	**Essential Readings in Environmental Law** **IUCN Academy of Environmental Law (www.iucnael.org)**

JUDGMENTS ON ENVIRONMENTAL LAW IN BRAZIL

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Background

Environmental law in Brazil can be considered, in 2016, to be passing through a stagnant period, at least in regards to its legislative production. Some issues have even received a regressive treatment from the legislators. However there are also several legal problems being solved by tribunals. There are today many interesting decisions even if a satisfactory level of coherence among them is still lacking. These decisions form a counterpoint to the legislative setbacks as they are helping to build a jurisprudence that deals with environmental liability, environmental crimes, invasive species, protected areas, the precautionary principle, and harmful substances, among many other themes. Before describing and commenting below on some of these decisions, it is important to briefly present the Brazilian governmental and judicial structure as well as to provide a short background of Brazilian environmental law.

Brazil has a federal system of government. The Union, the States and the municipalities are the three level of government and they all have legislative and administrative competences concerning environmental protection. There are many legal problems regarding conflicts of competence between these entities due to the difficulty to clarify the specific competence of each entity. Brazil is composed of two different jurisdictional orders: the Federal Justice and the State one. Article 109 of the Constitution of the Federative Republic of Brazil states that "(...) federal judges have the competence to institute legal proceedings and trial of cases in which the Union, an autonomous government agency or a federal public company are concerned".[1] Federal States and municipal issues are usually decided under State Tribunals. There is one Superior Court of Justice (*Superior Tribunal de Justiça* – STJ), with competence to judge, among some other matters, violations of federal laws, as established by article 105 of the Constitution. There is also a Supreme Federal Court (*Supremo Tribunal Federal* – STF), essentially responsible for safeguarding the Constitution, by virtue of article 102. When a Court is judging an appeal, a Judge-Rapporteur is assigned with the duty to report the case to the other judges during the Court Session. The Judge-Rapporteur is also the first one to announce how he or she will be voting. Afterwards, the other judges will also declare how they vote: in favor of the Judge-Rapporteur's vote or against it. Therefore, decisions are taken unanimously or by the majority of the judges from a Court.

It is also important to highlight the function of the Public Prosecutors with regard to environmental issues. Article 127 of the Constitution states that it is a "permanent institution, essential to the jurisdictional function of the State, and it is his/her duty to defend the juridical order, the democratic regime and the inalienable social and individual

interests". Public Prosecutors are responsible for the majority of the environmental lawsuits.

The origin of environmental law in Brazil goes back to the 1930's, when the first *Forest Code* and the *Water Code* were enacted and the first national park was created by president Getúlio Vargas. However, the consolidation of environmental law only took place in the 1980s when the *1988 Federal Constitution* established it as a competence and recognized its general guiding principles as constitutional ones. Since then Brazil has been alternating between periods of a great legislative production and periods of stagnation or even setbacks.

This paper will focus on twelve decisions related to the protection of the environment that were adopted by the Superior Court of Justice and the Supreme Federal Court that either changed precedents or innovated in terms of legal analysis. Although the legal system adopted in Brazil is Civil Law, which means that formal law, and not precedents, is the basis of the legal framework, decisions of the Brazilian high courts still play a very important role and deserve to be studied carefully. Therefore, the following issues dealing with environmental laws and policies will be addressed in this paper: environmental principles such as public participation (Márcia Dieguez Leuzinger) and the precautionary principle (Carina Costa de Oliveira); enforcement of public policies (Diego Vega Possebon da Silva); legislative powers of member States (Márcia Maria Macedo Franco); environmental criminal liability (Nilton Carlos de Almeida Coutinho and Priscila Pereira de Andrade); civil compensation for environmental damages (Paulo Campanha Santana and Larissa Ribeiro da Cruz Godoy); environmental civil liability (Gabriela Garcia Batista Lima and Larissa Soares Santos); *propter rem* obligation of property owners (Carina Costa de Oliveira) and administrative authorizations (Jorge Aranda).

Cases

1. Writ of Mandamus Nº 24184, (2004) Supreme Federal Court (Written by Márcia Dieguez Leuzinger, Public Attorney, PhD in Sustainable Development, Professor at Brasília University Center- UniCEUB)

Judge-Rapporteur: Ellen Gracie
Date of trial: August 13, 2003
Decision published in the Official Journal on: February 27, 2004
Parties to the lawsuit: *Aluisio Eneas Xavier de Albuquerque and others v Brazilian President; Brazilian Institute of Environment and Renewable Natural Resources* (*Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis – IBAMA) and the Ministry of the Environment.*
Legal Problem: Public participation and the creation of protected areas in Brazil.

a) Summary of the facts

This writ of mandamus was filed by rural proprietors who had been directly affected by the enlargement, from 60,000 to 230,000 hectares, of the *Chapada dos Veadeiros*

National Park, located in the Brazilian State of Goiás. According to the plaintiffs, the Presidential Decree that allowed for the enlargement of the National Park was illegal because of the lack of technical studies and public consultation, as required by article 22, §§ 2º and 6º, of *Law n° 9.985/00*. The proprietors also highlighted a problem with the Law since it lacked enabling regulations.

The respondents to the mandamus, in information provided to the process, argued that all requirements included in the *Law n° 9985/00* were observed. They argued that the requirements for public consultation were complied with as follow: a petition signed by some residents of the *Pouso Alto* region in 1992; consultation with specialists in 1998 who advised that it was necessary to create a national park in the area; and consultation with the Park's Advisory Committee, which was in favor of the enlargement of the park. The respondents also argued that public consultation is not deliberative, as it only has an advisory function to assist decision-making by the official agencies.

b) Synthesis of the decision

The Supreme Federal Court's Judge, Neri da Silveira, who was originally assigned as the Judge-Rapporteur of the case, granted, at the request of the plaintiffs, a preliminary injunction to prevent IBAMA and the Ministry of the Environment from *"creating difficulties for the rural proprietors or imposing upon them requirements that would not have been imposed, created or refused if their properties had not been affected by the increase of the parks' area"*. Judge Ellen Gracie took over as Judge-Rapporteur of the case. The Full Court decided, by a majority vote, to agree with the Rapporteur's decision and granted the injunction to annul the Federal Decree of 27 September 2001 enlarging the *Chapada dos Veadeiros* National Park.

Judge Ellen Gracie stated:

i) When the Decree of 27 September 2001 was proclaimed the *9.985/00 Act*, which established the National System of Conservation Units (SNUC), was in force but the regulations which would have allowed for the Decree had not yet been adopted. The regulations only took effect on 22 August 2002 with the enactment of *Presidential Decree n° 4340/02*.

ii) Paragraphs 2º, 3º and 6º of article 22 of the *9.985/00 Act* require that the creation or the enlargement of a conservation unit be preceded by technical studies and public consultation. There is no evidence in the case's file that this has occurred.

iii) The opinion of the Park's Advisory Committee, created by *Ordinance n° 82/2001*, does not replace public consultation because the Committee does not have the power to represent local communities.

c) Comments on the decision

The decision of the Supreme Federal Court changed the national environmental law landscape[2] by annulling the Presidential Decree because of lack of public consultation demanded by the *9.985/00 Act* (*SNUC Act).* Paragraph 2º of article 22 of the *SNUC Act* demands, for the creation or the enlargement of conservation units, technical studies and public consultation that leads to the identification of the most appropriate boundaries, location and dimensions of the area. The only two exceptions to the requirement for

public consultation are for the creation of biological reserves and ecological stations, because of the need to restrict human interference in such areas. These exceptions were a victory for conservationists, who advocated, during the legislative process, the impossibility of obtaining favorable results in public consultations from those affected in relation to protected areas which do not even admit visitors.

The obligation to respect the consultation process, even if it is only for the enlargement of a conservation unit that has already been created, is specified in paragraph 6º of article 22 of the *SNUC Act*. Therefore, as the case involves the enlargement of a National Park, there is an express provision of public consultation in the law. This instrument aims to implement the environmental principle of participation. The idea of public participation in the planning and implementation of public policies gained greater consistency in the second half of the 20th century. This occurred because new techniques of governance were developed given the necessity to increase the involvement of citizens, non-government organizations (NGOs) and social movements in the design, development and effective implementation of public policies in different areas, including the environment.[3]

Specifically with regard to the creation of conservation units, the obligation to consider public participation in the process arose with the proclamation of the *9.985/00 Act*. The requirement for public consultation, in this case, has a dual purpose: 1) to seek assistance to define the site, select its boundaries, categories and dimensions; and 2) inform those who will be affected by the park about its importance in terms of the conservation of biodiversity and benefits that will be generated for the community.

Respect for the participation principle leads, potentially, to a substantial reduction in conflicts generated by the establishment of conservation units, especially those that require full protection and public domain. According to Sachs, the top-down policy of creating conservation units without consulting the affected communities is a self-defeating policy, which only serves to raise the resistance of local populations, who will then not help to maintain the area.[4] This occurs because conservation units assigned full protection impose severe restrictions on the use of the area, which is different from conservation units of sustainable use that assign only partial protection. For example, national parks only allow people to visit the areas whereas before the park was established, people had been able to make direct use of the area's natural resources. Therefore, the involvement and understanding of local communities of the role that the conservation unit plays in building a good quality of life for society in general are essential for their success.

