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FEDERAL REGIONAL COURT OF THE 4TH REGION

INTERLOCUTORY APPEAL NO. 5033746-81.2021.4.04.0000/PR

APPELLANT: INSTITUTO DE ESTUDOS AMAZONICOS - IEA

APPELLEE: FEDERAL GOVERNMENT – OFFICE OF THE FEDERAL ATTORNEY GENERAL

ORDER/DECISION

This interlocutory appeal was filed against the decision rendered in the original public-interest climate civil action, in which the lower court rejected jurisdiction and ruled to transfer the action to the 7th Federal Environmental and Agrarian Court of the Judiciary Section of Amazonas, on account of alleged connection with public-interest civil action No. 1007104-63.2020.4.01.3200 (pursuant to articles 55, §3, 58 and 59, CPC/15 and reading *a contrario sensu* of precedent 235 from the STJ – Superior Court of Justice).

The appellant, also the plaintiff in the public-interest climate civil action, maintains, in summary, that the public-interest civil actions under analysis **present different central issues**. That being so because this public-interest climate civil action has as its main issue the enforcement of the normative climate targets assumed by the Federal Government in the National Policy on Climate Change – PNMC, to be executed as determined in the Action Plan for Prevention and Control of Deforestation in the Legal Amazon – PPCDAm. It argues that the obligation required from the Federal Government is that it comply with the determinations indicated in said climate regulations (legal and executory), which consist in reducing illegal deforestation in the Legal Amazon to at most 3,925 km² by the end of 2020. It states that this demand, eminently climate-based, aims to mitigate the emission of greenhouse gases (GHG) by reducing (illegal) deforestation to the levels required by Brazilian climate legislation. *In sum, this climate class action (i) is a class action linked to Climate Change Law (climate litigation); (ii) protects an environmental asset of national scope, for it aims to protect the right of all citizens to climate stability; and (iii) demands the implementation, by the Federal Government, of forest restoration as one of the instruments to achieve the climate targets assumed by the defendant*. On the other hand, public-interest civil action No. 1007104-63.2020.4.01.3200, filed by the Federal Public Prosecutor's Office before the Federal Court of Amazonas, deals with a class action that addresses matters related to Environmental Law. Its central theme is to ensure that certain governmental administrative agents implement measures to combat and control environmental offenders who operate harmfully in those points of the Amazon forest under greater threat of destruction, the so-called “ecological hotspots”, and specifically in the period during which the (covid-19) pandemic persists. This class action suit does NOT have a central theme linked to the Brazilian climate legislation, since the National Policy on Climate Change – PNMC and the Action Plan for the Prevention and Control of Deforestation in the Legal Amazon – PPCDAm, which are mentioned therein, are addressed only as factual background.

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The appellant requests: *a) that the present Interlocutory Appeal be granted a suspensive effect, holding the interlocutory decision herein contested suspended until the outcome of this Appeal*; b) on the merits, that the present interlocutory appeal be heard and granted, in order to revoke the interlocutory decision under discussion, and maintain the public-interest climate civil action filed by the appellant before the Court of the 11th Federal Court of Curitiba/PR.

These are the strict contours of the dispute. **I decide.**

Initially, I should like to highlight that the Superior Court of Justice has a consolidated position establishing the precedent that an appeal may be filed against an interlocutory decision dealing with a matter involving definition of jurisdiction, as already decided in the ruling of AgInt no REsp No. 1799493/RJ (05/04/2021) and REsp No. 1679909/RS (02/01/2018).

Let us examine the right alleged by the appellant (jurisdiction of the 'a quo' judge to judge the original action).

