

PARADIPLMACY AND THE MANAGEMENT OF THE AMAZON IN THE BRAZILIAN FEDERALISM

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ABSTRACT

The criteria for allocating Amazon Fund's resources have been redefined, leading donor foreign states to block the transfer of resources to that Fund. This generated much speculation and a series of economic embarrassments for Amazon state governments, as well as a malaise among Western countries with regard to sustainable development. In this study, thus, we address the following problem: what are the Legal Amazon states' options, considering the particularities of the Brazilian federalism, for keeping investments and management focused on mitigating illegal deforestation and degradation, the sustainable development and the security in their Amazon territories? Thus, the aim of this article is to provide a reinterpretation of Brazilian federalism, assessing the possibilities of international action by Amazon state governments to maintain foreign investments for the purposes of preservation, security and sustainable development of the Brazilian Legal Amazon. The methodology used was hypothetical-deductive, and our research hypothesis was ratified. In other words, the Amazon states can exercise paradiplomacy through the Legal Amazon Consortium. Questions about this position should be dispelled when the Constitution is amended to expressly recognize the exercise of paradiplomacy.

Keywords: Amazon rainforest; consortium; environment; federalism; paradiplomacy.

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A PARADIPLMACIA E A GESTÃO DA AMAZÔNIA NO FEDERALISMO BRASILEIRO

RESUMO

O Brasil passou por uma redefinição de critérios para utilização de recursos do Fundo Amazônia, levando os Estados estrangeiros doadores a bloquear o repasse de recursos para aquele Fundo. Isso gerou uma série de especulações e de embaraços econômicos aos governos estaduais amazônicos, bem como um mal-estar entre os Estados Ocidentais, no que diz respeito ao desenvolvimento sustentável. Com isso, a pesquisa busca responder ao seguinte problema: qual o caminho que os Estados-membros que compõem a Amazônia Legal podem tomar, considerando o federalismo brasileiro, para manter os investimentos e a gestão voltados à mitigação do desmatamento e da degradação ilegais, o desenvolvimento sustentável e a segurança naquelas circunscrições territoriais? Desse modo, o objetivo deste artigo é promover uma releitura do federalismo brasileiro, verificando-se as possibilidades de atuação internacional dos governos estaduais amazônicos para manter os investimentos estrangeiros para fins de preservação, segurança e desenvolvimento sustentável da Amazônia Legal brasileira. A metodologia utilizada foi a hipotético-dedutiva, pois o questionamento tinha como hipótese a resposta que foi ratificada, ou seja, os Estados-membros amazônicos podem praticar a paradiplomacia por meio do Consórcio da Amazônia Legal. Os questionamentos sobre esse resultado serão dissipados quando a Constituição for aprimorada pelo reconhecimento expresso da paradiplomacia.

Palavras-chave: consórcio; federalismo; floresta amazônica; meio ambiente; paradiplomacia.

INTRODUCTION

The 1988 Brazilian Constitution, influenced by the United Nations' Stockholm Declaration on the Human Environment of 1972, was the first Brazilian Constitution to dedicate a chapter exclusively to environmental protection, even though infra-constitutional legislation on national environment policy (Law No. 6,938/81) had already been enacted. The environment was elevated to the status of a diffuse, basic social right to which the community as a whole was entitled under the provisions of art. 225 of the 1988 Constitution, which made the principles enshrined in the 1972 Declaration imperative.

During the three decades since the 1988 Brazilian Constitution was promulgated, environmental legislation was strengthened through laws such as the Environmental Crimes Law (Law No. 9,605/98), the Law on National Solid Waste Policy and the New Forest Code. In addition, at the international level, Brazil had been adhering to international agreements on environment protection.

The 1988 Constitution continued the historical process of solemnly enshrining federative principles in the country's constitutional framework, imparting to it traditional characteristics of a Federal State, such as: indissolubility of the federal pact, autonomy of federative entities (states and municipalities), division of government powers and revenues, power of self-constitution of the states, representation of states in the federal legislative branch through the Federal Senate, as well as mechanisms for the control of the federal pact, such as provisions concerning federal intervention and constitutional review.

Despite these constitutional features, little progress has been made in consolidating the principles of federal political organization, especially due to the historical Brazilian practices of attributing excessive powers to the federal government and to the states' economic dependence on federal transfers.

Brazil has strong environmental provisions in its Constitution and legislation, a weak federalism and underwent a paradigm shift in environmental preservation policies, which has emerged as an international issue due to the recent growth in deforestation and forest degradation, as well as to the proposal of new criteria for the use of Amazon Fund resources. Considering all this, this study aims to answer the following research question: What are the Legal Amazon states' options, considering the particularities

of the Brazilian federalism, for keeping investments and management focused on mitigating illegal deforestation and degradation, on sustainable development and on security in their Amazon territories? Our hypothesis is that paradiplomacy allows Amazon states to transcend federal policies, while maintaining their commitment to preserve the forest without prejudice to the federal pact.

The aim of this article, thus, is to present a reinterpretation of the Brazilian federalism, assessing the opportunities Amazon state governments have for conducting international action aimed at maintaining foreign investments for the purpose of ensuring the preservation, security and sustainable development of the Legal Amazon – Legal Amazon is the official denomination of the Brazilian Amazon region.

Considering the studies by Marconi and Lakatos (2003), we adopted a hypothetical-deductive research method, because it starts from a problem to which a provisional answer is offered, which is then examined to have its validity verified, in an effort to eliminate any possible error. Our research thus starts with an examination of the 1988 Federal Constitution and of international and national decisions concerning the suspension of foreign donations to the Amazon Fund by Germany and Norway, and then proceeds to focus on laws and political decisions internal to the state of Pará, in agreement with the other Legal Amazon states.