The need for regulation in the 2nd paragraph of article 22 of the *SNUC Act* mentioned by the Rapporteur cannot be a reason for the annulment of the Decree that enlarged the national park's area. It is true that, in the civil law system, when the law itself mentions the need of a further regulation it is mandatory. And the 2nd paragraph of article 22 of the SNUC Act mentions it. But, if the conclusion is that the article was not in force because of the lack of regulation, and that there was not any other law establishing it, public consultation could not have been demanded, and the enlargement would be legal. However, the fact is that the need for public consultation can be based on other legal provisions, including the 1988 *Federal Constitution*, the *6.938 Act* of 1981 that established the National Environmental Policy, and the international treaties to which Brazil is a signatory. All these documents mention, albeit in the form of environmental

education, the necessity for public participation in environmental decision making process.[5]

In conclusion, the Supreme Federal Court's decision aligns with the principles promoted by the socio-environmental movement, which seeks, besides the conservation of biodiversity, the protection of sociodiversity represented by the different cultures that make up our society. It is also in line with overall Brazilian environmental legislation.[6] We are not denying the relevance of creating conservation units but only highlighting the importance of conducting a transparent and participatory process for its creation or enlargement. In this case, the importance of enlarging the national park was reaffirmed by the Supreme Federal Court because it highlighted the possibility of adopting a new Decree with the same purpose.

2. Special Appeal N° 1330027/SP, (2012) Superior Court of Justice (Written by Carina Costa de Oliveira, PhD in International Law, Professor of International and Environmental Law at the University of Brasília – UnB, Coordinator of the Research Group on Law, Natural Resources and Sustainability – Law Faculty – University of Brasília (GERN - http://www.gern.ndsr.org/).

Judge-Rapporteur: Ricardo Villas Bôas Cueva
Date of trial: June 06, 2012
Decision published in the Official Journal on: September 11, 2012
Parties to the lawsuit: *Adauto Aparecido Garcia and others v. Energy Company of the State of São Paulo (Companhia Energética de São Paulo* - CESP).
Legal Problem: Reversal of burden of proof through the precautionary principle

a) Summary of the facts

The construction of a dam in Brazil resulted in damages to the aquatic fauna of the Paraná River and to fishermens' activities.[7] The latter asked for reparation for the loss of their economic activities. In the decision of the First instance and of the Court of Appeals, their demand was rejected because of lack of scientific evidence establishing a causal link between the construction of the dam and the impacts to the aquatic fauna.

b) Synthesis of the decision

The Superior Court of Justice, based on some precedents[8], ruled that the company could be held liable even if a connection could not be established between the construction of the dam and the impacts on the aquatic fauna and the fishermen activities. Thus, the Court reversed the burden of proof from the fishermen to the company who had potentially caused the damage. The precautionary principle was one of the sources used to justify this reversal. Other procedural arguments were used in a complementary way such as, mentioned below, the normative provision and the inequality between the parties to the conflict.

c) Comments on the decision

The precautionary principle, in Brazil, can be found both in legal norms and in the case law. Since the year 2000, tribunals have regularly been asked to address how this

principle must be analysed in various situations, such as for genetically modified organisms[9], pesticides[10], electromagnetic fields[11], dam construction[12] and oil spills.[13] The principle has had the most impact in the context of civil liability where it has been used as a preventive means and as a remedy for damages. In Brazil, in both cases, the principle requires an administrative intervention when there is a risk of serious or irreversible damage.

Regarding prevention[14], the principle rests on the application of other measures such as temporary restrictions, cancelling authorizations[15] and compromises committing to continue the technical and scientific research on the issue.

Concerning reparation, the effect of the principle can be the reversal of the burden of proof.[16] The most important argument to justify the reversal is provided for in article 21 of the *Law of the Public Civil Action, (Law 7.347/1985)* and in the *Consumer Code*, article 6, VIII.[17] These norms are exceptions to the general rule stated in the Civil *Procedural Code*, article 333, I, which states that the claimant bears the burden of proof. To be reversed, the following criteria must be present: the normative provision stating this possibility and a procedural inequality between the claimant and the defendant.

In conclusion, as this case illustrates, the precautionary principle has an effect on environmental civil liability in Brazil by complementing the civil procedure criteria when addressing the inversion of the burden of establishing proof.

3. Public Civil Action N° 2006.71.00.021446-8/RS, (2013), 9th Division of Porto Alegre's Federal Court (Written by Diego Vega Possebon da Silva, Lawyer, MSc in Law)

Judge: Clarides Rahmeier
Date of trial: November 04, 2013
Parties to the lawsuit: Federal *Public Prosecuter's Office (Ministério Público Federal) v Brazilian Institute of Environment and Renewable Natural Resources (Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis – IBAMA) and State of Rio Grande do Sul.*
Legal Problem: Analysis of Brazilian judicial decision about inefficient policies to combat invasive species such as the Golden Mussel

a) Summary of the facts

The Federal Public Prosecutor's Office filed a lawsuit against the Brazilian Institute of Environment and Natural Resources – IBAMA and the Brazilian state of *Rio Grande do Sul*, to require them to combat more adequately the dire consequences of the foreign and invasive mollusk *Limnoperna Fortunei* introduced in the Brazilian environment through the ballast water discharge of vessels and ships. The introduced mollusk has no natural predators in Brazil and thus seriously contributes to a massive loss of local biodiversity. Moreover, the mollusk consumes toxic kelps, which carries a dangerous toxin to the food chain since fish eaten by humans may also consume it.

The problem could be managed if the Brazilian government had policies, data, surveys or better knowledge to cope with this issue. But, unfortunately, there is little information about it, and the policies are not enough.

The local State claims that the Judiciary should not rule on the matter because the local government has been working on solutions to solve the mollusk problem since 2010 (the first record of the mollusk invasion in Brazil was in 1998). In addition, the local State also argues that there is no available technology to eliminate the invasive mollusk.

IBAMA defended itself by also pointing to the lack of technology while describing some activities adopted to control the mollusk invasion. Furthermore, IBAMA pleads that the mollusk's massive proliferation is more an economical threat than an environmental one, considering that it causes little negative impact to nature and that the major problem is the pipeline jam. It also affects sewage and water treatment stations.

b) Synthesis of the decision

Initially, the judge imposed emergency obligations that were confirmed in the final decision. The judge rejected the argument that the matter was not justiciable, noting that the public measures adopted to face the mollusk invasion were clearly not enough. The Court observed that by pronouncing on the issue it would interfere within the structure and quality of the policies. Nevertheless, and despite the lack of well-known technology to eliminate the invasive mollusk and the existence of some public efforts to do so, the decision made it very clear that a judicial injunction was capable of improving the quality of policy measures since those taken to date were not reliable, convincing or producing the desired results. To justify its decision, the judge relied on article 225 of the *1988 Federal Constitution*, which does not contain any restriction as to measures to be taken to protect the environment. Based on this article, the judge can act when extreme measures are needed to mitigate a dangerous threat. The decision states that IBAMA and the State of *Rio Grande do Sul* were both responsible for the management and control of the mollusk invasion.

The judicial order requires both IBAMA and *Rio Grande do Sul* State to:

1) inspect and map more carefully the invaded areas, identifying them with educational signs;

2) find out which are the more threatened zones and pursue research for ways to prevent damages;

3) elaborate a massive management plan (*plano de manejo*);

4) formulate an environmental educational plan for the affected areas, with instructions on how to avoid the dissemination of the invasive mollusk;

5) inspect vessels and ships;

6) create a continuous program to detect, control and eliminate the mollusk;

7) support biological surveys to free the Brazilian environment from this plague;

8) severely reduce the dissemination of the Golden Mussel, even though there is no existing technology to completely clean the Brazilian ecosystem.

c) Comments on the decision

Many judicial decisions have obliged public authorities to act to provide services to citizens, for example medicines, hospitalizations, social benefits, etc. This is a leading case in Brazil, because it requires authorities to reformulate an entire policy. The Judiciary went as far as to pronounce on the quality of the policies adopted by IBAMA and the State of *Rio Grande do Sul*, expressly rejecting the adequacy of public attempts to stop and reverse the mollusk invasion. In this particular case, the public measures taken were occasional and lacked proper coordination. In addition, the decision highlights another feature: before acting governments need to have good, reliable data and information.

In conclusion, the judge realized that the Brazilian policies in this case were formulated on the basis of a significant lack of knowledge. Thus, an obligation exists for national and local governments to look for more information, collect data and map affected areas in order to elaborate better policies.

