HUMAN RIGHTS AND CLIMATE CHANGE FOR CLIMATE LITIGATION IN BRAZIL AND BEYOND: AN ANALYSIS OF THE *CLIMATE FUND* DECISION

MARIA ANTONIA TIGRE* AND JOANA SETZER†

ABSTRACT

In 2022, the Brazilian Supreme Court announced a groundbreaking decision in the Climate Fund *case. The decision, rendered amidst a challenging political climate, acknowledges the significance of the Paris Agreement within the country's legal framework. The Court's ruling established that the executive branch has a constitutional obligation to allocate funds from the Climate Fund for climate change mitigation and adaptation, grounded in the constitutional right to a healthy environment, international rights and commitments, and the principle of separation of powers.*

Notably, the Court recognized the Paris Agreement as a human rights treaty, granting it "supranational" status. The implications of the decision are far-reaching, including the potential influence on climate litigation cases in Brazil and other jurisdictions that similarly recognize the constitutional right to a healthy environment. However, the lack of visibility of the decision beyond Brazil hinders the advancement and understanding of global climate litigation trends.

This Article aims to address this gap by providing an in-depth analysis of the Climate Fund *decision, its implications, and its role in shaping rights-based climate litigation in Brazil and beyond. The Article adopts a comparative perspective to analyze trends in climate litigation, examining the rights and duties recognized by the Brazilian Supreme Court and their broader implications at national,*

* Director, Global Climate Litigation, Sabin Center for Climate Change Law at Columbia Law School.

† Assistant Professorial Research Fellow, Grantham Research Institute on Climate Change and the Environment. London School of Economics and Political Science. *Joana Setzer acknowledges support from the Grantham Research Institute on Climate Change and the Environment, at the London School of Economics and Political Science.*

The authors would like to thank Robert Larese, J.D. Candidate at Columbia Law School, for helpful research assistance and Isabela Keuschnigg for support with editing and formatting. Our thanks to the editors and staff of the *Georgetown Journal of International Law* and the organizers and participants of the symposium "International Rights-Based Climate Litigation: Emerging Hard Law" (Georgetown University, March 24, 2023). Finally, we extend our gratitude to the participants of the "Climate Change Litigation in the Global South Workshop" (National University of Singapore, May 22-23, 2023) for their helpful suggestions.

regional, and global levels. It argues that the decision marks the beginning of a new phase in climate litigation in Brazil and establishes critical precedents regarding the interpretation of the Paris Agreement, the human rights duty to mitigate greenhouse gas (GHG) emissions, and the role of judicial oversight in implementing the agreement. It also sheds light on Brazil's role as a hub for global climate litigation, showcasing procedural advancements, innovative cases, and influential rulings that have the potential to inspire litigants and courts worldwide.

I. INTRODUCTION

In July 2022, the Supremo Tribunal Federal (STF), Brazil's highest constitutional court (i.e., its Supreme Court), rendered an unprecedented ruling, acknowledging the significance of the Paris Agreement within the country's legal framework (in *PSB et al. v. Brazil* (on the Climate Fund)).[1] The case at hand, referred to here as the *Climate Fund* case, challenged the suspension of the Climate Fund, a financial mechanism established by national law that provided funds for climate

1. Supremo Tribunal Federal [S.T.F.] [Supreme Federal Tribunal], Arguição de Descumprimento de Preceito Fundamental [ADPF] 708, Relator: Min. Roberto Barroso, 04.07.2022, 194, D.J.e, 28.09.2022, 1 (Braz.), http://climatecasechart.com/non-us-case/psb-et-al-v-federal-union/; Paris Agreement to the United Nations Framework Convention on Climate Change, Dec. 12, 2015, T.I.A.S. No. 16-1104 [hereinafter Paris Agreement].

change mitigation and adaptation projects.[2] In a ten-to-one ruling, the Court determined that the executive branch has a constitutional obligation to allocate funds from the Climate Fund for climate change mitigation and could not refuse to implement a measure that was mandated by legislation.[3] This duty is grounded in the constitutional right to a healthy environment, the obligation to fulfill international rights and commitments, and the principle of separation of powers.[4] Significantly, the Court, for the first time in global climate change litigation, recognized the Paris Agreement as a human rights treaty.[5]

The majority decision came during a challenging political period, with Jair Bolsonaro serving as Brazil's president.[6] Bolsonaro's presidency was characterized by a series of setbacks in environmental and climate policy, including the suspension of the Amazon Fund, which provided funds for anti-deforestation efforts in the Amazon rainforest, and the Climate Fund, which supported projects related to mitigation and adaptation.[7] *Climate Fund* was added to the STF's "Green Docket," a collection of seven environmental and climate-related cases that addressed rollbacks in environmental rights, human rights, and climate protection during the Bolsonaro administration.[8] The Supreme Court's

2. PSB et al. v. Brazil (on Climate Fund), SABIN CTR. FOR CLIMATE CHANGE L., http://climatecasechart.com/non-us-case/psb-et-al-v-federal-union/.

3. Duda Menegassi, *Em vitória histórica, STF reconhece proteção do clima como dever constitucional* [*In Historic Victory, STF Recognizes Climate Protection as a Constitutional Duty*], O ECO (July 1, 2022), https://oeco.org.br/noticias/em-vitoria-historica-stf-reconhece-protecao-do-clima-como-dever-constitucional/.

4. S.T.F., ADPF 708, *supra* note 1; *see* CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] arts. 2, 5, 225; *see also* Lei No. 101, de 4 de Maio de 2000, Diaário Oficial da Uniaão [D.O.U.] de 4.5.2000, art. 9 ¶ 2, available at https://www.planalto.gov.br/ccivil_03/leis/lcp/lcp101.htm.

5. *See* S.T.F., ADPF 708, supra note 1; *see also* Isabella Kaminski, *Brazilian Court World's First to Recognise Paris Agreement as Human Rights Treaty*, CLIMATE HOME NEWS (Jul. 7, 2022, 11:47 AM), https://www.climatechangenews.com/2022/07/07/brazilian-court-worlds-first-to-recognise-paris-agreement-as-human-rights-treaty/.

6. Meghie Rodrigues, *Bolsonaro's Troubled Legacy for Science, Health and the Environment*, NATURE (Sept. 27, 2022, https://www.nature.com/articles/d41586-022-03038-3.

7. Nick Ferris, *What Four Years of 'Non-Existent' Climate Action Has Done to Brazil*, ENERGY MONITOR (Sept. 29, 2022), https://www.energymonitor.ai/policy/bolsonaro-what-four-years-of-non-existent-climate-action-has-done-to-brazil/?cf-view; Lisa Viscidi & Nate Graham, *Brazil Was a Global Leader on Climate Change. Now It's a Threat*, FOREIGN POLICY (Jan. 4, 2019), https://foreignpolicy.com/2019/01/04/brazil-was-a-global-leader-on-climate-change-now-its-a-threat/; Jeff Goodell, *What to Do About Jair Bolsonaro, the World's Most Dangerous Climate Denier*, ROLLINGSTONE (June 9, 2021), https://www.rollingstone.com/politics/politics-features/jair-bolsonaro-rainforest-destruction-1180129/.

8. Andrea Carvalho, *Brazil Court Reviews Bolsonaro's Environmental Policies*, HUM. RTS. WATCH (Apr. 12, 2022 5:00AM EDT), https://www.hrw.org/news/2022/04/12/brazil-court-reviews-bolsonaros-environmental-policies. For the list of the seven cases, see S.T.F., ADPF 760, Relator: Min. Cármen

decision to adjudicate these lawsuits as a coordinated effort has been understood as a response to a significant mobilization by civil society, led by Non-Governmental Organizations (NGOs), artists, and lawyers,[9] against an "unconstitutional state of [environmental and climate] affairs" that was present in Brazil at the time.[10]

The decision carries substantial implications for Brazil, granting "supranational" status to the country's obligations under the Paris Agreement.[11] This Article shows that, as a direct consequence of the decision, any Brazilian law or decree that contradicts the Paris Agreement can now be invalidated based on this constitutional interpretation. The decision also provides valuable lessons for climate change litigation, including the recognition of the Paris Agreement as a human rights treaty, the duty to mitigate GHG emissions, and challenges related to the separation of powers. Procedurally, it introduces innovative legal approaches that could serve as examples within Latin America and beyond, such as the involvement of political parties as plaintiffs in litigation and the unprecedented public hearing featuring a wide range of climate experts who provided the justices with scientific insights and facts related to climate change. Within Brazil, this victory is significant for climate advocates and provides lawyers with a crucial precedent to combat climate change.

Although reporting on the subject has been limited, there has been some international coverage of the decision. For example, one report highlighted that the Brazilian Court was "the first in the world to recogni[z]e the Paris Agreement as a human rights treaty,"[12] acknowledging the significant implications for national and international law. In the Brazilian media, the decision was considered a historical climate

Lúcia, 06.04.2022, 70, Diário da Justiça Eletrônico [D.J.e.], 08.04.2022; S.T.F., ADPF 735, Relator: Min. Cármen Lúcia, 16.11.2022, D.J.e., 09.12.2022; S.T.F., ADPF 651, Relator: Min. Cármen Lúcia, 28.04.2022, 88, D.J.e., 06.05.2022; S.T.F., Ação Direta de Inconstitucionalidade por Omissão [ADO] 54, Relator: Min. Cármen Lúcia, 06.04.2022, 70, D.J.e., 08.04.2022; S.T.F., ADO 59, Relator: Min. Rosa Weber, 03.11.2022, 227, D.J.e., 10.11.2022; S.T.F., ADI 6148, Relator: Min. Cármen Lúcia, 05.05.2022, 93, D.J.e., 13.05.2022; S.T.F., Ação Direta de Inconstitucionalidade [ADI] 6808, Relator: Min. Cármen Lúcia, 28.04.2022, 88, D.J.e., 06.05.2022.

9. Nauê Bernardo Pinheiro de Azevedo, *Oficinas de clima e direitos humanos | Litigância Climática - #2*, YouTube (Mar. 14, 2023), https://www.youtube.com/watch?v=iypmT77_bMw.

10. Mauricio Gentil, *O estado de coisas inconstitucional ambiental na pauta do STF [The Unconstitutional Environmental State of Affairs on the STF Agenda],* INFONET (Apr. 6, 2022), https://infonet.com.br/blogs/mauriciomonteiro/o-estado-de-coisas-inconstitucional-ambiental-na-pauta-do-stf/"\h.

11. S.T.F., ADPF 708, Relator: Min. Roberto Barroso, 04.07.2022, 194, D.J.e, 28.09.2022, 1, 2 (Braz.) (citing Paris Agreement, *supra* note 1, and United Nations Framework Convention on Climate Change, May 9, 1992, S. Treaty Doc No. 102-38, 1771 U.N.T.S. 107 [hereinafter UNFCCC]).

12. Kaminski, *supra* note 5.

litigation ruling in the country.[13] However, unlike comparable high-profile decisions in rights-based climate litigation from the Global North, such as the Dutch Supreme Court's ruling in *Urgenda Foundation v. State of the Netherlands*[14] and the German Constitutional Court's decision in *Neubauer et al. v Germany*,[15] the decision from the Brazilian apex court, as is often the case with climate change decisions in the Global South, has not garnered equivalent media and scholarly attention and consequently lacks the same level of "popularity." Since the decision, few scholars have analyzed it and its implications for climate litigation.[16]

This situation carries practical implications for understanding and advancing global climate litigation, as a piece of the story is often missing in analyses of global trends. Progressive decisions from the Global South, which have the potential to influence and inspire similar rulings worldwide, often go unnoticed. Within this context, the Article addresses the lack of attention given to individual decisions from the Global South by offering an in-depth analysis of the *Climate Fund* decision and its implications for climate litigation in Brazil and beyond.

With the precedent established by the Supreme Court, other ongoing and future climate litigation cases in Brazil may experience more favorable outcomes. As of January 2024, there were fifteen climate cases pending before the Supreme Court,[17] five of which have already received interlocutory decisions.[18] These cases were part of a larger set of eighty climate litigation cases that have been identified in

13. Menegassi, *supra* note 3.

14. Hoge Raad Der Nederlanden [HR] [Supreme Court of the Netherlands] 20 december 2019, RvdW 2020, 19/0035 m.nt. (De Staat der Nederlanden/Stichting Urgenda) (Neth.).

15. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Mar. 24, 2021, 1 BvR 2656/18, http://www.bverfg.de/e/rs20210324_1bvr265618en.html.

16. *See, e.g.*, Leticia Albuquerque et al., *Emergência Climática e Direitos Humanos: o caso do Fundo Clima no Brasil e as obrigações de Direito Internacional*, 19(1) REVISTA DE DIREITO INTERNACIONAL [R.D.I.] 126 (2022); Danielle de Andrade Moreira et al., *Rights-Based Climate Litigation in Brazil: An Assessment of Constitutional Cases before the Brazilian Supreme Court*, 16(1) J. HUM. RTS. PRAC. 7 (2024); Maria Antonia Tigre, *Advancements in Climate Rights in Courts Around the World*, CLIMATE L.: SABIN CTR. BLOG (July 1, 2022), https://blogs.law.columbia.edu/climatechange/2022/07/01/advancements-in-climate-rights-in-courts-around-the-world/; Nauê Bernardo Pinheiro de Azevedo et al., *O Fundo Clima e as lições do Ministro Barroso*, MIGALHAS DE PESO (June 25, 2022, 12:36 AM), https://www.migalhas.com.br/depeso/368577/o-fundo-clima-e-as-licoes-do-ministro-barroso; Caio Borges, *STF reconhece Acordo de Paris como tratado de direitos humanos (e por que isso importa)*, RESET (July 4, 2022), https://www.capitalreset.com/stf-reconhece-acordo-de-paris-como-tratado-de-direitos-humanos-e-por-que-isso-importa/.

