Summary: Environmental constitutional law. Argument of non-compliance with a fundamental precept. Climate Fund. Non-allocation of resources aimed at mitigating climate change. Unconstitutionality. Violation of international commitments.

1. This is an appeal for breach of fundamental precept whereby it is alleged that the Federal Government has kept the National Fund on Climate Change (Climate Fund) inoperative during the years 2019 and 2020, failing to allocate substantial resources for tackling climate change. It is requested: (i) the resumption of the Fund's operation; (ii) the declaration of the Union's duty to allocate such resources and the determination that it refrain from new omissions; and (iii) the prohibition of the contingency of such amounts, based on the constitutional right to a healthy environment.

2. The documents attached to the case records prove the effective omission of the Union during the years 2019 and 2020. They show that the failure to allocate the resources was a deliberate decision by the Executive Branch, until it was possible to change the constitution of the Fund's Management Committee, in order to control the information and decisions relevant to the allocation of its resources. This measure is part of a broader picture of systemic suppression or weakening of the collegiate bodies of the Public Administration and/or the reduction of the participation of civil society in their scope, with a view to their capture. Such arrangements have already been considered unconstitutional by the STF in repeated decisions. In this sense: ADI 6121, Reporting Min. Marco Aurélio (referring to the extinction of multiple collegiate bodies); ADPF 622, Reporting Min. Roberto Barroso (on alteration of the operation of the National Council of Children and Adolescents - CONANDA); ADPF 623 MC, Reporting Min. Rosa Weber (on the same problem in the National Council of Environment

- CONAMA); ADPF 651, Reporting Min.

Cármen Lúcia (relevant to the Deliberative Council of the National Environment Fund - FMNA).

3. The operation of the Climate Fund was hurriedly resumed by the Executive Branch after the filing of the present lawsuit, releasing: (i) all reimbursable resources to the BNDES; and (ii) part of the non-reimbursable resources to the Lixão Zero Project, of the government of Rondônia. The remaining portion of the non-reimbursable funds was kept withheld due to a contingency allegedly determined by the Ministry of the Economy.

4. Constitutional, supralegal and legal duty of the Union and elected representatives to protect the environment and combat climate change. The issue, therefore, has a binding legal nature, and is not a matter of free political choice. Determination to abstain from omissions in the operationalization of the Climate Fund and in the destination of its resources. Intelligence of arts. 225 and 5, § 2º, of the Federal Constitution (CF).

5. Prohibition of the contingency of the Climate Fund amounts, due to: (i) the serious context in which the Brazilian environmental situation is found, which has a strict dependency relationship with the essential core of multiple fundamental rights; (ii) the fact that such amounts are linked to expenses subject to a resolution of the Legislative Branch, aimed at fulfilling a constitutional and legal obligation, with a specific destination. Intelligence of art. 2, of the CF and art. 9, § 2, of the Fiscal Responsibility Law - LC 101/2000 (LRF). Precedent: ADPF 347 MC, Rel. Min. Marco Aurélio.

6. Application granted in order to: (i) recognize the omission of the Union, due to the failure to fully allocate the resources of the Climate Fund for 2019; (ii) determine the Union to refrain from omitting to

(ii) to make the Climate Fund operate or to allocate its resources; and (iii) to prohibit the contingency of revenues that make up the Fund.

7. Thesis: "*The Executive Branch has the constitutional duty to operate and allocate annually the resources of the Climate Fund, for purposes of mitigation of climate change, being prohibited its contingency, due to the constitutional duty of protection to the environment (CF, art. 225), rights and international commitments assumed by Brazil (CF, art. 5, § 2), as well as the constitutional principle of separation of powers (CF, art. 2 c. /c art. 9, § 2, LRF).*"

Voting :

The Rapporteur Minister LUÍS ROBERTO BARROSO

1. This is a direct action filed by the Brazilian Socialist Party - PSB, the Socialism and Freedom Party - PSOL, the Workers' Party - PT and Rede Sustentabilidade, admitted as a plea of breach of fundamental precept. The actions and omissions of the Federal Government are invoked, which, in practice, would lead to the non-functioning of the National Fund on Climate Change (Climate Fund) and the non-application of its substantial resources for the adoption of measures to mitigate climate change, in violation of the right to a healthy environment (CF, art. 225), as well as international commitments to which Brazil is a party (CF, art. 5, para. 2).