4. Direct Action of Unconstitutionality N° 3937-7, (2008) Supreme Federal Court
(Written by Marcia Maria Macedo Franco, Public Attorney, MSc in Law)

Judge-Rapporteur: Marco Aurélio Mello
Date of trial: June 4, 2008.
Decision published in the Official Journal on: October 10, 2008.
Parties to the lawsuit: *National Confederation of Industry Workers (Confederação Nacional dos Trabalhadores na Indústria – CNTI) v. Legislative Assembly of the State of São Paulo and Governor of the State of São Paulo.*
Amicus Curiae: Brazilian Association of the exposed to asbestos (*Associação Brasileira dos expostos ao amianto* - ABREA); Brazilian Association of industries and distributors of asbestos (*ABIFRIBO - Associação Brasileira das indústrias e distribuidores de produtos de fibrocimento*); Brazilian Institute of Chrysotile (*IBC – Instituto Brasileiro do Crisotila*)); Union of workers in the non-metallic mineral extraction industry of Minaçu-GO (*Sindicato dos trabalhadores na indústria da extração de minerais não metálicos de Minaçu-GO*); Federal Council of the Brazilian Bar Association (CFOAB – *Conselho Federal da Ordem dos Advogados do Brasil Federal*)); National Association of Labour Attorneys (ANTP - *Associação Nacional dos Procuradores do Trabalho*) and the Brazilian Institute of Mining (*Instituto Brasileiro de Mineração*) .
Legal Problem: State's legislative powers to prohibit the use of asbestos within its territory.

a) Summary of the facts

This action, filed on August 6, 2007, aimed at declaring the unconstitutionality of the *São Paulo State Law N°. 12.684*, which "prohibits, in São Paulo State, the use of products, materials or artifacts that contain any type of asbestos or other minerals that accidentally have asbestos fibers in their composition".

The applicant highlights that the contested state law is mistaken in its purpose to protect the population and workers from health hazards caused by the exposure to asbestos as

studies have indicated the existence of tolerable levels of chrysotile asbestos for the human body. Hence, on the merits, it was argued that the generalized prohibition of chrysotile asbestos, which is the only type of asbestos produced in Brazil, violates the principles of "proportional legal reserve" of free enterprise provided in the *1988 Federal Constitution* (Article 5, sections II and LIV, and Article 170) as, from the scientific point of view, it is not a threat to human health. The applicant also argued that the mentioned state law is formally unconstitutional, on the grounds that the State Legislative Assembly would have usurped privative and general legislative power from the Union (Article 22, I, IX and XII, and Article 24, paragraph 1 and sections V, VI and XII), which had been already exercised with the enactment of *Federal Law 9.055/1995*, that "regulates the extraction, processing, utilization, commercialization and transportation of asbestos and the products containing it, as well as natural and artificial fibers of any origin used for the same purpose", and expressly authorizes the use and consumption of chrysotile asbestos.

It was also stated in the petition that the contested law affronts the authority of the Supreme Federal Court, as it had declared the unconstitutionality of a State Law from the State of São Paulo, with the same content, in the midst of the *Direct Action of Unconstitutionality ADI 2656/SP* (published on the Justice Journal on August 1, 2003), whose Judge-Rapporteur was Justice Mauricio Correa; as well as other favorable precedents, namely *ADI 2396-9/MS*, whose Judge-Rapporteur was Justice Ellen Gracie. The applicant also listed other precedents against the impossibility of additional concurrent state legislation to establish rules that drive away the incidence of federal legislation, among which features the *ADI 3035-3 / PR*.[18]

The defendants argued the following:

> 1) lack of legitimacy of the applicant, on the grounds that the questioned law interferes, only indirectly, in the sphere of rights of its members (no thematic relevance);
>
> 2) absence of affront to the decision rendered in *ADI 2656*, as the object of this law was more restrictive than the questioned current law;
>
> 3) Article 2 of the *Federal law 9055/95*, which supposedly guarantees the marketing of chrysotile asbestos in the country, is being contested by a public civil action, arguing its unconstitutionality, given the proven harmful effects of the substance to public health;
>
> 4) that there was no interference of the questioned law in the field of labor law;
>
> 5) that *Federal law 9055/95* does not explicitly authorize the use of asbestos in the country;
>
> 6) that the object of the federal law is related to the necessary care with the handling of chrysotile, and not to the right to use it;
>
> 7) that the disciplined rules in the federal law apply only to Member States where the use of chrysotile is allowed; this is the only way to understand law *9055/95* without considering it unconstitutional;
>
> 8) that the understanding of the applicant related to the scope of the federal law leads to its unconstitutionality by disobedience to Articles 1, III; Article 170,

caput, and Article 196 of the *1988 Federal Constitution*. Thus, as the federal law violates the constitutional system, it cannot restrict the valid legislative activity of the Member State.

b) Synthesis of the decision

The primary injunction requested by the applicants was rejected by the majority of the Supreme Court Plenary, changing the jurisprudence that had been established before by the Court in similar cases, involving the regulation, by the States, of the use of asbestos. Until this case was submitted to the Supreme Court, similar cases had been decided by denying the States the power to prohibit the use of asbestos in their territory.

The argument used by the Supreme Court to change the jurisprudence was that the state law which banned the use of asbestos was constitutional and in accordance to *Convention n°162* of the International Labor Organization (ILO), signed and ratified by Brazil.

The chronology of the process is the following:

1) In August 29th, 2007, the trial began, with the vote of Justice Marco Aurelio, the Judge-Rapporteur for the case. He followed the precedents and allowed the injunction, with two other judges concurring: Ricardo Lewandowski and Carmem Lucia.

2) Justice Eros Grau voted for the rejection, contrary to the precedents, and Justice Joaquim Barbosa asked to review the process, suspending the judgment.

3) In June 04th, 2008, the process continued, with the vote of Justice Joaquim Barbosa, and the primary injunction was rejected.

4) The Court has not yet rendered a decision on the merits.

The argument used to overrule the precedents was that the norms in the ILO *Convention n°162* are key criteria to evaluate the exercise of the legislative powers of the states as it has the status of a supralegal and infraconstitutional norm.[19] The *Convention* requires States Parties, including Brazil, to gradually replace the use of chrysotile asbestos and to take measures at the domestic level to do so. Hence, it does not make sense that internationally Brazil commits itself to fulfilling a human rights treaty, but internally, with regard to the states and municipalities, it frees itself from doing so.

Moreover, Justice Joaquim Barbosa held that it would be inappropriate to conclude that the federal law precludes the application of any other rule to the case, asserting that the pre-existence of the ILO *Convention n°162* prevents the attempt to raise the federal law to the status of a general rule. It means that even though the federal law admits the use of asbestos in Brazil, States legislation can prohibit its use in its territory.

c) Comments on the decision

The judgment innovated by proposing a new interpretation of the constitutional discipline of concurrent legislative powers of member states. Justice Joaquim Barbosa noted that one of the changes that came with the advent of the *1988 Federal Constitution* was the establishment of guidelines to be followed in cases of regulatory conflict among the federal entities. He was of the view that Article 24 seemed to consider, implicitly, the

possibility that the Union exceeds its legislative limitations for the elaboration of general federal norms. In these cases, he recalls that in the Representation *No. 1153-4/RS*, whose rapporteur was Justice Oscar Corrêia, *RTJ 115/1008*, the Court had already envisaged the possibility of a state regulation to preclude the application of a federal rule where it contradicts the guidelines of a general rule. Yet, in the direct action of unconstitutionality *ADI 927-MC* (Judge-Rapporteur Carlos Velloso, November 11, 1994), the court decided that a federal law that limits the legislative power of the state and municipality, should be interpreted to apply only to the Union, as, otherwise, there would be illegitimate limitation of the powers of federal entities.

This decision proved to be innovative by pointing out that *Convention n° 162* of the International Labor Organisation is a commitment made by Brazil and that it supports the legislative stance adopted by the State: "the convention is a protective norm of fundamental rights, especially the right to health and the right to a balanced environment. It also meets the principles of human dignity and economic order based on the value of human labor, social justice and environmental protection."

The reasoning in this decision also innovates as it considers possible and reasonable the limitation imposed by state law regarding the use of chrysotile asbestos. In conclusion, this decision, although rendered only as a preliminary injunction, is of great importance for the environmental protection discipline, since the Federal Government has already promulgated general rules on various environmental matters, namely: forests, wildlife protection, water resources, environmental policy, conservation units, pesticides, biosecurity, environmental education, pollution fight, among other concurrent legislative issues. Norms that, far from providing only a framework of principles, also regulate in depth the addressed issues, which are also of local interest, could thus empty the legislative power of the States on the same matters.

Hence, this decision, which is still awaiting confirmation from the Supreme Court in the judgment on the merits, strengthens the autonomy of States in the exercise of their complementary legislative powers, by adopting the directive that, in the employment of such power, States should assess the legitimacy of their norms not only for consistency with federal laws that deal with general rules, but also, and mainly, with the international conventions on environmental matters (and other fundamental rights) signed and internalized by Brazil, thus changing the paradigm of validity of their legislation.

