

INTERNATIONAL INSURANCE LAW ASSOCIATION/ AIDA

WORLD CONGRESS

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**Topic IV - POLLUTION INSURANCE
- METHODS, COVERAGE AND BENEFICIARIES**

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QUESTIONNAIRE

Introduction

The topic relating 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 relating 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, resulting 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 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 are aimed 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?

DL 147/2008 has transposed the Environmental Liability Directive into national law and this Directive establishes an “administrative liability” towards the environment, excluding damages to persons or property, thus civil liability. However, the Portuguese legislator went further than the Directive and also established a civil liability regime in that diploma, in parallel with the “administrative liability”.

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?

Environmental damages are defined in our law as in the Directive. Environmental damage means (a) damage to protected species and natural habitats, which is any damage that has significant adverse effects on reaching or maintaining the favourable conservation status of such habitats or species...(b) water damage, which is any damage that significantly adversely affects the ecological, chemical and/or qualitative status and/or ecological potential...” (c) Land damage, which is any land contamination that creates a significant risk of human health being adversely affected as a result of the direct or indirect introduction, in, or under land, of substances, preparations, organisms or microorganisms...”

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

Any operator leading an economic activity and whose activity has caused the environmental damage or the imminent threat of such damage is to be held financially liable.

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

Causal link is determined on a basis of likelihood and probability that the fact is able to produce the damage in question, considering the circumstances and other criteria. This means definite proof regarding a causal relation is not required in order to establish liability, only likelihood.

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

Both. In the case of the activities listed in Annex III (considered dangerous activities that may cause damage to environment) there is a strict liability regime; for other activities, there is fault-based liability.

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?

Yes. In the case of natural habitats and water, the law mentions “damage” or “imminent threat of damage”; there can be damages without contamination. In the case of land damage, not only contamination is required, but it must also imply a significant risk for human health. Regarding air, environmental damage only includes damage caused by airborne elements as far as they cause damage to water, land or protected species or natural habitats.

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

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

The competent authority is APA – Agência Portuguesa do Ambiente (Portuguese Environment Agency) and its scope of activity is wide. The operators are obliged to inform APA about any aspects related to an imminent threat and prevention measures, as well as the occurrence of any damages and the measures taken to contain them. APA has the authority to monitor all measures taken as well as to take those measures whenever operators fail to do so. APA has to be informed at all times and

may give instructions to operators as how to proceed whenever deemed necessary, or even take the measures themselves and later charge the costs to the operator. They have to be consulted at all times during the whole process. They also have to verify the existence of the mandatory financial guarantee required of the operators with dangerous activities, as listed on Annex III.

There are other audit entities such as Government institutes related to the Environment and Territory as well as pro-military entities for the Protection of Nature and Environment.

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

They act according to DL 147/2008 and other legislation about environment protection.

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

Yes.

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

APA, as mentioned before.

1.5.2. How does this system work?

The law provides for a series of prevention and restoration measures that have to be undertaken by the operator while reporting permanently to APA and in close cooperation.

Prevention measures include:

- . Reporting by operators of any imminent threat to the environment;
- . The operator taking immediate measures to avoid new damages and immediate report to the competent authority about the measures taken and their success in avoiding damage;
- . APA may demand any reports from the operator and also that they take the necessary prevention measures; they can also execute these measures whenever the operator does not act accordingly.

Whenever environmental damage occurs, the operator is required to notify APA in 24 hours and adopt all necessary containing or mitigating measures, keeping APA

informed at all times. APA will intervene in the whole process giving instructions and demanding that all remediation measures are taken.

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.

There is no such framework. However, policies tend to adapt their wordings to the definitions and requirements of DL 147/2008.

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.

Not applicable.

2.3. Does the law provide for compulsory environmental insurance?

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

The law does not require compulsory environmental insurance. However, DL 147/2008 requires a mandatory financial guarantee for Annex III activities, and this may be complied through an insurance policy, a bank guarantee, and the participation in environmental funds or the constitution of special funds for this effect.

However, the law does not give any further details, stating that minimum limits might be the object of further regulation, but this hasn't happened so far.

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

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

For all activities listed in Annex III, the constitution of the mandatory financial guarantee came into force on January 1st 2010, so after that date all these activities are obliged to have the guarantee.

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?

As previously mentioned, the law does not require insurance, but it does require a compulsory financial guarantee, not for pollution but for environmental damage, a broader concept, that may include, damage to biodiversity without contamination (ie groundwater abstraction or habitat loss).

The market offers mostly liability insurance.

3.1.1. What kinds of risks should be covered thereunder?

Policies covers may vary according to companies, but they mostly offer:

- . Clean up costs
- . Bodily injury or property damage to third parties caused by polluting conditions resulting from the policyholder's activities and transportation
- . Environmental damage resulting from the policyholder's activities and transportation
- . Prevention costs
- . Defense costs

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

No.

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

Non applicable.

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?

Non applicable.

4. Coverage under pollution insurance (answer is required)

As mentioned before, we are dealing with Environmental insurance and not strictly pollution insurance. Some pollution insurance covers remain, as an extension of General Liability policies, but they have a very different – much more limited – scope than that of DL 147/08.

