of the country's international commitments and the conditioning that these – i.e. the commitments – play within the domestic sphere.

That is, the *conditioning* of the domestic legality (the normative production and interpretation and the public policies pursued) by the extra-State legality, for the latter serves in various ways as a parameter for the establishing (and concretization) of the former. A way to understand the relationship between the legal orders at stake, all the while fully considering the above mentioned composite character of the law, can be pursued through the “[inter-legality perspective](#)”, which considers “the overlapping among regimes and orders as a consequence of interconnectedness” (Palombella, 2019, p.468).

Said perspective is the effort to understand the ever-more complex character of the law in the twenty-first century or, in other words, “the unavoidable interconnectedness of legalities” (Palombella, 2019, p. 366). For such reason, it might be essential to adjudicate the two ADPF's, since the interconnectedness at stake is not only normative, but also factual, because international environmental laws and agreements state not only legal rules, but also scientific facts on the current health state of the Earth. For such reasons, inter-legality can play a decisive role in the adjudication of the cases at issue.

So far, there has not been any definitive ruling in any of the Federal Supreme Court cases. Only minor procedural decisions, preliminary injunctions and the conduction of public hearings (on ADPFs n° 708) were released. On the latter, when determining the realization of the public hearing, Justice Barroso highlighted the importance of the case at hand by mentioning two rulings of the Inter-American Court of Human Rights ([Advisory Opinion OC-23/17](#) and [Indigenous Communities of the Lhaka Honhat Association v. Argentina](#)) and by somewhat reckoning the need to take into account international environmental law, which may indicate an openness of the Brazilian Supreme Court to further recognize the overlapping of regimes and orders in play.

It is important to take into account that the cases brought before the Federal Supreme Court will be the ones to set the tone for the future environmental and climate change lawsuits in the decade that has just began. Depending on their outcomes and on the legal reasoning they put forward, the two mentioned cases may become a tipping point for the interpreting of domestic environmental provisions and for the enforcing of international environmental law in Brazil.

LAWSUIT	DATE	AT ISSUE
<a href="#">ADPF 592</a>	14/06/2019	The annulment of the procedures that have practically extinguished civil penalties and administrative fines for the deforestation of protected areas, created through presidential decree (n° 9.760/19).
<a href="#">ADO 54</a>	23/08/2019	The declaration of an unconstitutional omission (for inactivity) on the part of the President and the Minister of the Environment regarding the amazon forest's protection, with the consequent injunction to obligate them to act within the existing legal framework.
<a href="#">ADPF 623</a>	16/09/2019	Restoring the public and civil society's participation on the National Environmental Council (CONAMA), through the declaration of unconstitutionality of the presidential decree (n° 9.806/19) that excluded them from it.
<a href="#">ADO 59</a>	05/06/2020	The declaration of an unconstitutional omission by the Federal Government for not releasing the "Amazon Fund" budget, since 2019 (therefore impeding activities in benefit of the forest and the environment), with the consequent release of said funds.
<a href="#">ADPF 708</a>	30/06/2020	The declaration of an unconstitutional omission by the Federal Government for not releasing the "Climate Fund" budget, since 2019 (therefore impeding all activities to mitigate the effects of climate change), with the consequent release of said funds, <u>so the country can meet its commitments on the legalized global space regarding climate change.</u>
<a href="#">ADPF 747</a>	30/09/2020	The declaration of unconstitutionality of the resolution n° 500/20 of the National Environmental Council (CONAMA), which has greatly dropped environmental protection standards on "permanently protected areas" throughout the country.
<a href="#">ADPF 755</a>	22/10/2020	The restoring of the environmental organs' sanctioning powers, on matters of environmental crimes and administrative rules' violations, which have been paralyzed by presidential decree (n° 9.760/19).
<a href="#">ADPF 760</a>	12/11/2020	The application of the PPCDAm, in order to achieve the national goals of deforestation prevention planned for 2021 and the <u>fulfilment of the climate goals assumed in the international sphere.</u>

**Reference:** PALOMBELLA, G. *Theory, Realities, and Promises of Inter-Legality: A Manifest.*

*In:* KLABBER, Jan; PALOMBELLA, Gianluigi. *The Challenge of Inter-legality.* Cambridge University Press. 2019.