5. Special Appeal N° 564.960/SC, (2008) Superior Court of Justice (Written by Nilton Carlos de Almeida Coutinho, Public Attorney, PhD in Law, Professor of Centro Universitário de Brasília - UniCEUB)

Judge-Rapporteur: Gilson Dipp
Date of trial: June 02, 2005
Decision published in the Official Journal on: September, 26, 2008
Parties to the lawsuit: *Public Prosecuter's Office of the State of Santa Catarina (Ministério Público do Estado de Santa Catarina) v Auto Posto 1270 ltda – microempresa*
Legal Problem: Criminal liability of legal entities for environmental crimes

a) Summary of the facts

This is a special appeal filed by the Public Prosecutor's Office of the State of Santa Catarina against a judgment delivered by that state Court's Second Criminal Chamber, which considered that the criminal liability of legal entities for the pollution of a river due to the release of waste resulting from their activities was not warranted, upholding the decision of the first degree that had rejected the complaint. The applicants claimed that the criminal liability of legal entities for environmental crimes was provided for in the Constitution and was regulated by *Law 9.605/98*. In their claim they argue that such criminal liability would constitute a means to punish conduct harmful to the environment and to prevent this type of offense.

b) Synthesis of the decision

The decision of the Superior Court of Justice was that the complaint against the legal entity must be upheld. The judgment stated that, following trends in other parts of the world, the *Brazilian Constitution of 1988* clearly provides for the possibility of accountability of an entity for environmental crimes. Indeed, the Article 225 § 3 states that: "*procedures and activities considered as harmful to the environment shall subject the offenders, individuals or legal entities, to penal and administrative sanctions, without the obligation to repair the damage*".

Such device, however, was only regulated ten years later, by the *Law 9.605/98*. Thus, as it has been stated in the judgment: "the possibility of criminal sanctions against legal persons for damages to the environment" started with the entry into force of Law 9.605/98.

The Superior Court of Justice noted, however, that the legal entity can be held liable only when there is an intervening individual, acting on behalf and for the benefit of the moral one. In addition, it requires that the corporation has benefited directly or indirectly from the conduct of its representative or its Governing Board. This is because the role of the representative or of the Governing Board in the name and benefit of the corporation is, ultimately, the very will of the company. For the Court "in principle, whenever there is criminal responsibility of a society there will also be present the manager's fault that issued the command to conduct." In this regard, art. 3 of *Law 9.605/98* states: "the liability of legal persons does not exclude the individuals, authors, co-authors or participants of that fact."

c) Comments on the decision

This decision confirms the possibility of simultaneous accountability of an individual and a legal entity in the commission of an environmental criminal offense. This is important since companies, because of their industrial and commercial activities, are responsible for most of the damages to the environment. Thus, due to the implemented legislative changes, the legal entity can be held liable not only in the administrative and civil sphere but also in the criminal one. The legislator made a political choice that an essential facet of the environmental regime will be to punish the conduct harmful to the environment and prevent the commission of such crimes.

Criminal sanctions provide a much more efficient counter-stimulus to environment protection, because the criminal conviction of a legal entity affects its credibility in the market economy, affecting its image and making it more difficult to conduct new business, etc. Environmental Law also provides specific penalties adapted to the nature of legal entities, including fines, community service, restriction of rights, etc.

Finally, as we will see in detail in the next case analysis, the *Appeal in writ of mandamus* Nº 39.173/BA recently changed the Superior Court of Justice's position on the possibility of recognizing the environmental criminal liability of legal entities independently of simultaneous recognition of the liability of the individuals responsible for its activities. Therefore, simultaneous accountability of an individual and a legal entity for an environmental crime is still possible but no longer required.

6. Appeal in writ of mandamus *Nº 39.173*/BA, (2105) Superior Court of Justice

(Written by Priscila Pereira de Andrade, PhD in International Law, Professor at Brasília University Center – UniCEUB, Postdoctoral researcher PNPD-CAPES)

Judge-Rapporteur: Reynaldo Soares da Fonseca
Date of trial: August 06, 2015
Decision published in the Official Journal on: August 13, 2015
Parties to the lawsuit: *Petróleo Brasileiro S/A (Petrobras) v. Federal Government of Brazil.*
Legal Problem: The environmental criminal liability of legal entities is subjective and does not depend on the simultaneous recognition of the liability of the individuals responsible for its activities.

a) Summary of the facts

The *Constitution of the Federative Republic of Brazil (1988)* has a whole chapter dedicated to environmental protection and its Article 225, paragraph 3 provides that "*Procedures and activities considered as harmful to the environment shall subject the infractors, be they individuals or legal entities, to penal and administrative sanctions, without prejudice to the obligation to repair the damages caused*". [20] *Federal Law 9.605*, sanctioned on February 12, 1998, known as the *Environmental Crimes Act*, is the main legal instrument which classifies crimes against the environment[21] and sets forth environmental criminal liability and sanctions applicable to activities that degrade, pollute or damage the environment in Brazil. This statute's main purpose is to gather all environmental criminal sanctions which were previously dispersed throughout other laws and encourage environmental reparation. Within the Act, Article 3 states that legal entities that commit environmental crimes "*will be administratively, civilly and criminally responsible, according to that provided for in this Law in the instances where violation is committed by decision of its legal or contractual representative or of its collective body, in the interest, or to the benefit, of the entity*".[22] Therefore, no doubt exists that companies' environmental criminal liability is possible in Brazil. However, the question that frequently arises relates to the obligation of applying the Theory of Double Imputation (*Teoria da dupla imputação*) when judging legal entities (such as companies) environmental criminal liability. In other words, as this is not specified in the above

mentioned Constitutional norm and *Environmental Criminal Act*, the question usually raised in courts is if a legal entity can be subject to criminal prosecution and be held liable for environmental crimes alone or does it need individuals, such as decision-makers of the company, to also be held responsible?

In the Appeal in writ of mandamus (*Recurso em Mandado de Segurança***)** N°39.173/BA,[23] this was precisely the question that the Superior Court of Justice had to deal with. Originally, the Federal Public Prosecutor's Office (*Ministério Público Federal*-MPF*)* denounced the Brazilian oil company *Petrobrás* (*Petróleo Brasileiro S/A Petrobras*) and its manager (*Luiz Robério Silva Ramos*) for committing the environmental crime prescribed under Article 54 of *Law 9.605/98*.[24] According to the MPF both defendants could initially be held liable for the destruction of part of the environment surrounding the *Salinas da Margarida* in the Brazilian State of Bahia. The charges against the manager (*Luiz Robério Silva Ramos*) were dismissed by the 2nd chamber of the Bahia Criminal Court. However, the criminal lawsuit (n° 2009.33.00.012950-6) continued in relation to *Petrobrás*.[25] In two appeals *Petrobrás* insisted that the charges against it should also be suspended on the ground that criminal proceedings may not be brought exclusively against a legal entity. However, by that time, the old consolidated position of the Superior Court of Justice (STJ) regarding the need of a physical person to hold a legal entity liable for environmental crimes no longer prevailed and the STJ based its decision in case N°39.173/BA on its new jurisprudential orientation.

b) Synthesis of the decision

The Superior Court of Justice (STJ), which is the highest court in Brazil for non-constitutional[26] issues, used to require the simultaneous prosecution of an individual as a condition the criminal prosecution of a legal entity for environmental damages.[27] However, in case N°39.173/BA, among others,[28] the STJ adopted a new decision modifying and adapting its traditional position. Now it is possible to recognize criminal liability of legal entities for environmental damages without the concomitant recognition of liability of the individual who acted on their behalf. The Superior Court of Justice changed its previous understanding on the issue of environmental criminal liability in order to align to the Supreme Federal Court's position.

Since 2013, Brazil's Supreme Federal Court (STF) has ruled that a legal entity may be prosecuted for environmental crimes regardless of an individual being simultaneously subject to a criminal prosecution. This position was first adopted by majority vote in a decision (Extraordinary Appeal n°548.181/PR)[29] brought to the STF by the Federal Public Prosecutors' Office also concerning a criminal lawsuit against the Brazilian oil company *Petrobrás*.[30] In this case, Justice Rosa Weber mentioned the difficulties in identifying the responsible individual for legal entities environmental damages. It is generally easier to identify a set of individuals rather than just one responsible for the crime and this makes it nearly impossible to impose punishment for environmental crimes. Therefore, she argued that "there is no need to name the physical person that co-authored the crime". Consequently, she adopted a decision against the previous decision given by the Superior Court of Justice and noted that the Constitution in Article 225,

paragraph 3 does not require a link between the legal entity and individuals in order to apply criminal sanctions. In other words, Justice Rosa Weber clearly stated that the Constitution does not impose the "double imputation" of both the legal entity and the individuals potentially responsible within the company.[31]

c) Comments on the decision

Environmental criminal liability of companies is a very important matter in environmental law and has become a widely debated topic for quite some time now. In Brazil, the recognition of environmental criminal liability requires the existence of a crime expressly described by law and the proof of a willful misconduct or negligence from the individual and from the legal entity. The possibility to attribute environmental criminal liability exclusively to legal entities without requiring simultaneous criminal prosecution of its legal representatives has been questioned in many cases in Brazilian courts and, recently, went up to higher courts. This recent decision helps to harmonize and consolidate changes in the Brazilian jurisprudential understanding regarding legal entities' environmental criminal liability. It is now unnecessary to prosecute simultaneously an individual responsible for its decision-making (such as the director, members of the board, senior managers, legal representatives, etc).

The appeal in writ of mandamus Nº 39.173/BA herein analyzed shows how the Superior Court of Justice's decision is new and converges with the Supreme Federal Court's (*Supremo Tribunal Federal* – STF) current position that accepts the flexibility and the reinterpretation of the Theory of Double Imputation (*Teoria da dupla imputação*) and therefore also recognizes environmental criminal liability of legal entities autonomously.