17. *Plataforma de Litigância Climática no Brasil* [*Climate Litigation Platform in Brazil*], JUMA, https://www.litiganciaclimatica.juma.nima.puc-rio.br/listagem/visualizar (last visited Jan 11, 2024).

18. *See* Moreira et al., *supra* note 16, 15.

Brazil.[19] The majority of the petitions were filed between 2020 and 2022, seeking to challenge deregulation efforts.[20] It is conceivable that climate litigation in Brazil will continue to expand even after changes in government, targeting both state and non-state actors through the use of innovative legal arguments.

In examining the Supreme Court's decision in *Climate Fund*, this Article adopts a comparative perspective, analyzing the case in light of trends in climate litigation worldwide. In particular, it assesses the rights and duties recognized by the Supreme Court and their significance at the national, regional, and global levels. The Article argues that the decision represents the beginning of a third phase in climate litigation in Brazil, establishing a critical precedent due to three distinct legal interpretations advanced by the Court: (1) recognizing the Paris Agreement as a human rights treaty, (2) establishing the duty to mitigate GHG emissions as a constitutional obligation, and (3) affirming the duty to implement the Paris Agreement through judicial oversight.

The Article makes a unique contribution to the growing understanding of global climate litigation in several ways. First, it contributes to the scholarship on climate litigation in the Global South. Although this scholarship has seen recent growth, it has not yet reached its full potential or achieved parity with the research focused on the Global North. Second, this Article enhances the understanding of rights-based climate litigation, particularly through the unique interpretation of the Paris Agreement presented in the *Climate Fund* case. Last, it builds on the limited scholarship on climate litigation in Brazil. In the most recent analysis of global climate litigation, the United Nations Environment Program (UNEP) has highlighted Brazil as one of the top ten jurisdictions in the world in the number of cumulative cases, excluding the United States and the EU.[21] In fact, the country is becoming a "hub" for global climate litigation, featuring innovative cases, procedural advancements, and rulings that have the potential to inspire and influence litigants and courts worldwide.[22] This role reinforces the position of Latin America as a region that is quietly leading a revolution in climate litigation.[23]

---

19. *Plataforma de Litigância Climática no Brasil*, *supra* note 17.

20. DANIELLE DE ANDRADE MOREIRA ET AL., BOLETIM DA LITIGÂNCIA CLIMÁTICA NO BRASIL – 2022, 3 (2022).

21. MICHAEL BURGER & MARIA ANTONIA TIGRE, SABIN CTR. FOR CLIMATE CHANGE L., COLUM. L. SCH. & UNEP, GLOBAL CLIMATE LITIGATION REPORT: 2023 STATUS REVIEW 19 (2023).

22. *See generally* Moreira et al, *supra* note 16.

23. *See generally* Maria Antonia Tigre et al., *Climate Litigation in Latin America: Is the Region Quietly Leading a Revolution?*, 14(1) J. HUM. RTS. & ENV'T. 67 (2023).

The Article is structured as follows. Following this introduction, Part II analyzes the *Climate Fund* case, exploring the arguments presented by the parties and the Court's decision. Part III situates the decision in the context of the development of climate change litigation in Brazil. Part IV places the decision within the larger context of global climate litigation from a comparative perspective. Part V concludes.

II. The *Climate Fund* Case: Development and Legal Reasoning of the Court

This part delves into the background of the *Climate Fund* case. Section A provides a factual background on the Climate Fund itself, explaining the financial mechanism of climate policy under Brazilian law. Section B analyzes the arguments made by the plaintiffs, noting, when relevant, the counter-arguments presented by the government. Section C notes the public hearing held by the Court, which provided for a unique and innovative process of ensuring broad public participation. Finally, Section D provides the Court's rationale for the decision.

A. *The Climate Fund: Factual Background*

The National Climate Change Fund (*Fundo Nacional sobre Mudança do Clima*),[24] known as the Climate Fund *(Fundo Clima)*, was created in 2009 by Federal Law No. 12,114/2009.[25] It is a financial instrument central to the National Policy on Climate Change (PNMC), which recognizes the importance of financial and economic tools to promote climate change mitigation and adaptation.[26] As such, the Fund is directly associated with a low-carbon strategy of the Brazilian economy.[27] The Climate Fund ensures that resources are made available to support projects or studies and finance activities to mitigate GHG emissions and adapt to climate change.

From 2010 to 2022, the Climate Fund, established under the Ministry of Environment, received a total of R$4,36 billion (equivalent to USD

24. *Fundo Clima*, O banco nacional do desenvolvimento (BNDES), https://www.bndes.gov.br/wps/portal/site/home/financiamento/produto/fundo-clima (last visited July 3, 2023); *Fundo Nacional sobre Mudança do Clima*, Ministério do Meio Ambiente e Mudança do Clima, https://www.gov.br/mma/pt-br/acesso-a-informacao/apoio-a-projetos/fundo-nacional-sobre-mudanca-do-clima (last visited July 3, 2023).

25. Lei No. 12.114, de 9 de Dezembro de 2009, Diário Oficial da União [D.O.U.] (Braz.).

26. Lei No. 12.187, de 29 de Dezembro de 2009, D.O.U. (Braz.).

27. Ronaldo Seroa da Motta, *Eficácia e Focalização do Fundo Nacional sobre Mudança do Clima*, *in* STF E As Mudanças Climáticas: Contribuições para o Debate sobre o Fundo Clima 271, 271 (Caio Borges & Pedro Henrique Vasques eds., 2021).

827,854 million).[28] Resources from the Climate Fund arise from a variety of sources, including taxes related to royalties of oil and natural gas; appropriations from the federal government's annual budget; resources from agreements, adjustments, and contracts celebrated with organs and entities of the federal, state, district, or municipal administration; donations made by national and international entities, public or private entities; loans from national and international financial institutions; and resources from interest and amortization of financing, among others.[29] However, only R$564 million (equivalent to USD 107 million) was directed to specific projects, amounting to thirteen percent of the available resources.[30] The Climate Fund was—even prior to the Bolsonaro administration—"under-utilized."[31] From 2019 to 2022, these external sources of funds were thwarted, partly due to Bolsonaro's overall demeanor toward climate change.[32]

As noted by Flavia Witkowski Frangetto and Linda Murasawa, the Climate Fund is not a goal in and of itself.[33] Rather, it is a means to foster strategies of mitigation and adaptation.[34] Resources from the Climate Fund can be applied to:

(i) education, capacity building, training, and mobilization in the area of climate change;
(ii) climate science and impact and vulnerability analysis;
(iii) adaptation of society and ecosystems to the impacts of climate change;
(iv) projects for the reduction of GHG emissions;
(v) projects for the reduction of carbon emissions from deforestation and forest degradation, prioritizing threatened natural areas and areas relevant to biodiversity conservation strategies;

28. INSTITUTO DE ESTUDOS SOCIOECONÔMICOS (INESC), #03 FUNDO NACIONAL SOBRE MUDANÇA DO CLIMA: GOVERNANÇA, RECURSOS, GESTÃO E DESAFIOS 13 (2022).

29. Lei No. 12.114, de 9 de Dezembro de 2009, D.O.U. (Braz.).

30. INESC, *supra* note 28, at 13.

31. Flavia Witkowski Frangetto & Linda Murasawa, *Além do Caso da Voz Isolada no Fundo Clima: um Parâmetro para Manutenção e Busca de Soluções*, *in* STF E AS MUDANÇAS CLIMÁTICAS: CONTRIBUIÇÕES PARA O DEBATE SOBRE O FUNDO CLIMA 279 (Caio Borges & Pedro Henrique Vasques eds., 2021) ("Percebemos *subutilização*, para não dizer retração, do Fundo Clima.") (emphasis added).

32. *Id.*

33. *Id.* at 287 ("o Fundo Clima não pode ser tomado como um fim por si só.").

34. *Id.*

(vi) development and diffusion of technology for the mitigation of GHG emissions;
(vii) formulating public policies targeting mitigation of GHG emissions;
(viii) research and creation of projects, inventory systems, and methodologies to reduce net GHG emissions and emissions from deforestation and land use change;
(ix) development of products and services contributing to environmental conservation and stabilization of GHG concentrations;
(x) support for sustainable productive chains;
(xi) payments for environmental services to communities and individuals whose activities contribute to carbon storage, linked to other environmental services;
(xii) agroforestry systems that contribute to the reduction of deforestation, carbon sinks, and income generation; and
(xiii) recovery of degraded areas and forest restoration, prioritizing legal reserves, permanent preservation areas, and priority areas for the generation and quality assurance of environmental services.[35]

Priority projects related to climate mitigation and adaptation include:

(i) environmentally appropriate disposal of solid waste, including reuse, recycling, composting, co-processing, recovery, energy utilization, and final disposal in landfills, as well as the closure of open dumps;
(ii) methods for soil disposal such as the efficient collection of biogas and its combustion or use of energy in landfills and wastewater treatment plants;
(iii) basic sanitation, drinking water, sewage, urban cleaning, solid waste management, drainage, and stormwater management, and the cleaning and supervision of urban networks;
(iv) urban mobility and efficient low-carbon transportation;
(v) pollution control and air quality monitoring; and
(vi) creation, recovery, and expansion of green urban areas.[36]

If the resources available in the Climate Fund are not properly allocated (or allocated at all), the Fund enters an "identity crisis," as it

35. Decreto No. 9.578, art. 7, de 22 de Novembro de 2018, D.O.U. (Braz.).
36. *Id.*

cannot comply with its mandate or fulfill its function.[37] However, information on fund allocation, available resources, and follow-up activities is incomplete and inconsistent. A study published in 2022 by the Brazilian NGO Institute for Socioeconomic Studies (INESC) noted that the Climate Fund lacks full transparency as to the criteria and strategies of allocation of resources, including about specific sectors and priority areas, or alignment with the goals of the PNMC and its sectoral plans.[38] There is also a lack of continuity between the established directives and priorities for the allocation of resources. Furthermore, there is no monitoring of the results from the supported activities or evaluation of how these have contributed to reaching the goals set out in Brazil's nationally determined contribution (NDC).[39] These aspects worsened with the reduction of the mandate and the composition of the committee managing the Climate Fund.[40] This makes a comparison between periods and an analysis of the overall governance of the Climate Fund challenging. INESC further noted that it was not possible to understand the project selection strategy according to indicators and analysis of climate additionality and positive climate impact, as per the NDC and Paris Agreement goals.[41] From 2020 onwards, under the Bolsonaro administration, the available plans have been consistently less detailed.[42]

The study conducted by INESC notes that as of August 2022, there are six climate litigation cases related specifically to the Climate Fund, including pending cases at state and regional levels, including the case analyzed here.[43] The withholding of resources from the Climate Fund—a recurring practice—is largely associated with fiscal issues.[44] For several years (2012, 2014, 2015, 2016, and 2019), there were no transfers to Brazil's development bank, the National Bank for Development (BNDES), which makes up most of the Climate Fund's budget execution.[45] The goal of the Climate Fund, which was to maintain a rich and stable source of funds for climate mitigation and adaptation, has

37. Frangetto & Murasawa, *supra* note 31, at 287 ("críticas de 'identidade'").
38. INESC, *supra* note 28, at 9.
39. *See* Seroa da Motta, *supra* note 27, at 271-72.
40. *Id.*
41. INESC, *supra* note 28, at 10.
42. *Id.*
43. *Id.* at 13.
44. *Id.* at 14.
45. *Id.*

therefore not been fulfilled. The projects financed so far have not, together, had a significant climate impact on achieving the goals of the Brazilian NDC.[46]

Indeed, the Climate Fund has had limited application of its financial resources for several years, not only under the Bolsonaro administration. However, a few factors after Bolsonaro took office have contributed to the Climate Fund being further dismantled, leading to an argument about its "paralyzation" and the filing of the constitutional action analyzed in this Article. First, Bolsonaro's administration was characterized by a general "denial" of environmental and climate policies. As noted above, this factor alone has fueled climate change litigation in Brazil, challenging Bolsonaro's (lack of) policies and the overall dismantling of the environmental governance structure at the federal level.

Second, an executive decree from 2019 altered the Climate Fund's steering committee, reducing civil society's participation and privileging representatives from the corporate sector.[47] According to the plaintiffs, the Fund's revised governance failed to include broad participation of a range of communities, including members of the scientific community, NGOs, rural workers or traditional rural communities, urban workers, and representatives of states and municipalities.[48] Suely Araújo notes that the changes in the steering committee may justify the government's inaction in 2019 as it pertains to the allocation of funds.[49] Months after these changes, the government had not yet called for the steering committee to meet.[50] A report from the Brazilian Senate on the national policy on climate change further attested to this paralyzation.[51]

Third, a 2019 executive decree further altered the priority areas detailed in the regulation of the Climate Fund, allowing for the resources to be directed to urban projects, including solid waste management

46. *Id.* at 24.

47. *See* Decreto No. 10.143, de 28 de Novembro de 2019, D.O.U. (Braz.).

48. PSB v. Brazil (on the Climate Fund), Initial petition, filed June 05, 2020, at 14., https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2020/20200605_ADPF-708_petition.pdf.

49. *See* Suely Araújo, *Quando a Opção do Governo é não fazer: Origem e Desafios da ADPF N. 708*, *in* STF E AS MUDANÇAS CLIMÁTICAS: CONTRIBUIÇÕES PARA O DEBATE SOBRE O FUNDO CLIMA 295, 296 (Caio Borges & Pedro Henrique Vasques eds., 2021).