Professors Ingo Wolfgang Sarlet and Tiago Fensterseifer have pointed out that, in Brazil, over the course of approximately [four] decades, an ecological legal framework has progressively become consolidated – beginning in 1980 with Law 6.938/81 (National Environmental Policy Law), with the establishment of a new, autonomous ecological legal asset, consisting of a specialized legislative microsystem and a public environmental policy of national scope (at all federal levels). The 1988 Brazilian Constitution represents the apex of this development, with ecological protection taking a definitive place in the normative-axiological nucleus of our constitutional system, through the consecration of ecological protection duties attributed to the State and to individuals, as well as a new fundamental right assuring that everyone can live in a healthy and balanced environment – as expressed in its article 225. The 1988 Brazilian Constitution also establishes an open and cooperative Constitutional State, which has the prevalence of human rights as one of the governing principles of its international relations (art. 4, II), promoting what could be called a Dialogue of Normative Sources and even a Dialogue of Courts of Justice, which can be exemplified with the express reference made by Justice Barroso to the Advisory Opinion No. 23/2017 of the Inter-American Court of Human Rights on "Environment and Human Rights" in the decision convening the present public hearing. This constitutional scenario is underlined in the Supreme Court of Justice precedents, with the recognition of the *supra-legal status of* international treaties dealing with the environment, as highlighted in the reporting vote of Justice Rosa Weber in ADI 4066/DF (Asbestos Case), referring specifically on that occasion to the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (1989).

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For this reason, the Framework Convention on Climate Change and the Framework Convention on Biodiversity, both signed at the 1992 Rio Conference, as well as the 2015 Paris Agreement, should be taken as normative parameters, by national judges and courts, (including *ex officio*, as already decided by the Inter-American Court) for the control of conventionality of infraconstitutional legislation, as well as actions and omissions by public agencies and individuals. The new status attributed to the human right to the environment by the Inter-American Court of Human Rights was enshrined in the aforementioned OC 23/2017 and, more recently, already within the scope of its contentious jurisdiction, in the case *of Comunidades Indígenas Miembros* de *la Asociación Lhaka Honhat (Tierra Nuestra) v. Argentina,* 2020. This undoubtedly reinforces the international responsibility of the Brazilian State to protect the Amazon Rainforest. Regarding the fundamental right to the environment, the precedents of the Supreme Court of Justice recognize an ecological dimension inherent to the principle of human dignity, which calls for a minimum threshold of ecological quality and integrity as a premise for a dignified life and the exercise of other fundamental rights, also on the basis of the interdependence and indivisibility of such rights. (*Climate litigation, environmental protection and ADPF708/DF*. 2020. Available at < http://genjuridico.com.br/2020/09/25/protecao-do-meio-ambiente-adpf-708-df/>. Accessed 16 Aug 2021).

According to professors Gabriel Mantelli, Joana Nabuco and Caio Borges, climate litigation is a strategic alternative in the fight against climate change and for the defence of human rights. Increasingly, civil society organizations have made use of such mechanisms. This not only because there is a worldwide phenomenon of sharing experiences with this instrument – which can be seen in the efforts of the United Nations (UN) to lend visibility to the topic through the document *The status of climate change litigation: a global review* – but also because the use of climate litigation represents an additional opportunity to bring climate emergency to the forefront of public debate.

While individuals are indeterminate, collectivity can be brought together by the same factual support – damage to the environment caused by the alteration of its characteristics, demand for the restoration and repair of the environment damaged by climate change. (*Gabriel Wedy.* Climate litigation and procedural instruments of the Brazilian legal system. 2018. Available at <https://www.conjur.com.br/2018-dez-01/ambiente-juridico-litigios-climaticos-instrumentos-processuais-ordenamento-brasileiro>. Accessed on 16 Aug 2021).

Climate litigation is defined as a legal tool to call upon the Judiciary and non-judicial bodies to evaluate, monitor, implement and enforce legal rights and obligations related to climate change. Data indicate the existence of at least 1,200 climate litigation cases around the world, with a number of successful cases on record in favor of climate protection, such as *Massachusetts v. EPA* in the United States, the

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Urgenda case in the Netherlands and the *Leghari* case in Pakistan. In these last two cases, the lawsuits demanded improved climate protection standards, cases in which the judiciary required authorities to comply with improved climate protection standards.