The article is the result of a study carried out within the scope of the Research Project entitled “On the Legal Amazon Consortium: on the performance of the States of Pará and Amapá,” selected in a public bid process conducted within the scope of the Institutional Program for Scientific Initiation Scholarships (PIBIC) no. 10/2020, from the Federal University of Pará.

1 ON THE BRAZILIAN FEDERALISM IN THE 1988 BRAZILIAN CONSTITUTION

The federal form of the state was adopted in Brazil with the promulgation of the Republican Constitution of 1891, which altered the previous forms of government and state from Monarchy to Republic and from a unitary state to a federal state. At the time, the United States of America was the model of federalism to be followed, despite the differences in actualization, because while US federalism emerged to strengthen the Union

of member states³, in Brazil the shift to federalism came to provide more autonomy to the existing administrative entities, which did not enjoyed the administrative consistency observed in the United States of America, where the former confederates states enjoyed sovereignty and should reduce their powers – here the aim was obtaining actual administrative and political autonomy⁴.

At the historical root of the formation of the Federal State (based on the federalism of the United States of America), marking a shift from Confederation to Federation, is the commitment that the Federated States should not act at the international level, in order to safeguard the central role attributed to the Union. This characteristic was consolidated in that historical context as a unifying force.

It is true that since the 1891 Constitution the Brazilian federalism has undergone some legal changes – with Member States and the Union considered as federal units – having gone through democratic and authoritarian periods (1937 and 1967)⁵ until the promulgation of the 1988 Constitution.

The 1988 Brazilian Constitution restored the democratic regime and enshrined the federal principle as one of its pillars, in terms of territorial distribution of power. It incorporated the various characteristics tradition-

3 Although the purpose of federalism was to strengthen the union of the member states, Hamilton, Madison and Jay (2005) highlighted the objection to letting the federation make the Union too powerful. In this sense, the responses to this criticism emphasized that local matters should be decided locally, and that the representatives of each Member State, in addition to the people, could act to control the Union's greed for power. That is, at least two things were already clear: the possibility of the Union becoming a super power and of the Member States maintaining their power to solve local problems.

4 These conclusions follow from the reading of Hamilton, Madison and Jay (2005), combined with the Republican Manifesto of 1870, since, for the former, the shift from Confederation to Federation responded to the problems arising from the fragility of the confederate arrangement. The Republican Manifesto of 1870, on the other hand, marks a period when there was no proper federation in existence, but in which federative principles had already been ventilated and ignored in the changes implemented at the time by the monarchy. The 1870 Manifesto (BOCAIUVA et al., 1878, p. 16) reports the pressures put on the provinces, as the following excerpt shows: "The Additional Act interpreting the law of December 3, the Council of State creating, through the strict tutelage regime, the superior instance and the independent instruments that tend to curtail or annul the deliberations of the provincial parliaments, despite being truncated; the administrative dependence to which the provinces were subjected, even for the most trivial acts; the abuse of the effective sequestration of the balances of the provincial budgets for expenses and for the specific works of a neutral municipality; the restriction imposed on the development of the legitimate interests of the provinces by an obliged uniformity, which forms the type of our absurd centralized administration; everything is showing what precarious position occupies proper interests when confronted with the monarchical interest that is, in itself, the origin and strength of centralization." In other words, the decentralization process, during part of the monarchical period, was influenced by federal principles, but this influence was not lasting until the Constitution of 1891. Thus, the Republican Constitution of 1891 aimed at establishing the federal type of state in order to promote an effective power decentralization to the provinces (Member States).

5 On the constitutional period of the Dictatorship (1964 to 1985), see Tavares (2013, p. 99-108).

ally pointed out by the federal doctrine as essential elements of the Federal State.

Until the promulgation of the 1988 Constitution, Brazilian Municipalities were not considered federated entities. But from then on they were also established as federal units, triggering the consequent process of power devolution that have been under some criticism, as is the case of Silva (2009), who does not accept the federal unit qualification granted by the 1988 Constitution, arguing that municipalities continued to belong to the states⁶.

The administrative and legislative powers within the federation are described in the 1988 Brazilian Constitution, with the administrative and legislative powers of the Union defined in articles 21 and 22 of the Constitution. The powers of Municipalities are provided for in art. 30; the – very little – powers of the states are in art. 25, which may also be complemented by power delegation by the Union, as provided for in paragraph 22; and the concurrent powers of the Union, states and municipalities are defined in arts. 23 and 24. Thus, the Constitution grants to the Union and the municipalities most powers, leaving to the states legislative powers⁷ primarily focused on environmental and tax issues, with the other legislative powers attributed to the Union. State administrative action is more evident, but even in this respect state action is secondary in comparison with that of municipalities, which deal with local interests⁸.

6 Silva (2009, p. 474-475) examines the status of federative entity given to Municipalities since the promulgation of the 1988 Constitution, noting that this understanding is contrary to reality, because “[...] this is a mistaken thesis, arising from premises that cannot lead to the intended conclusion. That a territorial entity has political-constitutional autonomy does not necessarily imply the concept of federative entity. Nor is the Municipality essential to the concept of the Brazilian federation. There is no federation of Municipalities. There is a federation of states. These are the ones essential to any concept of federation [...] It is not a union of Municipalities that forms the federation [...] Another aspect that shows that Municipalities continue to be divisions of States is the fact that their creation, incorporation, merger and dismemberment must be carried out according to state law, within the period defined by complementary federal law (art. 18, § 4, wording of EC-15/96), and depend on approval in a referendum (which is always prior consultation) by the directly interested population.”