50. *See generally* SENADO FEDERAL [FEDERAL SENATE OF BRAZIL], COMISSÃO DE MEIO AMBIENTE: AVALIAÇÃO DA POLÍTICA NACIONAL SOBRE MUDANÇA DO CLIMA SUMÁRIO EXECUTIVO (Dec. 2019), http://legis.senado.leg.br/sdleg-getter/documento/download/c002f430-7ece-4ccb-aad3-9247f62713ab.

51. *See id.*

and sewage systems.[52] While these areas certainly need resources and attention in Brazil, the allocation of all resources directed to an area responsible for four percent of GHG emissions in Brazil is questionable.[53] The Brazilian Senate questioned the legality of these changes, noting that by introducing new priority areas, the decree modified the legislator's intent, which is beyond its competence.[54]

Araújo notes that pinpointing why the Climate Fund was paralyzed is difficult to ascertain.[55] However, a year and a half after Bolsonaro took office, the Climate Fund was effectively inoperative.[56] Funds (authorized in the country's fiscal regulation laws) were not allocated, the annual plan on how to apply the available resources was not presented, and no steering committee meeting took place.[57] This scenario led to several political parties filing the *Climate Fund* case.[58]

B. *Claims by the Plaintiffs*

On June 5, 2020, four political parties, Partido Socialista Brasileiro (PSB), Partido Socialismo e Liberdade (P-SOL), Partido dos Trabalhadores (PT), and Rede Sustentabilidade filed a Direct Action of Unconstitutionality for Omission ("*ação direta de inconstitucionalidade por omissão*" or ADO)[59] before the STF to challenge the Federal Union's alleged failure to adopt administrative measures concerning the Climate

52. Decreto No. 10.143, de 28 de Novembro de 2019, D.O.U. (Braz.).

53. Renata Fragoso Potenza et al., Sistema de Estimativas de Emissões e Remoções de Gases de Efeito Estufa, Análise das Emissões de Gases de Efeito Estufa e suas Implicações para as Metas Climáticas do Brasil 3 (2023), https://seeg.eco.br/wp-content/uploads/2023/03/SEEG-10-anos-v4.pdf (noting that waste accounted for 4% of the country's gross greenhouse gas emissions in 2021).

54. Senado Federal, *supra* note 50, at 6.

55. *See* Araújo, *supra* note 49, at 297.

56. *See* Annelise Monteiro Steigleder, *Estado de Coisas Inconstitucional e a ADPF n. 708: Um Olhar para o Financiamento das Políticas Públicas*, *in* STF e as Mudanças Climáticas: Contribuições Para o Debate Sobre o Fundo Clima 317, 322 (Caio Borges & Pedro Henrique Vasques eds., 2021) ("o Fundo Clima teria ficado inoperante ao longo do ano de 2019[.]")

57. *Id.* at 322-23.

58. Araújo, *supra* note 49, at 297.

59. The plaintiffs noted in their petition that the interpretation of the jurisprudence of the Supreme Court was unclear on whether a direct action of unconstitutionality for omission (ADO) or a petition of non-compliance with a fundamental precept (ADPF) was the proper constitutional control measure in this case. *See* PSB et al. v. Brazil (on the Climate Fund), Initial petition, *supra* note 48, at 38. Justice Barroso later changed the type of measure from an ADO to an ADPF, which was requested by the plaintiff as a subsidiary request in case that was the character of the case as interpreted by the Court. PSB v. Brazil, S.T.F., July 1, 2022, ADPF 708. An analysis of the constitutional control cases is beyond the scope of this article.

Fund.[60] The plaintiffs sought a declaration of "unconstitutional omission" against the paralysis of the Fund's operations and governance and an injunction compelling the government to reactivate the Climate Fund.[61]

In a pivotal publication on constitutional control in the Brazilian legal system, Minister Luís Roberto Barroso elucidated the function of constitutional control cases and highlighted their crucial role in upholding the cohesion of the judicial system.[62] Barroso emphasized that whenever a law is put into effect, a crucial examination ensues to determine its constitutionality. According to this decision, in order to undertake such constitutional control, two indispensable premises are identified: (i) the paramount nature of the Constitution as the highest norm within a legal framework, and (ii) the inflexible nature of the Constitution, serving as a yardstick for the validity of other norms.[63] At the heart of constitutional control cases lies the safeguarding of fundamental rights, which are regarded as shared societal values that demand protection against potential threats.

In the Brazilian legal system, a rich array of procedural mechanisms exist to ensure scrutiny of public acts to determine their constitutionality and to safeguard fundamental rights.[64] Supreme Court Minister Gilmar Mendes, a prominent scholar on constitutional control, underscores that the Brazilian Constitution adopts an abstract model of constitutional control, empowering the Supreme Court with the authority to adjudicate autonomous cases that involve constitutional controversies.[65] These types of cases enjoy wide standing, allowing various entities to bring them before the Court. Notably, the process is characterized by expeditiousness, as it permits the immediate precautionary suspension of the effects of the norm in question.

---

60. PSB et al. v. Brazil (on the Climate Fund), Initial petition, *supra* note 48, at 2.

61. *Id.* at 37.

62. Luís Roberto Barroso, O Controle de Constitucionalidade no Direito Brasileiro 23 (9th ed. 2022).

63. *Id.* at 34.

64. For abstract control of constitutionality, there are four types of cases available: ação direta de inconstitucionalidade (ADI or direct action of unconstitutionality), ação direta de inconstitucionalidade por omissão (ADO or direct action of unconstitutionality by omission), ação declaratória de constitucionalidade (ADC or declaratory action of constitutionality) and argüição de descumprimento de preceito fundamental (ADPF or allegation of non-compliance with a fundamental precept). *See id.* at 223-358.

65. Gilmar Mendes, O Controle de Constitucionalidade no Brasil 5 (2008), https://drive.google.com/file/d/0B8rTMOms9wLnVlVlYUs5clZBOUE/view?resourcekey=0-f79avPFVeBh1mr-R459kog.

The case under examination, involving political parties and the inaction of the federal government on climate action, is situated within this context, necessitating judicial scrutiny and an evaluation of the judiciary's role in maintaining checks and balances among the various branches of government.

As recalled by the plaintiffs and explained in the former section, the Climate Fund had been inoperative since 2019.[66] The plaintiffs asserted that Brazil's executive government, under President Bolsonaro's administration, failed to fulfill climate-related obligations and adhere to existing national policies mandated by federal law despite the availability of sufficient funds for these endeavors. This dereliction of duty by the federal government concerning the management of the Climate Fund occurred within a broader context of non-compliance with climate obligations and established national and international policies, consequently exacerbating deforestation in Brazil.[67] Notwithstanding Brazil's international commitments outlined in its NDC, the government implemented a series of measures that dismantled forest policies and impeded deforestation control efforts.[68] By citing a sequence of new legislation and policies enacted during the relevant period, the plaintiffs emphasized the substantial rise in deforestation rates, resulting in human rights violations and an upward trajectory of forest fires.[69]

The central focus of the political parties' arguments revolves around the glaringly unconstitutional failure to adopt the necessary administrative measures as mandated by law.[70] Specifically, the financial resources in question were affiliated with the Ministry of the Environment, which bears a legal obligation to allocate them within its annual budget for financing projects or studies aimed at mitigating climate change.[71] It is crucial to emphasize that these funds were abundantly available, leaving no room for contention regarding the absence of financial means to implement climate policies.[72] Quite the opposite, the resources were readily accessible, and additional commitments from international governments were reneged upon due to the government's inaction.[73]

According to the assertions made by the plaintiffs, this omission, which they contended represented an unexplained contingency of

66. PSB et al. v. Brazil (on the Climate Fund), Initial petition, *supra* note 48, at 21.

67. *See* Albuquerque et al., *supra* note 16, at 128.

68. *See generally* Adriano Ramos, *Amazônia sob Bolsonaro,* 70 AISTHESIS 287 (2021).

69. *See* PSB et al. v. Brazil (on the Climate Fund), Initial petition, *supra* note 48, at 5-6.

70. *See id.* at 8, 22–30.

71. *See id.* at 23.

72. *See id.* at 18.

73. *See id.* at 6-7.

resources, constituted a direct infringement upon the constitutionally guaranteed right to a healthy environment and the accompanying constitutional obligations pertaining to environmental protection.[74] Specifically, the plaintiffs argued a violation of Article 225 of the Federal Constitution, which (i) establishes the right to a healthy environment and enunciates the state's duties to preserve and restore ecological processes, (ii) promotes the ecological management of ecosystems, (iii) designates specially protected territorial spaces and their components, and (iv) safeguards fauna and flora.[75]

The plaintiffs further highlighted that the Brazilian Constitution mandates that the federal government, in conjunction with state governments and municipalities, collectively undertake the responsibilities to (i) safeguard the environment and combat pollution in all its forms and (ii) preserve forests, fauna, and flora.[76] By failing to fulfill its obligations, the federal government's omission had repercussions on states and municipalities. Consequently, the burden of environmental protection fell disproportionately on the latter entities due to the federal government's failure to fulfill its joint responsibility.

The non-utilization of these resources contradicted the legal, constitutional, and political duty to allocate funding for climate policies. This omission assumes a more critical significance within the backdrop of the COVID-19 pandemic, as predicted by the plaintiffs, wherein state and municipal governments faced budget cuts pertaining to environmental protection amidst a profound economic crisis. Last, the failure to mobilize the available resources for climate mitigation imperils compliance with the Paris Agreement.

According to Letícia Albuquerque et al., the omissions committed by the government reflect an overarching framework of regression and inadequate safeguarding of ecosystems and crucial ecological processes, thus violating the Constitution.[77] This argument draws upon the institutional context characterized by the dismantling of environmental institutions and climate change-related public policies, coupled with a significant upsurge in deforestation and forest fires. Consequently, this contributes to a national landscape characterized by a dearth of transparency and control over the requisite measures to mitigate GHG emissions in Brazil.[78]

74. *See id.* at 2.
75. *Id.*; C.F. art. 225.
76. C.F. art. 23.
77. Albuquerque et al., *supra* note 16, at 133.
78. *Id.* at 134.

Regarding the requested remedies, the petition sought an injunction mandating the Federal Union to undertake specific administrative actions.[79] First, it sought the reactivation of the Climate Fund's operations, along with the availability of resources pertaining to the Fund.[80] Second, it demanded that the Federal Union, through the Ministry of Environment, prepare and present appropriate annual plans for the allocation of the Fund's resources.[81] Last, it entreated the Federal Union to desist from imposing any new contingencies on the resources of the Climate Fund in future budgets.[82] As for the final remedies, the plaintiffs called on the Court to confirm the precautionary measures and declare the unconstitutional nature of the omissions made by the federal government with regard to the proper functioning of the Climate Fund.[83]

C. *Innovations in Public Participation: The Public Hearing*

The preliminary ruling issued by the Supreme Federal Court encompassed several key aspects. First, an urgent procedure was adopted for the action, ensuring an expeditious handling of the case.[84] Second, the governmental actors involved were summoned to participate in the proceedings.[85] Third, the action was admitted as an Argument for Failure to Comply with a Fundamental Precept (ADPF), a constitutional procedure aimed at enforcing the principles and values enshrined in the Constitution.[86] Last, a public hearing was scheduled for September 21 and 22, 2020, with a deadline set for interested parties to express their intention to participate by August 10, 2020.[87] This preliminary order already stipulated that participation would be granted to all interested parties who met the criteria of representativeness, technical specialization, and expertise.[88] The aim was to ensure a diverse composition of the audience, accommodating different perspectives to be presented.[89] Justice Barroso justified the holding of the public hearing by

79. PSB et al. v. Brazil (on the Climate Fund), Initial petition, *supra* note 48, at 37.

80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. *See* S.T.F., ADO 60, Relator: Min. Roberto Barroso, 30.06.2020, D.J.e No. 165, ¶ 5, https://portal.stf.jus.br/processos/downloadPeca.asp?id=15343625717&ext=.pdf.

85. *Id.*

86. *Id.* ¶¶ 6–8.

87. *Id.* ¶¶ 18–23.

88. *Id.* ¶¶ 22–23.

89. *Id.*

emphasizing the Court's need for an "objective and official account" of Brazil's environmental policy.[90] He also emphasized that the country's inaction, if proven, could have detrimental effects from various perspectives, including environmental, social, cultural, and economic dimensions.[91]

This was not the first time that the Brazilian Supreme Court called a public hearing. The possibility of Brazilian courts holding public hearings was initially provided for by two national laws passed in 1999 (Laws 9,868/99 and 9,882/99).[92] Within the scope of the Federal Supreme Court, public hearings were regulated by Regimental Amendment 29/2009, which attributed competence to the Court's President or the Rapporteur, pursuant to Articles 13, XVII, and 21, XVII, of the Internal Regulations, to "convene a public hearing to hear the testimony of people with experience and authority in a given matter, whenever it deems necessary to clarify matters or circumstances in fact, with general repercussions and relevant public interest" discussed in the Court.[93] The procedure to be observed is set out in Article 154 of the Internal Regulations.[94]

Public hearings held by the Brazilian Supreme Court are understood as instruments for opening constitutional jurisdiction to society, or "strategic arenas for processing contentious issues in which diverse actors have opportunities to contribute to legal practices."[95] The first public hearing held by the Court was called by Justice Ayres Britto, Rapporteur of the Direct Action of Unconstitutionality (ADI) 3510, which challenged provisions of the Biosafety Law (Law 11,105/2005)[96] and took place on April 20, 2007.[97] Between 2007 and 2020, the STF carried out over twenty-eight public hearings about the most diverse themes, including abortion, religious education in public schools,

90. *Id.* ¶ 18.

91. *Id.* ¶ 17.

92. Lei No. 9.868, art. 7, de 10 de Novembro de 1999, D.O.U. de 11.11.1999 (Braz.); Lei No. 9.882, art. 6, 3 de Dezembro de 1999, D.O.U. de 6.12.1999 (Braz.).