In the "Urgenda case", which was heard before the Dutch courts, the Dutch Supreme Court issued a decision at the end of 2019, ordering the Dutch government to reduce greenhouse gas emissions by 25% compared to 1990 levels, which – according to the decision – should have been fulfilled by the end of 2020. As pointed out by Gabriel Wedy, federal judge of this Court and one of the most prominent Brazilian and international jurists on the subject, this was the first time that a State was obliged by a court to adopt effective measures against climate change. According to the chief justice of the Dutch Supreme Court, Kees Streefkerg, "because of global warming, the life, well-being and living conditions of many people around the world, including in the Netherlands, are being threatened" (Gabriel Wedy. *O 'caso Urgenda' e as lições para os litígios climáticos no Brasil. Consultor Jurídico, Coluna Ambiente Jurídico*, 02.01.2021. Available at: https://www.conjur.com.br).

In Brazil, discussion on the viability of climate litigation is advancing. In addition to climate litigation being a global phenomenon, Brazil is the seventh largest global emitter of greenhouse gases, and the country is already suffering from the effects of climate change. Events such as altered rainfall patterns in the Southeast and temperature increases in some regions of the Northeast are increasingly associated with structural changes in climate conditions.

Climate change litigation can generally be understood as legal actions that require the judiciary or administrative bodies to make decisions that expressly address issues, facts or legal norms related in their essence to the causes or impacts of climate change. Climate change litigation can involve issues related to the reduction of greenhouse gas emissions (MITIGATION), the reduction of vulnerability to the effects of climate change (ADAPTATION), the reparation of damage suffered due to climate change (COMPENSATION) and the management of climate risks (RISKS).

Mitigation climate disputes can require the government to implement measures to reduce GHG emissions, ensuring the effectiveness of reduction targets or carbon markets, and monitoring actions to combat deforestation, or measures in urban planning and environmental licensing processes. Adaptation climate litigation can hold governments and companies accountable for risk assessment and compel the implementation of actions necessary to combat adverse impacts of climate change. As a hypothetical example, litigation may force municipalities to develop plans and other

legal instruments to deal with changes in rainfall patterns, sustained droughts, and sea level rise.

Climate compensation litigation seeks to hold government entities and large emitters liable for damage caused to individuals and groups due to extreme weather events and significant changes in the environment in which they live (e.g. melting glaciers and their impacts on traditional peoples).

Finally, climate risk litigation involves the consideration of climate risks in environmental licensing processes, environmental impact studies, and the preparation of sectoral plans related to climate issues (such as energy and mobility). In the latter, information concerning risks and the evaluation of mitigation measures, including financial and socio-environmental measures, related to climate change can be requested.

International experiences show that several possibilities exist for climate litigation in terms of cause of action and subject matter, as well as parties with standing. The main parties that file climate litigation (plaintiff) are states, non-governmental organizations, and individuals. The main defendants are likewise states, but also companies *(*Gabriel Mantelli, Joana Nabuco e Caio Borges. *Litigância climática na prática: Estratégias para litígios climáticos no Brasil.* CONECTAS DIREITOS HUMANOS. [S.I.] 2019. Available at <https://conectas.org/publicacoes/download/guia-de-litigancia-climatica?_ga=2.184721513.1325593939.1629153561-104691867.1629153561>. Accessed 07 Dec 2019).

Legal cases around the world have shown that different legal-procedural arrangements have been used in climate litigation. The diversity present in the phenomenon of climate litigation encourages the expansion of this mechanism. The aforementioned professors Gabriel Mantelli, Joana Nabuco and Caio Borges (*op.cit.*) have laid out – for ease of visualisation – a list of possibilities for the configuration of possible climate litigation, as shown in the graph below:

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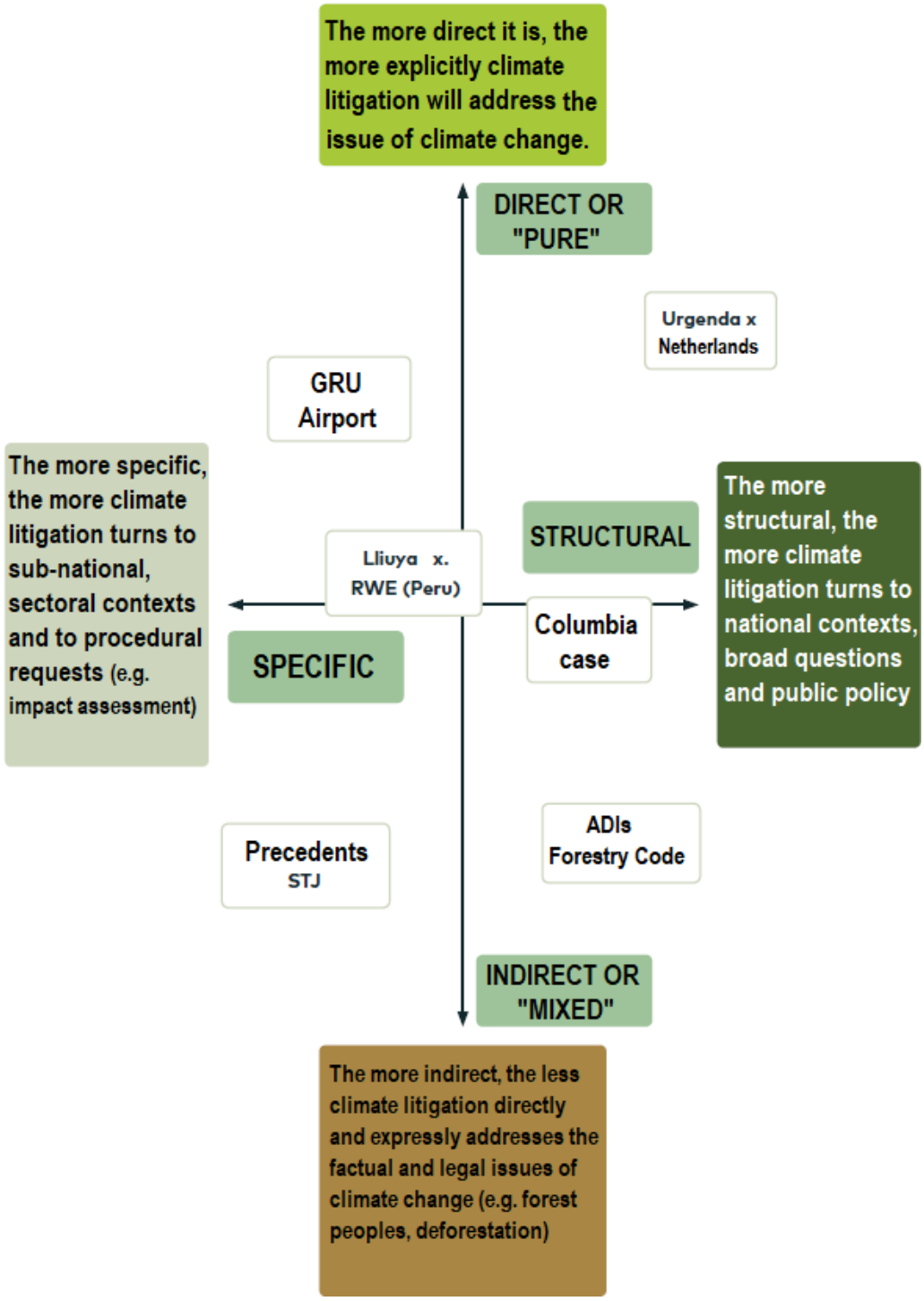

And these authors present us with a sample of possible claims in a climate litigation action (op.cit.):