I. Preliminaries

2. I reject the preliminaries invoked by the Union. It is not, as alleged by the Presidency, an action against mere acts that regulate the operation of the Climate Fund. On the contrary, it is questioning actions and especially **omissions (therefore, the absence of acts)** that led to the nonfunctioning of the Fund, with the undue retention and non-application of its resources in 2019 and at least part of 2020. There is also no reflex violation, as alleged by AGU. The examination of the actions

and omissions of the Union on the matter does not demand its collision with the law. On the contrary, the examination takes place in light of the constitutional right to environmental protection, to its preservation for present and future generations, as well as to the protection and restoration of essential ecological processes (CF, art. 225, *caput* and paragraphs).

3. Nor is the argument that the subsidiarity requirement applicable to ADPF is absent in this case, on the grounds that the same actions and omissions could be discussed by means of class actions. Obviously, the problem will only be adequately solved by means of a direct action resulting in a decision with binding and general effects for the Judiciary Branch and the Public Administration. There is no doubt, therefore, as to the appropriateness of the action or as to the presence of the aforementioned requirement.

II. Merit

4. On the merits, the plaintiffs request the resumption of the operation of the Climate Fund, with the approval of the Annual Resource Application Plan - PAAR, the continuity of fundraising and its effective allocation. They also request that the Federal Government be determined to ensure the operation of the Climate Fund while it exists, refraining from paralyzing it again, and allocating its resources; as well as to prevent the contingency of its resources, in order to avoid that, by a transversal measure (alleged need to comply with fiscal responsibility norms), the government precisely chooses to contingencyize the funds destined to the fight against climate change and, therefore, to environmental protection.

5. Before entering the merits of the case, however, it is important to make a few remarks about the context in which the present case develops and the implications of the present debate.

1. The context:

1.1. What is climate change

6. The environmental issue is one of the defining issues of our time. It encompasses two related issues that have an immense impact on our lives and on future generations: climate change and global warming. *Global warming* is linked to the 'greenhouse effect'. Solar energy reaches the Earth's atmosphere and is reflected back into space. Part of this energy, however, is trapped in the atmosphere by so-called greenhouse gases, the most important of which is carbon dioxide. This is a natural phenomenon and necessary to keep the Earth at a temperature compatible with human life.

7. The facts of modern life, such as, above all, the burning of fossil fuels (coal, petroleum, natural gas), but also agriculture, cattle raising and deforestation have excessively increased the emission of greenhouse gases and the consequent retention of heat, causing global warming and relevant *climatic changes*. The consequences are felt in different parts of the world. Among them can be pointed out: the increase in global temperature, the warming of oceans, the melting of polar *ice sheets*, *the glacial retreat*, the loss of snow cover in the Northern Hemisphere, the rise in sea level, the loss in the extension and thickness of the Arctic Sea ice, the extinction of species in alarming proportions and the increasing number of extreme climate situations (such as hurricanes, floods and heat waves). Taken together, such changes may put at risk the survival of man on Earth**[1]** .

8. The solution to the problem depends on the effort of each and every country and involves rethinking the production and consumption methods consolidated so far, in order to incorporate the concept of "sustainable development": that which "meets the needs of the present without compromising the ability of future generations to meet their own needs". Sustainable development depends on a general reduction of greenhouse gases (GHGs) by all actors involved, among other measures.

1.2. Transnational commitments assumed by Brazil

9. As a result, a transnational legal regime for tackling climate change was devised, based on three pillars: (i) the

(i) the *Kyoto Protocol* , which entered into force in 1994, has been ratified by 197 countries and established comprehensive principles, general obligations and negotiation processes to be detailed in subsequent conferences between the parties; (ii) the *Kyoto Protocol* , which entered into force in 1997 , has currently been ratified by 192 countries and established specific goals for the reduction of greenhouse gas emissions for 36 industrialized countries and the European Union. Developing countries were left out of this specific obligation; (iii) the *Paris Agreement* , which entered into force in 2016 and is adhered by 185 countries. Unlike the Kyoto Protocol, instead of setting binding emission limits, it provided that each country would voluntarily submit its "nationally determined contribution". The agreement does not distinguish between the roles of developed and developing countries.

