

*Summary in english*



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CALCULOS DE SEGURO

# **Environmental insurance in Brazil** and its current stage of development

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**A**ccording to the famous researcher Hans Jonas, “issues that have never before been the subject of legislation are now entering the realm of laws which have yet to be elaborated by the global ‘city’ to enable the existence of a world for the next generations of human beings”<sup>1</sup>. Consequently, today there are greater obligations and responsibilities. Environmental risk insurance must be designed and offered based on this understanding. There should be no compromise.

In order to demonstrate the current evolution of this specialized insurance sector, not only in the Brazilian insurance market but also abroad – bearing in mind that it started and was developed in the U. S. – the third edition of “Environmental Risk Insurance Programme in Brazil and its current stage of development”, has been produced and published by the Escola Nacional de Seguros (National School of Insurance).

New issues related to environmental insurance have been introduced and not so new issues revisited in a comprehensive manner. Following a time line, the book addresses the targets that need to be met by this sector of the Brazilian insurance market. There are some old issues: the debate over whether this insurance should be compulsory;

ports and terminals risks and the services currently on offer from insurers; the almost innocuous partial coverage for accidental and unexpected pollution risks under the General Liability Insurance Policy; the “confusion” about coverage for environmental risks in D&O insurance policies; and the current approach for oil risks.

There are also many new issues such as environmental liability concerning salvage, a discussion not contemplated prior to the National Solid Waste Policy law (LPNRS – 12,305/2010). This is not only with regard to auto insurance, which presents increasingly larger amounts of salvage, since, currently, other branches of insurance are subject to legal considerations of this nature. This is occurring for insurers that accept salvage from various types of insurance (transport, aircrafts, electronics, marine hulls etc.).

It in this regard that insurers, originally providers of guarantees for various risks, have now become passive agents subject to accountability for the possession and custody of various assets that still have some economic value, derived from the remains of claims already compensated (“salvage” in insurance vernacular).

When aligning salvage derived from claims and LPNRS – a broad field of analysis necessarily emerges for the domestic insurance market, one that is not only informed by what has come to be called sustainable practices. This is not the only aspect that affects the insurance business. Insurance

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<sup>1</sup> JONAS, Hans O princípio da responsabilidade (The principle of responsibility): ensaio de uma ética para a civilização tecnológica (an essay of ethics for a technological civilisation). Rio de Janeiro: Contraponto/PUC-Rio, 2006. p. 44.

companies are burdened with new legal responsibilities, in relation to the provision of cover for new risks arising from their role as agents subject to liability for environmental damage.

The specific issue with salvage derived from claims – throughout the various insurance lines – has not been analysed previously by those active in the domestic insurance market, except for the matter of expenses associated with its removal, traditionally supported by property insurance policies. Today, the discussion is much more comprehensive, and salvage, depending on the origin, must be properly treated, even before disposal in appropriate locations under the provisions of the law. The costs of this should

be comprehensively guaranteed by insurance policies, with objective forecasting, in the same way that expenses for containment and claims salvage have been part of the wording in current clauses since the 2002 Civil Code.

The States of the Federation impose their respective operational guidelines for post-consumption liability. One example is the SMA Resolution 45 from the State of São Paulo, dated June 23, 2015. The provisions affect not only environmental insurance, but also all other insurance lines that produce residual waste derived from loss. Therefore, the entire domestic insurance market needs to provide urgent and effective responses for all types of insurance currently on offer.

The need to protect natural assets in Brazil now has greater relevance, especially when spectacular environmental losses occur and appear in the media. Currently, such cases arrive in people's homes and workplaces through the TV and the Internet, showing events unfolding in real time. The chronology of such events, previously limited to those entities responsible for combating and containing the damage, is now divulged by the media using drones, becoming instantly available to everyone.

Only specific environmental insurance can provide cover for almost all types of loss resulting from major accidents. In contrast, given its technical and contractual limitations and subliminal interpretations, traditional liability insurance with additional coverage for accidental and unexpected pollution risk cannot offer significant support, especially in cases of losses that may extend beyond the 72 hours usually provided in this type of clause and under the condition that it started and terminated within the same period.

Moreover, the clause does not cover natural assets, being limited to material damage caused to the tangible property of specified third parties with registered ownership. This concept could even become a cause of disagreement when submitted to the Courts, despite its restrictive nature, given the fact that insurers had the intention to offer coverage to environmental risks, evident in the wording found the contracts.