7 A search performed on the website of the Legislative Assembly of the State of Pará showed that, from 1988 to 2018, the “major legislative activity” is concentrated in environmental and tax issues, in addition to establishing the administrative organization of that state. BRASIL. *Assembleia Legislativa do Estado do Pará*. Available at: <https://www.alepa.pa.gov.br/bancodeleis.asp>. Accessed on: November 14, 2019.

8 Concurrent powers in environmental issues are provided for in art. 23, VI and VII, and in art. 24, VI and VIII, as follows:

“Art. 23. The Union, the States, the Federal District and the Municipalities, concurrently, have the power:

VI – to protect the environment and to fight pollution in any of its forms;

VII – to preserve the forests, fauna and flora;

Art. 24. The Union, the States and the Federal District have the power to legislate concurrently on:

VI – forests, hunting, fishing, fauna, preservation of nature, defense of the soil and natural resources,

For Silva and Carvalho (2018), the constitutional continuity of the federal form of the state established by the 1988 Constitution did not mean the strengthening of the federation, because Brazilian federalism would be weak due to the concentration of power in the Union, “[...] which, on the other hand, makes it impossible for states to have a greater participation in decision making” (SILVA; CARVALHO, 2018, p. 1501).

After three decades of the promulgation of the 1988 Constitution of the Federative Republic of Brazil, environmental management at the federal level has led the Legal Amazon states to think again about the possibilities of taking administrative and legal action, as they perceived themselves as federative entities capable of acting nationally and internationally to protect the Amazon region.

The states can and should organize themselves to act together, in a coordinated manner, taking advantage of a legislative innovation conceived in the late 90s, but which went mainstream during the first decade of the new millennium. These are the so-called consortiums, through which the federative entities can come together, form a legal entity and act jointly to achieve an objective. This allows states to carry out legislative, public and administrative policies to strengthen their activities on certain common areas, in addition to allowing them to sign international agreements with international banks and organizations that intend to assist and/or invest in Brazil. Finally, states exist and can act effectively to further their own development, as will be seen in section 4.

The State, from the isolated perspective of the Union, has not been able to solve all the problems, allowing other federative entities to seek solutions for the emerging issues and to engage in international relations.

The coordinated action of states and municipalities in consortiums could lead some to question whether such action could undermine the principle of federal loyalty. Zago (2016, p. 510), in addressing the principle of federal loyalty, shows that it can be seen as “[...] the restriction to the exercise of a right by a federative entity, in consideration of the interests of other federative entities, which could be appreciably harmed by this action.” With respect to legislative action, Zago argues for federal cooperation as a means of settling disputes and complying with the principle of federal loyalty. It should be noted that this principle is not expressly stated

protection of the environment and control of pollution;
VIII – liability for damages to the environment, to consumers, to assets and rights of artistic, aesthetic, historical, and touristic value, as well as to remarkable landscapes.”

in the 1988 Constitution. However, the Federal Supreme Court has already ruled on issues related to federalism, taking into consideration the principle of federal loyalty. For example, the principle of federal loyalty has already been considered by the Supreme Court in decisions ADI/MC 2377, ADI 2452 and RE 572262⁹. Having clarified the meaning of the principle of federal loyalty, it should be mentioned that the creation of consortiums in Brazil did not start right after the promulgation of the 1988 Constitution, but was later included by Constitutional Amendment (EC) and subsequently regulated by law (by Constitutional Amendment no. 19/1998 and Law no. 11,107/2005). Thus, assuming their constitutionality, the creation of these consortiums cannot be viewed as an unconstitutional act. In this sense, questions about the constitutionality of consortiums can be answered by pointing out that the actions of federative entities in these agreements do not violate the principle of federal loyalty.

2 ON THE INCREASE IN DEFORESTATION AND DEGRADATION IN THE AMAZON

According to the Amazon Fund's Activity Report for 2018 (BRASIL, 2019a, p. 8),

By the end of 2018, the Amazon Fund had received R\$ 3.4 billion in donations, of which 93.3% came from the government of Norway, 5.7% from the government of Germany – through KfW Entwicklungsbank – and 0.5% from *Petróleo Brasileiro S.A. (Petrobras)*.

According to data from the National Institute for Space Research (INPE), deforestation in the state of Pará increased from 2017 to 2018, with 2,433 km² deforested in 2017, a figure that increased to 2,744 km² in 2018. The Amazon Fund's 2018 Activity Report found a 14% increase in deforestation in the Amazon. The data reported by INPE, which also showed an increase in deforestation in the Amazon, led to an international crisis involving the donor partners for the Amazon Fund, with Germany and Norway, so far, suspending their donations to the Fund.

In short, scientific findings showing increased deforestation in the Amazon and the proposals announced by the Ministry of the Environment concerning the establishment of new criteria for the use of the Amazon

⁹ The principle of federal loyalty originated in Germany as an unwritten principle that nonetheless must be observed in the relations between the Union and the states, which is called in Brazil the "principle of friendly federative conduct." On the subject, in addition to Zago (2016), see Leoney (2014).

Fund's resources caused the suspension of donations to the Fund by Norway and Germany. The environmental policy of the sovereign Brazilian State thus started to be openly questioned, which, in turn, led the exercise of Brazil's sovereignty to also be put into question.

Abdenur and Muggah (2019) argue that the sovereignty of a state must be based on the responsible protection of public goods. They discuss the international mechanisms for forest protection, using the Paris Agreement and the Kyoto Protocol as examples, in addition to the possibility of rewarding the reduction in greenhouse gas emissions.

This political moment created an opportunity for strengthening Brazilian civil society, states and municipalities, with several governors coordinating among themselves to take joint action to preserve the Amazon, including by proposing that the Union should decentralize the management of the Amazon Fund's resources (ABDENUR; MUGGAH, 2019).