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TYPE OF DISPUTES	EXAMPLES OF DEMANDS
MITIGATION CLIMATE DISPUTES	• demand government enforcement of laws and policies aimed at reducing GHG emissions; • call for effective carbon emission reduction targets or implementaion of carbon markets; • press for deforestation control actions and urban planning measures; • call for the review of environmental licensing processes.
ADAPTATION CLIMATE DISPUTES	• hold governments and corporations accountable for inadequate climate risk assessment; • push municipalities to develop legal instruments and plans to deal with changes in rainfall patterns, higher drought incidence, and rising sea levels.
COMPENSATION CLIMATE DISPUTES	• hold government entities and large carbon emitters accountable for damages caused to individuals and groups due to extreme weather events; • seek formal recognition of the causal link between specific damage and activities that cause climate change.
RISK CLIMATE DISPUTES	• require the consideration of climate risks in environmental licensing processes, environmental impact studies, and the elaboration of sectoral plans related to climate issues (such as energy and mobility); • press for disclosure of information about risks, including financial and social-environmental risks, related to climate change.

In other words, the strategy of climate litigation is to enforce existing laws, treaties, and other regulatory schemes, as well as to push for new regulations in this regard. Its central objective is to put pressure on the Legislative and Executive powers, by activating the Judiciary, in order to ensure a stable climate. Five trends can be observed regarding the purposes of climate litigation. *Firstly,* its aim is to pressure governments to comply with their legal and political commitments, seeking effective mitigation and adaptation measures. *Secondly,* an effort is made to associate the impacts of extractive activities to climate change – reflecting on the need to regulate such activities. *Thirdly,* there is an attempt to establish a causal link between certain emissions and climate impacts. *Fourthly,* governmental agencies are held accountable

for failures in adaptation measures. Finally, *in fifth place,* the application of the public trust doctrine to climate change cases is examined.

As pointed out by professors Luciana Bauer (also a federal judge at this Regional Court) and Ana Luísa Sevegnani**,** by contextualizing environmental litigation and its theoretical support in the world, attempts have been made to underpin its relevance to the discussion of the effects of environmental changes, especially with regard to bringing about a shift of attitude on the part of individuals and governments, so as to contribute to the environment. In several countries worldwide, lawsuits have been filed with the objective of hindering the advances of global warming, obtaining some beneficial results. However, in Brazil, few lawsuits considered climate change actions exist in the terms in which the UN recognizes them as such. Environmental litigation to safeguard life, livelihoods and health, as well as litigation on behalf of future generations is still a novelty here. However, we do recognize that this new environmental litigation is fundamental, for it promotes not only legal and governmental measures, but also the consciousness and culture of society itself, which will become increasingly concerned with promoting sustainable development. And it is of the utmost importance that courts, when faced with such litigation, do not treat it as an ordinary lawsuit, with ordinary parties. It is increasingly necessary to analyze the theoretical support offered by philosophical and sociological considerations, in addition to international agreements that propose considerations in relation to intergenerational litigation, as well as the decisions already issued by the courts in this area, such as the Urgenda decision. (...) we conclude that environmental litigation is relevant as a means of seeking concrete governmental action and, above all, the development of an environmental ethic for the new millennium. (*Luciana Bauer and Ana Luísa Sevegnani.* Litigância ambiental: uma ética ambiental para o novo milênio. 2021. Available at <https://www.trf4.jus.br/trf4/controlador.php?acao=pagina_visualizar &id_pagina=1643>. Accessed 16 Aug 2021).

In short: public-interest climate civil actions are unique in nature, aiming at the general and international. They may be seen as running alongside, but not overlapping with environmental civil actions, only sharing with them the root, which is the environment. Their subject matter and instruments are entirely diverse. In no way – ontologically speaking – can they be considered a common type.

Having considered all the doctrinal aspects and turning to the case at hand, it is clear that **the public civil actions under analysis present quite different typology and structure, specialized instruments and distinct political-legal approaches**, in addition to the fact that their object, cause of action and demands do not coincide.