In summary, therefore, according to the uniformed position of the Brazilian Highest Courts it is possible to affirm that nowadays the environmental criminal liability of legal entities is subjective and no longer depends on the simultaneous recognition of the liability of the individuals responsible for it.

These new interpretations are a positive development since they recognize certain flexibility in the Theory of Double Imputation and will consequently contribute to recognize the autonomous criminal liability of legal entities for environmental damages. The possibility of companies being subject to criminal prosecution for environmental harm even without prosecution against individuals reduces the risks of polluters going unpunished when it was not possible to identify the individual responsible for decision-making.

7. Special Appeal N° 1.114.893/MG, (2012) Superior Court of Justice (Written by Paulo Campanha Santana, Military, MSc in Law, Doctoral student)

Judge-Rapporteur: Antonio Herman Benjamin
Date of trial: March 16, 2010, Second Panel
Decision published in the Official Journal on: February 28, 2012
Parties to the lawsuit: *Luiz Tito Ferreira v Public Prosecutor's Office of the State of Minas Gerais*

Legal Problem: The possibility that damage to the environment may require both restoration and compensation, including the duty to compensate for collective moral (transindividual moral) and residual damage (others damages).

a) Summary of the facts

The Public Prosecutor's Office of the State of Minas Gerais filed a public civil action against Luiz Tito Ferreira for damages caused to the environment due to the unauthorized operation of a gold-digging activity. The Public Prosecutor's Office (*Parquet*) required the accused party to fully rehabilitate the degraded area and pay compensation. The judgment of 1st instance sentenced the defendant to fully restore the forest cover, but did not require the defendant to pay compensation. On appeal the Superior Court of Justice upheld the decision of the 1st instance on the grounds that restoration and compensation for environmental damage are not cumulative, but alternative. The prosecutor's then filed a special appeal before Judge-Rapporteur, Antonio Herman Benjamin. In the appellate court, the prosecutor's argued that the polluter should be sentenced to both restore the environment and compensate the community for damages at the time of the incident as well as in the future.

b) Synthesis of the decision

The Judge-Rapporteur found that:

> I) Article 225 of the 1988 Federal Constitution and *Law N° 6938* of August 31, 1981, enshrines the principle of full compensation or *integrum* for environmental damage; this is a reflection of the 'polluter pays' principle, consistent with the duty to restore and repair environmental damage, regardless of proof of guilt and irrespective of any criminal and administrative sanctions;
>
> II) Article 3 of *Law N°. 7.347/85* provides that in a public civil action a sentence can be imposed requiring the payment of cash or the fulfillment of an obligation to take or not to take other action and that the conjunction "or" has additive value, and is not an exclusionary rule;
>
> III) Environmental repair should be broadly defined so that the requirement to restore the degraded area does not exclude other duties to indemnify, especially for damages that were incurred as a result of environmental harm, damages sustained while the area is being restored (intermediate damage), collective moral damage, and residual damage.
>
> IV) The obligation to recover the degraded environment *in natura* is compatible with and may be imposed along with pecuniary compensation for losses suffered until the damaged environment is restored, as well as for suffering incurred of an extra-patrimonial nature as the collective moral damage.

Thus, the rapporteur partially granted what was being asked for on the special appeal, and returned the case to the Court of Justice of Minas Gerais, to discuss the recognition of cumulative monetary compensation focused on recovery *in natura* of the damaged environment, to check for compensable damage and to secure the eventual *quantum debeatur*. The four Judges of the Second Panel of the Superior Court of Justice voted along with the Judge-Rapporteur deciding unanimously to partially grant the appeal.

c) Comments on the decision

This decision is important because it recognized the possibility of collective environmental moral damages. It broadens the legal understanding of moral damage and consecrates the principles of human dignity, and of full reparation for damage caused to the environment as well as the polluter pays principle. The decision is particularly significant because, in Brazil, the existence of moral damage was a controversial one. Prior to 1988, except for cases provided for in a few laws, there was much disagreement about whether it was possible to legally consider moral damage. However, the Federal Constitution, which entered into force in 1988, expressly provides for the possibility of moral damage. Subsequently, there were discussions about the possibility of obtaining moral damages as a consequence of environmental damages. Article 1 of *Law N°. 7.347/85*, as amended in 1994 by *Law N°. 8884*, now governs liability lawsuits for moral and material damage caused to the environment, providing for the possibility of moral damages as a consequence of environmental harm.

However, the first conviction for environmental moral damages only occurred in 2001, at the Court of Rio de Janeiro, in an exemplary judgment in *Case No. 2001.001.14586* in appeal, with Judge-Rapporteur Maria Raimunda T. Azevedo, who overturned the 1st degree sentence to require the appellant to pay for environmental moral damages equivalent to 200 (two hundred) times the minimum wage in favor of a fund provided for in Article 13 of *Law 7,347/85*. In addition, the judgement required the planting of 2800 trees and the undoing of works that caused the damage. The rapporteur pointed out that the impossibility of returning the environment to its previous state justified the application of moral damages for the relevant community.

In 2006, the Superior Court of Justice, in *Special Appeal No. 589281-MG*, confronted the issue of moral damages for the first time and the majority did not recognize an argument for collective environmental moral damages. The flaw in that decision is that damages to the ecosystem are reflected directly in the living conditions of society; collective moral damage is the sum of harms to the individuals. Damage to the environment, therefore, impacts the interests of all in the community. In other appeals, the Superior Justice Tribunal had the opportunity to address the issue again. In one case, the Tribunal recognized the possibility of environmental moral damages resulting from noise pollution in the environment (*REsp No. 791.653-RS, 02/02/2007*).

In conclusion, the decision affirms that damage to the environment must be repaired in its entirety, which may require in some cases both restoration and compensation.

8. Direct Action of Unconstitutionality Nº 3378/DF, (2008) Supreme Federal Court
(Written by Larissa Ribeiro da Cruz Godoy, MSc in Law, Brasilia University Center)

Judge-Rapporteur: Carlos Ayres Britto
Date of trial: April 9, 2008
Decision published in the Official Journal on: June 20, 2008
Parties to the lawsuit: *Brazilian National Confederation of Industry and others v. Brazilian Federal Government and others*
Legal Problem: Environmental compensation through a duty of supporting the establishment and the implementation of protected areas.

a) Summary of the facts

The Brazilian National Confederation of Industry - hereafter the plaintiff - filed an injunction in the Brazilian Supreme Federal Court in order to challenge the constitutionality of article 36 of *Federal Law 9985*, an Act which was passed on July 18, 2000. If the activity of an entrepreneur will cause significant environmental damages, the statute imposes on the entrepreneur the obligation of paying at least the minimum amount of 0,5% of the total cost of the undertaking as a compensation. According to the statute, this compensation is due for environmental licenses related to undertakings that cause noteworthy impacts. The evaluation of the impacts has to be fixed according to preceding studies about possible damages to the environment. The amounts paid as compensation are used to support the implementation and the maintenance of protected areas. The plaintiff argued that the defendant had not respected the law of the land, the harmony and independence between powers, as well as the principles of reasonableness and proportionality. The plaintiff argued that the rule has established an *ex-ante* compensation, which would result in an illicit enrichment in favor of the Public Administration.

Some economic issues were also tackled by the plaintiff. Based on the views of some economic experts, the plaintiff argued that the compensation, as imposed by the statute, created an excessive burden and a hindrance to investments in Brazil as it could cause juridical uncertainty for investors.

Many *amici curiae* also argued against the statute. The main response of the defendant was that the statute represented a compensation for the exploitation of natural resources as well as related damages; the defendant also relied on some environmental law principles, such as *the polluter-pays* principle.

b) Synthesis of the decision

The Brazilian Supreme Court ruled in favor of the defendant, affirming the constitutionality of the statute, notwithstanding a dissenting vote penned by Justice Marco Aurelio. However, the Court also ruled that the amount due by the entrepreneur does not have to be limited to a 0,5% of the total costs of the undertaking; the amount due, according to the Court, has to be calculated on the basis of the expected harm to the environment. This means that the statute was unconstitutional only to the extent that it restricts the amount due by the polluter to 0.5% of the total costs.

c) Comments on the decision

The mentioned decision has created restlessness among investors and has also been of concern for the Administration. By the time of the decision, no methodology was agreed on to estimate the amount due as compensation for environmental damages. In fact, for many years, the lack of an approved methodology was sidetracked by an internal administrative act (*Resolução Conama* nº 371) that attempted to establish guidelines for environmental agencies to calculate environmental compensation.

In order to tackle this issue the Brazilian Administration, pressed by the Public Sector as well by several private enterprises, has recently developed a methodology with the aim of calculating the amount due. According to this methodology, the amount to be paid, which

was supposed to be a *minimum* 0.5% of the total costs of the undertaking, has set 0.5% as the *maximum*. The new methodology ignores the Brazilian Supreme Court decision, as it is still based on the cost of the undertaking and not the expected cost of environmental damages.