For the Institute of Man and Environment of the Amazon, there is a difference between deforestation and degradation. Deforestation means "the process of clear cutting, which is the complete removal of forest vegetation," while degradation "is characterized by the extraction of trees, usually for the purpose of wood commercialization, examples of degradation are forest fires [...]" (IMAZON, 2019).

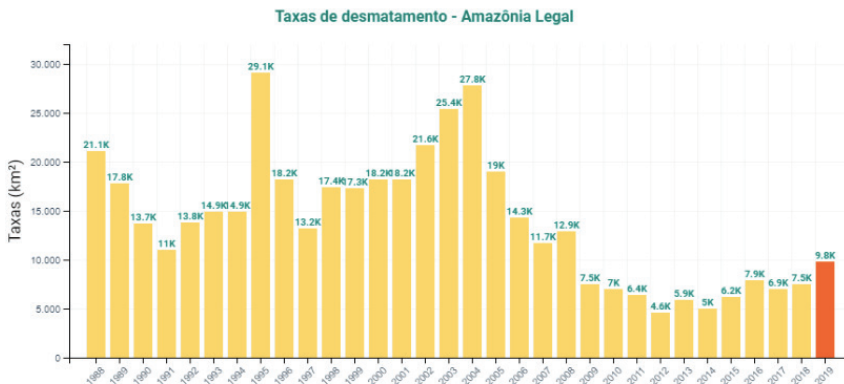
According to data from Imazon (2019), "[...] the destruction of the forest, through burning or timber extraction, grew by 394% compared with the month of October last year." As for deforestation in the Amazon, there was an increase of 212%, compared with last year. "Pará leads the ranking of deforestation by state, with 59%. Followed by Mato Grosso (14%), Rondônia (10%), Amazonas (85%), Acre (6%), Roraima (2%) and Amapá (1%)."

In a more detailed analysis of deforested areas in the Amazon, Imazon (2019) found that 54% of the deforestation occurred in private areas or in areas under various forms of land titling; of the remaining deforested areas, 32% were recorded in agrarian settlements, 7% in Protected Areas and 7% in Indigenous Lands.

Imazon (2019) points out that

The Triunfo do Xingu APA, in Pará, the Rio Preto-Jacundá Florex, in Rondônia, and the Guariba-Roosevelt Resex, in Mato Grosso, were the most deforested protected areas in the Amazon. Of the ten most deforested indigenous lands, eight are in the state of Pará. Those on the top of the list are the Cachoeira Seca do Iriri, the Ituna/Itatá and the Apyterewa indigenous lands.

Corroborating the advance of deforestation in the Legal Amazon, deforestation rates in the Legal Amazon from 1988 to 2019 are shown in Graph 1, according to the Brazilian Government's *Educa Clima* Portal of the Ministry of the Environment.



Graph 1 – Deforestation rates in the Legal Amazon.
Source: Brasil (2020).

Deforestation rates in the Legal Amazon fluctuated over the last three decades, with great peaks in the years 1995, 2003 and 2004, and lower levels observed in the period from 2010 to 2018. The year of 2019 is expected to show an increase in deforestation rates creating an upward curve resulting from the policies that are currently being conducted.

The increase in deforestation and environmental degradation was the subject of national and international debate and has led to the freezing of transfers and donations to the Amazon Fund.

3 ON THE SUSPENSION OF INTERNATIONAL TRANSFERS OF FINANCIAL RESOURCES TO THE AMAZON FUND

According to the Amazon Fund's 2018 Activity Report, the Fund was created by Decree no. 6,527, dated August 1, 2008, for the purpose of raising funds "for nonrefundable investment in actions to prevent, monitor and combat deforestation, besides promoting the conservation and sustainable use of the Brazilian Amazon" (BRASIL, 2019a).

For Marcovich and Pinsky (2014, p. 280)

The Amazon Fund, created by the Federal Government in 2008, is managed by the Brazilian Social and Economic Development Bank (BNDES). It is a pioneering initiative to raise and manage resources from voluntary donations to reduce deforestation and promote sustainable development for the 30 million inhabitants of the Amazon biome. The Amazon Fund has already received donations in the amount of R\$ 1.7 billion (about USD 787 million).

Also according to Marcovich and Pinsky (2014), the Brazilian Environment Policy is concentrated in the hands of a State that is unable to exercise an effective command and control over Amazon lands, which present high rates of deforestation, extensive agriculture, low human development levels and chaotic land distribution. Data from the National Institute for Space Research (INPE) for 2012 and 2013 already showed a 27.83% increase in deforestation in the Amazon between these years.

At that time, Marcovich and Pinsky (2014) were already scientifically investigating this issue, while the increasing deforestation demanded a change in practices, with encouragement given to environmental education focused on sustainability and environmental innovation, as well as incentives and support for those in charge of forest preservation.

In 2013, based on INPE data and on the research carried out by Marcovich and Pinsky (2014), the increase in deforestation was not a new finding, and a policy to deal with it should already have been included in the government environmental agenda. In addition to deforestation, there is the issue of financial donations, with the Norwegian government providing 96.7% of the donations to the Amazon Fund, followed by Germany with 2.8% and Petrobrás with 0.5%, according to Marcovich and Pinsky (2014).

The study by Marcovich and Pinsky (2014) concludes by emphasizing the importance of the Amazon Fund and the innovation represented by a fund established to protect the forest, a model that could be replicated to protect other forests. It turns out that despite the Amazon Fund's motto – "Brazil protects it. The world supports it. Everyone wins"¹⁰ – the world support to the Fund has changed recently with the suspension of financial donations from Norway and Germany, in a short period of time (2013-2019), due to the increase in unauthorized burnings in the Amazon and the current dubious government positions regarding sustainable development and the non-clarifying statements about its proposals for protecting the Amazon rainforest. The heated speeches and the exchanges of national

¹⁰ Government information on the Amazon Fund is available at the website <http://www.fundoamazonia.gov.br/pt/fundo-amazonia/>.

and international political barbs threaten with extinction the environmental innovation represented by the Amazon Fund's conception.

