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POLLUTION INSURANCE

- METHODS, COVERAGE AND BENEFICIARIES

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BRAZIL REPORT

PROFESSIONALS RESPONSIBLE FOR THE COMPLETION OF THE QUESTIONNAIRE:

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QUESTIONNAIRE

Introduction

The topic related to environmental damage insurance covering losses resulting from pollution was selected by AIDA's Brazilian Chapter for discussion during the World Congress to be held in Rio de Janeiro, in October 2018.

Such choice was justified by the growing frequency and intensity of environmental damages worldwide that sometimes affect entire communities and stop the production of goods and the supply of basic public services. History has been disclosing events of great impact related to chemical industries (such as Seveso/1976 and Bhopal/1984), to oil industries (such as black tides from oil spill in several locations, and Exxon Valdez in the Gulf of Alaska/1989), to nuclear industry (such as Three Miles Island, Chernobyl), and, recently, the explosion at Deepwater Horizon in 2010, in the Gulf of Mexico, that produced a significant repercussion.

In Brazil, environmental pollution has been raising great awareness and discussions, particularly in view of the last relevant event occurred in Mariana city (State of Minas Gerais), in November 2015, resulted from the collapse of the Fundão dam that spilled 50 million cubic meters of mine wastes downstream, contaminated the Doce River in its whole extension, and caused huge environmental, social and economic impact to populations and cities.

This context requires an analysis on how national legislations address the matter, as well as on the contribution provided by the insurance industry to either remedy or mitigate the impact from environmental damages. The local reports shall be particularly useful to the assessment of an issue whose perceptions may vary on a significant basis, depending on the national legal and administrative peculiarities. Please prepare your report in such a way as to submit the information as required for a correct and full understanding of the answers to the questions made herein.

This questionnaire contains only indicative questions. Please try to inform all the issues you may deem as important to the study of the topic, in the light of your country's scenario. Any information and comments shall be relevant. As the purpose of this questionnaire

is to know the situation in your country, we kindly ask you to provide answers that specifically refer to such scenario.

PRELIMINARY REMARK:

Please note that the questions under “1. Environmental Legal Aspects” relating to liability issues aim at ensuring a better understanding of the pollution insurance law and practice in different countries. Answering those questions is left to the sole discretion of the national reporter who may freely choose to answer only questions relating to insurance law aspects (i.e. to questions from “2. Legal aspects on environmental insurance policies” to “7. Academic development”).

1. Environmental legal aspects (answer is optional)

1.1. Which are the major general rules on civil liability arising from environmental damages in your country?

In Brazil, the environmental civil liability results from a wide range of rules that compose an environmental liability system. It is shown the main rules, in overall nature liability.

Federal Constitution, which expressly provides on: Art. 225. Everyone is entitled to the environment ecologically balanced, right to the common use of the people and essential to the healthy life quality, by imposing to the Public Power and to the community the duty of defending and preserving it for the current and further generations. § 2 He who explores mineral resources has the obligation to recover the degraded environment, according to technical solution required by the competent public body, according to the law. § 3 Conducts and activities considered harmful to environment shall subject violators, individuals or legal entities to criminal and administrative sanctions, regardless of the obligation to repair caused damages.

Law 10.406/2002 (Civil Code), which provides on general rules regarding civil liability in articles 927, 186 and 187: Art. 927. He who that, by illegal act, causes damage to another, has the obligation to repair it. Art. 186. He who that, by voluntary action or omission, negligence or imprudence, violates the law and cause damage to another, even exclusively moral, commits illegal act. Art. 187. The holder of a right that, when exercising it demonstrably exceeds the limits imposed by its economic or social purpose, by good faith or by good practices also commits illegal act.

Law 6.938/81, which provides on the National Policy of Environment, its purposes and arrangements of formulation and enforcement, including establishing important legal concepts, such as pollution, degradation, polluter and environment.

Law 9.605/98, which provides on the criminal and administrative sanctions resulted from conducts and activities harmful to environment.