93. Emenda Regimental No. 29 (Feb. 18, 2009), https://www.stf.jus.br/ARQUIVO/NORMA/EMENDAREGIMENTAL029-2009.PDF.

94. *See id.*; *see also* S.T.F., REGIMENTO INTERNO: ATUALIZADO ATÉ A EMENDA REGIMENTAL N. 57/2020, art. 154, https://www.stf.jus.br/arquivo/cms/legislacaoRegimentoInterno/anexo/RISTF.pdf.

95. Eduardo Moreira da Silva et al., *Public Hearings at the Brazilian Supreme Court: From Strategic Litigation to Resolution*, 28(2) OPINIÃO PÚBLICA 462 (2022).

96. S.T.F., ADI 3.510, Relator: Min. Ayres Britto, 27.05.2010, 96 D.J.e, 28.05.2010 (Braz.); Lei No. 11.105, de 24 de Março de 2005, D.O.U. (Braz.).

97. *Informações*, S.T.F., https://portal.stf.jus.br/audienciapublica/default.asp (last visited July 3, 2023).

higher education racial affirmative policy, banning the use of asbestos, and the importing of used tires.[98]

However, when examining climate litigation cases around the world, convening a public hearing on a climate case by a Supreme Court is rare, if not unprecedented. In this case, the Court acknowledged that climate issues transcend the confines of law and are inherently interdisciplinary.[99] This approach helps to enhance public participation in climate policy, promoting climate democracy and access to information, including scientific knowledge.[100] A similar approach was taken by the Philippines Commission on Human Rights in its National Inquiry on Climate Change, with Commissioner Roberto Cadiz justifying the approach to enable a global dialogue around climate change.[101]

In the United States, when deciding on a lawsuit brought by the cities of San Francisco and Oakland against five major oil companies for public nuisance, U.S. District Court Judge William Alsup ordered a climate science tutorial to inform him of the scientific issues at hand in the case.[102] Confronted with the complexities of climate science, the federal judge asked both sides to present the history of climate science and "the best science now available on global warming, glacier melt, sea rise, and coastal flooding."[103] The hearing has been described as an unprecedented move in a federal lawsuit.[104]

Albeit rare, public hearings in climate cases represent a "valuable mechanism" to understand the complex aspects of the scientific evidence intrinsic to them, as it invites the participation of experts who

98. Marjorie Marona, *Por que são convocadas as Audiências Públicas no Supremo Tribunal Federal?*, 30 Revista de Sociologia e Política [Rev. Sociol. Polit.], e016 (2022).

99. S.T.F., ADI 3.510, at 17.

100. *See generally* Hyo Yoon Kang, *What If All We Can See Are the Parts, and There Is Not a Whole: Elements and Manifestations of the Making of Law of Climate Justice*, 23 L. Text Culture 138 (2019).

101. *See id.* at 151; *see also* Republic of the Philippines Commission on Human Rights, http://climatecasechart.com/non-us-case/in-re-greenpeace-southeast-asia-et-al/; *see also* Annalisa Savaresi & Jacques Hartmann, *Using Human Rights Law to Address the Impacts of Climate Change: Early Reflections on the Carbon Majors Inquiry*, *in* Climate Change Litigation in the Asia Pacific 73 (Jolene Lin & Douglas A. Kysar eds. 2020); *see generally* Reinna S. Bermudez & Tamara Ligaya J Damary, *Climate Change as a Human Rights Issue: The Role of National Inquiries in the Philippines*, 69 Forced Migration Rev. 67 (2022).

102. *See* Oakland v. BP P.L.C., 325 F. Supp. 3d 1017, 1022 (N.D. Cal. 2018).

103. Michael Burger & Jessica Wentz, *Holding Fossil Fuel Companies Accountable for Their Contribution to Climate Change: Where does the law stand?*, 74(6) Bull. Atomic Scientists 397, 397 (2018); *see also* Natasha Geiling, *City of Oakland v. BP: Testing the Limits of Climate Science in Climate Litigation*, 46 Ecology L.Q. 683, 688-89 (2019).

104. Warren Cornwall, *In a San Francisco courtroom, climate science gets its day on the docket: A curious federal judge gets lengthy tutorial in unusual hearing*, Science (Mar. 22, 2018), https://www.science.org/content/article/san-francisco-court-room-climate-science-gets-its-day-docket.

could help judges understand the technical aspects of a case.[105] According to Gastón Medici-Colombo and Thays Ricarte, the advantages of public hearings are multiple: they (i) allow judges to "appropriate" the scientific debate, (ii) provide civil education through the courtroom, (iii) enrich debates under rules guaranteeing evidence-based arguments, and (iv) facilitate monitoring of enforcement of complex judgments.[106]

The Brazilian Supreme Court justified convening a public hearing on climate change based on its need to factually understand the current state of Brazil's climate change policies from a broad range of perspectives.[107] Following the preliminary ruling, Minister Barroso issued another ruling determining the selection criteria adopted for the public hearing.[108] In addition to the authorities and entities invited, the Court opened the possibility for stakeholders interested in contributing to the debate to submit an application to participate.[109] The Court made it explicit that it would decide the participants based on the three criteria: representativeness; technical specialization and expertise of the exhibitor; and guarantee of plurality in the composition of the audience and points of several views to be defended.[110]

The public hearing took place on September 21 and 22, 2020, at the Supreme Court, with both in-person and remote attendance options.[111] The event was broadcast live and recorded.[112] This hearing marked a historic moment for the Supreme Court, during which sixty-six experts, including scientists, environmentalists, Indigenous people, representatives from the agribusiness and financial sectors, economists, researchers, parliamentarians, and government representatives at the federal and state levels, presented their views on climate science, the state of

105. Gastón Medici-Colombo & Thays Ricarte, *The Escazú Agreement Contribution to Environmental Justice in Latin America: An Exploratory Empirical Inquiry through the Lens of Climate Litigation*, 16(1) J. HUM. RTS. PRAC. 160, 172-73 (2024).

106. *Id.*

107. *See generally* S.T.F., ADPF 708, Relator: Min. Roberto Barroso, 17.08.2020, 219, D.J.e.

108. See generally S.T.F., ADPF 708, Relator: Min. Roberto Barroso, 31.08.2020, 219 D.J.e.

109. *See id.* ¶ 3.

110. *See id.*

111. This section of the paper is based on a Commentary written by the second author and published as a Grantham Research Institute blog piece. Joana Setzer, *First climate case reaches Brazil's Supreme Court*, LSE: GRANTHAM RSCH. INST. ON CLIMATE CHANGE & ENV'T (Sept. 30, 2020), https://www.lse.ac.uk/granthaminstitute/news/first-climate-case-reaches-brazils-supreme-court/.

112. *Id.*

climate governance in Brazil, and the main challenges affecting their respective communities or economic sectors.[113]

Justice Barroso initiated the hearing by expressing his intention to facilitate a "plural" conversation, providing an opportunity for all sides to present their perspectives.[114] He justified the hearing by stating that the case extended beyond legal matters and acknowledged climate change as "one of the most defining questions of our time."[115] The hearing revealed stark differences in perspectives among high-level representatives of the Bolsonaro government, civil society, and academia regarding the matters under consideration.[116] For instance, General Augusto Heleno, Chief of the Institutional Security Cabinet responsible for national security and defense policy, contested the anthropogenic causes of global warming and questioned the data on deforestation in the Amazon.[117] He argued that there was no scientific evidence linking the government's inaction to the increase in forest fires, instead suggesting a conspiracy against the government involving international NGOs.[118]

Several speakers, including economists and climate scientists, highlighted how the government's failure to address deforestation and burning negatively impacts Brazil's international image, business environment, and economy.[119] They underscored the challenges faced by Brazil in obtaining international funding and establishing trade agreements.[120] Former environmental minister Izabella Teixeira emphasized Brazil's influential role in building the global architecture for sustainable development, arguing that a shift in political orientation would diminish Brazil's "soft power" in international relations.[121]

Prominent scientists, including the Vice President of the Intergovernmental Panel on Climate Change (IPCC), Thelma Krug, provided compelling evidence of the unequivocal link between human interference and observed warming since the mid-twentieth century.[122] They presented robust data on Brazilian GHG emissions and the

113. *Id.*

114. *Id.*

115. *Audiências Públicas do STF – Fundo do Clima (1/4)*, YOUTUBE (Sept. 26, 2020), https://www.youtube.com/watch?v=AVXETmIp9KA.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

association between the disturbance of the climate system, biodiversity crisis, and environmental crisis in Brazil.[123] The damage caused to the Amazon rainforest and the associated environmental and economic impacts occupied a prominent place in the debates and was present in all sessions, as was expected, given Minister Barroso's interest in the topic.[124]

Chief Executive Officers of Brazil's largest companies presented their proposals for and commitments to protecting the Amazon.[125] The cosmetics group Natura unveiled its commitment to zero deforestation by 2030, in addition to its existing initiatives for sharing benefits with local communities.[126] The president of Brazil's largest private bank, Itaú Unibanco, presented initiatives to improve the diligence of financing in withholding credit to companies that deforest illegally and in supporting land regularization in the region.[127]

Civil society organizations such as Greenpeace Brazil, Instituto Socioambiental, Imazon, and the World Wildlife Foundation-Brazil provided data demonstrating the dismantling of the systems of governance and environmental and climate protection instruments in Brazil.[128] They also highlighted the interconnection between climate change and fundamental rights, associating Article 225 of the Constitution (right to an ecologically balanced environment) with several other constitutionally protected rights, such as the right to life, food, housing, culture, and work.[129] The U.N. Special Rapporteur on human rights and the environment, David Boyd, recalled Brazil's international obligations and identified the current situation of deforestation as unconstitutional.[130]

At the end of two days, Justice Barroso concluded, presenting a list of what he called "uncontroversial" points that emerged from the debates, including that there has been a significant reduction in fines and embargoes instituted by the federal environmental agency, Ibama, and that the government had not yet approved the Plan for the Application of the Climate Fund Resources, nor allocated the resources.[131] In his closing remarks, Justice Barroso stated that environmental protection is

123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*

not a political choice; rather, it is a duty of the nation.[132] In the words of the magistrate: "[m]any points of view exist [in this case] and the truth has no owner. However, deliberate lying does, and one of our efforts here has been to identify narratives that are not supported by facts. This is a Court of Justice . . . our ruling is as objective as possible."[133]

D. *The Supreme Court's Decision in ADPF708*

On June 30, 2022, the Supreme Court reached a decision following the vote of Justice Barroso, the rapporteur of the case.[134] The Supreme Court, through a ten-to-one majority decision, pronounced that the executive branch is constitutionally obligated to carry out the allocation and execution of Climate Fund resources to mitigate climate change based on the constitutional right to a healthy environment and the principle of separation of powers. This pronouncement established the government's duty to allocate funds strategically, directing them towards areas where climate mitigation efforts are most needed.

The Court found that the government's omission as it pertains to the Climate Fund was deliberate: the government failed to allocate the resources until it could alter the composition of the steering committee, which, as noted in the background session, removed members of the civil society in favor of corporate stakeholders. Nauê Bernardo Pinheiro De Azevedo et al. note that this decision mandates the duty to allocate the Fund's resources efficiently to preserve its original function.[135] This advancement can avoid the mismanagement of funds intended for mitigation and adaptation. Furthermore, the decision contributes to unraveling the much-needed climate finance to a net zero transition in Brazil's economy.[136] The resources from the Climate Fund (estimated to be around R$1.1 billion) are, therefore, essential in ensuring the implementation of policies to increase Brazil's ambition.[137]

Furthermore, the Court affirmed the constitutional significance of climate protection. Significantly, the Supreme Court elucidated that environmental law treaties hold a distinctive position as a subset of

132. *Id.*

133. *Id.*

134. S.T.F., ADPF 708, Relator: Min. Roberto Barroso, 04.07.2022, 194, D.J.e, 28.09.2022, 1 (Braz.).

135. *See* De Azevedo et al., *supra* note 16.

136. Borges, *supra* note 16.

137. *See id.*

human rights treaties, granting them a "supranational" status.[138] This "supra-legality" endows such treaties with a hierarchical superiority over conventional laws.[139] Consequently, any Brazilian legislation or decree contradicting the provisions of the Paris Agreement, potentially including the NDC presented by Brazil to fulfill its obligations under the U.N. Framework Convention on Climate Change (UNFCCC), is susceptible to nullification. Any act or omission contravening this safeguard constitutes a direct violation of both the Constitution and human rights. Thus, the constitutional duty to effectively allocate funds entails an obligation to address climate change in accordance with the international commitments enshrined within the climate change framework.

The decision has practical implications for the procedural duties of states to maintain accountability for climate change, including producing scientific information about climate change. Thus, in practice, the government will have a duty to allocate funds to where they are most needed for climate mitigation. Noting how environmental and climate protection is a constitutional duty, the decision is a landmark development of climate litigation in the Global South, as it ensures the role of courts in judicial oversight of government decisions (or the lack thereof).

III. Relevance of the Decision for Domestic Climate Litigation

For many decades, litigation has been a tool used to fight environmental degradation in Brazil, with thousands of lawsuits filed before Brazilian courts on issues relating to water and air pollution, management, and/or conversion and clearing of land, including illegal logging, forest-clearing, and restoration of degraded areas.[140] Brazil also has a long and well-established history of human rights litigation. In comparison, climate litigation is a very recent phenomenon. The number of cases filed, from a global comparison, is significant. With eighty climate cases, Brazil is one of the top countries in cumulative numbers.[141] However, this number is very small compared to thousands of other environmental cases that have been filed in the country.[142] In

138. S.T.F., ADPF 708, ¶ 17.

139. *See id.* ¶ 16.

140. *See* Danielle de Andrade Moreira et al., Litigância Climática no Brasil: Argumentos Jurídicos para a Inserção da Variável Climática no Licenciamento Ambiental 27-28 (2021).

