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SABIN CENTER FOR CLIMATE CHANGE LAW

**CLIMATE LEGISLATION AND
LITIGATION IN BRAZIL**

By Gabriel Wedy

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Sabin Center for Climate Change Law

Columbia Law School

435 West 116th Street

New York, NY 10027

Tel: +1 (212) 854-3287

Email: columbiaclimate@gmail.com

Web: <http://www.ColumbiaClimateLaw.com>

Twitter: @ColumbiaClimate

Blog: <http://blogs.law.columbia.edu/climatechange>

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About the author: Gabriel Wedy is a Federal Judge in Brazil, an Environmental Law Professor at ESMAFE (the Brazilian Federal Judiciary Superior School). He is also a Ph.D and LL.M in Environmental Law at Pontifícia Universidade Católica do Rio Grande do Sul (PUC/RS) and a Visiting Scholar at Columbia Law School (Sabin Center for Climate Change Law). President of Federal Judges Brazil Association- AJUFE (2010-2012).He can be reached at gtwedy@gmail.com.

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1. INTRODUCTION

Brazil plays a major role in the global fight against climate change, especially because of its vast forests. However, the amount of deforestation now occurring is in great dispute. Between August 2014 and July 2015, for example, deforestation in the Amazon rainforest increased by 215% according to Imazon Research Institute.¹ Contrarily, according to the Brazil Government, the increase was only 16%.²

This paper discusses the role that legislation and litigation are playing, and the roles they may and should play in the future, in combatting deforestation and other factors relevant to climate change in Brazil.

2. CLIMATE LEGISLATION

Brazil has a specific Act on climate change. However, it needs to be enforced and interpreted in accordance with the constitutional principle of sustainable development so as to be effective. The principle of sustainable development is provided for by Act 12.187/2009, which established the National Policy for Climate Change -NPCC. The Act - although imperfect and lacking in some respects - is a breakthrough and a milestone in the fight

¹ See *About Us*, IMAZON, <http://imazon.org.br/institucional/> (last visited Jan. 5, 2017).

² According with Brazil's Government data, 5.831 square kilometers of land was cut down or burned in the Brazilian Amazon one year before to August 2015. In other words, trees covering an area more than seven times the territory of New York City have been cleared in the Brazilian Amazon over the past year. See Jonathan Watts, *Amazon Deforestation Report Is Major Setback for Brazil Ahead of Climate Talks*, GUARDIAN, Nov. 27, 2015, <https://www.theguardian.com/world/2015/nov/27/amazon-deforestation-report-brazil-paris-climate-talks>.

against climate change and global warming. It has clearly incorporated concepts of international instruments that protect the environment.

The Act 12.187 is implemented by Executive Order 7.390/2010, which, among other important points, states that greenhouse gas emissions should be reduced from 36.1% to 38.9% by the year 2020. However, before the United Nations Conference on the Post-2015 Development Agenda, held in New York in September 2015, Brazil promised that the reduction would be of 37% by 2025 and 43% by 2030³, exceeding the goals established in the Executive Order. The big question is whether Brazil will have the structure, technical capacity and political will to seriously achieve these goals. The shortage of structure to monitor sources that emit greenhouse gases; the increasing deforestation of the Amazon rainforest; transport dependent on fossil fuels⁴; the lack of environmental education in schools; and corruption⁵ are all serious obstacles to be fought against so that this goal can be achieved.

The Act provides the principles, goals, guidelines and instruments of NPCC [Article 1]. Important technical concepts were created for the Brazilian Law, such as the concepts of

³ *Brazil Pledges to Cut Carbon Emissions 37% by 2025*, GUARDIAN, Sept. 28, 2015, <https://www.theguardian.com/environment/2015/sep/28/brazil-pledges-to-cut-carbon-emissions-37-by-2025>.

⁴ On the use of fossil fuels, transport and alternatives, see Brent Yacobucci, *Transportation Fuels*, in GLOBAL CLIMATE CHANGE AND U.S. LAW 543 (Michael B. Gerrard & Jody Freeman eds., 2d ed. 2014). On transport powered by fossil fuels and land use, see John Nolon, *Transportation and Land Use*, in GLOBAL CLIMATE CHANGE AND U.S. LAW, *supra*, at 505.

⁵ Unfortunately corruption scandals in Brazil has occurred often, how the diversion of money from the state-owned Oil - Petrobras. See Dan Horch, *Corruption Scandal at Petrobras Threatens Brazil's Economy*, N.Y. TIMES: DEALBOOK (Feb. 11, 2015, 8:19 PM), <https://dealbook.nytimes.com/2015/02/11/a-corruption-scandal-at-petrobras-threatens-brazils-bond-market-and-economy/>.

adaptation; of adverse effects of climate change; of emissions; of emission sources; of greenhouse gases; of impact; of mitigation; of climate change; of GHG sink and of vulnerability [Article 2, inc. I, II, III, IV, V, VI, VIII, IX and X]. These technical definitions needed to be clearly spelled out and translated into legal language, since they must be employed with the greatest possible care and accuracy in the formulation and implementation of public policies as well as judicial and administrative decisions.