Furthermore, there is specific legislation for the different natural resources and for different activities, as shall be described in own item below.

1.2. Please describe the main characteristics and objectives of environmental civil liability in the light of national legislation and court precedents.

1.2.1. How are environmental damages described under the law?

The Brazilian legislation does not provide a specific concept of environmental damage, which has been developed by the opinion of jurists and precedents as of the concepts of pollution and degradation set forth in Law 6.938/81, that is: Art 3 - For purposes established in this Law, it is understood as: II - environmental quality degradation, the adverse change of the environment characteristics; III - pollution, the environmental quality degradation resulting from activities that, directly or indirectly: a) damage health, safety and welfare of population; b) give rise to conditions different from the social and economic activities; c) affect biota adversely; d) affect the aesthetic or sanitary conditions of the environment; e) launch matters or energy in non-compliance with the established environmental standards.

1.2.2. Who may be (either directly or indirectly) made liable?

Law 6.938/81 describes polluter as being: IV - polluter, the individual or legal entity, of public or private law, responsible, directly or indirectly, for activity causing environmental degradation.

Although it is not a consolidated understanding, there are sentences reaffirmed by the Superior Court of Justice (maximum Court for construction of the ordinary legislation) providing on the concept of polluter is very broad, stating: For the purpose of assessment of the causal connection in the environmental damage, it is equated who does it, who does not do it when should do it, who fails to do, who does not care to do, who sponsors to do, and who takes advantage when others do.

1.2.3. How is the determination of causal link of environmental damages?

The legislation does not provide on different modules of establishment of causality, although the procedural law (Consumer's Defense Code and Code of Civil Procedure) establishes the shifting of burden of proof, in procedural issues, as well as dynamic distribution of the burden of proof, in situations in which one of the parties has the best technical and financial capacity of producing proof. Such events of shifting and redistribution of the burden give rise to admit a presumption of causality in specific situations, reason for which sentences and opinion of jurists are supported by the possibility of relaxation or flexibilization of the elements of the causality. Such issue, however, is not completely devoted in the Courts.

1.2.4. Does your legislation provide for strict or fault-based environmental liability?

The Brazilian legislation is strict, objectively providing on the civil liability, regardless of fault (objective). Although there is no determinant understanding, there are statements that Brazil adopted the principle of the full liability, not admitting any form excluding liability. Such issue, however, is not completely devoted in the Courts.

1.3. Are there peculiarities regarding environmental damages resulting from pollution? If so, are there differences in the legal treatment to air, soil or water pollution?

The rules on responsibilities for environmental damages are general in the terms presented in the previous items, being valid for damages of any type of natural resources. However, there are specific legislations on air, soil, and water resources quality, although they do not establish a different regime of civil liability. For example, Law 9.433/87, which establishes the National Policy of Water Resources, creates the National System of Water Resources Management; or for having direct relation with water quality, Law 11.445, which establishes national guidelines for basic sanitation. However, they insist that do not establish a different regime of civil liability.

1.4. Which are the governmental entities in charge of authorizing and supervising activities that produce environmental impacts or pollution?

Brazil adopts models of common (and concurrent) administrative competences as to environmental protection matter (currently regulated by Complementary Law 140/2011), by virtue of the Federal Constitution (article 23). Thus, at all federative levels (Union, States, Federal

District and Municipalities) there is the possibility of having monitoring, authorization and supervisory entities of activities impacting environment.

Such set of entities form the National Environment System - SISNAMA, composed of bodies and entities of the Union, of the States, of the Federal District, of the Territories, and of the Municipalities, as well as foundations established by the Public Power, responsible for the protection and improvement of the environmental quality. It should be emphasized the environmental bodies of the States, as well as IBAMA, at federal level.

With direct, and emphasized, assignment, including by constitutional virtue, it should be mentioned the assignment of the Public Prosecution Office (at the level of the States and Federal), to act for the benefit of the environmental protection.