141. *See Brazil*, Climate Case Chart, http://climatecasechart.com/non-us-jurisdiction/brazil/ (last visited July 3, 2023).

142. Joana Setzer et al., *Climate Change Litigation in Brazil: Will Green Courts Become Greener?*, *in* Climate Change Litigation: Global Perspectives 143, 143 (Ivano Alogna et al. eds., 2021) ("1,213 in the US").

addition, most climate cases are still pending.[143] Still, it is possible to observe different phases in this movement and reflect upon the significance of this case and the ruling of the Supreme Court for domestic climate litigation. This section analyzes the different stages of climate litigation in Brazil. Section A notes early developments in climate litigation in Brazil. Section B argues that the *Climate Fund* decision initiates a new phase of climate litigation in the country.

A. *Early Developments in Climate Litigation in Brazil*

Climate litigation in Brazil had a rather discrete beginning.[144] A small number of environmental lawsuits with climate arguments were filed between the late 1990s and early 2000s by public prosecutors.[145] Climate was a marginal matter in these cases.[146] Two cases challenged the use of fire as a harvesting method for sugarcane, and one case challenged the clearing of a mangrove forest to build a landfill.[147] When they reached the High Court, the final rulings only implicitly and indirectly tackled climate change concerns in their decisions. The first example of litigation where climate was not marginal to the filings consisted of a series of thirty-five lawsuits filed in 2010 by the Public Prosecutor Office against airlines operating out of Brazil's international airport, seeking compensation for the GHG emissions produced by landing and take-off of aircraft.[148] Following this case, in 2019, Brazil's Attorney General's Office filed a public civil action against a steel company and its managing partner for environmental and climate damages allegedly caused by the company's continuous and fraudulent use of illegal charcoal in its plants in the State of Minas Gerais.[149]

However, the status of climate litigation in Brazil changed quickly. In 2019, a second phase of climate litigation in Brazil emerged as a reaction to the process of deregulation of environmental protection and an increase in the rates of deforestation observed during the Bolsonaro

143. CLIMATE CASE CHART, *supra* note 141.

144. Setzer et al., *supra* note 142, at 147-48.

145. *Id.*, at 147-48, 151.

146. *See id.*

147. Setzer et al. describe these three cases (Public Prosecutor's Office v Oliveira & Others, filed in 1995; Maia Filho v Environmental Federal Agency, filed in 1995; and Public Prosecutor's Office v H Carlos Schneider S/A Comércio e Industria & Others, filed in 2004). *Id.* at 169.

148. *See id.* at 151-52.

149. *See id.* at 154-55.

administration.[150] One of the ways in which Brazilian actors responded to this crisis was by filing lawsuits against the government and against individuals and corporations responsible for deforestation.[151]

As Joana Setzer, Guilherme Leal, and Caio Borges have argued, the issues discussed in this second phase of climate cases coincided to a certain extent with environmental issues already thoroughly analyzed by scholars and courts in the country.[152] But in addition to alleging environmental damages and grounding their action on environmental legislation, cases filed in this second phase were also grounded in domestic climate law and made explicit the linkages between protecting the Amazon and the climate (including the GHG emissions caused by deforestation and forests' function as carbon sinks). Several cases filed during this phase centered on the protection of human rights, drawing a connection between the right to a healthy environment and other human rights.[153] Plaintiffs in these cases argued that the effectiveness of the fundamental human right to a healthy environment depends, at least in part, on climatic conditions that enable a dignified life.[154] Some of these cases also sought to protect the rights of Indigenous peoples and traditional communities.[155]

During the four years of the Bolsonaro administration (2019–2022), at least thirty lawsuits were filed challenging the inactions and the deregulatory actions of the Bolsonaro administration and directly linking deforestation and climate change.[156] This body of cases had three common goals: (i) combat illegal deforestation, (ii) reduce Brazil's GHG emissions, and (iii) bring the topic of climate action to Brazilian courts.[157] Yet the cases were also quite distinct, being brought by a diverse set of actors (public prosecutors, civil society organizations, and opposition political parties) and grounded on different legal provisions.[158]

---

150. Joana Setzer & Délton Winter de Carvalho, *Climate litigation to protect the Brazilian Amazon: Establishing a constitutional right to a stable climate*, 30(2) REV. EUR. COMPAR. INT'L. ENV'T. L. 197, 198 (2021).

151. *See id.* at 197.

152. *See* Setzer et al., *supra* note 111, at 145.

153. *See* Moreira et al., *supra* note 16, at 1, 2.

154. *See id.* at 5.

155. *See* Setzer & Winter de Carvalho, *supra* note 150, at 200; *see also* Maria Antonia Tigre, *Climate Change and Indigenous Groups: The Rise of Indigenous Voices in Climate Litigation*, 9(3) E-PUBLICA 214 (2022).

156. *See* CLIMATE CASE CHART, *supra* note 141; *see also* Moreira et al., *supra* note 16, at 3; Setzer & Winter de Carvalho, *supra* note 150, at 198.

157. Setzer & Winter de Carvalho, *supra* note 150, at 198.

158. *See* Moreira et al., *supra* note 16, at 4.

Another relevant characteristic of this new phase of climate litigation in Brazil is that, rather than isolated efforts by public prosecutors—like the examples from the first phase—the new cases were part of a wider global movement of climate litigation. Particularly, Brazil's second phase of climate litigation was part of a group of cases being brought in the Global South, and in Latin America specifically, that targeted the poor enforcement of domestic climate and forestry legislation and the failures of governments to implement measures upholding NDCs submitted pursuant to the Paris Agreement, specifically in relation to land use change and forestry.[159]

B. *A New Phase in Brazil's Climate Litigation?*

The decision by the Supreme Court in the *Climate Fund* case, while still very recent, potentially initiates a new (third) phase of climate litigation in Brazil. The decision made it clear that the Court was prepared to step into new foundations, drawing from international law principles, comparative case law, and its own human rights jurisprudence. The Court treated climate change with the attention that the topic requires, recognizing its extension as a human right and as a right of present and future generations. The decision, moreover, showed that it was possible for a court to order the cessation of government inaction and contribute to the country's advancement in the fulfillment of its climate commitments. It also advanced climate law in Brazil.

Following the Supreme Court ruling in the *Climate Fund* case, new climate cases in Brazil have demonstrated various possible approaches to engaging with established precedent. A notable example is the lawsuit *Instituto Verdeluz and others v. Portocem Geração de Energia S.A. and Secretariat of the Environment of the State of Ceará (SEMACE)*.[160] In this case, filed in 2023, the plaintiffs sought the suspension and subsequent

159. *See* Jacqueline Peel & Jolene Lin, *Transnational Climate Litigation: The Contribution of the Global South*, 113 AM. J. INT'L L. 679, 708 (2019) (finding that "an overwhelming majority of cases in the Global South docket are brought under other [non-climate change] laws and embed climate change considerations in wider disputes over environmental protection, land-use, and natural resource conservation."); *see also* Joana Setzer & Lisa Benjamin, *Climate Litigation in the Global South: Constraints and Innovations*, 9(1) TRANSNAT'L. ENV'T. L. 77, 86-87 (2019) (explaining that in the Global South, "[c]ases are brought to address poor enforcement of existing planning and/or environmental legislation[.]"); *see also* Joana Setzer & Lisa Benjamin, *Climate Change Litigation in the Global South: Filling in Gaps*, 114 AJIL UNBOUND 56 (2020); *see also* Kim Bouwer, *The Unsexy Future of Climate Change Litigation*, 30 J. ENV'T L. 483 (2018).

160. TRF-5, Apelação Cível No. 0805185-51.2023.4.05.8100 Ceará (Initial petition filed Mar. 31, 2023,https://www.litiganciaclimatica.juma.nima.puc-rio.br/visualizacao/IDqhSlm9XP8q8Dj5Pmf5;data=noEdit.

annulment of the environmental licensing process for the Portocem Thermoelectric Power Plant, which is intended to be fueled by natural gas and installed in the Pecém Industrial and Port Complex.[161] The grounds for their claim are centered around alleged non-compliance with legal norms and several omissions in the project's Environmental Impact Assessment (EIA).[162] Specifically, the plaintiffs argue that the EIA failed to adequately consider the climate impacts associated with the proposed gas thermoelectric plant.[163]

The filing document references the Supreme Court's decision in *Climate Fund* as a justification for its arguments, highlighting not only the significance of constitutional provisions in safeguarding the environment but also Brazil's crucial obligation to uphold its international environmental (and climate) protection commitments.[164] Litigation challenging alleged shortcomings in EIAs and/or the decision by the authorities to authorize projects with adverse environmental and social impacts are common in Brazil. However, until the *Climate Fund* precedent, EIA litigation rarely invoked the climate aspect.[165]

An additional illustration of climate litigation that leverages the *Climate Fund* precedent is the ADI 7332, specifically targeting the "Policy for 'just energy transition' of the State of Santa Catarina" in Santa Catarina's State Law 18,330/2022.[166] As part of a larger trend of "just transition" litigation cases in Latin America,[167] the lawsuit was initiated by the political party Rede Sustentabilidade, which has requested injunctive relief.[168] The plaintiff argues that the aforementioned policy, which provides incentives for the mineral coal production chain despite its documented adverse impacts on public health and socio-environmental well-being, contradicts emissions reduction objectives, violates the Paris Agreement, and runs counter to the ruling in *Climate Fund*, "which recognized that international treaties relating to the

161. *See id.*

162. *See id.*

163. *See id.*

164. *See id.*

165. *See* Caio Borges, *Corporate Climate Litigation in Brazil* (draft chapter), *in* GLOBAL PERSPECTIVES ON CORPORATE CLIMATE LEGAL TACTICS (British Inst. Int'l & Compar. L. (BIICL)) (forthcoming).

166. S.T.F., ADI 7332, Initial Petition, 29.12.2022, https://climatecasechart.com/wp-content/uploads/non-us-case-documents/2022/20221229_Acao-Direta-de-Inconstitucionalidade-7332_petition.pdf.

167. For explanation of the "just transition," see MARIA ANTONIA TIGRE ET AL., JUST TRANSITION LITIGATION IN LATIN AMERICA: AN INITIAL CATEGORIZATION OF CLIMATE LITIGATION CASES AMID THE ENERGY TRANSITION, v (Sabin Ctr. for Climate Change L., 2023).

168. *See generally* S.T.F., ADI 7332, Initial Petition.

defense of the environment are treaties of human rights, having, consequently, a supra-legal nature within our legal system."[169]

Although the number of exemplar cases filed in Brazil after the decision is still limited, research shows that the *Climate Fund* decision has informed new filings, reinforcing the human rights argument brought in climate cases in a positive way. While litigation against the federal government has increased significantly in recent years, changes in the political administration may alter this trend. It is not yet clear if the third wave of climate litigation in Brazil will witness a "corporate turn," similar to what has been observed in other jurisdictions where a case against the government received a favorable decision by the country's apex court.[170] In Germany, for example, following the successful outcome in *Neubauer*, at least four cases have been filed against car manufacturers, arguing that the companies should be prohibited from producing and selling internal combustion engine vehicles.[171] These cases were dismissed, and the decision in *DUH v. Mercedes Benz* illustrates some of the challenges facing litigants in German courts: efforts to rely on the same constitutional rights protections as those successfully used in *Neubauer et al. v. Germany* failed on the basis that the constitutional obligations were addressed to the legislator, not to the company.[172]

Brazil, nonetheless, allows some application of human rights law to corporations, as has been observed in the Netherlands in the Hague

169. *Id.* at 56.

170. *See* JOANA SETZER & CATHERINE HIGHAM, GLOBAL TRENDS IN CLIMATE CHANGE LITIGATION: 2023 SNAPSHOT 3 (2023) (explaining that "there has been a decline in the proportion of Global cases filed against governments[,]" and that "strategic litigation against companies continues to develop[.]").

171. The four cases are: Deutsche Umwelthilfe (DUH) v. Mercedes-Benz AG [Regional Court of Stuttgart], Sept. 20, 2021, https://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-mercedes-benz-ag/; Deutsche Umwelthilfe (DUH) v. Bayerische Motoren Werke AG (BMW) [Regional Court of Munich], Sept. 20, 2021, https://climatecasechart.com/non-us-case/deutsche-umwelthilfe-duh-v-bmw/; Kaiser et al. v. Volkswagen AG [Regional Court of Braunschweig], Nov. 8, 2021, https://climatecasechart.com/non-us-case/kaiser-et-al-v-volkswagen-ag/; Allhoff-Cramer v. Volkswagen AG [Regional Court of Detmold], Nov. 8, 2021, https://climatecasechart.com/non-us-case/allhoff-cramer-v-volkswagen-ag/. For an analysis of the first two cases, see Maria Antonia Tigre, *The contribution of Automakers to Climate Change: Broadening the Reach of Private Sector Defendants in Climate Litigation*, CLIMATE L.: A SABIN CTR. BLOG (Oct. 14, 2021), https://blogs.law.columbia.edu/climatechange/2021/10/14/the-contribution-of-automakers-to-climate-change-broadening-the-reach-of-private-sector-defendants-in-climate-litigation/.

172. See Tigre, *supra* note 171, for the dismissal of the four cases. Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court], Mar. 24, 2021, 1 BvR 2656/18, ¶¶ 247-52.