Among other things the Act provides that economic and social development must be compatible with the protection of the climate system [Article 4, inc I]. The relationships of the environment to the economy must always be considered when planning and implementing reductions of carbon emissions..

The NPCC establishes that Brazil must promptly comply with all of its commitments to the United Nations Framework Convention on Climate Change and other international documents on climate change which the country will eventually sign [Article 5, inc. I]. Therefore, the Brazilian Government needs to abide by the provisions of COP 21. Once new international documents on climate change are approved, it is essential that Brazil immediately adopt them as guidelines, especially when they provide resilience and adaptation measures compatible with the fundamental duty of environmental protection, provided for in Article 225 of the Federal Constitution.

The Act provides for tools under the NPCC tools, including the National Plan on Climate Change, the National Fund on Climate Change and, in particular, the assessment of environmental impacts on the microclimate and the macroclimate [Article 6, items I to

XVIII]. Among the institutional instruments for the work of the National Climate Change Policy are the Interministerial Committee on Climate Change, the Brazilian Research Network on Climate Change and the Coordination Committee of Activities in Meteorology, Climatology and Hydrology.

Significantly, Article 8 provides that official financial institutions will make available credit and financing lines in order to produce and encourage clean energy.

Principles, goals, guidelines, public policies and government programs must be compatible with the principles, objectives, guidelines and instruments of the National Policy for Climate Change [Article 10]. The Act provides that the Executive Order, in accordance with the National Policy for Climate Change, must set sectoral plans for the mitigation and adaptation to climate change in order to create a low-carbon economy in the generation and distribution of electricity; in urban public transportation; in the interstate transportation systems of cargo and passengers; in the durable consumer goods manufacturing industry; in chemical industries; in the pulp and paper industry; in mining; in the construction industry; in health services; and in agriculture. The goal is to meet gradual emission reduction targets, considering the particularities of each sector.

3. CLIMATE CHANGE LITIGATION

Climate change litigation has been occurring in the United States for years and is now common, but in Brazil it is very recent and rare.⁶ This is particularly due to the fact that there is not a sound doctrine regarding the Climate Change Law in the country. The jurisprudence presents few interesting cases. Most important is a decision by the Supreme Federal Court, discussed in detail below. This decision is a cause of concern, as it authorizes burning straw in the harvest of sugarcane, despite its contribution to global warming.

This decision is in conflict with the provisions of the Climate Change National Policy Act (Act 12.187/2009), and with the Paris Agreement, which went into force on November 4, 2016. Likewise, the decision is in conflict with a precedent from the Supreme Federal Court itself, which, construing the Article 225 of the Federal Constitution of 1988, stated that a balanced environment is a public asset, a fundamental constitutional right and that it must be protected in the interest of present and future generations.⁷

⁶ In Brazil it is necessary to go a long way forward regarding Climate Change Law. This matter is still poorly developed, and climate change law, which is of great importance, is dealt with as a small part of the Brazilian environmental law. In the United States, on the other hand, there are relevant works, with global importance, of Climate Change Law, such as: GLOBAL CLIMATE CHANGE AND U.S. LAW, *supra* note 4; THE LAW OF CLEAN ENERGY: EFFICIENCY AND RENEWABLES (Michael B. Gerrard ed. 2011); ERIK A. POSNER & DAVID WEISBACH, CLIMATE CHANGE JUSTICE (2010); CHRIS WOLD ET AL., CLIMATE CHANGE AND THE LAW (2d ed. 2013); Daniel Farber, *Climate Change: A U.S. Perspective*, 2 YONSEI L.J. 1 (2011); Jody Freeman, *The Uncomfortable Convergence of Energy and Environmental Law*, 41 HARV. ENVTL. L. REV. 339 (2017).

⁷ BRAZIL. Supreme Federal Court Extraordinary appeal no. 22164/SP. Reporting Judge: Justice Celso de Mello. Brazilian Justice Gazette, Brasília, DF, Nov. 17th, 1995. Available at: <<http://stf.jusbrasil.com.br/jurisprudencia/745049/mandado-de-seguranca-ms-22164-sp>>. Accessed on: May 2nd, 2017.

Six cases will be reviewed in the present paper. First the case judged by the Supreme Federal Court will be discussed. Then there will be brief discussions of two cases that are still ongoing at the Federal Regional Court of the Third Region, and three that have already been judged by the Superior Court of Justice. These cases relate to the anthropogenic factors causing climate change (though not always in such terms) and some mention their sometimes catastrophic effects.

