

An aerial photograph of a wide, dark blue river flowing through a dense, lush green Amazon rainforest. A small boat with several people is visible on the right side of the river, moving away from the viewer. The text is overlaid on the left and center of the image.

JUSTICE AND SOCIO-ENVIRONMENTAL PROTECTION IN THE BRAZILIAN AMAZON

EXECUTIVE SUMMARY

NOVEMBER 2020





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List of Acronyms

| | | | |
|--------------|--|---------------|---|
| CJEU | Court of Justice of the European Union | SFM | Sustainable Forest Management |
| CoE | Council of Europe | | |
| EC | European Commission | TFEU | Treaty on the Functioning of the European Union |
| EU | European Union | UNFCCC | United Nations Framework Convention on Climate Change |
| LLEGT | Forest Law Enforcement, Governance and Trade | | |
| NGO | Non-Governmental Organization | | |
| REDD+ | Reducing Emissions from Deforestation and forest Degradation, plus the sustainable management of forests, and the conservation and enhancement of forest carbon stocks | | |

1. ABSTRACT

The overall purpose of the project is that of providing an international exchange of best practices on the protection, by the Judiciary, of the Amazon forest biome against deforestation, by the Judiciary, and identification of difficulties and limitations of the Brazilian justice system in this subject area. This project also seeks to identify the countries of the European Union that also have experience in the issue of environmental degradation and deforestation, recommending good practices for addressing this issue, and striving to compare European and Brazilian legislation at the different levels (Commission and Member States) (Union and Subnational Amazonian States).

After comprehensive analysis of the Brazilian and European framework, several typologies of policies, good practices and judiciary cases arise, and this permits a wide-scope comparison of both systems. In general, such comparison showed evidence of, a common background of nature protection policies. However, few differences deserve attention, such as the mandatory assessments previous to any potential damage to the environmental resources of the EU , the integration of EU environmental objectives among citizens and, most importantly, the EU citizen's rights related to access to justice. In this latter case, EU citizens can address environmental issues directly to the EU and, as a result, the EU can directly hold the Member States responsible in the corresponding judiciary and restoring actions.

Finally, we provide a series of suggestions aimed at public policies based on the identification of Brazilian and European best practices with regard to the mentioned access to justice instruments and direct legal procedures. We propose legislative instruments, which could be relevant to the National Justice Council. Finally, we recommend the creation and harmonisation of a taxonomic methodology based on geo-referenced procedures and quantitative data.

2. EXECUTIVE SUMMARY

Introduction and Context: Since the late 1980s, Amazonian deforestation has been an increasingly relevant matter on the agendas of international environmental institutions. Several studies have shown the impact of environmental damage to the Amazon biome on a global scale. Despite the efforts of the Brazilian government to impose control policies, deforestation continues to advance at high annual rates. Currently, Brazilian environmental legislation is one of the most up to date frameworks in the world, allowing legal instruments to coordinate the limits on, and the reduction of, illegal deforestation although the problem persists.

Within the European Union, qualified policy debates have forced in mechanisms to restrict commodity imports of agricultural products from countries that are not preserving their forest resources, based on policies to reduce carbon emissions resulting from deforestation and forest degradation. From the perspective of sustainable development, the European Union is even more committed to targets for reducing impact on climate change, as drawn up in the “EU Green Deal” plan, a development pact aimed at tackling climate change and inequality, as well as international cooperation as an essential means of meeting global challenges.

The origin of the present report is the EU-Brazil Dialogue: Environmental Dimension of Sustainable Development, which proposed facing this problem from a perspective based on the Judiciary System’s performance. In this regard, it is imperative to outline a diagnosis of the performance of the Judiciary and, based on this panorama, promote the involvement of national and international entities. This involvement will take place by allowing the identification of similar experiences of EU countries within in the area of deforestation (but also mining and civil rights), considering the wide experience of the Directorate-General for the Environment within the European Commission (EC), the consecutive Environment Action Programmes, the European Union’s public policies for reducing emissions from deforestation and forest degradation, and the European Green Deal, which will guide the European Union’s internal and international policies and actions in the coming years. The Brazilian National Council of Justice, in turn, has entities capable of implementing possible measures and programmes resulting from this project, given the existence of the National Observatory on Environmental, Economic and Social Issues of High Complexity, Great Impact and Repercussion, including the goal of protecting the Amazonian environment on its agenda, and maintains several campaigns, standards and working groups that address the Amazon challenge.