10. In 2009, Brazil made a voluntary climate commitment to reduce GHG emissions between 36.1% and 38.9% of its projected emissions for the period until 2020. Although the aforementioned document has been a mere political declaration, with no binding nature, the announced goal was confirmed in the art. 12 of Law nº 12.187/2009 **[2]** , diploma that established the National Policy on Climate Change (PNMC) **[3]** .

11. Such forecast was repeated in art. 19, § 1, I, of Decree No. 9.578/2018 and was equivalent to the commitment to reduce the annual deforestation rate to a maximum level of 3.925 Km2 by 2020. This is because, in the case of Brazil, land use change and deforestation are among the main activities responsible for GHG emissions. On the occasion of the ratification and internalization of the Paris Agreement, Brazil has also committed to reduce GHG emissions by 37% in relation to the 2005 level by the year 2025, and by 43% by the year 2030 **[4]** .

1.3. Serious setbacks in environmental matters

12. Between 2004 and 2012, Brazil improved public policies for environmental protection and experienced considerable success in reducing deforestation. Despite this, from 2013 onwards, annual deforestation rates began to rise again progressively. Along these lines, in 2018, deforestation was 7,536 km2, representing a 65% increase compared to 2012. Therefore, the picture related to the fight against climate change in the country, before the current government, was already worrying.

13. As of 2019 (the same year in which the Climate Fund was paralyzed), deforestation suffered an even greater increase in comparison to what occurred in the previous decade. The annual deforestation rate in the Legal Amazon returned to the 2006/2007 levels, increasing significantly, including in protected areas, such as indigenous lands and conservation units. The situation characterizes a major setback in a situation that was already critical **[5]**.

14. Along these lines, in 2019, deforestation by clear cutting was 10,129 km2, an increase of 34% compared to the previous year, when the rate was already high due to the upward trend between 2013 and 2018. In 2020, this rate was 10,851 km2, almost three times the target established in Decrees 7,309/2010 and 9,578/2018, which should have been met that year. In 2021, deforestation increased another 22% and reached an area of 13,235 km2, the highest in 15 years , representing an increase of 76% in annual deforestation compared to 2018, and almost 190% compared to 2012. For the year 2022, the artificial intelligence tool PrevisIA, predicts deforestation in the Legal Amazon of 15,391 km2, which would represent an increase of 16% compared to 2021.

15. **Therefore, the results objectively ascertained indicate that the country is, in fact, moving in the opposite direction to the commitments made and to the mitigation of climate change, and that the situation has worsened substantially in recent years. This is the worrying and persistent situation in which the confrontation with climate change in Brazil finds itself, which puts at risk the life, health and food security of its population, as well as the economy in the future.**

2. The environmental issue as a constitutional issue

(CF, art. 225)

16. Contrary to what the Presidency of the Republic and the Office of the Solicitor General claim, the issue pertaining to climate change is a constitutional matter. Along these lines, Article 225, *caput* and paragraphs, of the Constitution expressly establishes the right to an ecologically balanced environment, imposing on the Public Power the duty to defend, preserve and restore it for present and future generations.

Therefore, environmental protection is not part of the Chief Executive's political judgment of convenience and opportunity. It is an obligation which the Chief Executive is bound to fulfill.

17. Along the same lines, the Constitution recognizes the supralegal character of the international treaties on human rights to which Brazil is a party, under the terms of its article 5, §2. And there is no doubt that the environmental issue fits the hypothesis. As the representative of UNEP in Brazil, during the public hearing, clearly stated: "There are no human rights on a dead or sick planet" (p. 171). Treaties on environmental law are a species of the genus human rights treaties and enjoy, for this reason, supranational status. Thus, there is no legally valid option of simply omitting to combat climate change.