We will start with the decision of the Supreme Federal Court (STF) that deemed unconstitutional the Act of the Municipality of Paulínia, in the State of São Paulo, which prohibited the use of intentional fires for agricultural purposes.

3.1 Supreme Federal Court (STF) Case. São Paulo State, Sindicato da Indústria da Fabricação do Alcool do Estado de São Paulo – SIFAESP and Sindicato da Indústria de Açúcar no Estado de São Paulo – SIAESP Vs. City and City Council of Paulina (RE 586224/SP. Dje 07-05-2015)

The Supreme Federal Court is the guardian of the Constitution, and it gives the last word in constitutional matters, either in its original competence or in its appellate competence. Its competence is provided for in Article 102 of the Federal Constitution of 1988. It is the most important court of the country, equivalent to the Supreme Court in the United States.

The Union of the Alcohol Manufacturing Industries of the State of São Paulo (Sindicato da Indústria de Fabricação do Alcool) (SIFAESP) and the Union of the Sugar Industries in the State of São Paulo (Sindicato da Indústria de Açúcar) (SIAESP) filed a claim asserting the unconstitutionality of the Municipal Act 1.952, of December 20th, 1995, of the Municipality of Paulínia, which prohibited completely the use of intentional burning of sugarcane straw in its territory.

The article of the contested municipal law provides:

“Article 1- It is prohibited, under any manner, the employment of fire for soil cleaning and preparation purposes in the Municipality of Paulínia, including preparation for planting and for harvesting sugarcane and other crops.”

The plaintiff unions claimed that such municipal law breached article 23, item e, article 14, article 192, § 1, and article 193, items XX and XXI, all from the Constitution of the State of São Paulo.

The claim was dismissed by São Paulo State Court, on the grounds that burning sugarcane straw is a primitive and rudimentary method, harmful to the environment, and that might be most conveniently replaced with mechanization. The Court understood that the Municipality could expand environmental protection through the Municipal Law, according to the Federal Law 6.766/79.

The State of São Paulo presented an extraordinary appeal to the Supreme Federal Court against the decision of São Paulo State Court. for the State of São Paulo. It argued that Resolution no. 237/97 of CONAMA did not assign administrative competence to

municipalities to deal with the matter. According to the State of São Paulo, the municipal law that prohibited fires in harvests was harmful to the economy of the State and hampered the environmental control of the activity, making annual harvests unfeasible to rural workers.

The State of São Paulo argued that the municipal law, by prohibiting the burning of sugarcane straw, was beyond the limits of the interests of the Municipality of Paulínia, and that it affected the state economic order and the tax revenues of the State of São Paulo and caused social disturbance due to the potential dismissal of employees of the sugarcane industry and the resulting unemployment.

Sindicato da Indústria da Fabricação do Alcool do Estado de São Paulo – SIFAESP and Sindicato da Indústria de Açúcar no Estado de São Paulo – SIAESP also presented an extraordinary appeal in line with that of the State of São Paulo, requesting the reversal of the decision of São Paulo State Court.

The Supreme Federal Court reviewed the appeals of the State of São Paulo, of Sindicato da Indústria da Fabricação do Alcool do Estado de São Paulo - SIFAESP and of Sindicato da Indústria de Açúcar do Estado de São Paulo - SIAESP and reversed the decision of São Paulo State Court.

According to the Supreme Federal Court, in an opinion of Justice Fux:

“The Municipality of Paulínia is competent to legislate on the environment, up to the limit of its local interest and given that such regulation is harmonious with State and Federal rules (article 24, VI c/c 30, I and II of the Brazilian Constitution). The Judiciary Branch is inserted in the society

and, therefore, it must respond to its expectations, in the sense of keeping in mind the objective of meeting the needs, as it is also a public service. In this case, it is undeniable the multidisciplinary content of the matter, involving social, economic and political issues. Such as: (i) the relevant decrease - progressive and planned - of burning of sugarcane; (ii) the impossibility to handle machines upon the existence of rugged cultivating areas; (iii) cultivation of sugarcane in smallholdings; (iv) workers with low education level; (v) and the existing pollution regardless of the chosen option. Although full mechanization in the cultivation of sugarcane is inevitable, it is necessary to reduce as much as possible its negative side. Thus, considering the weighted values, a State Law regulating the manner it understands to be suitable to meet the needs of its respective population was issued. Such diploma reflects, unquestionably, a desirable means of compatibility with the society that, together with the power directly granted by the Constitution, overly consolidates its position in the state system as a standard to be followed and respected by other units of the federation connected to the State of São Paulo. Therefore, it is not allowed an interpellation by the Supreme Federal Court which does not recognize the interest of the Municipality in providing a balanced environment for its population. However, it is impossible to identify a local interest that provides ground to keep the Municipal Law effective, as both pieces of legislation aim at meeting the same social need, which is the maintenance of a balanced environment, specifically regarding the burning of sugarcane”.