This report thus intends to investigate, analyse and map the functioning of the Brazilian justice system, with a perspective of protection of the Amazon biome, through the analysis of legislative processes and the processing of legal actions, seeking to propose actions and public policies to improve its guardianship, with an emphasis on the good Brazilian and European judicial practices . The perspective is to approximate and fine-tune them. A comparative analysis of environmental standards and policies between Brazil and the UE will be developed.

There will be a need to create regulatory mechanisms, interaction techniques, establish a balance, and get action of the three powers.

Methodology: This report intends to nurture and provide an international exchange of best practices in the prevention of the deforestation of the Amazon, by the Judiciary, identifying difficulties and limitations of the Brazilian justice system in this subject. It also seeks to identify the countries of the European Union that also have experience in the issue of environmental degradation and deforestation, indicating best practices to address this issue, and is also comparing European and Brazilian legislation on the different levels (Commission and Member States) (Union and Subnational Amazonian States).

The mapping will be one of the results of this project that is divided mainly into three parts: Diagnostics (divided into European Union and Brazilian frameworks), Comparative study and Recommendations.

After a comprehensive analysis of the Brazilian and European framework, several typologies of policies, best practices and judiciary cases arise, which permit a wide-scope comparison of both systems

Comparison: On the whole, the comparison showed a common background of policies for protection of natural resources. *nature protection policies*. However, few differences warrant attention, such as the mandatory assessments before any potential damage to the EU environmental resources, the integration of EU environmental objectives among citizens and, most importantly, EU citizen's rights concerning access to justice. In this latter case, EU citizens can address environmental issues directly to the EU and, as a result, the EU can directly hold the Member States responsible in the corresponding judiciary and restoring actions.

Recommendations: The study brought as main highlights the following set of recommendations:

1. Suggestions aimed at public policies based on the identification of Brazilian and European best good practices on the subject:

Access to instruments of Justice:

Incremental instruments and policies to facilitate concrete, real and effective access to justice and the ability to obtain quick decisions will be critical for implementation and monitoring in the Brazilian legal and regulatory framework.

Direct legal procedures:

Direct legal infringement tools – the adoption of direct fast-track infringement instruments that reduce the distance between the final decision maker and/or decision rule/institution could bring a higher degree of efficiency. In addition, the implementation of tools, that allows the analysis of specific concrete issues (as opposed to broader and abstract policy noncompliance actions), allows a quicker, more efficient and focused response to the concrete environmental impacts. One powerful

tool is the ability to impose, directly upon a member state, the responsibility of the “failure of action” on the protection of the environment. **Proposal of normative instruments that could be enacted by the National Justice Council:**

Regulation procedures on the land registry “notarial registry”: This allows full implementation of the principles of transparency, monitoring and compliance with the Forestry Code and other land use legal frameworks effective in Brazil. Inclusion of the diverse status of the land deeds (including judicial and non-judicial temporary and/or permanent decisions with regard to administrative or judicial entities).

The Judiciary Branch, through the National Council of Justice, may also act with the purpose of facilitating the unification of databases and registration information of producers and owners of lands in the Amazon Region and to promote unification of other systems that interest and affect rural producers, such as SIGEF, SICAR, SNCR, CCIR and ADA. There is a working group within the Brazilian Ministry of Agriculture for this specific purpose. This measure could improve the legal certainty of rural land registration and provide more information to support public policies in the Amazon region.