The recent methodology imposed by the Administration was questioned in the Supreme Court by some NGOs in the context of the original proceedings. The issue is still under consideration, that is, the question is *sub judice.* Therefore, this complex case is not completely resolved. One can conclude that the Brazilian Supreme Court ruling on this issue has generated more complications than clear solutions.

9. Special Appeal N°904.324/RS, (2009) Superior Court of Justice (Written by Gabriela Garcia Batista Lima, PhD in International Law, Professor at University of Brasília - UnB)

Judge-Rapporteur: Eliana Calmon
Date of trial: May 05, 2009
Decision published in the Official Journal on: May 27, 2009
Parties to the lawsuit: *Public Prosecutor's Office of the State of Rio Grande do Sul v. Romeu Pedro Mior.*
Legal Problem: The necessity of the interpretation of environmental liability within a technical perspective.

a) Summary of the facts

The case was originally brought by the Public Prosecutor's Office of the State of Rio Grande do Sul (RS) against a decision *a quo* that exonerated Mr. *Romeo Pedro Mior* of the obligation to comply with a reforestation project and the obligation to pay an indemnification amount because he had planted 800 seedlings of native trees. Mr. Romeo was being sued for environmental damages due to the logging and burning in a 2,000m² area situated in the municipality of Irai-RS. In order to comply with his environmental obligations (to repair and to indemnify), the trial State Court of Law of Rio Grande do Sul decided that Mr. Mior should present to the local Forestry Agency, a very detailed reforestation project[32] and make a donation of 1500 fish of two types of local fish species or pay an amount as compensation. This amount consisted only as an alternative for the donation of fish and not for the reforestation. Mr. Mior planted 800 seedlings of native trees, but he did it without a reforestation project. Moreover, he did not pay any indemnification; neither did he deliver the 1500 fish. The prosecutor then appealed arguing that the public civil action should take its course because neither the environmental legal obligation to repair nor the legal obligation to indemnify was properly fulfilled. However, the appeal was dismissed culminating in the Special Appeal herein analyzed. [33] The *parquet* argued that the previous trial should be revised in order to proceed with the public civil action and its objectives, that is, to assure that Mr. Mior will properly repair (having a reforestation project) and compensate.

b) Synthesis of the decision

The Superior Court of Justice (STJ) held that the previous decision should be revised. Mr. Mior's actions did not fulfill the legal obligation to repair or the legal obligation to indemnify. The legal obligation to repair had to be complied with through the reforestation project. In addition, he should also comply with the indemnification measures. The Court argued that the natural recovery of the degraded area due to Mr. Mior's efforts did not eliminate his responsibility to repair and to provide legal compensatory measures.

c) Comments on the decisions

The case is important as it indicates the necessity of interpreting environmental liability from a technical perspective – that is, what does it mean to repair an environmental damage? Does it need a detailed project or is it sufficient to take any action in favor of the area damaged? Does any environmental action fulfill the legal obligation to repair? Does the fulfillment of the obligation to repair discharge the obligation to indemnify? It was the lack of specification in the law that led to the different understanding of the Superior Court of justice and the Appellate Court. While the first one interpreted that Mr. Mior should adopt a reforestation project to repair the area and should indemnify by paying an amount or by making a donation in fish, the second one understood that the mere action in favor of the area damaged was sufficient to fulfill Mr. Mior liability.

No legal differentiation exists and Brazilian courts do not usually determine environmental liability using a technical perspective. There are no specific legal provisions concerning technical aspects to help define environmental liability (*art.14, paragraph 5, Law 6938/81*), except the obligation to repair the material damage and to compensate.[34] While it is settled that the accumulation of these obligations (repair and indemnify) is possible[35], there is no legal specification on how to repair.

This case contributes to the jurisprudence by demonstrating the need to improve technical interpretation to fulfill the environmental legal obligation related to material damage (to repair) and moral collective damage (to indemnify).

10. Special Appeal N° 1.164.630/MG, (2010) Superior Court of Justice (Written by Gabriela Garcia Batista Lima, PhD in International Law, Professor at University of Brasília – UnB and Larissa Soares Santos, Master in Law Candidate, Brasília University Center - UniCEUB)

Judge-Rapporteur: Castro Meira
Date of trial: November 18, 2010
Decision published in the Official Journal on: December 01, 2010
Parties to the lawsuit: Fazenda Guaicuhy Agropecuária Ltda v. *Public Prosecutor's Office of the State of* Minas Gerais.
Legal Problem: Criminal parameters for the valuation of civil liability for environmental damage.

a) Summary of the facts

The case was originally brought by the Public Prosecutor's Office of the State of Minas Gerais as a public civil action on environmental liability against the "Guaicuhy Agropecuária Ltda", claiming that Guaicuhy should be held responsible for the

environmental damage related to the death of a group of birds caused by the use of illegal pesticides. The Guaicuhy company, in its defense, claimed that the public civil action lacked legitimacy because it did not define precisely which obligation the company should have respected, nor the value of the environmental damage to be repaired. It also tried to characterize the episode as a superficial environmental damage, arguing that the amount of birds killed was not enough to compromise the environment. The civil action was sustained at trial. Guaicuhy was ordered to pay a compensation of RS $ 150,000.00 (one hundred and fifty thousand "reais") for the environmental damage caused by the death of 1.300 birds. The decision was maintained at the appeal level. The tribunal found that the death of the birds was indeed caused by the use of illegal pesticide and that the company's activities generated an obvious environmental damage. In the Special appeal[36], filed by Guaicuhy, the decision given by the tribunal *a quo* was questioned since the evaluation of the compensation would require technical knowledge that the judge did not have. It also questioned the value of the compensation, arguing that the damage could be reversed by buying a number of birds.

b) Synthesis of the decision

The Superior Court of Justice (STJ) decided that the local restoration of the damage should consider the entire damage not only the birds, but also "its ecosystem functions" – that is the ecosystem impact caused by the bird loss. According to the Court, it would not be possible to reduce the amplitude of the concept of environment to bird loss. Besides, the evaluation of the environmental damage was not limited to the simple mathematical evaluation of the dead birds' value. The degree of ecological imbalance caused by the illegal pesticides as well as the violation of the right to an ecologically balanced environment also need to be addressed. The Court further stated that to determine an amount for the loss, because of the inability to repair *in nature*, was difficult. The Court recommended that a competent professional should do this evaluation.

Moreover, in the absence of a legally defined rule to measure the indemnity quantum in civil law, the criteria adopted by *Law 9.605/98* (the *Environmental Criminal Act*) for imposing penalties and for increasing the amount when needed should be used. These criteria include the danger of the violation, its reasons and its consequences for public health and the environment. Furthermore, it also takes into account the offender's compliance with environmental legislation and its economic situation.

c) Comments on the decision

There is a lack of consolidated methodology to evaluate precisely the quantum when there is an obligation to indemnity for environmental damages. The lack of parameters makes it difficult to assess the responsibility for environmental harm in its various aspects (material, moral, collective).

Although this Special Appeal is a judicial confirmation of the jurisprudence in favor of monetary compensation for environmental damages, this decision can be criticized for its lack of precision on the parameters that should be used to define the indemnity quantum for collective environmental damages.

Brazilian civil legislation does not provide, nor does it suggest parameters for this valuation. Given this legal gap, the Court chose to base its interpretation on criminal

parameters linked to the *Environmental Crimes Act*. Therefore, since the Court did not discuss the evaluation methods in the area of civil environmental responsibility, the gap related to the definition of parameters remains.

11. Special Appeal Nº 1.090.968/ SP, (2010) Superior Court of Justice (Written by Carina Costa de Oliveira, PhD in International Law, Professor of International and Environmental Law at the University of Brasília – UnB, Coordinator of the Research Group on Law, Natural Resources and Sustainability – Law Faculty – University of Brasília (GERN - http://www.gern.ndsr.org/).

Judge-Rapporteur: Luiz Fux
Date of trial: June 15, 2010
Decision published in the Official Journal on: August 03, 2010
Parties to the lawsuit: *Oswaldo Ribeiro de Mendonça Administração e Participações Ltda. v. Public Prosecutor's Office of the State of São Paulo*
Legal Problem: Legal liability of property owners to repair environmental damages caused in their property, as a *propter rem* obligation, even if the damage has been caused by the previous owner.

a) Summary of the facts

The case was initially brought by the Public Prosecutor's Office of the State of São Paulo against *Oswaldo Ribeiro de Mendonça, Administração e participações Ltda*. The latter bought a property which had suffered environmental damages and was asked by the Public Prosecutor's Office to pay for its restoration. The judge of first instance stated that: 1) the new owner had to comply with the environmental obligations related to the property such as the restoration of the area that could not be deforested; to delimit and to isolate the area indicated in the law for preservation; to register the area that had to be preserved.

After an unsuccessful appeal to the Court of Appeal, the claimant filed the case in the Superior Court of Justice stating that: when the damage was caused by the previous owner of the property, the previous owner was allowed to deforest some areas and it was not mandatory to register the area that should have been preserved. The new law could not retroactively penalize the new owner.

b) Synthesis of the decision

The decision states that the obligation to restore the environment is a *propter rem* one, that is, it is an obligation related to the property**.** Even if the new rural owner was not responsible for the deforestation, he bears responsibility for the damages caused in the area of the property that should have been protected (20% of the property). The decision was based on article 186 of the *1988 Federal Constitution* which affirms the principle of the social function of rural property.[37] One of the criteria to comply with this principle is to use the property's natural resources as per the applicable law.

c) Comments on the decision

The interpretation of civil liability elements has changed in Brazil regarding environmental damages caused in private properties. The Brazilian Judiciary has relied on two arguments for this change: the principle of the property's social function and the *propter rem* obligations.