According to the interpretation of the Constitution by Justice Fux, which was followed by other Justices (except for Justice Weber, who dissented), the Act of the State of São Paulo authorizing the fires and providing for a progressive decrease until the year 2031 shall prevail over the Municipal Law of the Municipality of Paulínia, which provided for

the immediate termination of the fires within the Municipality and aimed at instant environmental protection. The Supreme Federal Court stated that the Municipal Law no. 1.952, of December 20th, 1995, of the Municipality of Paulínia, was unconstitutional. The Supreme Federal Court decision did not mention either the severe risk of emission of greenhouse gases deriving from the fires, or the Climate Change National Policy Act.

On the other hand, Justice Fux wrote in his opinion that the *“use of machines of crops has had negative impacts on the Environment and the cane decomposition emits methane and contributes to global warming, which does not take place in the burning of the cane”*. This honorable opinion unfortunately has a scientific mistake.

Global warming potential (GWP) and human health indicators of sugarcane ethanol production in Brazil, in the pre-mechanization (100% burned), current (~50% burned) and future (100% without burning) scenarios, were calculated. In the past, the GWP of ethanol production was 1.1 kg CO₂ eq L⁻¹ and BC emissions were 32.6 kg CO₂ eq L⁻¹. The human health impact in disability adjusted life years (DALY) was 3.16E-05 DALY L⁻¹ ethanol. The current ethanol production process has a GWP 46% smaller, while BC emissions are seven times smaller than before mechanization started. The human health impact is currently 7.72E-06 DALY L⁻¹. In the future, with complete mechanization and the integration of first and second generation ethanol, the expected GWP emissions will be 70% smaller, and BC emissions will be 216 times smaller than when all sugarcane was harvested with

burning.⁸ According a specific research about this issue, the major part of the total emission (44%) resulted from residues burning; about 20% resulted from the use of synthetic fertilizers, and about 18% from fossil fuel combustion.⁹ In the same sense, sugarcane burning cause a tremendous negative respiratory health effects.¹⁰

This decision also ignored International Treaties, Conventions and Agreements related to measures against emissions caused by anthropogenic factors, of which Brazil is a signatory.

3.2 Superior Court of Justice (SCJ) Cases.

The Superior Court of Justice is headquartered in Brasília. According to the articles 104 and 105 of the Brazilian Constitution, it is competent to judge, in a special appeal, the cases decided, in sole or last instance, by Regional Federal Courts or by the courts of the States, Federal District and Territories, when the decision under appeal: a) goes against treaty or federal law, or denies its effectiveness; b) judges as valid an act by local government contested due to a federal law; or c) construes a federal law differently from other courts.

⁸ Marcelo Galdos et al., *Trends in Global Warming and Human Health Impacts Related to Brazilian Sugarcane Ethanol Production Considering Black Carbon Emissions*, APPLIED ENERGY, Apr. 2013, at 576.

⁹ Eduardo Barretto de Figueiredo et al., *Greenhouse Gas Emission Associated with Sugar Production in Southern Brazil*, CARBON BALANCE & MGMT. (2010), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC2893520/pdf/1750-0680-5-3.pdf>. About directs and negatives impacts on local climate of sugar-cane expansion in Brazil, see Scott Loarie et al., *Direct Impacts on Local Climate of Sugar-Cane Expansion in Brazil*, 1 NATURE CLIMATE CHANGE 105 (2011).

¹⁰ About respiratory health effects caused by sugarcane burning see: Helena Ribeiro, *Sugar Cane Burning in Brazil: Respiratory Health Effects*, REV. SAUDE PUBLICA (2008), http://www.scielo.br/pdf/rsp/v42n2/en_6804.pdf.

This Court reviews cases related to environmental law when non-constitutional rules are being debated.

The Superior Court of Justice (SCJ) has adopted a progressive jurisprudence regarding the protection of the environment as an independent legal asset and fostering sustainable development. This can be clearly seen in several situations. The first of them is the recognition of the inversion of the burden of procedural evidence against the alleged polluter, so that it must show that its activity does not damage the environment. Actually, for having better information on the alleged dangerous action and for being the causing agent of risks due to its activity, the defendant must prove that the environment and the collectivity are not subject to risks or damage threats. In this regard, the SCJ decided to enforce the article 6, item VIII, of the Act 8.078/90 in concrete cases¹¹ involving environmental matters. As a fundamental right, the environment is protected by a set of procedural rules – including the inversion of the burden proof against defendant - encompassing the Act 4.717/65, 7.385/85 and the Act 8.078/90.¹²

In the same regard, the SCJ has adopted the theory of full risk to check environmental damage. The evidence of damage and causal link is enough to present the obligation to indemnify. The Court overruled the risk-gain theory, as the Court does not accept

¹¹ BRAZIL. Superior Court of Justice. Agaresp no. 206748. Reporting Judge: Justice Ricardo Villas Boas Cueva. Brazilian Justice Gazette, Brasília, DF, Mar. 27th, 2013. Available at: <<http://stj.jusbrasil.com.br/jurisprudencia>>. Accessed on: May 2nd, 2017.