The potential adoption, approval and enforcement of other similar international conventions and legal instruments such as the Aarhus Convention and The “Regional Agreement on Access to Information, Public Participation and Access to Justice in Environmental Matters in Latin America and the Caribbean” as it is called, could bring a significant and robust contribution to the right to environmental information, compliance and access to justice.¹

Turning to the implementation of international legal conventions and instruments, and national regulation on environmental services and carbon, there is still the possibility for the Judiciary to study its role in regulation of the environmental services and/or carbon emission from a technical and regulatory point of view, as part of the land title registry and its component attributes.

2. Proposal for Taxonomy Creation and Harmonisation of Methodology:

Georeferenced procedures: It's crucial to be able to identify the geolocalisation of the judicial cases, considering not only the identification of the court but also in what respects to the real geolocalisation of the environmental damage, in this sense we could recommend that CNJ could adopt taxonomic procedure that, with mandatory regulation, creates an obligation to input and harmonise the latitude and longitude of the environmental damage (from the initial notice of the case until the final decision

¹ https://repositorio.cepal.org/bitstream/handle/11362/43611/51800493_pt.pdf

level). This strategy can be a tool to facilitate the regulation of the notarial registry of land in the Amazon region.

Quantitative data: It is also critical to understand the real extent (in hectares) of the damage, and the remedies that will/have been adopted to indemnify and/or recover the area and environmentally protected assets. In this regard it is advisable that a taxonomic procedure should be implemented to create a procedure to identify the size/number of hectares (type of biome) of the damaged area and, in addition to those it will be value-added to include specific taxonomic procedures that allow the identification of the remedies applied to the specific cases: recovery, compensation, financial penalties and/or other alternative measures, and their effective implementation.

Conclusions and Key Messages: It is important to highlight that we are dealing with two of the most important, largest, and most significant territories of the world with significant differences regarding land use and forest management uses, that need specific legal, regulatory and administrative instruments to address their own challenges. Nevertheless, we found a significant common ground and similarities on many of the thematic issues addressed, such as:

Illegal deforestation shows a common concern in both jurisdictions in terms of legal and regulatory framework, with administrative and judicial instruments used for the protection of environment and legal/judicial action against violations. In both territories here considered, forest conservation includes significant and robust legalisation and administrative tools that address the common objective of maintaining forest cover (and, especially in Brazil, native forest cover), highlighting the Brazilian legislation that requires the maintenance of 80% of legal reserve on the Amazon biome (even in areas that could be used for agriculture and cattle ranching production).

Forest Management arises as an area of mutual interest with a slightest increase and a detailed legal framework in forest management in Brazil at the national and subnational levels, revealing much huge attention to the monitoring and control of transactions on the internal market.

Illegal mining reflects an almost unanimous restraining regulatory procedure and a legal framework with detailed legal and regulatory frameworks. In Brazil, what refers to the prohibition of mining in Brazilian Indigenous Lands is also highlighted.

About Citizen's Rights and access to justice, both systems have instruments that allow access to information and to justice, there being only slight differences between Brazil and Europe with regard to the Aarhus Convention. Brazil has made a huge effort to create instruments that could allow the integrity of the acknowledgement and assurance of individual and collective rights and also grant access to the judicial systems (by establishing the right to access Justice in Article 5 of its constitution the right to access justice, as also creating legal and judicial instruments just like Civil Action and People Class Action, but there is the lack of other direct legal environmental responsibility

(direct infringement tools) just like the “direct infringement action” that European citizens can enact to the European Commission allowing fast and direct tracking between the specific environmental damage with the ability to make responsible the state member being by “failure to act”. The effective implementation of access measures of the citizen's rights and access to justice, especially to assure the security of citizens and other institutions to the exercise and use the justice instruments; this could result in an important and practical way to progress on the road to full enforcement of those rights.

Looking now at social integration, social integration clearly shows the importance of permanent investment in educational, research and communication programmes related to environmental protection, and a similar pathway is been built in some areas in Brazil.

Direct infringement instruments assure an agile and more efficient means to call for the attention of the citizens and other institutional organisations of the society and assure more efficiency in the protection against deforestation and environmental degradation.