1.4.1. What is the scope of activity of these entities?

The scope of the environmental bodies that compose SISNAMA is: enforce and cause to enforce the policy and government guidelines established for the environment, according to the respective competences; implementation of programs, projects and by the control and inspection of activities capable of causing environmental degradation.

In turn, the Public Prosecution Office, which does not compose SISNAMA, has assignment either to inspect and issue recommendations, or to act procedurally.

1.4.2 How do they operate, and on which legal grounds?

The bodies that compose SISNAMA operate, basically, in the definition of standards of issuance, environmental licensing and environmental inspection, as well as:

I - government action in the maintenance of the ecological balance, considering the environment as a public property to be necessarily ensured and protected, aiming at the collective use;

II - streamlining of the use of the soil, sub-soil, water and air;

III - planning and inspection of the use of the environmental resources;

IV - protection of the ecosystems with the preservation of representative areas;

V - controlling and zoning of the potential activities or effectively polluter;

VI - incentives to study and research of technologies oriented to rational use and protection of the environmental resources;

VII - following-up of the environment quality status;

VIII - recovery of the degraded areas;

IX - protection of threatened areas of degradation;

1.5. Is there a legal system of procedural mechanisms in case of environmental offenses?

The procedural arrangements are basically regulated by Law 7.347/85, which regulates on the Public Civil Action of responsibility for damages caused to environment, consumer, assets and rights of artistic, aesthetic, historical, touristic and landscaping value. Such legislation, however, engages with other procedural decrees, such as the Code of Civil Procedure, the Citizen's Action Act, the Law against Misconduct in Public Office and the procedural part of the Consumer's Defense Code, among others.

The Public Civil Action set forth in Law 7.347/85 is the main procedural instrument for environment protection, and the rest for custody of the diffuse and collective interests and rights. The Public Prosecution Office is the main responsible for the filing of environmental public civil actions, although there are others legitimized.

1.5.1. Who is in charge of keeping the environmental protection?

Those legitimized to file public civil action are set forth in article 5 of Law 7.347/85, to wit: Public Prosecution Office; Public Defender; Union, the States, the Federal District and the Municipalities; government agency, public company, foundation or mixed capital company; and associations (for example, ONG's)

1.5.2. How does this system work?

The procedural system of environmental protection is submitted to the procedural rules set forth in the Code of Civil Procedure.

2. Legal aspects on environmental insurance policies (answer is required)

2.1. Is there a specific legal framework to regulate environment insurance policies? If so, please describe such legislation, as well as the major features thereof.

Brazil still does not have a specific regulation on environment insurance policies.

2.2. In the event of a negative response to the question 2.1, please inform if there is any administrative rule, or any other kind of legal regulation that applies to environmental insurance policies. In this case, please describe such regulation, as well as the major features thereof.

Brazil adopts sparse rules that refer to environmental insurances so far. We point out two of them, for the special relevance.

The National Policy of Environment, established by Law 6.938/1991, with further amendments, defines as one of its principles (article 2, VIII) that of "repair of degraded areas" and, for such, establishes among its objectives the "restoration of the environmental resources aiming at its rational use and permanent availability, concurring for the maintenance of the ecological balance propitious to life" (article 4, item VI) and the "order, to polluter and predator, of the obligation to recover and/or indemnify the caused damages and, to the user, of the contribution for the use of environmental resources with economical purposes" (article 4, item VII). In article 9, it is listed the instruments of the National Policy of Environment and as of 2006, by Law 11.284/2006, item XIII is entered to institute economic instruments, among which the forest concession, environmental servitudes and the **environmental insurance**.

More recently, it has been established Law 12.305/2010 that refers to National Policy of Solid Wastes, which provides on its article 40:

Art. 40. In the environmental licensing of ventures or activities that operate with hazardous wastes, the licensor body of Sisnama may require the contracting of civil liability insurance for damages caused to environment or public health, according to the rules regarding coverage and maximum limits of contracting established in regulation.

Sole paragraph. The provision of the **main section** shall consider the company's size, according to regulation.