¹² BRAZIL. Superior Court of Justice. Special appeal no. 200400011479. Reporting Judge: Justice Luiz Fux. Brazilian Justice Gazette, Brasília, DF, Aug. 31st, 2006. Available at: <<http://stj.jusbrasil.com.br/jurisprudencia>>. Accessed on: May 2nd, 2017.

exemptions from civil liability, such as the victim's exclusive guilt, fortuitous event or force majeure and the contractual clause that provides for the prerogative of hold harmless.¹³

SCJ has also recognized that there's no statute of limitation (deadline) for proceedings aiming at remedying environmental damage, considering the peculiarities of the damage that is spread and is beyond the limits of time and space. It is a position that aims at providing maximum effectiveness to the principle of environmental damage remediation and makes a mechanism available for the State, the collectivity and the individual able to protect the fundamental right to a balanced environment in an intergenerational perspective.¹⁴ The objective is remedying and restoring the environmental asset at any moment and prevent unsustainable development activities.

Finally, going beyond the theory of guilt of public service (*faute du service*) of French law, the Superior Court of Justice understands that the liability of the State for environmental damage occurs not only in cases of State action, but also for omission, according to the interpretation of the art. 37, § 6, of the Federal Constitution of 1988.¹⁵ The presence of the assumptions of civil liability, damage and causal link motivates the

¹³ BRAZIL. Superior Court of Justice. Interlocutory appeal in the special appeal no. 1412664. Reporting Judge: Justice Raul Araújo. Brazilian Justice Gazette, Brasília, DF, Mar. 11th, 2014. Available at: <<http://stj.jusbrasil.com.br/jurisprudencia/25017000/agravo-regimental-no-recurso-especial-agrg-no-resp-1412664-sp-2011-0305364-9-stj>>. Accessed on: May 2nd, 2017.

¹⁴ BRAZIL. Superior Court of Justice. Special appeal no. 201002176431. Reporting Judge: Justice Castro Meira. Brazilian Justice Gazette, Brasília, DF, Feb. 4th, 2013. Available at: <<http://www.lexml.gov.br/urn/urn:lex:br:superior.tribunal.justica;turma.2:acordao;resp:2009-09-08;769753-1112299>>. Accessed on: May 2nd, 2017.

¹⁵ BRAZIL. Superior Court of Justice. Special appeal no. 1071741/SP. Reporting Judge: Justice Antonio Herman Benjamin. Brazilian Justice Gazette, Brasília, DF, Dec. 16th, 2010. Available at: <<http://www.lexml.gov.br/urn/urn:lex:br:superior.tribunal.justica;turma.2:acordao;resp:2009-03-24;1071741-1075754>>. Accessed on: May 2nd, 2017.

imputation of State liability in the acts of commission and omission of its agents in the event of environmental damage.

The liability for restoring the environment or remedying environmental damage is assigned to the owner purchaser of the real estate, even if the defendant has not caused the damage. This is the position of the SCJ, which understands that the liability of the purchaser of the real estate is of *propter rem* nature. These precedents encourage the fulfillment of the social function of the property in its element and in its environmental sense and encourage ecologically sustainable development,¹⁶ overcoming the Napoleonic civilist individualism and the bourgeois liberal rationale of *laissez passer* and *laissez faire*.

Pursuant to these comments, we will review three cases judged by the SJC that are relevant in fighting the anthropogenic factors causing climate change.

3.2.1 State Prosecutor’s Office of the State of São Paulo Vs Filipe Salles Oliveira and Others (AgRg in EDcl in the Special Appeal no. 094.873 – SP 0)

The Superior Court of Justice, based on article 27 of the old Forest Code, ruled in favor of the State Prosecutor’s Office of the State of São Paulo against the farmers Filipe Salles Oliveira and Others, and found that it is illegal to use the technique of burning in the

¹⁶ BRAZIL. Superior Court of Justice. Special appeal no. 201100461496. Reporting Judge: Minister Herman Benjamin. Brazilian Justice Gazette, Brasília, DF, Sep. 11th, 2012. Available at: <<http://stj.jusbrasil.com.br/jurisprudencia>>. Accessed on: May 2nd, 2017.