18. Furthermore, the objective data presented above highlight a situation of collapse in public policies to combat climate change, undoubtedly aggravated by the omission of the current Executive. In contexts like these, it is the role of the supreme courts and constitutional tribunals to act to prevent retrogression. The principle of the prohibition of retrogression is especially prominent when it comes to environmental protection. It is violated when the level of environmental protection is lowered through inaction or when relevant public policies are suppressed without adequate substitution.

3. Union actions and omissions related to the Climate Fund

19. Regarding specifically the Climate Fund, it is the main federal instrument aimed at funding the fight against climate change and the fulfillment of greenhouse gas emission reduction targets. According to Law 12.114/2009, which regulated it, its resources must be destined to the activities indicated in art. 5, §4º, of Law 12.114
/2009, namely:

> I - education, capacity building, training and mobilization in the area of climate change;
>
> II - Climate Science, Impacts Analysis and Vulnerability;
>
> III - adaptation of society and ecosystems to the impacts of climate change;

IV - projects to reduce greenhouse gas emissions - GHG;

V - projects to reduce carbon emissions from deforestation and forest degradation, with priority to natural areas threatened with destruction and relevant to biodiversity conservation strategies;

VI - development and dissemination of technology for the mitigation of greenhouse gas emissions;

VII - formulation of public policies to solve problems related to the emission and mitigation of GHG emissions;

VIII - research and creation of project and inventory systems and methodologies that contribute to the reduction of net greenhouse gas emissions and to the reduction of emissions from deforestation and land use change;

IX - development of products and services that contribute to the dynamics of environmental conservation and stabilisation of greenhouse gas concentrations;

X - support for sustainable production chains;

XI - payments for environmental services to communities and individuals whose activities are proven to contribute to carbon storage, linked to other environmental services;

XII - agroforestry systems that contribute to the reduction of deforestation and carbon absorption by sinks and to income generation;

XIII - recovery of degraded areas and forest restoration, prioritizing Legal Reserve and Permanent Preservation Areas and the priority areas for generating and ensuring the quality of environmental services.

20. Law 12.114/2009 also establishes that the fund is managed by a Steering Committee (art. 4) and that such resources are applicable by means of: (i) **reimbursable** financial support, through the concession of a loan, by means of the operating agent, in this case, the BNDES (art. 5, I, c/c art. 7); and/or

(ii) **non-reimbursable** financial support to climate change mitigation projects, approved by the Steering Committee, in accordance with guidelines previously established by the Committee.

21. However, despite its importance, and as reported in the initial submission, **the Climate Fund actually remained inoperative throughout 2019 and part of 2020**. According to the "Evaluation of the National Policy on Climate Change", of the Environment Committee of the Federal Senate, such inoperability was due to the lack of appointment of the Committee

Management of the Fund **because the Executive intended to change its composition before allocating the resources**. According to the same document: the "new composition of the Committee favours the representation and participation of the private sector to the **detriment of the participation of organised civil society**, contrary to the old composition".

22. The provision is not foreign to the STF and is part of the same context of the extinction and/or alteration of multiple collegiate bodies of the Public Administration, through which the intention was to suppress or reduce the participation of civil society and *experts* in such bodies and ensure government control over decisions and information relevant to the sector. In general, these measures were declared unconstitutional by the Supreme Federal Court, having pointed out that they generated a risk of capture of such bodies and violated the right of citizenship and civil society organisations to participate in matters of relevant public interest. It was also considered that the changes compromised the duty of transparency and *accountability* of the Public Administration and elected representatives and, consequently, the democratic principle itself. In this sense: Precedents: ADI 6121, Reporting Justice Marco Aurélio (referring to the extinction of multiple collegiate bodies of the Federal Administration); ADPF 622, Reporting Justice Roberto Barroso (pertaining to the National Council of Children and Adolescents - CONANDA); ADPF 623 MC, Rel. Min. Rosa Weber, monocratic (related to the National Environmental Council - CONAMA); ADPF 651, Reporting Min. Cármen Lúcia (related to the Deliberative Council of the National Environmental Fund).