This law was regulated by Decree No. 7.404/2010, which provides on:

Art. 67. In the environmental licensing of ventures or activities that operate with hazardous wastes, the licensor body of SISNAMA may require the contracting of civil liability insurance for damages caused to environment or public health, according to the rules regarding coverage and maximum limits of contracting established by the National Council of Private Insurances - CNSP.

Sole paragraph. The enforcement of the provision in the **main section** should consider company's size and characteristics.

However, there is no regulatory arrangement on the rules of coverages yet.

2.3. Does the law provide for compulsory environmental insurance?

There is no legal provision of obligation of environmental insurances or insurances for pollution.

2.3.1. If so, which would be the relevant risks, covered items and limits?

Not applicable.

2.4. In case of a legal requirement or regulation, when should an environmental insurance policy be obtained?

Not applicable.

2.4.1. In which step of a venture should such policy be submitted under the law?

Not applicable.

3. Operational methods for pollution insurance (answer is required)

3.1. Which are the pollution insurance's modalities that are offered in the market? Performance bonds or civil liability insurance?

The type provided in Brazil is of civil liability. However, within such modality, there are products that allow the setting of coverage through the discovery by the own Insured Person of events of environmental pollution, in addition to third-parties' complaint. Generally, the policies are referred to as Environmental Risk Insurance by the Brazilian Market. Susep establishes the formal nomenclature of the area as Civil Liability Insurance Environmental Risks (R.C. Environmental Risks).

3.1.1. What kinds of risks should be covered thereunder?

The covered environmental pollution risks involve: the disposal, diffusion, release or scape of any irritating, polluting, or solid, liquid, gaseous or thermal contaminant element, including, but not limited to smoke, steam, soot, exhalation, odor production, noises, vibrations, variations of temperature, waves, acid, alkaline, toxic chemical products, fungi, hospital waste and scrap material, in or on the soil, or in any other structure on the soil, in the atmosphere or in any

watercourse, or in other water natural resources, including water tables, among others. This definition of POLLUTION CONDITIONS is the essence of the product, given that all coverages should be related, in their origin, with these Pollution Conditions.

Coverages provided by the Brazilian Market are: Cleaning Costs and Expenses of the Pollution Conditions, Judicial Costs of Defense, bodily, moral Damages and material damages on third-parties, Collective Environmental Moral Damages, Damages to Natural Resources, Environmental Compensation, Loss of Use and Loss of Value, Loss Restraint Expenses, Third-Party's Loss of Profit, Own Insured's Loss of Profit, Pre-Existing Pollution Conditions, Crisis Management, Third-Parties Locations for disposal of wastes and residues.

3.2. Does the law or administrative rule define upper limits for losses or coverage?

Currently, only a standard establishes the minimum insured limits for policy of Environmental Risk Insurance, which is the Ordinance of the Administration of the Ports of Paranaguá and Antonina - PR (APPA) No. 064/2016, applicable only to the reference port area, and only for companies that carry out service provision activities of phytosanitary treatment (fumigation). The Ordinance imposes the contracting of policies with pre-established limits of BRL 1,000,000.00 for fumigation activities, when vessels are docked at the port, and BRL 3,000,000.00 for fumigation activities, when vessels are offshore (sea).

3.2.1. Which are the criteria that should apply to limits' definition?

In this specific case of the Ordinance APPA No. 064/2016, there are no established criteria applied to the definition of these minimum limits.

In general terms, Insurance Brokers and the Insured Persons require the limits for subjective criteria established by them.

3.3. Is there any difference in the legal treatment to state-owned and private ventures?

No.

3.4. Is there any difference in the legal treatment to fix and mobile facilities?

No.

3.5. Is there any difference in the legal treatment to underground works, mines or underground quarries?

No.

3.6. Do insurers use to insert pre-contractual provisions in the policy (pre-contractual disclosure)?

No.

3.6.1. Which are the most usual ones?

No.