harvest of sugarcane due to its negative impact on the environment and the emissions of CO₂, contributing to global warming, in addition to causing respiratory damage to people, especially to farm workers. This decision came to the opposite conclusion than the later decision from the Supreme Federal Court in the case of the State of São Paulo and others vs. the City and the City Council of Paulínia

In the decision it was stated that academic studies show that the burning of sugarcane straw causes significant environmental damage and that, considering sustainable development, there are modern instruments and technologies that are able to replace the burning practice without making the economic activity unfeasible. The Court clarified that the exception of the sole paragraph of the article 27 of the Act 4.771/65 (old Forest Code) to the prohibition of fires must be construed restrictively when it authorizes the fires for agro-industrial or agricultural activities, as the economic interest cannot prevail over the environmental protection when there are techniques less harmful to the nature.

According to Justice Martins:

“The interpretation of the rules that protect the environment do not comprise only, and solely, the use of strictly legal instruments, as it is a fact that the sciences related to the study of the soil, to the study of life, to the study of chemistry, to the study of physics must help the jurist in his/her daily activity of understanding the fact that is harmful to Environmental Law. The cane field absorbs and incorporates CO₂ in large amounts throughout its growing period, which lasts from 12 to 18 months on average, and the burning releases it all almost instantly, i.e., in the period of one fire, which lasts approximately from 30 to 60 minutes. Therefore, the fire releases the CO₂ collected from the

atmosphere during 12 to 18 months in a little longer than 30 or 60 minutes. In addition, other gases are formed and released in the atmosphere together with CO₂".

According to the Justice: *"a study carried out by Universidade Estadual Paulista – UNESP, which concludes that the PAH's (Polycyclic Aromatic Hydrocarbons) released by the fire causes cancer, affecting the bodies of workers in cane fields who are exposed to the smoke".*

The old Brazilian Forest Code provides for:

"Art. 27. It is forbidden the use of fire in forests and other types of vegetation. Sole paragraph. If local or regional peculiarities justify the employment of fire in agricultural or forestry activities, the permission shall be granted by act of Public Authorities, restraining the areas and establishing precautionary rules."

The rule uses the expression *"local or regional peculiarities"*.

According to the Justice, *"the appellants have shown that the procedure is archaic and obsolete by stating that it is a secular conduct, i.e., a method used in times of major technological limitations, surely today the progress of agro-industry enables a mitigation of environmental damage without compromising its economic feasibility"*.

Therefore, according to the opinion, the activity must be developed with modern industrial instruments and technology to reduce the environmental impact and not using fires in cane fields for the harvest that contribute with climate change.

The voting was unanimous, with Justices Benjamin, Campbel, Calmon and Meira following the vote of the reporting Justice.

We will review the second case ruled by the Superior Court of Justice.

3.2.2 Braulino Basílio Maia Filho Vs. Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais (Special Appeal 1000.731- RO).

Braulino Basílio Maia Filho filed an ordinary proceeding against IBAMA - Instituto Brasileiro do Meio Ambiente (Brazilian Environmental Institute), aiming at revoking a fine, from 09/20/1995, applied due to a fire in a pasture carried out in an area of 600 hectares.

The federal judge ruled in favor of the plaintiff, on the grounds that the legal instrument that justified the fine (article 14, item I, of the Act 6.938/1981) could not be applied in this case.

After an appeal by Ibama, the Regional Federal Court reversed the decision on the grounds that *"the penalties for violations of the environmental legislation have express legal provision inserted in the article 14, item I, of the Act 6.938/81"* and that Ibama has legal competence to enforce them.

Braulino Basílio Maia Filho, dissatisfied with the decision, appealed to the Superior Court of Justice, which decided that it is legal to apply a fine due to the burning of 600 hectares of pasture, pursuant to the provisions of the Act 6.938/1981. According to the Act:

"Article 14 - Notwithstanding the penalties defined by federal, state and municipal legislation, non-compliance with the measures required to the preservation or correction of inconveniences and damages caused by degradation of the environmental quality shall subject the violators:

I - to a simple or daily fine, in amounts corresponding, at least, to 10 (ten) and, at most, to 1,000 (one thousand) Readjustable National Treasury Bonds - ORTNs, aggravated in case of specific

recurrence, as provided for in the regulation, and the Federal Union is not allowed to collect it if the fine has already been applied by the State, Federal District, Territories or Municipalities”.

Justice Benjamin, in his opinion which the other judges signed onto, explicitly mentioned the relation between the fires and climate change. He stated that:

“The law provides for application of fine for non-compliance with the measures required to the preservation or correction of inconveniences and damages caused by degradation of the environmental quality. It is certain that the expression ‘non-compliance’ includes acts of degradation not only by omission, but also by action. In this case, the appellant’s conduct, of carrying out the burning of an area corresponding to 600 hectares without authorization from the environmental agency, violates the law.