Finally this study as make possible though the comparison to bring several recommendations that have the potential to increase the agility, robustness , accuracy and efficiency of the judicial system in Brazil in what concerns to the environmental and social protection of the amazon region its people, culture and environmental richness.

3. INTRODUCTION AND CONTEXT

Since the late 1980s, deforestation in Amazonia has been an increasingly important matter on the agendas of environmental organisations and national and international institutions concerned about environmental issues (Greenpeace 2017). Despite the efforts of the Brazilian government to enforce control policies, deforestation continues to advance at high annual rates (UNEP-WCMC 2018) due to a combination of global environmental and economic change (Mercure et al 2019). There have been important developments in Brazilian environmental legislation, including the Environmental Criminal Law, the Forestry Code and the Water Resources Law. Currently, Brazilian environmental legislation is one of the most up to date frameworks in the world, enabling the enactment of legal instruments to coordinate the limits and the reduction of illegal deforestation.

Several studies have shown the impact of environmental damage to the Amazon biome in the climate and geophysical aspects of countries in the Northern Hemisphere, among many forms of global impact (Gedney et al 2000; Werth & Avissar 2002). Within the European Union, reports and studies have forced qualified policy debates for the preservation of global forests through mechanisms to restrict commodity imports of agricultural products from countries that are not preserving their forest resources (Weatherley-Singh & Gupta 2018). Such measures are based on policies to reduce carbon emissions from deforestation and forest degradation (such as the REDD+).

Under the perspective of sustainable development, the European Union is even more committed to targets for reducing impact on climate change, drawn up in the “EU Green Deal” plan, a pact development aimed at fighting climate change and inequality, as well as the development of deforestation and environmental degradation, which includes international cooperation as an essential means to achieve global challenges.

The origin of the present report is the EU-Brazil Dialogue: Environmental Dimension of Sustainable Development, which proposed facing this problem from a standpoint of the Judiciary System’s performance. The Brazilian Judiciary System has an important role in prioritising environmental protection in the Amazon, including the subject in its strategic goals and developing specific public policies. In this regard, it is imperative to outline a diagnosis of the performance of the Judiciary and, based on this panorama, promote the involvement of national and international entities.

This involvement will take place in the perspective of the EU-Brazil Dialogues, allowing the identification of similar experiences of EU countries in the area of deforestation (but also mining and civil rights), considering the wide experience of the Directorate-General for the Environment within the European Commission (DG Environment)², the consecutive Environment Action Programmes (as explained in Section 4 - EU Legislation), the European Union’s public policies for reducing emissions from deforestation and forest degradation (Section 4 - EU Agreements), and

² https://ec.europa.eu/dgs/environment/index_en.htm

the European Green Deal (Section 4 - EU Legislation), or European Ecological Pact, which will guide the European Union's internal and international policies and actions in the coming years.

The Brazilian National Council of Justice, in turn, has entities that are capable of carrying out possible measures and programmes resulting from this project (Boucher 2014), given the existence of the National Observatory on Environmental, Economic and Social Issues of High Complexity, Great Impact and Repercussion, which includes the aim of protecting the Amazonian environment on its agenda, and maintains several campaigns, standards and working groups addressing the Amazon challenge.

Therefore, this report intends to investigate, analyse and map the functioning of the Brazilian justice system, from a perspective of protection of the Amazon biome, presenting a diagnosis of its functioning and monitoring, through analysis of legislative processes and processing of legal actions, to propose actions and public policies to improve its guardianship, stressing the good Brazilian and European judicial practices. The perspective is to bring them closer together and fine-tune them. A comparative analysis of environmental standards and policies between Brazil and the UE will be developed. There will be a need to create regulatory mechanisms and/or compulsory/coercive licensing, mechanisms and techniques of interaction, balance and action of the three powers.

This mapping will be one of the results of this project, divided mainly into three parts: Diagnostics (divided into European Union and Brazilian), Comparative Study and Recommendations.