District Court decision in *Milieudefensie v. Royal Dutch Shell plc*.[173] In this regard, despite the limited recognition of corporate liability by Brazilian courts, the Brazilian legal system offers various avenues for individuals and communities to sue corporations for environmental, social, and climate damages, which have not yet been explored by climate litigants.[174]

Brazil's civil liability and tort law, in particular, offers promising grounds for future climate litigation against corporations. Litigants can seek damages and injunctions not only based on fault-based liability but also on strict liability when the act that caused harm violates a legal norm.[175] Compensation for damages can cover both patrimonial damages and non-patrimonial damages resulting from the violation of personality rights.[176] Environmental damage cases may lead to obligations to restore the environment, such as replanting native species or installing pollution containment systems, alongside compensation for non-material losses.[177]

Recent developments have also recognized the potential for climate damages in compensation actions related to deforestation.[178] Moreover, in Brazil, a company's legal personality can be disregarded (the piercing of the corporate veil doctrine) whenever its "corporate personality" hinders the compensation of damages caused to environmental quality (Article 4 of Brazil's Environmental Crimes Act, Law 9,605/98).[179] That is, administrators or shareholders may be held personally responsible independently of fault, fraud, or deviation from purpose, when the corporate entity is unable to recover or pay for the damage caused to the environment.[180] Shareholders can bring legal action against corporate fiduciaries for breaches of fiduciary duty or

173. *See* Rb. Hague, 26 mei 2021, C/09/571932/HA ZA 19-379; for a general discussion of the case, see also Chiara Macchi & Josephine van Zeben, *Business and Human Rights Implications of Climate Change Litigation: Milieudefensie et al. v Royal Dutch Shell*, 30(3) REV. EUR. COMPAR. INT'L. ENV'T. L. 409 (2021).

174. Borges, *supra* note 165.

175. *See id.*

176. *See id.*

177. *See id.*

178. *See* Maria Antonia Tigre, *Guest Commentary: Brazilian's First Tort Climate Case for Illegal Deforestation in Amazonia*, CLIMATE L.: A SABIN CTR. BLOG (June 16, 2021), https://blogs.law.columbia.edu/climatechange/2021/06/16/guest-commentary-brazilians-first-tort-climate-case-for-illegal-deforestation-in-amazonia/.

179. Lei No. 9.605, de 12 de Febrero de 1998 (Braz.).

180. Roberta Danelon Leonhardt et al., *Expanding Environmental Liability in Insolvency Cases: Risks for Shareholders, Managers and Practitioners under Brazilian Law*, 9 INSOLVENCY & RESTRUCTURING INT'L 16 (2015).

fraud.[181] Board members, company administrators, and shareholders can be held accountable under various legal frameworks, encompassing civil, criminal, and administrative liability.[182]

Beyond the domestic context, with this decision, Brazil joins the group of countries where constitutional courts have ruled on climate disputes. This body of rulings has been widely studied by lawyers and scholars around the world.[183] Arguably, these cases can also contribute to strengthening the corpus of decisions on climate disputes.[184]

IV. Relevance of the Decision for Comparative Climate Litigation

Because the Supreme Court decision in the *Climate Fund* case is short and succinct, this renders it subject to criticism for the lack of expansion on its legal reasoning. However, it still makes an important contribution to the growing understanding of rights-based climate litigation. This section further explains two core legal advancements of the decision from a comparative perspective, namely (i) the interpretation of the Paris Agreement as a human rights treaty and its consequences for the duty to mitigate, and (ii) the separation of powers and judicial oversight over the duty to implement the Paris Agreement at the national level.

A. *The Paris Agreement as a Human Rights Treaty*

After considerable debate over the incorporation of human rights obligations into the Paris Agreement, human rights were relegated to the preamble. The preamble acknowledges that "climate change is a common concern of humankind" and emphasizes that "[p]arties should, when taking action to address climate change, respect, promote and consider their respective obligations on human rights[.]"[185] Despite its inclusion in the preamble, this recognition remains a crucial development, particularly in light of previous climate instruments, such as the UNFCCC and the Kyoto Protocol, which did not include

181. *See* Tigre, *supra* note 178.

182. *See* Borges, *supra* note 165.

183. *See, e.g.*, Alessandra Lehmen, *O STF e o clima: a defesa inaplicável da separação de poderes à ADPF 708*, Juchem Advocacia (last visited July 3, 2023), https://www.juchem.com.br/artigos/o-stf-e-o-clima-inaplicabilidade-da-defesa-da-separacao-de-poderes-a-adpf-708/.

184. *See* Intergovernmental Panel on Climate Change [IPCC], Climate Change 2022: Mitigation of Climate Change. Contribution of Working Group III to the Sixth Assessment Report of the Intergovernmental Panel on Climate Change 1358 (2022).

185. Paris Agreement, *supra* note 1, pmbl.

human rights references.[186] As such, the Paris Agreement represents a groundbreaking development as it is recognized as the first binding multilateral climate agreement that explicitly references human rights.[187]

The inclusion of human rights considerations in the Paris Agreement represents the culmination of years of civil society advocacy and scholarly progress, contributing to the emergence of a political narrative that justifies climate action through the lens of human rights.[188] This nexus between human rights and climate change first gained recognition in 2009 when the Office of the High Commissioner for Human Rights acknowledged that human rights obligations offer crucial protections to individuals whose rights are affected by climate change, regardless of whether climate change effects are directly characterized as human rights violations.[189] After fourteen years, this recognition paved the way for crucial developments in the nexus of climate change and human rights.

As elucidated by Anna Grear, human rights not only provide an "intrinsic and indispensable" response to the climate crisis but also serve as a prerequisite for achieving climate justice.[190] Climate justice still remains a distant reality and a more challenging achievement as each prediction of climate breakdown becomes more tangible. Farhana Sultana argues that this climate breakdown lays bare the "fault

186. *See generally* Lavanya Rajamani, *Human Rights in the Climate Change Regime: From Rio to Paris and Beyond*, *in* THE HUMAN RIGHT TO A HEALTHY ENVIRONMENT 236, 236–251 (John H. Knox & Ramin Pejan eds., 2018).

187. Sam Adelman, *Human Rights in the Paris Agreement: Too Little, Too Late?*, 7 TRANSNAT'L. ENV'T. L. 17, 17 (2018).

188. *See, e.g.*, Benoit Mayer, *Human Rights in the Paris Agreement*, 6 CLIMATE L. 109, 109-10 (2016); Stephen Humphreys, *Introduction: Human Rights and Climate Change*, *in* HUMAN RIGHTS AND CLIMATE CHANGE 1 (Stephen Humphreys ed., 2009); ROUTLEDGE RSCH. IN INT'L ENV'T L., CLIMATE CHANGE AND HUMAN RIGHTS: AN INTERNATIONAL LAW AND COMPARATIVE LAW PERSPECTIVE (Ottavio Quirico & Mouloud Boumghar eds., 2015); Sam Adelman, *Rethinking Human Rights: The Impact of Climate Change on the Dominant Discourse*, *in* HUMAN RIGHTS AND CLIMATE CHANGE 159 (Stephen Humphreys ed., 2009); Sam Adelmann, *Human Rights and Climate Change*, *in* HUMAN RIGHTS: CURRENT ISSUES AND CONTROVERSIES 411 (Gordon DiGiacomo ed., 2016); John H. Knox, *Linking Human Rights and Climate Change at the United Nations*, 33(2) HARV. ENV'T L. REV. 477 (2009); Derek Bell, *Does Anthropogenic Climate Change Violate Human Rights?*, 14(2) CRITICAL REV. INT'L SOC. & POL. PHIL. 99 (2011).

189. Rep. of the Off. of the United Nations High Comm'r for Hum. Rts. on the Relationship Between Climate Change and Human Rights, at 24, ¶ 71, U.N. Doc. A/HRC/10/61 (Jan. 15, 2009).

190. *See* Anna Grear, *Towards 'Climate Justice'? A Critical Reflection on Legal Subjectivity and Climate* In*justice: Warning Signals, Patterned Hierarchies, Directions for Future Law and Policy*, 5 J. HUM. RTS. & ENV'T 103, 105, 121-25 (2014).

lines" of inequities, with people being impacted "differently, unevenly, and disproportionately[.]"[191] Still, some achievements are worth celebrating. The year 2022 witnessed a significant milestone when the U.N. General Assembly (UNGA) finally acknowledged the right to a healthy environment as a human right, reaffirming in the preamble that climate change hinders the enjoyment of a clean, healthy, and sustainable environment and that environmental damage, including climate damage, has adverse implications, both direct and indirect, on the effective realization of all human rights.[192]

Indeed, the Paris Agreement explicitly recognizes the relevance of human rights in addressing climate change by mandating that nations "respect, promote[,] and consider" these rights in climate action.[193] Nonetheless, there are significant limitations to this approach. First, recognition in the preamble fails to create rights or obligations on its own.[194] Second, relinquishing the recognition to a preamble means that no concrete measures were identified, with limits as to the direct impact of climate action on the protection of human rights.[195] Third, according to Sam Adelman's perspective, the preamble of the agreement incorporates notions of human and environmental rights yet fails to adequately acknowledge the immense peril that climate change presents to human rights or effectively advance their promotion and protection.[196]

While scholars have called into question the normative value of this provision, the Brazilian Supreme Court's interpretation of the obligations herein included may provide some reassurance of its significance. The Supreme Court confirmed that there is a constitutional, supralegal, and legal duty to protect the environment and combat climate change. This interpretation is based, however, not on the Paris Agreement but instead on the Brazilian Constitution. The Constitution

191. Farhana Sultana, *Critical Climate Justice*, 188 GEOGR. J. 118, 118 (2022).

192. G.A. Res. 76/300, at 2-3 (Aug. 1, 2022).

193. Paris Agreement, *supra* note 1, pmbl.

194. Nonetheless, the International Law Commission noted in the commentary on the draft of the Vienna Convention, "[t]hat the preamble forms part of a treaty for purposes of interpretation is too well settled to require comment" and is recognized as customary norm. *See* Int'l Law Comm'n, Rep. to the G.A., U.N. Doc. A/CN.4/SER.A/1966/Add.1, at 221 (1966). Mayer interprets this statement to mean that parties must comply with human rights obligations when carrying out climate action under the Paris Agreement. Mayer, *supra* note 188, at 113-14 ("[the Paris Agreement]'s parties-to-be must recognize an obligation to comply with their respective human-rights obligations when carrying out climate-change-related actions under the Agreement.").

195. *See* Mayer, *supra* note 188, at 115.

196. Adelman, *supra* note 187, at 18.

recognizes the supra-legal character of international human rights treaties to which Brazil is a party.[197] Furthermore, the Constitution recognizes the human right to a healthy environment.[198] Based on both these provisions, and as mentioned in Section II D above, Justice Barroso clarified that "undoubtedly" environmental (and climate) issues "fit the hypothesis" (of the treaty being a human rights treaty of supra-legal character).[199] The Supreme Court further clarified that environmental law treaties constitute a particular species of the genus of human rights treaties. For this reason, they enjoy "supranational" status.[200]

Based on the decision, "there is no legally valid option to simply [not act] in the fight against climate change."[201] The "supra-legality" of human rights treaties means that human rights are above ordinary laws in the country's legal hierarchy.[202] If a law passed by the Brazilian Congress conflicts with a provision of a human rights treaty, the human rights treaty (and based on this ruling, environmental and climate treaties as well) prevails. In practice, the law in question is overridden by the treaty. Accordingly, as the ruling in the *Climate Fund* case supports, any Brazilian law or decree that contradicts the Paris Agreement, including Brazil's NDC, may be invalidated. Any action or omission contrary to the protection of the Paris Agreement directly violates the Constitution and human rights. Therefore, Justice Barroso dispels any doubts about whether the climate issue falls within the context of the constitutional right to a healthy environment and concerns a fundamental human right.[203]

The former U.N. Special Rapporteur on human rights and the environment, John Knox, has clarified that "the Paris Agreement is not a

197. C.F. art. 5 ¶¶ 2-3.

198. C.F. art. 225.

199. S.T.F., ADPF 708, Relator: Min. Roberto Barroso, 04.07.2022, 194, D.J.e, 28.09.2022 (Braz.), ¶ 17.

200. *See id.*

201. Tigre, *supra* note 16.

202. *See generally* Antonio Moreira Maués, *Supra-Legality of International Human Rights Treaties and Constitutional Interpretation*, 10(18) INT'L J. HUM. RTS. 205 (2013). *But see* Maria Antonia Tigre, *South America*, *in* THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW 1097, 1097-98 (Lavanya Rajamani & Jacqueline Peel eds., 2021) (noting that while "[multilateral environmental agreements] have had a significant role in shaping domestic law in South America[,] the hierarchy of laws, and the role of international law in particular, is traditionally inconsistent" and that "there is still no general agreement on the relationship between international and national law," as evidenced by "Brazil's [STF] still disagree[ing] on the weight of treaties within the hierarchy of laws.").

203. Moreira et al., *supra* note 16, at 14.

human rights treaty in the usual sense[,]" because "[i]t does not define rights or create mechanisms to review and promote their compliance."[204] Nevertheless, this accomplishment signifies a crucial milestone as it integrates human rights safeguards into global and local institutions, underscoring the imperative for climate change actions to consider and uphold human rights principles.[205] The Brazilian Court was the first court in the world to formally recognize the Paris Agreement as a human rights treaty.[206] However, Justice-Rapporteur Roberto Barroso missed an opportunity to advance the interpretation of the very nature of the Paris Agreement as a human rights treaty based on its own preambular recognition of human rights. Given the wide adoption of the Paris Agreement, further engaging with this aspect of climate law would have proven useful for building a transnational climate regime, as it would facilitate cross-reference between this decision and other rights-based cases worldwide.

Still, while the Court advanced this interpretation based on the domestic legal regime, it barely engaged with the international one. The twenty-page decision only refers to the Paris Agreement twice. The first time, the decision mentions its system of voluntary contributions through NDCs.[207] The second time, the decision refers to Brazil's ratification of the Agreement and its own commitments to emissions reductions.[208] It never addresses the human rights obligations in the Paris Agreement itself. For such a groundbreaking decision, the Court failed to provide a holistic interpretation of the linkages between the international climate change legal framework and its domestic applicability under Brazil's constitutional and domestic climate change legal regime.