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

For answers to 4.1, 4.2 and 4.3 please see 3.1 above.

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

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

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 honour or personality?

Yes. According to Portuguese Civil law, moral damages will be indemnified whenever they are significant, and court decisions ultimately decide what “significant” is.. This is a concept that has been evolving and more situations are being considered as “significant”.

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?

There is cover for moral damages, as foreseen by law, but only in the case of civil liability, so a collective action would only be possible in the case of several injured parties as a consequence of the same event.

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, these are not allowed under Portuguese law.

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?

In the case of administrative liability, the environment itself is the beneficiary of indemnity. This means that preventive and remedial measures will have to be taken at the expense of the operator who is responsible, and they will be coordinated by the competent authority. However, intervention of the authority, or notification of imminent or effective damage may be required by a number of entities, considered to be “interested parties”. The law defines these “interested parties” as anyone who may be affected or have an interest related to the damage or imminent threat in question, or claims there has been a violation of a legitimate interest protected by law. In the case of civil liability, the individuals or entities suffering losses, as established in the Civil Code.

6. Market status (answer is required)

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

There are no official numbers as the market information includes Environmental liability in the General liability branch. Estimates are of 4 to 5% of the liability insurance market.premiums.

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

Around € 5,5 – 6 M, in 2016.

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

Large multinational companies tend to write this insurance, namely those with activities listed in Annex III. Among these, in the last year and due to an increase of inspections by the competent authority regarding compulsory guarantees, auto repair shops and

transport companies have been looking for insurance solutions, so the number of insurance policies for these activities has increased significantly.

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

Data not available.

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

Data not available.

7. Academic development (answer is required)

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

Not that I know of. Any research is mostly done by Universities in several areas (Law, Sciences and technology).

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.

The following works will be referred to in their original language (mostly in Portuguese):

Maria José Freitas (2014). Metodologia de Aplicação da Responsabilidade Ambiental à Indústria Cerâmica Estrutural – Tijolos e Telhas. Dissertação incluída no mestrado integrado em Engenharia do Ambiente, da Faculdade de Ciências e Tecnologias da Universidade Nova de Lisboa.

Alcides Pais Marques Mamede (2014). Responsabilidade ambiental aplicada ao sector dos resíduos sólidos urbanos : caso de estudo : Aterro Sanitário de Mato da Cruz. Tese de Mestrado em Cidadania Ambiental e Participação apresentada à Universidade Aberta (2014).

Clara de Almeida Couto e Valverde de Moura (2013). METODOLOGIA DE AVALIAÇÃO AMBIENTAL E QUANTIFICAÇÃO DE CUSTOS NO ÂMBITO DA RESPONSABILIDADE AMBIENTAL. Tese de Mestrado em Economia e Gestão do Ambiente. Faculdade de economia da universidade do Porto.

Fábio Miguel Pimenta Marques (2012). Avaliação do Risco Ambiental e Cálculo da Magnitude do Dano em ETAR. Dissertação para obtenção do Grau de Mestre em Engenharia do Ambiente. Instituto Superior Técnico.

Ana Salgueiro (2003). Development of a Framework to Support the Implementation of an Environmental Insurance System. Faculdade de Ciências e Tecnologias da Universidade Nova de Lisboa

Teses da Universidade de Lisboa e Católica

Data	Título	Autor(es)	Tipo
2009	<u>Repercussão do ato administrativo extinto na responsabilidade penal ambiental</u>	<u>Costa, Geyson Nunes da</u>	masterThesis
2011	<u>Argumentos publicitários de defesa do ambiente</u>	<u>Sílvia, Alexandre; Horta, Ana</u>	bookPart
30-Jun-2015	<u>A responsabilidade ambiental no âmbito dos deveres dos administradores</u>	<u>Menezes, António Maria Côrte-Real de Magalhães</u>	masterThesis
18-Jun-2013	<u>Responsabilidade internacional por dano ecológico</u>	<u>Xavier, Bernardo Pinto</u>	masterThesis
20-Ago-2014	<u>Fundo ambiental da União Europeia</u>	<u>Machado, Sara Daniela Coelho</u>	masterThesis
19-Jan-2015	<u>Responsabilidade da administração por déficit de ponderação de circunstâncias de risco no âmbito do licenciamento ambiental</u>	<u>Barroso, Aquiles das Mercês</u>	masterThesis
27-Ago-2014	<u>O transporte de resíduos perigosos e a responsabilidade por dano ecológico</u>	<u>Madeira, Ana Rita Fonseca</u>	masterThesis
2009	<u>Responsabilidade civil por dano ambiental: inovações legislativas</u>	<u>Sanches, Filipa Melo Pires da Silva</u>	masterThesis

Livros:

Responsabilidade Ambiental - Operadores Públicos e Privados. Sofia Sá. 2011

Responsabilidade Ambiental – O princípio do poluidor pagador e a importância da Gestão de Risco. Ana Salgueiro – 2013.