In addition to this conjecture, there is the premise that insurers are familiar with the scope of civil liability in the realm of environmental law. This understanding justified the large compensations of the 1980s in the U. S. for cases where U. S. insurers used the same restrictive contractual basis that the Brazilian insurance market uses today. The U. S. Courts were unyielding in making relevant all ties that were objectively embedded in the policies to the benefit of policyholders and the environment, and demanded the clean-up of the areas that had been contaminated over the years, laying the responsibility on the insurers involved.

On that note, authors Sidney Guerra and Sérgio Guerra (2014) present, correct and complement the thoughts here expressed with the following statement:

It is true that civil liability under environmental law is different in the realm of civil law since it is not intended to meet the needs of an individual, but those of unspecified groups of people who depend on natural conditions for survival (GUERRA; GUERRA, 2014, p.249)<sup>2</sup>.

There is no way to address environmental insurance and its inherent cover without this broad consideration. Its concerns are beyond the scope of damages and losses guaranteed by traditional liability insurance or by prop-

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<sup>2</sup> GUERRA, Sidney; GUERRA, Sérgio. Curso de direito ambiental (Environmental Law Course). 2<sup>nd</sup> issue. São Paulo: Atlas, 2014. p. 249.

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## **Large and extensive environmental claims cannot remain without cover or with the false notion of being covered by provisions that offer the partial and minimal coverage we have today.**

erty insurance, which are geared towards the individual. Environmental insurance also involves the guarantee of diffuse damages, of a broader nature, without the ties found in traditional insurance models.

Large and extensive environmental claims cannot remain without cover or with the false notion of being covered by provisions that offer the partial and minimal coverage we have today. In this sense, insurance brokers have a special responsibility and professional duty to provide adequate clarification for their customers about the reality of the risks they are facing, and about the specific covers that can and should be purchased through a particular insurance policy.

Brazilian business, in general, seems to believe that only competition is subject to risks, and that environmental damage, if it does occur, is caused by companies that are not under their direct management. The government, in turn, is not always attentive and observant of its du-

ties in a qualified and effective manner, and has a special role in the scenario that is still being devised. The following information emerged from the tragic accident at the Samarco Company dam in the city of Bento Rodrigues, Minas Gerais, in November this year: 24 dams, out of the 14,966 in the country catalogued by the National Water Agency (ANA) are classified as high risk by the National Department of Mineral Production (DNPM) under the Ministry of Mines and Energy<sup>3</sup>. No authority, however, has commented on the measures to be adopted following this shocking and alarming announcement. This situation reveals a society that is still undermining good practices, not only at the corporate level and in public administration, but also in relation to the demands made by the population, which is often unprepared to stand up for its rights.

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<sup>3</sup> According to data from the Newspaper "O Estado de São Paulo", issue of November 8, 2015, p. A18.

Today, the need to hold environmental insurance is imperative. Previously, concerns in the industrial sector were associated with the management of related risks but now the science has evolved, as well as bringing standardisation of procedures. However, from this perspective, insurance cannot serve as a palliative for bad practices, which seems an obvious conclusion. This equation is not always well understood – notably, within the political realm, which is sometimes dissociated from the legal framework of the insurance contract that is often viewed as a panacea for all diseases. This is not how it works around the world, and it is no different in Brazil.

Environmental insurance should be required and understood as an ancillary guarantee, consistent with effective management techniques. According to this understanding, risk management and environmental insurance can protect the balance sheet of companies. Moreover, it ensures their good reputation, because a particular insurance policy can provide greater comfort to the Board of Directors and reveals to the broader public the company's degree of concern with society and with the preservation of the environment (eco-efficiency).

Concerns about the environment and the company's image are, in contemporary times, elements of prime importance in the corporate world. A corporation cannot dissociate itself from this economic and social imposition. In this vein, the number



of companies that disclose their GHG (greenhouse gas) emission indexes is growing in the country, following a similar trend that has existed abroad for some time. Methodologies have been developed to address such concerns and the Brazilian GHG Protocol Programme<sup>4</sup> was created in 2008, which now disseminates hundreds of business inventories. To date, the main sectors that have adhered to this programme are manufacturing industries, financial ventures, insurance and other related services, electricity and gas, as well as a number of scientific and technical professional activities, transport, storage, post-offices and construction groups.

<sup>4</sup> FGV. Brazilian GHG Protocol Programme. Site. Available at: <[www.ghg-protocolbrasil.com.br](http://www.ghg-protocolbrasil.com.br)>. Access on: November 13, 2015.