Benoit Mayer notes that even without the preamble of the Paris Agreement recognizing human rights, the U.N. Charter calls for the interpretation of treaties in accordance with "relevant rules of international law applicable in the relations between the parties."[209] This includes, naturally, human rights obligations, which prevail over the

204. John H. Knox, *The Paris Agreement as a Human Rights Treaty*, *in* HUMAN RIGHTS AND 21ST CENTURY CHALLENGES: POVERTY, CONFLICT, AND THE ENVIRONMENT, 323, 323 (Dapo Akande et al. eds., 2020).

205. *See id.*

206. Tigre, *supra* note 16.

207. *See* S.T.F., ADPF 708, Relator: Min. Roberto Barroso, 04.07.2022, 194, D.J.e, 28.09.2022, 7 (Braz.), ¶ 9.

208. *Id.*, at 8, ¶¶ 10-11.

209. Mayer, *supra* note 188, at 114 (citing to Vienna Convention on the Law of Treaties, May 23, 1969, 1155 U.N.T.S. 331, art. 31(3)(c)).

Paris Agreement.[210] This interpretation within the larger context of international law is helpful to further advance these linkages. Yet, some of the challenges in implementing the human rights obligations of climate change relate to the very legal nature of the Paris Agreement.

Shortly after the adoption of the Paris Agreement, several scholars debated the normative value of the treaty. For example, Sandra Cassota argued that the Paris Agreement was "legally binding" but "effectively unenforceable" because there were no mechanisms to ensure its implementation.[211] Sebastien Oberthür and Ralph Bodle argued that the "prescriptive and precise legal obligations" of the agreement are mostly procedural (i.e., the NDCs) and political (i.e., in terms of guiding future implementation and evolution).[212] Daniel Bodansky noted that while the Agreement is a treaty under the definition of the Vienna Convention, not every provision creates legal obligations, and there is a mix of mandatory and non-mandatory provisions, especially as it pertains to obligations to mitigate, adapt, and contribute to climate finance.[213]

Once again, there was a missed opportunity to further engage with some of these questions in the Supreme Court's decision, which could have clarified the nature of the obligations under the Paris Agreement within the context of the Brazilian legal system. The Court noted that, as a human rights treaty with "supranational" legal status, the government's constitutional environmental protection mandate is not a discretionary political decision but a mandatory obligation.[214] Within the factual background of the case, this means that "[t]he constitutional duty to allocate the funds [available in the Climate Fund] effectively means that there is a duty to mitigate climate change considering the

210. "In the event of a conflict between the obligations of the Members of the United Nations under the present Charter and their obligations under any other international agreement, their obligations under the present Charter shall prevail." U.N. Charter art. 103. An affirmation of states' human rights obligations can be found in the U.N. Charter art. 1, ¶ 3 (providing that one of "[t]he Purposes of the United Nations" is "[t]o achieve international co-operation in solving international problems of . . . [a] humanitarian character, and in promoting and encouraging respect for human rights[.]"). *See id.*, art. 1, ¶ 3.

211. Sandra Cassotta, *The Development of Environmental Law within a Changing Environmental Governance Context: Towards a New Paradigm Shift in the Anthropocene Era*, 30(1) Y.B. Int'l Env't L. 54, 54, 58 (2019).

212. Sebastian Oberthür & Ralph Bodle, *Legal Form and Nature of the Paris Outcome*, 6 Climate L. 40, 40 (2016).

213. *See* Daniel Bodansky, *The Legal Character of the Paris Agreement*, 25(2) Rev. Eur. Compar. Int'l. Env't. L. 142, 142 (2016).

214. De Azevedo et al., *supra* note 16.

international commitments under the climate change framework."[215] Accordingly, the executive branch has a constitutional duty to execute and allocate the funds of the Climate Fund to mitigate climate change based on separation of powers and the constitutional right to a healthy environment.

The constitutional duty to allocate the funds effectively means that there is an obligation to mitigate climate change considering the international commitments under the climate change framework.[216] Taking it one step further, Maria Antonia Tigre argues that the decision could have implications for the advancement of the duty to mitigate climate change under the Brazilian legal framework.[217] Considering that there is a collective goal of reducing emissions under the Paris Agreement, as well as an obligation to ensure progression in those commitments, "the imperative to implement more stringent mitigation measures based on the requirements of the Paris Agreement is, according to Brazil's apex court, a human rights obligation."[218] These are binding obligations and not a matter of "free political choice."[219] The Court determined that the executive must allocate resources to operate the Climate Fund, curing its intentional and wrongful omissions in violation of Article 225 and Article 5, § 2, of the Federal Constitution.[220]

For rights-based climate litigation, this interpretation sets an important precedent. Recognizing the Paris Agreement as a human rights treaty helps integrate climate change and human rights into a shared framework for action, promoting greater accountability, international cooperation, and climate justice.[221] While the rationale of the Court was lacking in its interaction with the international climate regime, the recognition still has value. It contributes to the international movement of "norming" the right to a healthy environment by pairing human rights with specific multilateral environmental agreements, emphasizing the intrinsic link between these fragmented regimes.[222]

---

215. Tigre, *supra* note 16.

216. *Id.*

217. *See* Maria Antonia Tigre, *The "Fair Share" of Climate Mitigation: Can Litigation Increase National Ambition for Brazil?*, 16(1) J. HUM. RTS. PRAC. 25, 35 (2024).

218. *Id.* at 17.

219. S.T.F., ADPF 708, Relator: Min. Roberto Barroso, 04.07.2022, 194, D.J.e, 28.09.2022, 7 (Braz.), ¶ 4.

220. *Id.* ¶ 36.

221. *See* Knox, *supra* note 204, at 323.

222. Maria Antonia Tigre & Katherine Quinn, *Trends in Human Rights Law-Making: the Implications of 'Norming' Climate Climate Rights*, *in* HUMAN RIGHTS AND INVESTMENT LAW FOR CLIMATE CHANGE: TRENDS AND PROSPECTS (B. Martinez Romera et al. eds., forthcoming 2024).

The interpretation of the Brazilian Supreme Court in the *Climate Fund* case demonstrates the prominence of rights-based approaches in addressing environmental protection and climate change mitigation through robust environmental constitutionalism.[223] At its core is the notion that the climate system should be regarded as an integral component of an ecologically balanced environment.[224] Specifically, the case has played a crucial role in implementing the right to a healthy environment by providing clarity on its scope and implications in relation to climate change and the proper management of funds essential for addressing the climate crisis. Consequently, it represents a significant advancement in the constitutional interpretation of the right to a healthy environment.[225]

Cross-fertilization between courts is extremely valuable in this field of law, as courts often look to one another to seek transnational inspiration on how to answer unprecedented legal questions.[226] It is not uncommon for courts to cite these precedents to substantiate their own rationales for reaching a certain conclusion.[227] This can be particularly important in areas where domestic jurisprudence may be lacking, but similar climate challenges have been addressed elsewhere by the courts.[228] Considering the widespread scientific knowledge on the human rights impacts of climate change and the development of rights-based climate litigation, leaning on the Paris Agreement with a human rights lens is a logical evolution. It would not be surprising if other courts worldwide, therefore, relied on the decision in *Climate Fund* to reach similar conclusions under their own legal systems or for plaintiffs to refer to the decision in substantiating their claims.

For comparative purposes, any legal system that similarly recognizes the constitutional right to a healthy environment (or that has adhered

223. ERIN DALY ET AL., COMMON BUT DIFFERENTIATED CONSTITUTIONALISMS: DOES 'ENVIRONMENTAL CONSTITUTIONALISM' OFFER REALISTIC POLICY OPTIONS FOR IMPROVING UN ENVIRONMENTAL LAW AND GOVERNANCE? US AND LATIN AMERICAN PERSPECTIVES (Ernst-Ulrich Petersmann and Armin Steinbach, ed., Brill/Nijhoff, forthcoming 2024)

224. *See* MOREIRA, *supra* note 140, at 29.

225. DALY ET AL., *supra* note 223.

226. *See* Sarah Mead & Lucy Maxwell, *Climate Change Litigation: National Courts as Agents of International Law Development*, *in* THE ENVIRONMENT THROUGH THE LENS OF INTERNATIONAL COURTS AND TRIBUNALS, 617, 620 (Edgardo Sobenes et al. eds., 2022).

227. *See* CATHERINE HIGHAM ET AL., CHALLENGING GOVERNMENT RESPONSES TO CLIMATE CHANGE THROUGH FRAMEWORK LITIGATION 2 (2022).

228. Robert Carnwarth, *Climate-Conscious Courts: Reflections on the Role of the Judge in Addressing Climate Change*, LSE: GRANTHAM RSCH. INST. ON CLIMATE CHANGE & ENV'T (Jan. 19, 2022), https://www.lse.ac.uk/granthaminstitute/news/climate-conscious-courts-reflections-on-the-role-of-the-judge-in-addressing-climate-change/.

to the UNGA resolution recognizing such a right at the international level, for example)[229] could similarly interpret the Paris Agreement as a human rights treaty. Internally, this interpretation could be further expanded by the Supreme Court (or other Brazilian courts) in future cases. Judges could then further engage with the Paris Agreement more clearly, clarifying what this recognition means in terms of the obligations contained in it.

B. *Separation of Powers: The Duty to Implement the Paris Agreement and Judicial Oversight*

Based on the interpretation of the supra-legal nature of the Paris Agreement, the Brazilian Supreme Court advanced on the types of obligations it creates. Acknowledging the "seriousness" of Brazil's environmental situation (i.e., of the backlash of environmental policies, the dismantling of environmental bodies, and the failure to allocate resources to climate policies), the Court granted the plaintiff's request to determine that the executive body has "the duty—and not the free choice—to give operation to the Climate Fund and allocate its resources for its purpose."[230] Furthermore, the Court found that the legal obligation related to the allocation of resources of funds is a "complex act" subject to the principle of separation of powers and requires appreciation and deliberation of the executive and legislative branches.[231] Given the risk of violating the principle of separation of powers, the executive branch cannot "simply ignore the allocations determined" by the legislative body "at its own discretion."[232] The interpretation of the Court relies on Brazilian fiscal responsibility laws and the constitutional duty to protect and restore the environment based on the constitutional right to a healthy environment.

The Court also addressed the issue of "suboptimal allocation of resources of the Fund" because, upon resuming the operations of the Climate Fund, the executive government allocated resources to a single project related to the urban environment.[233] The Justice-Rapporteur

229. This includes almost all countries in Latin America and the Caribbean. *See* Maria Antonia Tigre, *International Recognition of the Right to a Healthy Environment: What is the Added Value for Latin America and the Caribbean?*, 117 AJIL UNBOUND 184, 186 (2023).

230. S.T.F., ADPF 708, Relator: Min. Roberto Barroso, 04.07.2022, 194, D.J.e, 28.09.2022 (Braz.), ¶ 27 ("o Executivo tem o dever – e não a livre escolha – de dar funcionamento ao Fundo Clima e de alocar seus recursos para seus fins.").

231. *Id.* ¶ 28.

232. *Id.* ("O Executivo não pode simplesmente ignorar as destinações determinadas pelo Legislativo, a seu livre critério[.]").

233. *Id.* ¶ 33 ("alocação *subótima* dos recursos do Fundo") (emphasis in original).

critically noted that it is common knowledge that a significant part of GHG emissions in Brazil comes from deforestation.[234] Allocating resources to the urban environment would mean sacrificing the limited resources available to invest in measures that effectively address the climate crisis.[235] The Justice-Rapporteur, noting that this question would be beyond the limits of the question as originally formulated, still addressed this point as *obiter dicta*.[236]

In order to contribute to this discourse and strengthen the argument presented herein, the Court diligently addressed significant concerns associated with the separation of powers in climate litigation. First, the Court displayed recognition for its consolidated case law, which consistently upholds deference to the elected representatives' allocation of resources.[237] Nevertheless, when such resource allocations become compromised due to factors such as purpose misuse, lack of plausible justifications, or disproportionality, thereby resulting in severe infringement upon the fundamental rights' indispensable core, the Court possesses both the ability and obligation to exert oversight over these acts of allocation.[238] The justification for this "interference" rests upon the understanding that, in such instances, the judge's role does not entail evaluating the merit or political expediency of said acts but rather assumes the responsibility of ensuring compliance with legal norms and principles.[239] By delving into these considerations, the Court not only engaged with crucial aspects of separation of powers but also expanded the understanding surrounding the Court's interpretation within the context of climate litigation.

It is important to emphasize that, in the context of the *Climate Fund* case, the Court recognized the limitations of exercising control over the (mis)allocation of resources.[240] However, the Court drew attention to the persistent failure of the government to effectively mitigate significant sources of GHG emissions, such as deforestation and land use change, which have contributed to the exacerbation of climate change mitigation challenges over an extended period.[241] Consequently, the Court recognized that it is conceivable that the judiciary may be compelled to take future action to ensure that resources align with the

234. *Id.*
235. *Id.*
236. *Id.*
237. *Id.* ¶ 34.
238. *Id.* ¶¶ 27, 34.
239. *Id.* ¶¶ 30, 34.
240. *Id.* ¶¶ 32-35.
241. *Id.* ¶ 35.

intended purposes stipulated by the law. This potential intervention aims to prevent any violation of the principle of proportionality by prohibiting inadequate protection measures. By raising these concerns, the Court not only strengthened the argument at hand but also expanded upon its interpretation of the separation of powers within the intricate landscape of climate litigation.