Borges (2019) reported that the current federal government has prepared a proposal altering the allocation of the resources Norway and Germany would invest to finance the Amazon Fund projects. A new decree would allow Fund's resources to be used for paying indemnities to private property owners living inside protected areas. The government was interested in eliminating indemnity liabilities that have not been paid since the creation of the protected areas.

As a result, Brazil stopped receiving donations from Norway and Germany, reducing the amount of Fund resources available for the preservation of the Amazon rainforest and the promotion of sustainable environmental education.

Despite the importance of the Amazon Fund observed by Marcovich and Pinsky (2014), the results of a more recent study questions the importance of the Fund by showing that donations are not enough to pay for forest protection, in actual market prices. Santos (2018), quoting Manoel Sobral Filho, director of the United Nations (UN) Forum on Forests, points out that the market value of tropical forests is low, arguing that the international community should increase this value, as the amount needed for actually protecting the Amazon rainforest would be 20 billion dollars per year.

The amount donated to the Amazon Fund by the governments of Norway and Germany and by Petrobrás, from 2009 to 2018, totaled R\$ 3,396,694,793.53. In US dollars, this represents US\$ 1,288,235,378.26. It is important to note that Norway donated R\$ 3,186,719,318.40 from 2009 to 2018. Germany, in turn, made donations in the years 2010, 2013, 2014 and 2017, totaling R\$ 131,992,896.00. Petrobrás S/A was much more modest in its donations, which amounted to R\$ 17,285,079.13 from 2011 to 2018 (BRASIL, 2019a).

An assessment of donations per year, considering only those from Norway as reported by the Amazon Fund, shows that no individual donation has reached the billion mark. Therefore, the amount donated would not be sufficient to ensure forest protection through sustainable development while preventing pure and simple (and often criminal) deforestation, according to the statement by the Director of the UN Forum on Forests, as mentioned above.

Without addressing in detail the importance of the Amazon Fund, we point to the fact that it received donations over a significant period of time,

with the resources managed by the BNDES, which linked them to specific projects and had two governance committees (Steering Committee and Technical Committee) that, in turn, focused on combating deforestation. It is important to note that, in addition to the government position that the resources would not be sufficient, those committees were also extinguished (Decree No. 9,759, of April 11, 2019), centralizing more the management of forest policies, even with the Amazon Fund website stating that “until the present date, the new governance of the Amazon Fund has not been defined.”

Far from trying to establish whether the amount donated is sufficient or not to combat deforestation and promote sustainable development, the fact is that the donations stopped at that time, both by Norway and Germany, due to the government’s position on the matter.

As reported by Senra (2019), Germany’s Ministry of the Environment froze donations in the amount of € 35 million to the Amazon Fund due to the current federal government’s review of the Fund’s governance structure and resource allocation criteria. As if the freezing of donations were not enough, the German government also expressed doubts about German support for the free trade agreement between Mercosur and the European Union.

Passarinho and Senra (2019) pointed out that donations from Canada, the United Kingdom and the G7 cannot offset the loss of donations from Norway and Germany. According to their report, the Amazon Fund lost R\$ 299 million in donations in 2019.

On October 3, 2019, Schelp (BRASIL, 2019b) reported that Germany confirmed that € 33 million was to be donated to the Amazon Fund, with Norway still needing to confirm, at the time, whether it would also continue to donate resources to the Fund. It is also important to highlight that Germany confirmed the donation, but also emphasized that it would wait for the negotiations between the Brazilian and Norwegian governments on the issue to transfer the resources, which did not occur until the end of that year.

4 ON THE CONSORTIUM OF THE LEGAL AMAZON STATES

Since the Public Administration Reform – more particularly the reform of public management, that is, of how the Public Administration is managed, established by Constitutional Amendment no. 19/1998 after

discussions that started in mid-1996 – there is no escaping the works of Bresser-Pereira (2009), as well as the developments arising from the reform and the difficulties in implementing the federal decentralization.

Bresser-Pereira (2009) shows great care in addressing decentralization and delegation of powers, including by examining the case of the United States of America, in which the subnational entities (states) gave up sovereignty to centralize more the power of a confederate state. For Bresser-Pereira (2009, p. 299),

[...] decentralization is a public management strategy, while delegation of powers is a decision with managerial consequences. Decentralization is generally decided from the top down, being a strategy for improving the capacity of central offices to achieve established goals, while power delegation usually is a response to demands for greater local and regional autonomy, to which central government officials reluctantly agree. Delegation is the result of political negotiations about the division of powers between government levels.

The 1988 Brazilian Constitution had already defined, as mentioned above, the administrative and legislative powers of each federative entity. The Administrative Reform (CA no. 19/1998) increased the decentralization, and the “delegation” of power – which has already been established by constitutional amendment¹¹, though not exactly as defined by Bresser-Pereira (2009) – was legally established only in 2005, with the enactment of Law no. 11,107, of April 6, which defined the general rules for public consortiums¹².

Aiming to further the decentralization process and exercising their constitutional administrative and legislative powers, in addition to the “delegation” allowed by CA no. 19/1998, the states of the Legal Amazon (Acre, Amapá, Amazonas, Maranhão, Mato Grosso, Pará, Rondônia, Roraima and Tocantins) formed a consortium for the protection and development of the Legal Amazon in 2017, as published in the Official Gazette of the State of Pará (Year CXXVII of the State Official Press, 128th of the Republic, no. 33,513).