The possibility that financiers may start requiring evidence of sound environmental insurance is also on the horizon and this trend is starting to expand, as is already happening in relation to liability insurance in general. Those who contract services require a liability insurance policy from the contracted party, in the event of damage to third parties that may occur during the execution of the work.

This movement has given a significant boost to the liability insurance sector in recent years and is beginning to develop in the Brazilian corporate world. If, in the past, a company aware of its risks and obligations sought guarantees through its own liability insurance policy, including all manner of third parties acting on its behalf, today, the company



requires the third party to purchase its own liability insurance, despite already having a policy that grants extensive guarantees. Stockholders, in turn, will also have access to information as to which companies have environmental insurance in their portfolios to support equity.

The BM&FBovespa Sustainability Index, administered by the Getulio Vargas Foundation, takes into account which companies have specific environmental insurance when determining the respective degree. Therefore, the maximised impact of such a policy on several fronts, along with the economic and financial scenario in the country becomes a matter of time and cultural betterment. Following that, environmental insurance is within the radar of this emerging paradigm.

The loss of opportunity, which before focused almost exclusively on medical issues or on other activities such as attorneys and their respective professional performances, has broadened under the current doctrine, spreading to the environmental sector. For products containing nanotech elements, for example, the duty to provide information regarding content is highlighted in the existing system, albeit in a manner based on principles<sup>5</sup> given the gap in the law in relation to this topic. However, despite the incompleteness of the law, the systematisation of the legal framework determines this understanding, and the consumer has the right to be informed about the dangers of products in circulation. Following this dialectic movement, individuals should have the option of not using products made with nanotechnology elements, if he or she wishes.

According to the Sergio Savi's lecture (2006), "anyone denied a serious opportunity of gaining an advantage or avoiding a loss will be considered the victim of unjust damages and, therefore, should be compensated"<sup>6</sup>.

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<sup>5</sup> Articles 113, 187 and 422 of the 2002 Civil Code, and Articles 12 and 14 of the Consumer Protection Code (CPC). The provision of Article 931 of the same Civil Code considerably extends the liability of every entrepreneur who puts products in circulation, regardless of whether or not they contain a flaw, and also expanding the provisions of Article 12 of the CPC, because of the implementation of the rule in Article 7 of the same code.

<sup>6</sup> SAVI, Sérgio. Responsabilidade Civil por perda de uma chance (Liability due to loss of an opportunity). São Paulo: Atlas, 2006. p. 103.

The doctrine is based on the Institute of full compensation, provided in the Brazilian civil framework<sup>7</sup>, as well as in the constitutional principle that preserves human dignity<sup>8</sup>. Specific environmental insurance policies can add Products Liability coverage and, similarly, those with nanotech characteristics can also be guaranteed.

Oil exploration risk also excels in Brazil, resulting mainly from the pre-salt discovery. The insurance industry should seek appropriate underwriting tools, and operations are unlikely to happen without the backing of well-structured insurance policies, also in the context of environmental risk.

In his prophetic 2013 book, Al Gore identifies that "the relatively new and imperfect technology of drilling in deep water involves more risks than conventional techniques because, at the bottom of the ocean, the pressure is greater"<sup>9</sup>. Although the author relates his lecture to desired operations in the Arctic and to the risk of leakage in a primitive ecosystem where the repair and rescue operations would be impossible for most of the year, the

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<sup>7</sup> Art. 944 of the 2002 Civil Code: compensation is measured according to the extent of the damage.

<sup>8</sup> Art. 1, III, Federal Constitution – about the fundamental principles of the Federative Republic of Brazil.

<sup>9</sup> GORE, Al. O Futuro (The Future): seis desafios para mudar o mundo (six challenges to change the world). São Paulo: HSM, 2013. p. 306.

## **There is an ever-growing trend towards holding directors and company administrators accountable for environmental accidents they helped cause.**

risk is equally present in Brazil in areas that are far offshore. What level of guarantee does insurance provide for pre-salt operations, including the risk of environmental pollution? Do national insurers provide such guarantees today? Is there such reinsurance capacity available in Brazil?

There is no doubt that Resolution 4,327/2014 from the Central Bank of Brazil, which provides guidelines to be observed for the establishment and implementation of the Social and Environmental Responsibility Policy (PRSA) by financial institutions and other institutions authorised to operate by the Central Bank, has brought new impetus to the potential accountability of financial players in environmental issues in the country. The subsequent and more detailed Legislative SARB 14, from August 28, 2014, concerning the Self-Regulation Banking System of the Brazilian Federation of Banks (Febraban) specified criteria and mechanisms to assess and manage the risks of social and environmental projects being funded. It even explicitly mentions that environmental permits, as well as the Biosafety Quality Cer-

tificates issued by the National Biosafety Technical Commission (CTNBio), should be verified.