The Court clarified, in closing, that:

> The Executive Branch has the constitutional duty to make the Climate Fund's resources work and allocate them annually, for climate change mitigation purposes, and its contingency is prohibited, due to the constitutional duty to protect the environment (CF, art. 225), international rights and commitments assumed by Brazil (CF, art. 5, para. 2), as well as the constitutional principle of separation of powers (CF, art. 2 c/c art. 9, para. 2, LRF).[242]

The Court's recognition of the duty of oversight of the judiciary to act to avoid the regression of environmental (and climate) protection is not without controversy.[243] Angela Rutherford and Flavianne Nóbrega argue that this recognition is "ambivalent," as the "high degree of normative-judicial ineffectiveness" can facilitate political manipulation and undermine a broad realization of climate-related human rights.[244] Their criticism, while not properly expanded, may relate to the limited expansion of the argument by the Justice-Rapporteur.

In some of the ongoing climate cases in Brazil, the discussion around separation of powers revolves around the possibility of judicial review of executive policies.[245] So far, the Supreme Court has rejected this argument, determining that it would not discretionarily analyze public policies but rather their adequacy and impact on rights guaranteed by the Constitution. For example, in ADPF 749, a case related to the rollback of several environmental regulations by the executive branch, the Supreme Court stated that the conduct of the executive branch is

242. *Id.* ¶ 37.

243. *Id.* at 5, ¶¶ 8-9.

244. Angelica Rutherford & Flavianne Fernanda Bitencourt Nóbrega, *The Paris Agreement as a Human Rights Treaty: The Ruling in PSB et al v Brazil (on Climate Fund)*, 3(2) JUS CORPUS L. J. 456, 456 (2023).

245. *See, e.g.*, S.T.F., ADPF 749, Relator: Min. Rosa Weber, 14.12.2021, ¶¶ 2, 21; S.T.F., ADPF 760, Relator: Min. Cármen Lúcia; 06.04.2022, 70, D.J.e.

bound by the constitutional order (including environmental protection) and that the judiciary is responsible for maintaining its jurisdictional control.[246] In the event of a failure to provide justification for its actions within the constitutional framework for the protection of the environment, the normative activity of the administrative entity becomes subject to judicial scrutiny of its legitimacy. These objectives and principles are primarily derived from the constitutional right to a healthy environment. They also impose upon the government and society the duty to defend and preserve the environment for present and future generations.[247]

In this regard, in the joint trial of ADPF 760 and ADO 54, which argued against the Brazilian Federal Government's inaction in relation to combating deforestation in the Amazon, Justice-Rapporteur Cármen Lúcia emphasized that the Court was not to determine the choice of the most appropriate public policy, but rather, to safeguard the constitutional order.[248] Justice Lúcia concluded that because the Federal administration was not protecting and reducing risks to the environment, the Court had to step in and guarantee the protection of this right.[249]

As mentioned, the final decision on the *Climate Fund* consists of the prevailing opinion of Justice Barroso—followed by eight collegiate justices—the concurring opinion of Justice Edson Fachin, and the dissenting opinion of Justice Nunes Marques. Justice Marques's position was that there was no omission on the part of the Federal Public Administration and that the Court's decision constituted a violation of the principle of separation of powers.[250]

However, in Brazil, there is no intrinsic incompatibility between the judicialization of climate matters and separation of powers.[251] This question was explicitly addressed in an article by Justice Barroso, in

246. S.T.F., ADPF 749, ¶ 8.

247. *Id.* ¶ 2.

248. S.T.F., ADPF 760, ¶ 63. The ADPF 760 and the ADO 54, both part of the "green package," were being ruled in conjunction. In her vote, Justice-Rapporteur Cármen Lúcia acknowledged the illegal deforestation taking place in the Amazon and the failure of the Brazilian state in protecting an ecologically balanced environment. The vote recognizes "the right to an ecologically balanced environment is one of the human rights included in agreements that Brazil has committed to", not only in the Constitution but also in international agreements, and determined that the Federal Government should resume the Action Plan for the Prevention and Control of Deforestation in the Amazon Region (PPCDam).

249. *Id.*

250. S.T.F., ADPF 708, Relator: Min. Roberto Barroso, 04.07.2022, 194, D.J.e, 28.09.2022 (Braz.) (dissent), at 11.

251. *See* Lehmen, *supra* note 183.

which he clarifies that the "conservation and promotion of fundamental rights, even against the will of political majorities, is a condition for the functioning of democratic constitutionalism. Therefore, the intervention of the judiciary, in such cases, remedying a legislative omission or invalidating an unconstitutional law, is in favor and not against democracy."[252]

The *Climate Fund* decision precisely deals with the judicialization of concrete actions and omissions and public policies that directly affect the right to an ecologically balanced environment provided for in Article 225 of the Federal Constitution. The plaintiffs argued and the Court agreed that the government's actions and omissions constitute an unconstitutional state of affairs as well as a violation of the principle of prohibition of retrogression in environmental matters. In this context, the approach to the separation of powers can be understood from three different angles.

First and foremost, the right to a balanced and stable climate is a requisite for the guarantee of the fundamental right to an ecologically balanced environment (established by Article 225 of the Federal Constitution).[253] Government actions and omissions that put at risk the effectiveness of the constitutional protection of the environment and, consequently, of the right to a balanced climate constitute, therefore, a constitutional matter that falls within the sphere of action of the Federal Supreme Court. There are several other examples of rights-based climate cases that seek to stop rights violations and thus cannot be removed from the appreciation of the judiciary. For similar reasons, the argument on separation of powers also did not prosper in *Leghari v. Federation of Pakistan*,[254] *In re Court on its own motion v. State of Himachal Pradesh and others,*[255] or *Gbemre v. Shell Petroleum Development Company of Nigeria Ltd.*[256]

The ruling in *Climate Fund* confirms the understanding that judicial control of the government's omission is not only possible but imperative. The Court highlighted that "in the face of illicit procrastination of the stages of implementation of constitutional plans" or in the face of

252. Luís Roberto Barroso, *Judicialização, ativismo judicial e legitimidade democrática*, *in* SUFFRAGIUM: REVISTA DO TRIBUNAL REGIONAL ELEITORAL DO CEARÁ 11, 19 (2009); for the English translation, see Alessandra Lehmen, *Advancing Strategic Climate Litigation in Brazil*, 22 GERMAN L. J. 1471, 1475 (2021).

253. *See* Setzer & Winter de Carvalho, *supra* note 150, at 204.

254. Leghari v. Pakistan, (2015) 25501/2015 WP 1 (Pak.).

255. Sher Singh v. State of Himachal Pradesh, No. 237 (THC)/2013 (CWPIL No.15 of 2010).

256. Gbemre v. Shell Petroleum Development Company Nigeria Ltd. [2005] AHRLR 151 (Nigeria).

systemic violation of fundamental rights, "the principle of separation of powers cannot be interpreted as a mechanism that impedes the effectiveness of constitutional provisions, under the risk of transforming constitutional programs into mere promises."[257]

Second, the requests formulated in the *Climate Fund* case are limited to compelling the executive branch to comply with the norms that govern the operation of the Climate Fund. As in the case of *Friends of the Irish Environment (FIE) v. Ireland*[258] and in *R (on the application of Friends of the Earth Ltd and others) v. Secretary of State for Business Energy and Industrial Strategy*,[259] the judiciary was being asked to recognize the noncompliance of certain government actions with the law and to order the government to take steps to implement it. In the *Climate Fund* case, upon presentation of evidence showcasing the government's omission, the Court concluded that there was a need for the enforcement of both domestic laws and international commitments undertaken by the state.

Similar to landmark cases decided by other apex courts, the separation of powers did not prevent the judicial assessment of climate disputes. In *Urgenda*, the Court refuted the separation of powers argument.[260] The Dutch government's defense argued that a court order requiring the nation to limit its GHG emissions would violate the doctrine of separation of powers; such a decision should rest with democratically elected leaders, not with the judiciary. The Supreme Court disagreed, concluding that the judiciary can assess the acts of other powers when citizens' rights are at stake, even if the resolution of the case has consequences of a political nature. The Court asserted that the requests in *Urgenda* essentially concerned the protection of rights and, therefore, justified the judicial manifestation.[261]

As Marco A. Moraes Alberto and Conrado Hübner Mendes have argued in their analysis of separation of powers in climate litigation,

257. S.T.F., ADO 2, Relator: Min. Luiz Fux, 15.04.2020, 2, D.J.e, 30.04.2020.

258. Friends of the Irish Env't CLG v. Ireland [2017] IEHC 747 (Ir.).

259. R (on the application of Friends of the Earth Ltd and others) v. Heathrow Airport Ltd [2020] UKSC 52.

260. Hoge Raad Der Nederlanden [HR] [Supreme Court of the Netherlands] 20 december 2019, RvdW 2020, 19/0035 m.nt. (De Staat der Nederlanden/Stichting Urgenda) (Neth.), ¶ 2.3.2.

261. In the Urgenda case it was clear that (1) that the requested measure leave the other powers with sufficient leeway for policy formulation; (2) that determining whether a federal government action violates constitutional rights is standard judicial practice; (3) deciding the case does not require the Judiciary to politically determine the "best" level of emissions or how to achieve it, leaving a significant margin of discretion to the Executive. *See* Christina Eckes, *The Urgenda Case is Separation of Powers at Work*, AMSTERDAM CTR. FOR EUR. L. & GOVERNANCE RSCH. PAPER NO. 2021-05 (Dec. 7, 2021), http://dx.doi.org/10.2139/ssrn.3979729.

judicialization, and judicial activism are distinct concepts.[262] The requested judicial control of climate policy cannot be considered judicial activism.[263] The matter does not differ from other matters brought before the judiciary when the object of the discussion involves the spontaneous non-compliance of an obligation assigned to the executive or the legislative branch.[264]

Last, the principle of separation of powers was brought into the ruling to demonstrate that the administration had an obligation to allocate public funds in accordance with what is established in budgetary laws. The ruling makes this interpretation based on Article 2 of the Constitution, combined with Article 9, paragraph two, of the Fiscal Responsibility Law.[265] To understand this dimension of the ruling, it is important to clarify that the Constitution establishes budgeting obligations for each branch of government. The judiciary's role is to provide a safeguard on the use of public funds after the budget is approved by Congress to ensure the use of funds remains consistent with the country's existing laws. The judiciary may review the federal budget where an area of budget expenditure is inconsistent or contravenes existing legislation. The judiciary can also rule on the use of presidential decrees to shift money from one purpose to another during a given year. As such, the jurisdiction of the judiciary extends beyond adjudicating procurement processes; it encompasses the implementation of initiatives outlined in the budget.[266]

Therefore, the ruling not only confirms that a court decision is supported by the principle of separation of powers, but because of the way in which Brazil's budgetary system is set, it is also necessary to reestablish the balance between the executive and the legislative branches. As stated in the decision, the legal obligations of the destination of funds to climate action rely on the deliberation of both the executive and the legislative branches: "[t]he Executive cannot simply ignore the destinations determined by the Legislature, at its free discretion, under penalty of violation of the principle of separation of powers."[267]

---

262. *See* Marco A. Moraes Alberto & Conrado Hübner Mendes, *Litigância Climática e Separação de Poderes*, *in* LITIGÂNCIA CLIMÁTICA: NOVAS FRONTEIRAS PARA O DIREITO AMBIENTAL NO BRASIL 117, 117–38 (Joana Setzer et al. eds., 2019).

263. *See id.*

264. *See id.*

265. Lei Complementar No. 101, de 4 de Mei de 2000, D.O.U., de 5 de Mei de 2000.

266. OECD, CENTRE OF GOVERNMENT REVIEW OF BRAZIL: TOWARD AN INTEGRATED AND STRUCTURED CENTRE OF GOVERNMENT 101 (2022).

267. S.T.F., ADPF 708, Relator: Min. Roberto Barroso, 04.07.2022, 194, D.J.e, 28.09.2022 (Braz.), ¶ 28 ("O Executivo não pode simplesmente ignorar as destinações determinadas pelo

V. Conclusion

The groundbreaking decision in the *Climate Fund* case holds significant implications for rights-based climate litigation in Brazil and beyond. The Court's recognition of the Paris Agreement as a human rights treaty and its establishment of the executive branch's constitutional obligation to allocate funds from the Climate Fund for climate change mitigation sets a clear precedent from the country's apex court. This recognition of the human rights framework as applicable to climate change opens new avenues for future climate litigation in Brazil and has practical implications in pending cases.

Moreover, the decision's importance for the development of climate litigation in Brazil cannot be understated. It firmly establishes critical precedents regarding the interpretation of the Paris Agreement, the duty to mitigate GHG emissions, and the role of judicial oversight in implementing the agreement. This landmark ruling provides a solid foundation for future climate litigation cases within the country, encouraging the exploration of innovative legal approaches and reinforcing the rights-based approach to climate change. By addressing these topics comprehensively, this Article contributes to advancing the understanding of the *Climate Fund* decision and its role in shaping climate litigation in Brazil and beyond. However, the implications of the decision also extend beyond Brazilian borders. Adopting a comparative perspective, this Article analyzed trends in climate litigation, highlighting the rights and duties recognized by the Supreme Court and their broader implications at national, regional, and global levels.

Through this analysis, the Article contributes to the growing understanding of global climate litigation in Brazil, in Latin America, and in the Global South. This analysis is by no means exhaustive, and the authors encourage others to further assess the legal ramifications of this decision in Brazil and beyond. For example, one aspect that deserves further attention is the topic of climate finance, which holds central importance in the *Climate Fund* decision. The mechanism of the Climate Fund itself highlights the significance of financial resources in addressing climate change. Future research and analysis could delve deeper into the intricacies of climate finance within the context of the decision, exploring its implications for funding climate change mitigation and adaptation efforts.

Legislativo, a seu livre critério, sob pena de violação ao princípio da separação dos Poderes.") (internal citation omitted).