The fires are incompatible with the purposes of environmental protection established in the Federal Constitution and in the environmental laws. In times of climate changes, any exceptions to this general prohibition, in addition to being expressly provided for in federal law, must be restrictively construed by the manager and judge”.

The Superior Court of Justice, with this foundation, understood as legal the fine applied by Ibama to Braulino Basílio Maia Filho, due to carrying out fires in 600 hectares of pasture.

We will review the third case ruled by the Superior Court of Justice.

3.2.3 Federal Prosecutor's Office Vs H. Carlos Schneider S/A Comércio e Indústria and Other (Special Appeal no. 650.728 – SC)

The Federal Public Prosecutor's Office of Joinville, Santa Catarina, filed a public civil proceeding against H. Carlos Schneider S/A Com. e Ind. and S.E.R. Parafuso, a labor entity congregating the employees of CISER Group.

The Federal Public Prosecutor's Office claimed that the defendants filled and drained a mangrove forest in an urban property, even after being notified by IBDF, by FATMA (environmental bodies), by the City Council of the City of Joinville and by the Port Authority.

Federal Judge Moraes condemned the defendants to a) removing the landfill and any buildings that are on the mangrove forest, and b) specific reforestation of the mangrove forest.

The decision by Judge Moraes was confirmed by the Regional Federal Court of the 4th Region. The defendants appealed to the Superior Court of Justice.

The SCJ rejected the defendants' appeal and upheld the original decision favorable to environmental protection.

In his opinion (which the other judges signed onto), Justice Benjamin, mentioning again the risks of climate change, especially increasing sea levels, stated in the opinion:

“As a result of the evolution of scientific knowledge and changes in the ethical attitude of the human being towards Nature, several functions are recognized in mangrove forests: a) ecological, as

a sea nursery, a core piece in the reproductive processes of a large number of species, a biological filter that retains nutrients, sediments and even pollutants, a buffer zone against storms and a barrier against the erosion of the coast; b) economic (source of food and traditional activities, such as artisanal fishing); and c) social (vital environment for traditional populations, whose survival depends on the exploitation of existing crustaceans, mollusks and fishes).

Current Brazilian legislation reflects the scientific, ethical, political and legal transformation that repositioned the mangrove forests, taking them from a condition of health risk and undesirable condition to the level of a critically threatened ecosystem. Aiming at protecting its ecological, economic and social functions, the legislation assigned them a legal nature of Permanent Preservation Area. Accordingly, it is everyone's duty, owners or not, to ensure the preservation of mangrove forests, an ever-increasing need, especially in times of climate changes and increasing sea levels. Destroying them for direct economic use, with the permanent incentive of easy profit and short-term benefits, draining them or land filling them for real estate speculation or soil exploitation, or turning them into garbage dumps constitute serious harm to the ecologically balanced environment and to the welfare of the collectivity, a behavior that must be promptly and vigorously repressed and sanctioned by the Administration and the Judiciary."

Concluding his opinion, the Justice stated that "it is unacceptable, after the Federal Constitution of 1988, which valued the preservation of fundamental ecological processes (article 225, § 1, item I), and full non-compliance with the Forest Code of 1965, intending to give the mangrove forest other destination that is inconsistent with the untouchability assigned to it by law, as a Permanent Preservation Area".

The decision of the Superior Court of Justice was unanimous in the sense of condemning the defendants: a) to remove the landfill and any buildings that are on the mangrove forest, and b) to make a specific reforestation of the mangrove forest.

Justices Calmon, Noronha, Meira and Martins also participated in the decision and followed the vote of the reporting Justice.

Finally, we will review the proceedings ruled, but not yet with a final decision, by the 3rd Regional Federal Court.

4. 3RD REGIONAL FEDERAL COURT CASES

The Regional Federal Court of the 3rd Region, headquartered in São Paulo, has a Panel specialized in dealing with appeals deriving from decisions of individual court sentences from federal judges related to cases of environmental law. The competence of the Regional Federal Courts is provided for in the Art. 108 of the Federal Constitution. In this Federal Court, these cases are being processed but there are no final decision. They aim at preventing the emission of greenhouse gases that cause climate change.

4.1 State Prosecutor's Office of the State of São Paulo Vs. Angola Airlines (Civil Appeal no. 0031654-68.2014.4.03.999).

The Third Panel of the Regional Federal Court of the 3rd Region has decided that the Federal Judge of the 6th Civil Court of Guarulhos is competent to rule a public civil proceeding originally filed by the Public Prosecutor's Office of the State of São Paulo against

Angola Airlines, due to environmental impact caused by the activities of airlines operating in the International Airport of São Paulo, located in the city of Guarulhos. The Public Prosecutor's Office, in a public civil proceeding is seeking to require the airline to acquire land and recover it by installing a Private Reserve of Natural Heritage, as provided for in the Act 9. 985/2000, preferably in the City of Guarulhos, where the International Airport is located, planting trees to fully absorb the emission of greenhouse gases that cause global warming and other pollutants deriving from the activities of the airline at the Airport. The Public Prosecutor's Office, alternatively, requests the payment of an indemnification to be deposited in the State Fund of Remediation of Harmed Diffuse Interests.