The main demand of the original Public-Interest Climate Civil Action is the enforcement of the climate normative targets assumed by the Federal Government in the National Policy on Climate Change – PNMC, to be executed as determined in the Action Plan for Prevention and Control of Deforestation in the Legal Amazon – PPCDAm. The obligation required of the Federal Government, we reiterate, is for the

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FEDERATIVE REPUBLIC OF BRAZIL, at federal level, to comply with the determinations indicated in the referred climate norms (legal and executory), consisting in the reduction of illegal deforestation in the Legal Amazon to the maximum level of 3,925 km² by the end of 2020 (considering the period of analysis between August 2020 and July 2021). This demand, which is eminently climate-based, intends to mitigate the emission of greenhouse gases (GHG) by reducing (illegal) deforestation to the levels required by the Brazilian climate legislation. In short, this climate collective action (i) is a class action linked to Climate Change Law (climate litigation); (ii) seeks to protect environmental assets of national scope, for it aims to protect the right of all citizens to climate stability; and (iii) demands the implementation, by the Federal Government, of forest restoration as one of the instruments to achieve the climate targets assumed by the defendant.

On the other hand, public-interest civil action No. 1007104-63.2020.4.01.3200, filed by the Federal Public Prosecutor's Office before the Federal Court of Amazonas, is a class action that addresses matters related to Environmental Law. This demand seeks as its central theme to force several governmental administrative agents to implement measures to combat and control environmental offenders who operate, harmfully, at those points of the Amazon forest with greater threat of destruction, the so-called "ecological hotspots", specifically as long as the pandemic (covid-19) persists. **This class action does NOT have a central theme linked to Brazilian climate legislation,** nor does it reflect (directly projected) compliance with international obligations assumed by the Federative Republic of Brazil, since the National Policy on Climate Change – PNMC and the Action Plan for Prevention and Control of Deforestation in the Legal Amazon – PPCDAm, which are mentioned therein, are addressed only as factual background. In other words, the class action proposed by the Federal Public Prosecutor's Office seeks to enforce the exercise of the environmental police power (supervision and control) in specific areas of the Amazon forest (at local level) in order to combat environmental crimes and violations of indigenous rights during the pandemic period (covid-19).

As appropriately summarized by the appellant in the following illustrative table (event 1 - INIC1):

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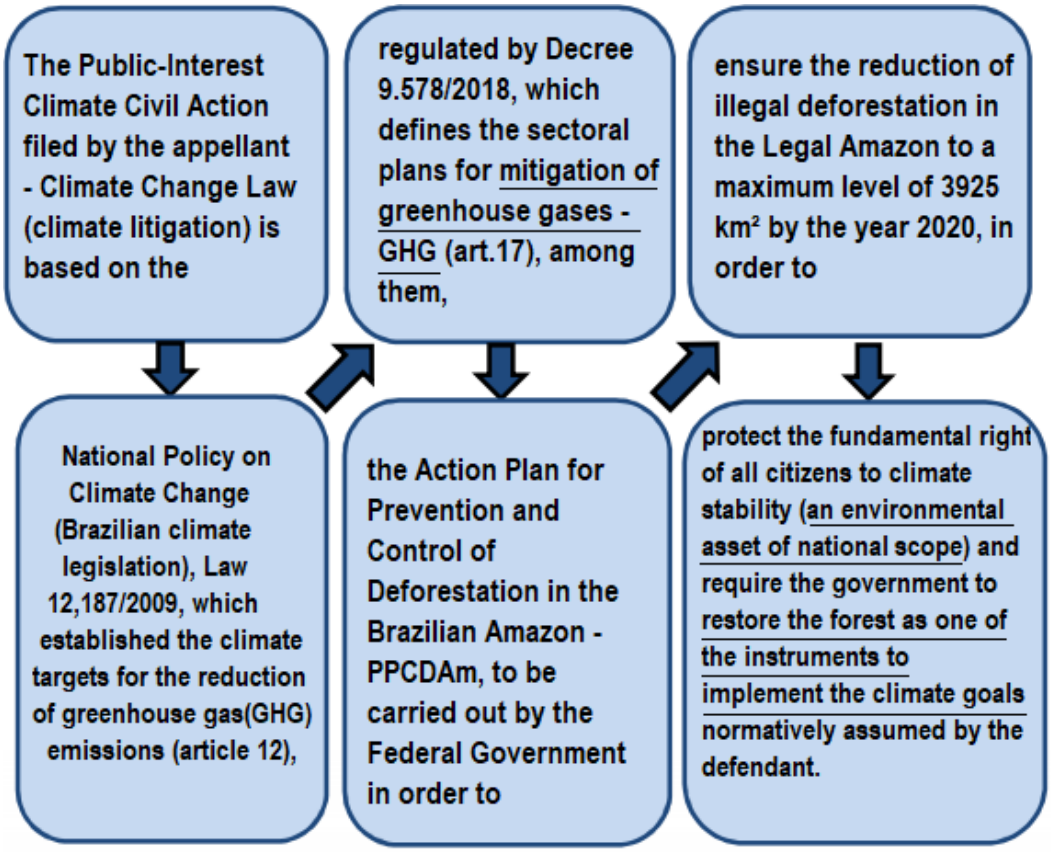