In 2017, the Legal Amazon states signed the Protocol of Intent of the

¹¹ Public consortiums were included in the Constitution by Constitutional Amendment no. 19/98: “Art. 241. The Union, the States, the Federal District and the Municipalities shall issue legislation to regulate public consortiums and cooperation agreements between members of the Federation, authorizing the joint management of public services, as well as the transfer, in whole or in part, of charges, services, personnel and goods essential to the continued rendering of the services transferred” (BRASIL, 1998b).

¹² Law no. 11,107/2005 in its 1st article states that “This Law provides for the general rules for the Union, the States, the Federal District and the Municipalities to contract public consortiums for the achievement of objectives of common interest and sets forth other provisions” (BRASIL, 2005a).

Interstate Consortium for the Sustainable Development of the Legal Amazon. This protocol of intentions was ratified by the State of Pará through State Law no. 8,573, of December 6, 2017.

Clause 7 of the Interstate Consortium for Sustainable Development of the Legal Amazon¹³ established the goals of the Consortium, namely:

I – the economic and social development of the Legal Amazon, in a harmonious and sustainable manner;

II – the regional integration and the strengthening of the region and of its political and economic role, in the national and **international** context;

[...]

V – the development of infrastructure and logistics projects aimed at the integration of the region and its national and **international insertion**;

[...]

VIII – the **attraction of investments** and the expansion of the sources of resources **for the promotion and development of the Amazon and the conservation of its biodiversity, forests and climate**;

IX – the **development of projects aimed at a low carbon economy** (AMAZONAS, 2017, emphasis added).

The highlighted goals of the Consortium of the Legal Amazon allow for the possibility of establishing international contacts aimed at the promotion of regional economic and social development, based on the implementation of infrastructure and logistics projects, on fundraising for the conservation of biodiversity, forests and the climate, and on projects aimed at the transition to a low carbon economy. If the federal government's efforts to change the criteria for allocating the resources donated by other countries (Norway and Germany) created an obstacle to the conservation of Amazon forests, at the same time it allowed the establishment of international contacts, through the Consortium of the Legal Amazon, with the aim of developing projects for the protection, preservation and development of the Legal Amazon. This process thus promotes an actual and regional (of the Brazilian Legal Amazon region) decentralization of public management, as well as allows the Legal Amazon states to raise funds for sustainable development purposes, while considering local and regional issues.

It is necessary to strengthen the union of the Legal Amazon states, in order to avoid certain issues observed in some municipal public consortiums, with members taking unfair advantage of the others by acting individually

¹³ From now on the Interstate Consortium for the Sustainable Development of the Legal Amazon will be referred to as Consortium of the Legal Amazon.

and focusing only on furthering their own individual agendas¹⁴.

This model of federative cooperation is potentially suitable for the implementation of an environmental plan, as the logic of environment action is incompatible with isolated efforts and a rigid division of responsibilities, requiring action at all levels of the federation.

On the other hand, the Amazon is constitutionally defined as a “national heritage” (Federal Constitution’s art. 225, § 4), which implies two things: the right of the Brazilian State to establish its own environmental and development policy (sovereignty in environmental matters) and the duty of states and municipalities to comply with the minimum levels of environmental protection set by federal legislation. This does not mean that environmental policy in areas of relevant ecological interest such as the Amazon is an exclusively federal competence, but rather allows states to establish more protective policies for the environment.

In this sense, the management of the Legal Amazon, in environmental matters, will become more regional and focused on problems specific to the region, such as reliability in terms of prevention of deforestation and degradation and sustainable development. The management of the Legal Amazon will involve more than isolated actions by the federative entities individually considered, the Union and all the Legal Amazon states should take joint action to strengthen the management process and make it more focused on the resolution of more localized and regional concerns.

5 PARADIPLOMACY, FEDERALISM AND THE AMAZON CONSORTIUM

Addressing the issue of paradiplomacy requires reflecting on federalism, since this approach can be taken due to problems arising in the relations between the entities of the federation. In this sense, Wright’s (1974) studies of US federalism helps in the examination of intergovernmental relations between federative players. According to Wright (1974), five phases of intergovernmental relations were identified: (1) conflict; (2) cooperative; (3) concentrated; (4) creative; and (5) competitive. For example, the following elements were identified for each phase, respectively: initial conflicts between states; need for cooperation in the face of depression

¹⁴ On this subject, see MACHADO and ANDRADE (2014), who address the risk of public consortium members behaving as “free riders.” A consortium member could realize that it can benefit without cooperating, behaving as a free rider, that is, it would act individually to the detriment of the collective strengthening that was the purpose for creating the consortium.

and wars; concentration on specific development issues such as urban renewal, waste treatment, construction of libraries and others; grants for project development, with more than 40 grant projects developed; and the competition in administrative performance and in the effective delivery of public goods and services. Such phases specifically describe the American federalism and the important is to demonstrate that there are phases in intergovernmental relations between federative entities that can affect their internal and international relations.

Intergovernmental relations, according to Anderson (1960 apud WRIGHT, 1974, p. 2), serve “to designate an important body of activities or interactions occurring between governmental units of all types and levels within the [United States] federal system.” And it is on the basis of this general definition that Wright (1974) builds his conception of intergovernmental relations. The context of this analysis of intergovernmental relations was the United States of America, but it can be adopted for other Federal States, provided the peculiarities of each one are always taken into account.

The aim of our study is not to characterize Brazilian federalism since its inception, but to examine its current characteristics. In this sense, the new federal government is cause for rethinking the Brazilian federalism, as increasing deforestation and degradation in the Amazon has led to a strengthening of the intergovernmental relations of the region’s states, which realized that, as autonomous entities, they can establish international contacts for accomplishing local and regional objectives, especially environmental ones.