4. Coverage under pollution insurance (answer is required)

4.1. Which are the major covered risks relating to civil liability arising from pollution?

The risks of soil and surface/groundwater pollution.

4.2. Which are the major covered guarantees for events arising from pollution?

The warranties involving the coverages of cleaning costs and expenses of pollution, and also the coverages of pollution related to wastes generated by Insured Persons and intended to third-party's places (landfills, for example), in addition to the Costs of Defense related to such coverages.

4.3. Which are the major covered operational risks arising from pollution?

The industrial risks, of industrial plants of the most different sectors of the economy, such as chemical, metallurgical, automotive industries, power generation, among others.

4.4. Does the insurance cover fines?

No.

4.5. Is there coverage for individual moral damages, being understood as such any physical or psychological suffering experienced by the victim and/or injury against his/her honor or personality?

Yes, all policies of the Brazilian Market provide coverages for individual moral damages, when caused by events of environmental pollution.

4.6. Is there coverage for collective moral damages, being understood as such any moral injury undergone by a group of certain persons who are interconnected by a fundamental legal relationship or by a same event experienced by all of them, or any injury to non-determinable trans-individual rights?

Yes. In a recent movement (of 1 year for present times), Insurance Companies are modernizing their clauses and starting to provide coverage for collective environmental moral damages.

4.7. Is there coverage for punitive damages, being understood as such any penalty levied on the agent of the illicit conduct, in addition to the compensation of damages themselves?

No.

5. Beneficiaries (answer is required)

5.1. Who is entitled to be beneficiary of losses recoverable under pollution insurance? Any individuals, legal entities, state-owned or private institutions, collectivities?

From the point of view of the insurance, it is not clear yet of whom are the beneficiaries of an environmental insurance.

Making an analysis on the traditional aspect of the civil liability, beneficiaries are third-parties, individual. In this case, the reflective environmental damages that affect individuals should have indemnifications inured for the benefit of the own damages individual, according to its losses.

However, as to the third-party definition, including for purposes of understanding of the range and of the beneficiaries in the insurances of environmental civil liability, within the scope of the environmental risks and of the diffuse injuries, receive own outlines and very special regarding the resizing of the injured third-party in the environmental civil liability, especially with regard to the damages to natural resources, loss of the environmental quality and diffuse non-property environmental losses. The third-party, beneficiary of the insurance, shall be the collectivity, not customizable.

Thus, the solution, by speculation, will undergo the adhesion to the general system of environmental protection of diffuse rights, with conversion of indemnifications to Environmental Damages Recovery Funds, or equivalents, that in Brazil has compensatory nature, that is, funds resources are intended to recovery, protection and environment preservation projects, not necessarily interconnected to the activity that gave rise to the environmental damage.

On the other hand, there is the possibility, in a procedural perspective, of imposition, to the insured person that has caused an environmental damage, of specific measures (obligation to do) to recover the environmental damage directly caused.

Therefore, beneficiary will be the holder of the right or interest of the environmental property that had its quality reduced (damages to natural resources, loss of environmental quality and diffuse non-property environmental damages) and, being such holder the community, its defense will be made by those that have procedural capacity and legitimacy, as already previously pointed out (item 1.5 above).

6. Market status (answer is required)

6.1. What is the percentage of participation of environmental insurance at the insurance market in its whole?

According to data of the Superintendence of Private Insurance - SUSEP, the participation of the environmental insurance in the Brazilian market is lower than 1%, considering only the property and liability insurances (therefore, disregarding life, pension and health).

6.1.1 As regards the figures thereof, what is the yearly participation of premiums collected under environmental insurance?

According SUSEP data, in 2016 it was collected 17 million Dollars in premiums.

6.2. Which are the sectors of economic activity that use to obtain environmental insurance?

Many sectors, such as: chemical, metallurgical, automotive, pharmaceutical, storage of hazardous products, transportation of hazardous loads, energy (generation, transmission and distribution) and steel.