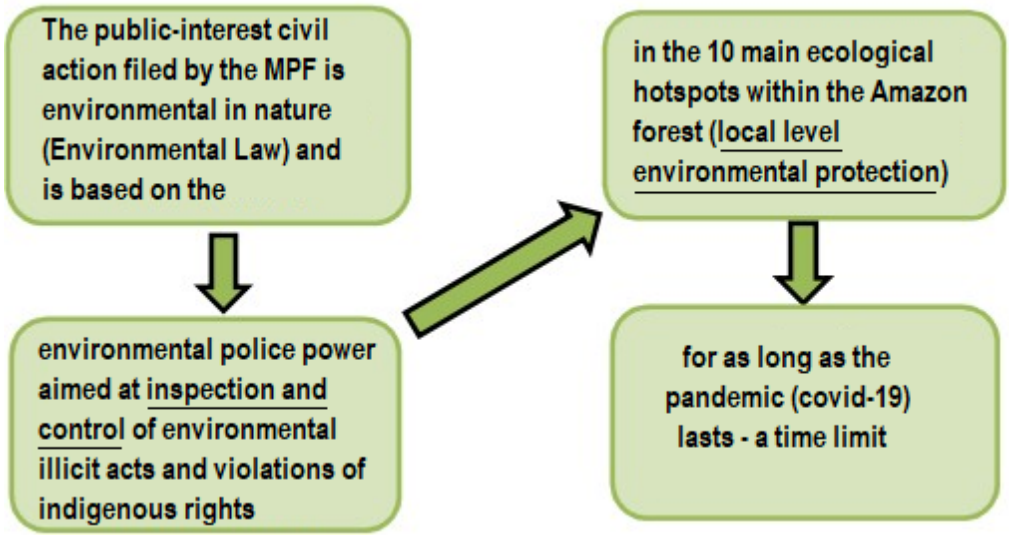

The evident thematic difference between the characteristics and objectives sought by the compared class actions makes it impossible to apply the institute of connection in this case, given that (i) there is no similarity between the claim and the cause of action; (ii) the central issues discussed and the legal grounds of the class actions are distinct; and (iii) the judicial decisions handed down in these class actions, consequently, will NOT be contradictory, NOR will they affect legal certainty, as the demands of the lawsuits are entirely different.

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Not to be overlooked is the fact that, on April 8, 2021, when ruling on RE No. 1101937- Theme 1075 -, the Supreme Court of Justice held the rule of article 16 of the public-interest civil action law to be unconstitutional, as to the territorial limitation of decisions rendered in class actions. The summary of the aforementioned decision reads as follows:

> *CONSTITUTIONAL AND CIVIL PROCEDURE. UNCONSTITUTIONALITY OF ARTICLE 16 OF LAW 7.347/1985, AS AMENDED BY LAW 9.494/1997. PUBLIC INTEREST CIVIL ACTION. IMPOSSIBILITY OF RESTRICTING THE EFFECTS OF THE SENTENCE TO THE LIMITS OF THE TERRITORIAL JURISDICTION OF THE ISSUING COURT. GENERAL REPERCUSSION. EXTRAORDINARY APPEALS DENIED. 1. The Federal Constitution of 1988 extended the protection of diffuse and collective interests, not only by constitutionalizing them, but also by providing important instruments to ensure their effectiveness. 2. The Brazilian collective procedural system, aimed at social pacification in relation to individual litigation, attained constitutional status in 1988, bringing about an important strengthening in the defense of diffuse and collective interests, resulting from a natural need for effective protection of a new array of rights resulting from the recognition of the so-called third generation or dimension human rights, also known as solidarity or fraternity rights. 3. Absolute respect and observance of the principles of equality, efficiency, legal security and effective judicial protection are needed. 4. Unconstitutionality of article 16 of LACP, as amended by Law 9.494/1997, which had the ostensible purpose of restricting the condemnatory effects of collective lawsuits, limiting the list of beneficiaries of the decision by means of a territorial criterion of jurisdiction, causing serious damage to the necessary isonomic treatment of all citizens before Justice, as well as to the full incidence of the Principle of Efficiency in the service of jurisdictional activity. 5. EXTRAORDINARY APPEALS DENIED, with the establishment of the following thesis of general repercussion: "I - The wording of article 16 of Law 7.347/1985, as amended by Law 9.494/1997, is unconstitutional, and its original wording is reinstated. II - When dealing with public-interest civil actions with national or regional effects, the jurisdiction should observe art. 93, II, of Law 8078/1990 (Consumer Defense Code). III – Should multiple public-interest civil actions of national or regional scope be filed, and jurisdiction defined in accordance with item II, the prevention of the court that first took cognizance of one of them is established for the trial of all related claims". (STF, RE no. 1101937 - Theme 1075, Reporting Justice Alexandre de Moraes).*

Nevertheless, the *ratio decidendi* involved in this precedent merits contextualization in the environmental public-interest civil actions. Establishing a pure and simple equivalence between such actions and the public-interest climate civil action is not possible (because they are distinct, as explained above). In this sense, the item relating to multiple and simultaneous public civil actions **does not apply - in this case –** as they would all have to be environmental (*Should multiple public-interest civil actions of national or regional scope be filed, and jurisdiction defined in accordance with item II, the prevention of the court that first took cognizance of one of them is established for the trial of all related claims*).

The jurisdiction to hear and render judgment on the original public-interest climate civil action, for all the above arguments, remains with the lower court.

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Therefore, **granting a suspensive effect to this appeal is deemed necessary**, whereby the consequences of the appealed interlocutory decision remain suspended until the resolution of the issue herein discussed.

I should like to emphasize that delaying the examination of the factual and legal arguments raised in the climate class action will result in serious and difficult to remedy harm to the environmental asset for which protection is being sought, namely, the fundamental right of all citizens to climate stability. As highlighted by the appellant, the deadline for compliance with the climate target established in the PNMC, and which is to be met by the Federal Government, will end in August 2021, the month in which the National Institute for Space Research (INPE) will announce the official rate of illegal deforestation in the Legal Amazon for the year 2020.

Given the above, I **grant the suspensive effect to** the decision that declined jurisdiction in favor of the court of the 7th Federal Environmental and Agrarian Court of the Judiciary Section of Amazonas.

Notify the aggrieved party - also - to file counterarguments.

Submit to the Regional Prosecution Office (MPF) for its opinion.

Afterwards, return the case records to the court. Legal measures.

Electronic document signed by **VÂNIA HACK DE ALMEIDA, Reporting Federal Judge**, pursuant to article 1, item III, of Law No. 11.419, of December 19, 2006 and Resolution TRF 4th Region No. 17, of March 26, 2010. The verification of the **authenticity of the document** is available at the electronic address http://www.trf4.jus.br/trf4/processos/verifica.php, by filling in the verification code **40002768829v29** and the CRC code **4ffbe55c**.

Additional subscription information:
Signatory: VÂNIA HACK DE ALMEIDA
Date and Time: 8/19/2021, at 9:10:28 AM

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