Such demand is being processed, as determined by the Third Panel of the Regional Federal Court of the 3rd Region, at the 6th Civil Federal Court of the City of Guarulhos, and is pending decision.

4.1.2 State Prosecutor's Office of the State of São Paulo Vs. Angola Airlines (Civil Appeal no. 0031654-68.2014.4.03.999).

The State Prosecutor's Office has filed a proceeding with the same object against United Airlines (State Prosecutor's Office of São Paulo vs. United Airlines, Civil Appeal no. 0002920-10.2014.4.03.9999). In the case, the Regional Federal Court of the 3rd Region stated it is competent to process the cases that involve the National Civil Aviation Agency (ANAC) and that the State Courts are not competent to rule such cases. The State Prosecutor of The State of São Paulo has filed a proceeding with the same object against Delta Airlines (0038698-

75.2013.4.03.9999), Mexicana Airlines (0028032-15.2013-15.2013.4.03.9999), Emirates Airlines (0020327-63.2013.4.03.9000), Aerolineas Argentinas (0028033-97.2013.4.03.9999) and South Africa Airlines (0016875-45.2013.45.2013.4.03.9000). These demands are being processed and are pending final decision.

5. CONCLUSION

In such context, it is possible to see that there is recent and still fragile climate litigation in Brazil. It is important to mention that the Act 12.187/2009, which instituted the National Policy on Climate Change, with imperfections and abstractions, is a considerable progress as a milestone in fighting climate change and global warming.¹⁷ This act clearly incorporates the concept of international treaties and agreements on environmental protection, which is, in fact, extremely positive. The legislation is regulated by the Decree 7.390/2010, which provides, amongst other important issues, the baseline of emissions of greenhouse gases for 2020 to be estimated in 3.236 GtCO₂-eq. Thus, the corresponding absolute reduction was established between 1.168 Gt-CO₂-eq and 1.259 GtCO₂-eq, 36.1% and 38.9% emission decrease, respectively. Brazil, however, has committed, before the

¹⁷ On the omissions and imperfections of the Act of the Brazilian National Policy of Climate Change, see: Gabriel Wedy, Sabin Ctr. for Climate Change Law, *Climate Change and Sustainable Development in Brazilian Law* (Mar. 2016), <http://wordpress.ei.columbia.edu/climate-change-law/files/2016/06/Wedy-2016-03-Climate-Change-and-Sustainable-Development-in-Brazilian-Law.pdf>.

Regarding climate change and regulation, the National Policy of Climate Change is complemented by the Act 12.305/10, which institutes the National Policy of Solid Waste (PNRS); the Act 13.123/2015 and the Decree 8772/2016, which regulate the biodiversity in Brazil.

United Nations Conference of Agenda 2030 for Sustainable Development, held in New York in September 2015, to present reductions of 37% by 2025 and of 43% until 2030¹⁸, exceeding the numbers established in the decree. It remains to be seen, of course, if the country will have the structure, technical capability and political integrity to achieve such challenging goal. Furthermore, the country, in the Paris Agreement, already effective, has committed to reduce the emissions caused by anthropogenic factors to hold global warming under 2°C and try to reach a maximum increase of 1.5°C until 2100, compared to the pre-industrial period.

The decisions of the Superior Court of Justice, in this scenario, are according to the provisions of the Paris Agreement and the National Policy of Climate Change, even though they are not mentioned, and the Brazilian Constitution, which is mentioned. On the other hand, the decision of the Supreme Federal Court in the case of the State of São Paulo, *Sindicato da Indústria da Fabricação do Alcool do Estado de São Paulo – SIFAESP and Sindicato da Indústria de Açúcar no Estado de São Paulo – SIAESP vs. The City and the City Council of Paulínia*, authorizing the fires to carry out the harvest of sugarcane, raises major concerns.

In short, it is important that the Brazilian Judiciary Power take seriously, in its decisions, the severe threats posed by climate change, such as droughts, floods, increased storms and sea levels and major environmental, social and economic losses deriving from

¹⁸ *Brazil Pledges to Cut Carbon Emissions 37% by 2025*, *supra* note 3.

these facts. The Brazilian Constitution, the National Policy of Climate Change and the Paris Agreement are important instruments for legal decisions favorable to the environment and to stabilization of the climate for the benefit of present and future generations.