A key issue in civil liability elements concerns the causality link between the damage and the author of the damage. The general rule is that the one having caused the environmental damages bears the liability. One has to identify the author of the damage, the damage itself and the causal link between both.[38] In the context of environmental damages caused in a private property, tribunals have shown flexibility with regard to this rule. As illustrated in this case, new owners have been held liable for damages committed by previous owners. The legal argument is that the obligation is connected to the property. It is a *propter rem* obligation, incorporated to the property. There is an article in the *Forestry Code*, article 2º, paragraph 2, stating that the legal nature of this kind of obligation is a *propter rem* one.

This decision illustrates a change in the Court's interpretation. Before 2000, in order to hold someone liable for this kind of damage, it was necessary to prove the damage and the causal link between the author and the damage.[39] In 2000, the jurisprudence changed[40], thereby connecting the obligation to repair to the new owner.[41] Both new and previous owners[42] can be held liable for damages caused in the property if the claimant decides to sue both of them. However, the claimant can also decide to sue only the new owner.[43] One criticism of this interpretation is that there is no obligation for the previous owner to show that he has informed the new one of possible environmental damages that had occurred in the property under his ownership.[44] As well, there is no obligation for the new owner to prove that he has been diligent when buying the property.[45] While there is no obligation it is also not a defence for the new owner to show that he was diligent during the process of acquiring the property. Both actions, of the previous and the new owner, should be analysed when examining who must be held liable for the damage: the rulings of the Brazilian tribunals do not cover this aspect of the matter.

12. *Special Appeal* N° 1.011.581/RS, (2008) Superior Court of Justice (Written by Jorge Aranda Ortega, PhD Law Candidate, University of Brasilia. Ll.M., University of Chile)

Judge-Rapporteur: Teori Albino Zavascki
Date of trial: August 07, 2008
Decision published in the Official Journal on: August 20, 2008
Parties to the lawsuit: *Sarcedo Construtora e Incorporadora Ltda. v. Roberto Fritzen and others.*
Legal Problem: Justifications to revoke the validity of an administrative authorization.

a) Summary of the facts

The *Special Appeal N°1.011.581/RS* concerns an urban authorization given by the Municipality of Osorio which approved the construction of a tower complex for tourism in a coastal area even after the local administrative process identified some environmental and aesthetic impacts on the coastal zone. Interest groups and the Public Prosecutor's

Office asked for the cancellation of this administrative authorization in the First Instance and in the Court of Appeal of the Brazilian State of *Rio Grande do Sul*. The latter considered the project as being environmentally risky, revoking the authorization. Thus, the company *Sarcedo Construtora e Incorporadora Ltda* brought a Special Appeal (*Recurso especial* in the Superior Court of Justice (STJ). The most important legislation used in this case is the local urban code, which establishes an administrative procedure for the approval or rejection of any construction project.

b) Synthesis of the decision

The Superior Court of Justice (STJ) rejected the interest group's petition, by analyzing the Brazilian construction law and by reaching the two following conclusions:

> 1. Any administrative authorization is presumed legal, and, therefore, should be respected by the Government and by any interested party.
> 2. Nevertheless, there are three justifications to revoke the validity of an administrative authorization, including construction authorizations. The justifications are: (1) if the authorization's execution transgresses the particular legal framework set forth by the authority; or if the authorization transgresses Brazilian laws *(cassar)*; (2) if the authorization contravenes an upcoming and new public interest. In this case, the authority, responsible for revoking the authorization, should pay a due compensation to the affected authorization holder (*revogar*); (3) if the authorization was obtained in contravention of the law, for instance, involving corruption (*anular*).

As a result, these two statements provided important directions for administrative legal certainty in Brazil. The first one concerns legal stability of administrative authorizations, a matter important for the field of construction. The second one is that the case clearly identified three specific justifications for revoking an administrative authorization.

c) Comments on the decision

This remarkable precedent has been followed in other interesting decisions such as *Resp 1.227.328-SP*, dated May 5th, 2011. The STJ, in a similar situation related to a construction authorization in a coastal zone, in the Municipality of Caraguatatuba, adopted the same reasoning: the stability of the administrative authorization and the three justifications for revoking it, upholding the legal validity of the appealed authorization.[46]. This case included an additional element: beyond the local authority's permission for the construction, an environmental impact assessment procedure was also approved. The reasoning for the three justifications, in this case, was extended beyond the authorization cases established by the local urban code for construction. Therefore, the three justifications also apply to the general legal framework for administrative procedure for environmental impact assessment, contained in law *n° 6.938*, also known as the *National Policy for the Environment.*[47].

Another precedent that follows the two statements about legal certainty is the *Resp 1.193.474-SP*, dated June 5th, 2014. The STJ, facing similar facts and the same applicable norms as described above in the first precedent, decided, to maintain the validity of the appealed authorization. An important difference between this *Special Appeal N°*

1.193.474-SP and the previously mentioned ones, relates to the minority vote of judge Kukina, in consideration of applying the precautionary principle in situations where there is uncertainty with regard to the risk of harm. The minority vote connects the precautionary principle to two civil law procedure criteria designed as protective measures, i.e., the Latin expressions *periculum in mora* (in order to protect some goods or people from an imminent damage) and *fummus boni iuirs* (in order to understand the petition as containing a possible likelihood of success).[48] Following these ideas, uncertainty related to possible harms and damages necessarily should be considered as a factor, in administrative procedures, to reject authorizations, using the precautionary principle.

In spite of *Special Appeal N°1.011.581/RS* justifications, there is still one important issue to address which, as an unsolved legal problem, could give rise to new debates in the future. The problem is the limit of the first justification i.e., if the authorization's execution transgresses the legal framework. This transgression could be interpreted in two different ways: (1) as a transgression of the special dispositions of the authorizing text, and; (2) as a transgression of law in general. The first level of interpretation is obvious, since the authorization text can be considered as a special and specific framework for undertaking any activity. However, with regard to the second level of interpretation, what can be considered law in a general sense? In a restrictive interpretation, what can be considered as laws are only positive environmental rules, but in a wider perspective, it could integrate environmental law principles, such as the precautionary principle?

In our view, it is important in administrative procedures to consider environmental law principles as a legal means to justify decisions. These principles could impose limits to discretionary administrative decisions. This issue will most certainly be addressed in future legal struggles.

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[1] See: Brazilian Constitution in English. Available at: http://www.stf.jus.br/repositorio/cms/portalStfInternacional/portalStfSobreCorte_en_us/anexo/constituicao_ingles_3ed2010.pdf. Access in: 15 March 2016.

[2] After the judgment of the writ of mandamus nº 24184, another important decision was made by the Supreme Court with similar content: MS nº 24665, Rapporteur Judge Marco Aurélio.

[3] Lane, M. B., Public participation in planning: an intellectual history. Australian Geographer, 36:3, 283-299. Disponível em: http://dx.doi.org/10.1080/00049180500325694. acesso em 17/09/2015; Beck, U., Sociedade de risco: rumo a uma outra modernidade. Tradução de Sebastião Nascimento. São Paulo: Ed. 34, 2010.

[4] Sachs, I. Caminhos para o desenvolvimento sustentável. Organização: Paula Yone Stroh. Rio de Janeiro: Garamond, 2002.

[5] Allegretti, M. A construção social de políticas ambientais: Chico Mendes e o movimento dos seringueiros. Tese de Doutorado, Centro de Desenvolvimento Sustentável da Universidade de Brasília, 2002.

[6] Santilli, , J., Socioambientalismo e novos direitos. São Paulo: Peirópolis, 2005; Souza Filho, C. F. M. de. Introdução ao direito socioambiental. In: Lima, A. (org). O direito para o Brasil socioambiental. Porto Alegre: Fabris, 2002.

[7] STJ, *Resp* 1330027/SP, *3ª. turma*, decision (11/06/2012); TRF 2, *Agravo de instrumento* n. 0004075-70.2012.4.02.0000, 5ª. turma, decision (31/07/2012); STJ, *Resp* nº 883.656 - RS (2006/0145139-9), decision (9/03/2010); STJ, *Resp* nº 972.902 - RS (2007/0175882-0), decision (25/08/2009).

[8] STJ, *Resp* 1.049.822/RS, decision (23/04/2009).

[9] TRF *1ª. região*, *Apelação cível* nº 2000.01.00.014661-1/DF, decision (8/08/ 2000).

[10] TRF 1ª região, *Apelação cível* n. 2001.34.00.010329-1/DF, Decision (12/02/2004); STJ, *AgRg na MC* 14.446/ RS, decision (21/10/2008).

[11] STF, *Repercussão geral no Rec. Extraord.* n. 627.189SP/2011, decision (22/09/2011; STJ, *AgRg na Medida Cautelar* n. 17.449/ RJ, decision (22/09/2011).