In this self-regulatory field there is a clear concern with the adoption of extensive environmental compliance procedures. What was previously defended by the specialised and attentive doctrine, is now the subject of the regulatory body of the system, which has established guidelines to be observed by entities subordinated to it, emphasising the responsibility of all of them, albeit in a quite contained and implicit manner considering they are users of financial services. If the administrative rule sought to reduce or neutralise the exposure of related agents, the LPNMA (Law 6.938 / 1981), which stands in a hierarchically higher level than the aforementioned Resolution, had already determined the indirect responsibility of the banks, due to the provisions on Art. 3, item IV. With this new regulation, the need for financial institutions to seek specific environmental insurance as a guarantee from certain risks re-emerges more acutely, something that happens in other countries, notably in the U. S.

Paulo Affonso Machado addresses the matter in a concise and clear way when he says:

The content of Resolution 4,327/2014 mirrors what has been understood as a customary norm – those who finance the pollution or destruction of nature have a shared responsibility with the entrepreneur who caused pollution or degradation (MACHADO, 2015, p. 395)<sup>10</sup>.

There is an ever-growing trend towards holding directors and company administrators accountable for environmental accidents they helped cause, sometimes disregarding the corporate veil of the company as a legal entity. Administrators, in a certain way, are always involved in decisions and in the operations of the companies on those occasions prior to the disaster, and at times are involved in the absence of action.

Such assertion has been accepted by developed societies, and quite unanimously so, because these professionals, in fact, can make or represent a difference to the degree of appropriate measures in terms of decision-making regarding the management of relevant risks. Any negligence in this regard opens the field to accountability, and D&O insurance cannot always provide proper and comprehensive guarantees. In fact, that does not occur because it is not part of its scope to compensate for the regeneration

<sup>10</sup> MACHADO, Paulo Affonso Leme. Direito ambiental brasileiro (Brazilian environmental law). 23rd issue. São Paulo: Malheiros, 2015. p. 395.

of the damaged environment. Only specific environmental insurance policies can offer full coverage and include directors and company administrators, as policyholders. It should also be noted that the risk of changes or developments in regulations may determine a current claim in relation to, for example, the risk of exposure to a substance or industrial process that was previously allowed or permitted under the current regulations. The risk of change of legislative pattern must provide an automatic and extensive guarantee by specific environmental insurance policies. This issue is becoming a cause for concern for Brazilian business leaders.

The topics related to environmental insurance started being discussed in the international arena only from the mid-1960s, and within narrow conceptions of the liability insurance policies<sup>11</sup>.

<sup>11</sup> According to the lecture by Ambrose B. Kelly (USA), introducing the Topic II - *Poluição e Seguro (Pollution and Insurance)*, at the AIDA V World Insurance Law Conference, in 1978: "Hasta hace aproximadamente diez años, el problema de la cobertura de daños causados por la contaminación era prácticamente ignorado en el marco del seguro de responsabilidad general. Posteriormente, tras varios escapes de petróleo dramáticos (incluyendo el de la Torrey Canyon), y teniendo en cuenta la creciente atención suscitada por las tremendas reclamaciones que podrían derivarse de la acumulación gradual de productos tóxicos, los aseguradores tomaron consciencia del problema". Source: KELLY, Ambrose B. *Poluição e Seguro (Pollution and Insurance)*. In: CONGRESO MUNDIAL DE DERECHO DE SEGUROS, 5, 1978, Madrid. *Annals...* Madrid: Mapfre Editorial, 1978. p. 15.



However, in contemporary times, they have already reached another level of importance and individualised attention, especially in societies with more developed insurance markets. In Brazil, studies have begun to evolve towards the formulation of specific contractual basis in order to structure this new and increasingly more prominent insurance sector in the domestic market.

These and other topics are analysed in the third edition of the book "Programa de Seguros de Riscos Ambientais no Brasil: estágio de desenvolvimento atual" ("Environmental Risk Insurance Programme in Brazil and its current stage of development"), consistent with the content already found in the second edition. The revision and consolidation of the themes have made the work

more comprehensive, attributing concepts and information about that particular branch of insurance as evidenced in Brazil. The key objective was a greater degree of focus on what is new in this area in terms of insurance. From this perspective, the text offers comprehensive insights suited to the interests of professionals and students involved with contemporary environmental issues. ●

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