6.3. During the last 5 (five) years, what is the sum of losses paid by virtue of environmental damages?

Indemnified losses, by virtue of environmental damages in the last 5 years, have been in the amount of approximately 10 million Dollars.

6.3.1. What percentage of the aforesaid losses was covered under insurance?

Annual average of 20%.

7. Academic development (answer is required)

7.1 Are there research institutes focused on the study of environmental insurance? Please identify them.

There are individual researches, including with preparation of dissertations and thesis. However, there are no institutes or universities with specific research lines of the subject.

AIDA Brazilian Section, since 2010, has a specific work group of the subject, which production, in part, is informed on the following item.

The National Group of Work of Risks, Insurances and Environmental Sustainability commits to the study of issues related to Environmental Insurances and Risks and Environmental Sustainability in the Insurance Operations, especially of the high entering and reflections of the environmental issued within the scope of the insurance operations, of the expansion of the environmental insurance area, and the necessity of increasing inclusion of practices of sustainability in the insurance market.

7.2 Are there academic and scientific works produced in the fields of law, economy, environment or other similar area, that specialize in environmental insurance? Please indicate some reference legal manuscripts and books, and the main authors thereof.

Some legal texts can be found in the following collections on the subjects of insurances organized by the AIDA Brazilian Section:

CARLINI, Angélica; SARAIVA, Pery. (Org.). **Aspectos Jurídicos dos Contratos de Seguro**. Porto Alegre: Livraria do Advogado, 2013.

____; _____. **Aspectos Jurídicos dos Contratos de Seguro - Ano II**. Porto Alegre: Livraria do Advogado, 2014.

____; _____. **Aspectos Jurídicos dos Contratos de Seguro - Ano III**. Porto Alegre: Livraria do Advogado, 2015.

____; _____. **Aspectos Jurídicos dos Contratos de Seguro - Ano IV.** Porto Alegre: Livraria do Advogado, 2016.

____; _____. **Aspectos Jurídicos dos Contratos de Seguro - Ano V.** Porto Alegre: Livraria do Advogado, 2017.

Ainda:

POLIDO, Walter. **Seguros para riscos ambientais.** São Paulo: Revista dos Tribunais, 2005.

____. **Programa de Seguros de Riscos Ambientais no Brasil:** estágio de desenvolvimento atual. Rio de Janeiro: Funenseg, 2014.

SARAIVA, Pery; FENILI, M. B. . Seguro Ambiental Obrigatório: propostas legislativas, (in) convenientes e perspectivas pós desastre de Mariana. REVISTA ELETRÔNICA TRIMESTRAL DA ASSOCIAÇÃO INTERNACIONAL DE DIREITO DE SEGUROS, v. 1, p. 41, 2016.

SARAIVA, Pery; MARIANO, G. G. . Precificação dos Seguros para Riscos Ambientais: jurisprudência do STJ como fator de compreensão e delimitação da responsabilidade civil ambiental. Revista Jurídica de Seguros, v. 1, p. 82-117, 2015.

SARAIVA, Pery; LOPES, R. H. V. ; FERREIRA, M. A. P. ; MARIANO, G. G. . SEGURO AMBIENTAL COMO INSTRUMENTO ECONÔMICO DE PROTEÇÃO AMBIENTAL. In: 18o CONGRESSO BRASILEIRO DE DIREITO AMBIENTAL, 2013, SÃO PAULO/SP. 18o CONGRESSO BRASILEIRO DE DIREITO AMBIENTAL - INSTITUTO O DIREITO POR UM PLANETA VERDE. SÃO PAULO, 2013.

SARAIVA, Pery. O Seguro de Responsabilidade Civil Ambiental: fatores jurídicos para a adequada implementação no mercado brasileiro. In: XII Congresso Ibero-latinoamericano de Derecho de Seguros - III Congresso Internacional del Seguro, 2011, Asunción. Ponencias y Comunicaciones - XII Congresso Ibero-latinoamericano de Derecho de Seguros - III Congresso Internacional del Seguro, 2011. p. 401-414.