23. In fact, Decree 10.143, of 28.11.2019, changed the rules of composition of the Climate Fund. And the MMA Ordinance No. 113, of 16.03.2020, of the Ministry of Environment, appointed the new members of the Council. It can be seen, therefore, that **the Fund was inoperative, by deliberate decision of the Union in keeping it inoperative**.

24. The allegation, invoked by the then Minister of the Environment, that the non-operation occurred because the new regulatory framework for sanitation was awaited, does not hold water. Firstly, the resources of the Fund are not intended for sanitation, neither exclusively nor in the majority, as can be inferred from the provision transcribed above (art. 5, §4, of Law 12.114
/2009). There are many other activities to which its resources could be directed, which even emit more GHGs than the sanitation activity and,

therefore, would be more effective in mitigating climate change.

climate. In addition, **the PAAR for 2020 and 2021, subsequently approved, was not limited to the allocation of the frozen resources for sanitation, directing them to all lines available for BNDES financing, which shows that the previous delay did not result from waiting for the approval of the sanitation framework.** See the wording of the PAAR:

> *Biennial Guidelines and Priorities*
>
> Brazilian urban spaces have demanded public policies in the environmental area. Over the years, insufficient public investment in sanitation, air quality improvement, solid waste management, among other issues, has generated local environmental liabilities with high cost to environmental sustainability, affecting even the health of the most vulnerable families. Directing resources to meet this need has positive repercussions on the population in general, including in its relationship with the city and the environment.
>
> *Priorities for Implementation*
>
> The priority areas for investment of FNMC resources are all applications aimed at improving the quality of life of the population, with emphasis on urban environmental quality throughout Brazil, related in some way to mitigating climate change and adapting to its effects.
>
> • **Non-reimbursable resources**: the priority themes and regions for application will be determined by the choice of projects presented by the MMA for approval by the Steering Committee, **with emphasis on the urban environmental quality agenda, including solid waste management and the closure of landfills**.
>
> • **Reimbursable resources**: **all existing BNDES Climate Fund lines are eligible for financing, namely: urban mobility, sustainable cities and climate change, efficient machinery and equipment, renewable energy, solid waste, charcoal, native forests, management and carbon services, as well as innovative projects in all sub-programmes**. (Emphasis added)

25. What is clear from the analysis of the records is that the allocation of resources was rushed, after the filing of the lawsuit and possibly because of it.

26. According to information presented in the case records, the reimbursable resources were all allocated by PAAR 2020 and 2021 to the BNDES, and directed primarily to the urban environment (and not

to combat deforestation and change in soil use in rural areas). As for non-reimbursable resources, they were fully allocated to the solid waste disposal project of the Rondonia government - Lixão Zero project. Also, according to information from the Ministry of Environment, the **amount of** "**R$ 212,772 that were blocked by the Ministry of Economy, due to the meeting of fiscal targets**" was retained.

4. Duty of allocation of resources by the Union (CF,

Arts. 2 and 225 c/c art. 9, § 2, of the LRF)

27. The context narrated above, the seriousness of the Brazilian environmental situation, the aversion to the theme repeatedly manifested by the Federal Government, the history of destructuring of collegiate bodies integrating the Public Administration and the non-allocation of resources for environmental protection corroborate, furthermore, the need for this Federal Supreme Court to grant the request of the plaintiffs to determine that the Executive has the duty - and not the free choice - to give operation to the Climate Fund and allocate its resources for its purposes. In this sense, the request that it cease to omit to do so in subsequent fiscal years is well-founded.

28. The request to prohibit the contingency of the Fund's resources is also well founded. This is because the legal obligations of specific allocation of resources of funds rely on the appreciation and deliberation not only of the Executive, but also of the Legislative. It is a matter, therefore, of allocative choice produced based on a complex act, which is subject to the principle of separation of Powers. The Executive cannot simply ignore the allocations determined by the Legislative, at its own discretion, under penalty of violation of the principle of separation of Powers (FC, article 2). Due to the particularity of such expenses with specific destination, Article 9, paragraph 2 of Complementary Law 101/2000 (Fiscal Responsibility Law) provided: "**Expenses that constitute constitutional and legal obligations of the entity will not be subject to limitation**.