Despite the global crisis of democracy, paradiplomacy emerges as a viable approach for the states.

In the context of 21st century Federal States and of the influences of globalization, the role of federative entities must be reviewed, based on their needs, to resolve local issues, in which the Union does not act as a catalyst for solving the problems of federative units. The express provision that the Federated States cannot act *uti singuli* in the international sphere must be specifically established in the Constitution¹⁵.

Furthermore, according to Garcia-Pelayo (1984), federalism, as a dialectical synthesis of two contradictory tendencies – a tendency to unity and a tendency to diversity – cannot exist only under a centralizing perspective or force. The action of the states is essential to ensure the balance of the

15 On not acting *uti singuli*, see Miranda (1936, p. 33).

federative ideal.

The term paradiplomacy, a parallel democracy neologism used to designate the multiple forms of action of subnational governments in international relations, was coined in the 1980s and has as pioneering doctrinal references the works of Ivo Duchacek (1990 apud PRADO, 2018, p. 139) and Panayotis Soldatos (1986 apud PAQUIN, 2004, p. 16). Other expressions have been used in the literature¹⁶, which were proposed due to the functionality and limits of this new approach to international relations, although they are not predominant among leading scholars.

Paradiplomacy is a concept developed especially within the disciplines of Social Sciences and International Relations for explaining the role of subnational governments in the international order, in the context of the globalized, complex and challenging world of traditional Nation-States. In his study of the history of paradiplomacy, Arenas-Arias (2018, p. 4) explains that “the nation-state is seen as a multivocal (polyphonic) player that, on the international scene, expresses itself with more voices than the legitimated one of the central government.”

Despite involving actions by non-central entities on the international stage at various levels and of different natures, from matters of low politics (cultural exchanges, technical cooperation and tourism, for example) to separatist claims, paradiplomacy examines the possibility of entities deprived of sovereignty and legal personality acting in the international scene according to international law, as is typically the case for states and municipalities in federal states.

One of the major potential obstacles to understanding paradiplomacy as a useful approach to international relations and to human rights and environment protection arises from traditional definitions used in the Theory of the State and International Law, which were established before to the strengthening of international human rights law. In this sense, in terms of public international law, international personality entails the faculty of taking direct action in the international scene, having the power to create norms of international law, exercise rights, enter into obligations and resort to international protection mechanisms. Examples of such entities

¹⁶ Débora Prado (2018), in a study on the conceptual constructions of paradiplomacy, provides a conceptual systematization of the phenomenon according to the Brazilian and foreign literature on the matter. She presents and analyzes the expressions: multilevel democracy, microdiplomacy, constituent diplomacy, multilayered diplomacy, sub-state diplomacy, federative foreign policy, federative diplomacy (Itamaraty), decentralized international cooperation, multilevel cooperation.

are sovereign states, international organizations, regional blocs and some nations seeking sovereign status.

The most recent doctrine of international law, especially of international human rights law, takes a critical approach to traditional concepts and to the pillars of state sovereignty as viewed from a Hobbesian perspective, attributing international personality to companies, non-governmental organizations and to individuals, raised to the level of subject of international law.

The prescription that federated states cannot act *uti singuli* in the international scene, a dividing mark between a Federation and a Confederation, deserves to be reframed in the new world context and must be understood while considering specific limitations set by the Constitution of the Federal State. It is not possible to borrow from the doctrine a general clause defining a form of territorial political organization – which, incidentally, has multiple nuances in the different federal states – and then use it to stifle the dynamism of international and federative relations in the globalized world of the 21st century.

The 1988 Brazilian Constitution gives primacy to the central government in the international scene, as a way of ensuring the indissolubility of the federative pact and uniformity in some matters such as diplomatic relations in the strict sense and signature of international treaties which result in charges or commitments that go against the national property (Art. 49, I and art. 84, VIII). Also subject to approval by the Federal Senate are external financial operations carried out by the federative entities (art. 52, V), due to issues related to federal liability. It is worth mentioning, for example, the changes brought about by CA no. 45/2004 on the federalization of crimes against human rights (art. 109, V-A and § 5) to ensure the fulfillment of the obligations of the Brazilian State arising from international human rights treaties, in place of actions taken by states.

International relations in the 21st century, however, encompass multiple possibilities of action not related to issues of state sovereignty. Thus, technological agreements, cultural cooperation, tourism, education, trade in goods and services are examples of matters that do not in themselves pose a threat to the Federation's integrity.

Federated states and municipalities, in turn, have predefined competences set in the 1988 Constitution, whose execution and responsibility transcend the consent or operation of the Federal Union. The Brazilian Constitution, in its article 18, which provides for the political and

administrative organization of the Federative Republic of Brazil, expressly refers to the autonomy of the Union, the States, the Federal District and the Municipalities, and then proceeds to map legislative and administrative competences, including the establishment of the joint responsibilities of the federative entities in its art. 23. The protection of the environment, in this sense, is a joint competence of the three federal levels, whose responsibility is shared and cannot be avoided with the argument that the non-central entities have pursued policies that may proved disastrous under the guidance of the Federal Union.

The Brazilian constitutional framework requires an analysis of the types or manifestations of the paradiplomacy in a broad sense in order to assess its constitutional legitimacy in Brazil. Due to the diversity of mechanisms, purposes and intensity of the actions by subnational governments at the international level, experts propose classification criteria to address the issue, with emphasis on protodiplomacy and global paradiplomacy.