[12] STJ, *Resp* n.1330027/ SP, *3ª. turma*, decision (11/06/2012).

[13] TRF 2, *Agravo de instrumento* n. 0004075-70.2012.4.02.0000, decision (31/07/ 2012).

[14] STJ, Resp nº 592.682/RS, decision (6/12/2005); STJ, Resp 1172553 / PR, 1ª. Turma, decision (27/05/ 2014).

[15] TRF 1ª região, *Apelação cível* n. 2001.34.00.010329-1/DF, decision (12/02/ 2004).

[16] STJ, *Resp* 1330027/ SP, 3ª. turma, decision (11/06/2012); TRF 2, *Agravo de instrumento* 0004075-70.2012.4.02.0000, 5ª. turma, decision (31/07/2012); STJ, *Resp* nº 883.656 - RS (2006/0145139-9), decision (9/03/ 2010); STJ, *Resp* nº 972.902 - RS (2007/0175882-0), decision (25/08/2009).

[17] There are some authors who say that there is no norm in environmental law stating the reversion of the burden of proof. About this topic see: E. MILARÉ. *Direito do ambiente*, 9ª. ed. São Paulo, RT, 2014, p. 1499.

[18] Justice-rapporteur Gilmar Mendes, published in the Journal of Justice on October 14, 2005, filed by the Partido da Frente Liberal – PFL (Party of the Liberal Front) v. Paraná State Governor, contesting the state law No. 14,162/2003 which forbade the cultivation, handling, import, processing and marketing of genetically modified products in supposed contradiction with F*ederal law 10.814/2003*, published by the Union on the matter.

[19] This understanding was adopted by Justice Gilmar Mendes and Justice Celso de Mello in two judgments (*RE 466,643 and RE 349,703*).

[20] BRASIL, Constitution of 1988, Article 225, §3, p. 151, English version with amendments through 2014 available at: https://www.constituteproject.org/constitution/Brazil_2014.pdf>, access on: 24/11/2015.

[21] The statute classifies the crimes in five categories: crimes against the fauna; crimes against the flora; pollution-related crimes; crimes against urban zoning rules and cultural heritage, and crimes against environmental protection institutions.

[22] BRASIL, Lei nº 9.605, 12/02/1998, available at: http://www.planalto.gov.br/ccivil_03/LEIS/L9605.htm

[23] BRASIL, Superior Tribunal de Justiça, Recurso em Mandado de Segurança n°39.173-BA (2012/0203137-9). *Penal e processual penal. Recurso em mandado de segurança. Responsabilidade penal da pessoa jurídica por crime ambiental: desnecessidade de dupla imputação concomitante à pessoa física e à pessoa jurídica*, avaliable in portuguese at: https://ww2.stj.jus.br

[24] Article 54, Pollution and other Environmental Crimes, "To cause pollution of any nature at such level that it results or could result in damage to human health, or that it could cause death of animals or significant destruction of flora", Federal Law 9.608/1998.

[25] Mandado de Segurança n° 0021154-60.2010.4.01.0000/BA, Rel. Desembargador Federal Carlos Olavo, Rel. Conv. Juiz Federal Evaldo de Oliveira Fernandes Filho, Segunda Seção, e-DJF1 p.052 de 19/4/2012.

[26] NOGUEIRA, Simone Paschoal; PEDREIRA, Adriana Coli; FREIRE, Marina Vieira, "Brazil", In: MIGUEL, Carlos de, "Environment in 21 jurisdictions worldwide", Getting the deal through, 2014, p.12.

[27] BRASIL, Superior Tribunal de Justiça (5ª Turma), Recurso em Mandado de Segurança nº 37.293/SP, 2/5/2013. *Recurso ordinário em mandado de segurança. Crime contra o meio ambiente. Art. 38, da lei n.º*

9.605/98. Denúncia oferecida somente contra pessoa jurídica. ilegalidade. recurso provido. pedidos alternativos prejudicados; FRIEDE, Reis, "Responsabilização penal da pessoa jurídica por crime ambiental: a necessária quebra de um paradigma", *Espacios*, vol. 36, n°09, 2015, p.3.

[28] See also the STJ similar decision in cases: "Recurso improvido", (RHC 40.317/SP, Rel. Ministro Jorge Mussi, Quinta Turma, 22/10/2013); "Ordem de habeas corpus não conhecida", (HC 248.073/MT, Rel. Ministra Laurita Vaz, Quinta Turma, 1/4/2014), and "Recurso em habeas corpus improvido", (RHC 53.208/SP, Rel. Ministro Sebastião Reis Júnior, Sexta Turma, 21/5/2015.

[29] BRASIL, Supremo Tribunal Federal (1ª Turma), RE 548.181/PR, Relatora Ministra Rosa Weber, 6/8/2013.

[30] In this case, the Brazilian *Petrobrás* company was accused of being criminally liable for the leaking of crude oil in the municipality of *Araucaria* situated in the Brazilian State of Paraná on July 16, 2000. Both the *Barigui* and *Iguaçu* Rivers and their adjacent areas were polluted. BRASIL, Supremo Tribunal Federal (1ª Turma), RE 548.181/PR, Relatora Ministra Rosa Weber, 6/8/2013.

[31] "*O art. 225, § 3º, da Constituição Federal não condiciona a responsabilização penal da pessoa jurídica por crimes ambientais à simultânea persecução penal da pessoa física em tese responsável no âmbito da empresa. A norma constitucional não impõe a necessária dupla imputação"* BRASIL, Supremo Tribunal Federal (1ª Turma), RE 548.181/PR, Relatora Ministra Rosa Weber, 6/8/2013

[32] It should include in the reforestation project: the suspension of the damaging activities; the isolation of the irregular devastated area in order to enable its regeneration; the indication of which and how many species of natives trees should be planted; the time of planting, among others specifications.

[33] STJ. REsp 904.324/RS, Rel. Ministra Eliana Calmon, Segunda Turma, May 05, 2009. Available at: https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ATC&sequencial=4491209&num_registro=200602581508&data=20090527&tipo=51&formato=PDF . Accessed: November 11, 2015.

[34] Art. 14, paragraph 5 of *Law 6938/81. Available in: http://www.planalto.gov.br/ccivil_03/Leis/L6938.htm. Accessed: November 11, 2015.*

[35] This is the understanding contemplated by the STJ jurisprudence related to the interpretation of article 14, paragraph 5º, of the law 6938/81. STJ - REsp 1415062/CE; REsp 1198727-MG; REsp 1145083-MG, REsp 1178294-MG, REsp 605323-MG, REsp 625249-PR, REsp 1248214-MG. Available in: http://www.stj.jus.br/SCON/. Accessed: November 11, 2015.

[36] STJ. REsp 1164630/MG, Rel. Ministro CASTRO MEIRA, SEGUNDA TURMA, julgado em 18/11/2010, DJe 01/12/2010). Available at:
https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ATC&sequencial=11838246&num_registro=200901323665&data=20101201&tipo=91&formato=PDF . Accessed: November 11, 2015.

[37] This principle provide for some conditions for the owner to follow in the context of using his/her own property. The conditions are related to the environment and social rights protection. About this topic see: Sarlet, I.W. and T. Fernsterseifer, *Princípios do direito ambiental*, São Paulo, Saraiva, 2014, p. 104; Machado. P.. , *Direito ambiental brasileiro*. 21ª. ed. São Paulo, Malheiros, 2012, p. 180; E. MILARÉ. *Direito do ambiente*, 9ª. ed. São Paulo, RT, 2014, p. 274; STJ, *REsp 1109778/SC*, decision (10/11/2009); STJ, *REsp 628.698/SP*, decision (13/03/2006).

[38] Article 14, § 1.º de la Loi 6.938/1981. See about the issue: LEITE, J.R.M.; AYALA, P. De A., *Dano ambiental: do individual ao coletivo extrapatrimonial. Teoria e prática*, 4. ed, São Paulo, Ed. RT, 2011.

[39] See: STJ, *Resp* 11074/SP, decision (6/09/1993); STJ, *RESP 229302/PR*, decision (18/11/1999). See: P. F. I. LEMOS, *Meio ambiente e responsabilidade civil do proprietário: análise do nexo causal*. 2a. ed, São Paulo, RT, 2012, p. 173.

[40] STJ, *RESP 218781*, decision (5/02/2002); STJ, *Resp 282781/PR*, decision (16/04/2002).

[41] Lemos,
P. F.I.,*Meio ambiente e responsabilidade civil do proprietário: análise do nexo causal*. 2a. ed, São Paulo, RT, 2012, p. 173

[42] *Ibid.*, p. 127.

[43] STJ, *Resp* 18567/SP, decision (16/06/2000).

[44] *Supra*, n. 22, , p. 127.
[45] *Ibid.*, p. 192.
[46] Federative Republic of Brazil, Superior Court of Justice. RE. 1.227.328. [On-line] www.stj.jus.br pp. 16-17.
[47] Ibid. p. 16.
[48] Federative Republic of Brazil, Superior Court of Justice. RE. 1.193.474 [On-line] www.stj.jus.br . pp. 26-27.