29. Along the same lines, the doctrine notes that the Fiscal Responsibility Law was approved, among other objectives, with the purpose of limiting the

discretion of the Executive Branch in the contingency of amounts, in order to ensure the effective compliance with mandatory expenses. See below:

> The **LRF and the LDO specify which expenses are mandatory and therefore a priority**. Considering that the LDO originates in a proposal from the Executive and is mandatorily **examined and approved by the National Congress, composed of representatives of the people, legitimately elected, not there is how to question the classification of expenditure on the priority of its realization**, because such priorities should reflect the best interest of the Brazilian people, the public interest. (Rubens Luiz Murga da Silva, Da despesa na Administração Pública Federal, R. CEJ, Brasilia, n. 26, pp. 69-78, Jul./ Sep. 2004, emphasis added).

30. This is precisely the hypothesis in question. The allocation of resources from the Climate Fund materializes the constitutional duty to protect and restore the environment (and the fundamental rights that are interdependent on them). Its revenues are bound by law to certain activities. For this reason, such resources cannot be contingent, under the terms of the Fiscal Responsibility Law. This understanding is also supported by precedent of the Full Court of the STF, rendered in ADPF 347, Reporting Min. Marco Aurélio, which concluded for the impossibility of contingency of the resources of the National Penitentiary Fund (FUNPEN), based on the same arguments. See the vote of the rapporteur on the point:

> As stated by Professor Eduardo Bastos de Mendonça, "public policies are defined concretely in the budget law, depending on the State's financial possibilities", so that "withholding funds tends to produce, at best, less comprehensive programs". **According to the author, the measure is even more problematic taking into account "that the cuts have reached programs related to areas in which, beyond any doubt, the performance of the State has been unsatisfactory or insufficient**", as is the case of the national prison system (MENDONÇA, Eduardo Bastos Furtado de. The Constitutionalization of Public Finances in Brazil. Rio de Janeiro: Renovar, 2010, p. 97-98).

The amounts not used do not cover not only reforms of prisons or the construction of new ones, but also resocialization projects that could even reduce the time in prison. **Moreover, it is completely doubtful the possibility of limiting expenses of this nature before the provisions of paragraph 2 of Article 9 of Complementary Law No. 101 of 2000:**

Article 9. If, at the end of a bimester, it is verified that the realization of revenue may not allow for compliance with the primary or nominal result targets established in the Fiscal Goals Annex, the Powers and the Public Prosecutor's Office shall, by their own act and in the necessary amounts, within the following thirty days, limit commitment and financial transactions, according to the criteria established by the budget guidelines law. [..]

§ 2º. Expenses that constitute constitutional and legal obligations of the entity, including those aimed at debt service payment, and those reserved by the budget guidelines law, shall not be subject to limitation.

The head of the device deals with the situation in which the Government fails to execute, partially, the budget, coming to contingency the amounts ordered to expenditure, **while in § 2, there is an exception considered obligations arising from legal commands and constitutional commands. As the Funpen deals with resources with a specific legal purpose, the circumstance that they cannot be used to satisfy contingency requirements is unavoidable: meeting contingent liabilities and other unforeseen fiscal risks and events** (article 5, item III, letter "b", of Complementary Law no. 101 of 2000). (ADPF 347, Reporting Justice Marco Aurélio, emphasis added)

31. The situation in the case records is identical to that examined in the precedent. The contingency, in the present case, would affect an area - combating climate change - in which, beyond any doubt, the State's performance is manifestly unsatisfactory and, more than that, is in clear retrogression. The resources whose contingencies are intended to be prohibited in the present case belong to the Climate Fund (just as those that were the object of ADPF 347 belonged to FUNPEN) and have a specific legal purpose, which, in turn, concretizes fundamental rights. There is no doubt, therefore, as to the impossibility of the contingency of the resources in question.