Protodiplomacy is an activity carried out by a subnational government that is contrary to the interests of national diplomacy, has a destabilizing effect and may even constitute preparatory work for secession manifestly incompatible with the unity of the Brazilian State (PRADO, 2018).

Global paradiplomacy, in contrast, corresponds to the actions taken by federal states that come into contact not only with financial, industrial or cultural centers outside the country, but also with foreign agencies¹⁷. The Brazilian constitutional system does not impose restrictions on non-central entities, states and municipalities, in matters of international relations, especially on issues such as environment protection, which should not be limited by geographical boundaries. The Legal Amazon Consortium, in this context, represents an instrument for paradiplomatic federative cooperation endowed with constitutional legitimacy, whose main political and legal function resides in fulfilling constitutional obligations with assistance and resources provided by foreign governments, without posing any threat to national integrity.

Regarding the actions taken by states aimed at promoting the development of the Amazon region, it should be noted that these federative entities cannot act as international representatives of the Brazilian State, an activity that is an exclusive competence of the Union, as already mentioned

¹⁷ With regard to the types of paradiplomacy, Ivo Duchacek (1986 apud PAQUIN, 2004, p. 16) addresses transboundary regional microdiplomacy, transregional microdiplomacy, global paradiplomacy and protodiplomacy.

(art. 21, item I). The consortium members, although formally devoid of legal personality under international law, can establish relations with other countries through agreements.

In examining the international participation of subnational units, Branco (2007) points out the signature of International Treaties by subunits in the former Union of Soviet Socialist Republics, West Germany, Argentina and Switzerland, particularly the fact that the *jus tractum* of subnational entities is expressly established in the Constitutions of those countries.

The German Constitution of 1949 provides for in its art. 24¹⁸ the possibility of delegation of sovereignty to the states, thus showing that the signature of international treaties by subnational units may be allowed by constitutional provision, without this being seen as a threat to the federal regime.

The Brazilian legal system has already attempted to establish paradiplomacy, in the strict sense of allowing states and municipalities to become subjects of international public law in order to enter into international treaties, as was the case of the constitutional amendment bill (PEC) no. 475/2005, which was filed under the argument that it is unconstitutional due to the provisions of art. 18 of the 1988 Constitution. A PEC aimed at adjusting the Brazilian federative framework, taking into account the recent expansion of the federated entities' powers, could be approved and implemented as long as the essence of the federal regime remains in place, that is, national unity is maintained, but respecting regional diversity. Paradiplomacy is already being conducted in Brazil, without proper regulation, but already recognized by the Ministry of Foreign Affairs, through the work of the Special Advisory on Federative and Parliamentary Affairs¹⁹, since this advisory body is responsible for evaluating the paradiplomatic initiatives of the states and municipalities. In this sense, paradiplomacy must be constitutionally regulated.

FINAL REMARKS

If, in terms of constitutional environmental provisions, there has been a considerable advance in environmental protection since the promulgation of the 1988 Brazilian Constitution, with respect to the internal territorial

18 Art. 24 [Transfer of sovereign rights – Collective security system] (1) The Federation may transfer sovereign rights to interstate organizations, by law.

19 On this topic, see Bohn e Krieger (2019, p. 1-14).

distribution of power, however, there was little actualization of the federative principle, in the sense of the autonomous exercise of power by the federative entities until this moment.

That is, the constitutional provision for the administrative and legislative power of subnational units in environmental matters was not enough, since the effectiveness of such delegation of power can be put into question by the degradation and deforestation currently occurring in the Brazilian Legal Amazon, since those did not happen naturally, but by human action. Thus, constitutional regulation does not mean that environmental protection will be effectively carried out. Environmental policies, in addition to environmental legislation, should also be developed, promoted, and implemented not only by the Union.

The changes to the criteria for the allocation of Amazon Fund's resources resulted in reviewing and reassessing the power of the federative entities, since the lack of resources directly affected Legal Amazon states, which have constitutional responsibilities for protecting the environment. Therefore, they must act to achieve this goal.

Paradiplomacy designates a way for establishing international contacts by federated entities, in order to secure fundraising through donations for cultural, tourist, technological and environmental development, among other purposes, that are not linked to fictitious geographical borders or even natural ones.

In this sense, the federated entities of the Brazilian Legal Amazon, which already formed a consortium, should act by means of paradiplomatic mechanisms to attract investments and donations for the preservation and sustainable development of the Amazon rainforest, in order to break the cycle of degradation and deforestation that has been devastating that forest. Taking such measures do not hinder in any way federal policies and the maintenance of the federative pact, because the federative entities incur in no unconstitutionality or disloyalty in receiving donations and international investment for the development of the Brazilian Amazon. The position of the states is of beneficiaries of financial and technological resources, among others, without encumbering the national property.

The exercise of paradiplomacy is the answer to our research problem, that is, international contacts by member states with international agencies may serve to attract international resources, in order to mitigate the degradation and deforestation of the Amazon rainforest. In addition, it can show a path for regional consortium policies aimed at sustainable environmental development.

Brazilian states can exercise paradiplomacy for seeking solutions to regional and local problems without prejudice to the federative pact or threatening the sovereignty represented by the Union. Environmental law as an ordinary constitutional right has been an object of special attention and should be closely watched over by all federative entities.

The importance of paradiplomacy is in balancing intergovernmental relations between federative entities, because it shares responsibilities for preserving the Amazon rainforest between the Union and the states, decentralizing such responsibilities. In the absence of conflicts or competition between the Union and the states due to the exercise of paradiplomacy, we can only point the relevance of the states to the preservation and development of the Amazon region.

The establishment of international treaties by the states depends on amending the Brazilian Constitution of 1988, with the aim of reconciling the administrative, political and regional frameworks to the current global context in which Brazil is immersed.

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