5. by way of *obiter dictum*

Suboptimal allocation of resources and

proportionality as a barrier to insufficient protection

32. A final word should be said about the allegations of the plaintiffs and *amici curiae* on the allocation decisions of the Climate Fund Management Committee. The present lawsuit was filed in order to overcome the omission in the functioning of the Fund and for its resources to be applied. The Fund has resumed its operation and its resources were applied in activities compatible with the norms in force. The remaining requests, for non-mission and non-contingency, are also being complied with. Therefore, the object of the present action, under the terms in which it was proposed, is exhausted.

33. However, during the course of the case, the claimants also alleged that the resources subsequently allocated were preferentially destined to serve the urban environment, when it is common knowledge that a relevant part of the country's GHG emissions derive from deforestation and the alteration of current soil use in the rural environment, which are no longer served. It is, therefore, an allegation of possible suboptimal allocation of resources of the Fund, which would sacrifice scarce resources in a situation of serious climate crisis. I understand that the question is beyond the limits of the action, as originally formulated. I shall, however, make a few remarks on the subject by way of *obiter dicta*.

34. According to the consolidated case law of the STF, the Court should, in principle, be deferential to the allocation choices made by elected representatives in matters of public policy, given that they involve difficult decisions about how to allocate scarce resources that are insufficient to meet equally relevant competing demands. If, however, it is found that such choices are vitiated by misuse of purpose, lack of plausibility of the reasons that determined them or violation of proportionality, implying serious damage to the essential core of fundamental rights, the Court can and should exercise control over such allocative acts. This is because, in this case, it is a question of controlling legality and not the merit or political expediency of such acts.

35. Therefore, although such control is beyond the scope of this action, persistent failure to address important sources of GHGs - such as deforestation and land use change - over time, and the consequent frustration of climate change mitigation, may

the Judiciary's future action on the matter, in order to ensure that the resources meet the purposes for which they were intended by the law and/or to avoid violation of the principle of proportionality by prohibiting insufficient protection.

III. Conclusion

36. On these grounds, in respect for the constitutional right to a healthy environment (CF, art. 225), for the country's duty to comply with internationally assumed rights and commitments (CF, art. 5, §2), and in observance of the principle of separation of Powers, which governs the "expenses that constitute constitutional and legal obligations" (CF, art. 2 c /c art. 9, § 2, LC 101/2000), I grant the action to: (i) recognize the omission of the Federal Government, due to the failure to fully allocate the resources of the Climate Fund for 2019; (ii) determine the Federal Government to abstain from omitting to make the Climate Fund work or to allocate its resources; and
(iii) prohibit the contingency of revenues forming part of the Fund.

37. I state the following thesis: "*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, par. 2), as well as the constitutional principle of separation of powers (CF, art. 2 c/c art. 9, par. 2, LRF)".*

It's like voting.

Notes:

[1] Luís Roberto Barroso and Patrícia Perrone Campos Mello. How to save the Amazon: why the standing forest is worth more than cut downs. *Revista de Direito da Cidade* 12(2), May 2020.

[2] Law nº 12.187/2009, art. 12: "To achieve the PNMC objectives, the country will adopt, as a voluntary national commitment, mitigation actions

of greenhouse gas emissions, with a view to reducing between 36.1% (thirty-six integers and one tenth percent) and 38.9% (thirty-eight integers and nine tenths percent) of its projected emissions by 2020".

[3] In regulating the legal provision, Article 6, § 1, I of Decree 7390/2010 established as one of the actions to be implemented, in order to achieve the legal commitment, "the reduction of eighty percent of the annual deforestation rates in the Legal Amazon in relation to the average verified between the years 1996 to 2005".

[4] The NDC text divides the emission mitigation measures aimed at reaching the target into certain sectors, including forests and land use change.

[5] Luís Roberto Barroso and Patrícia Perrone Campos Mello. How to save the Amazon: why the standing forest is worth more than cut downs. *Revista de Direito da Cidade* 12(2), May 2020.

[6] Available at: <https://previsia.org/>. Accessed on: 27 Mar. 2022. This tool was developed by Microsoft, Fundo Vale and Instituto do Homem e Meio Ambiente da Amazônia - Imazon,