



Roundtable

# Trends in Brazilian Environmental Law and Enforcement Under the New Administration

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# Doing Business in Brazil: Environmental Obligations and Liabilities

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# Brazil 101—Location and History

- Largest country in South America. 5<sup>th</sup> largest country in the world. Total area slightly smaller than the U.S.
- 26 states and one federal district (capitol—Brasilia)
- >7,000 km coastline
- Located in eastern South America. Borders the Atlantic Ocean, Argentina, Bolivia, Colombia, French Guiana, Guyana, Paraguay, Peru, Suriname, Uruguay and Venezuela.
- Formally recognized as independent in 1825. Abolished the monarchy and became a republic in 1889. A republic again in 1985 after dictatorships and a military regime era.
- One of the strongest emerging markets despite 2013–2016 recession

# Brazil 101—Economy and Population

- 8<sup>th</sup> largest economy in the world. Belongs to Mercosur, the Common Market of the South, together with Argentina, Paraguay and Uruguay.
- \$1.96 trillion GDP (2019)—“anemic economy and stretched public finances”
- \$240 billion worth of goods exported in 2018. Primary trading partners: China, U.S., Argentina and the Netherlands. Major commodities are soy, crude oil, iron ore, meat, cellulose, sugar and coffee.
- Brazil imported \$181.2 billion worth of goods in 2018. The primary commodities included machinery, electrical and transportation equipment, chemicals, oil, car parts and electronics. Primary import partners were China, the U.S., Argentina and Germany.
- U.S. goods and services trade with Brazil: \$103.9 billion in 2018 (\$28.9 surplus)
- U.S.’s 9<sup>th</sup> largest good export market in 2018 (mineral fuels, aircraft, machinery, electrical machinery and plastics)
- US’s 17<sup>th</sup> largest supplier of goods imports in 2018 (mineral fuels, iron and steel, aircraft and machinery)
- Approximately 210 million people
- High ratio of immigrants, primarily from Argentina, Chile and the Andean countries. Many of these immigrants are illegal and unskilled, contributing to poverty and high unemployment.
- Brazil grew 2.2% since the 1980’s. 0.6% per year growth during the past 10 years.
- Several structural problems

# Brazil 101—Political Landscape

- Federal representative democratic republic
- Presidential system: President Jair Bolsonaro took office in January 2019. President #38 since 1889.
- First 100 days of Bolsonaro:
  - New environmental laws—federal level penalties—mediation system
  - Reduction of Ministries—From 39 to 22
  - Gun Possession Decree
  - Anticrime Package
  - Pension Reform
  - Cut of 21K governmental positions—\$50 Million/year in savings
  - Tourist Visa Suspension: United States, Japan, Canada and Australia. Unilateral decision in force as of 17 June.
  - Alcantara Base: Bolsonaro Offered the Military Base of Alcântara, in Maranhão, to U.S. Military Operations
  - End of Daylight Saving Time
  - Dismissal of Ministers

# Environmental Protection Principles

1. **Right to an ecologically balanced environment (Art 225 of Constitution)**
2. **User Pays (and Polluter Pays) Principle.** Those who produce pollution should bear the costs of managing it to prevent damage to human health or the environment.
  1. User pays for the use of environmental resources for economic purposes. It is not punishment for infringing the law. You pay for the pollution that CAN BE CAUSED.
  2. Polluter Pays Principle included: polluter to recover and/or indemnify for any damage caused.
3. **Prevention**
  1. Duty to avoid the damage to the environment, whenever it is considered as possible (environmental impact studies).
4. **Precaution—In Doubt Pro Health—In Doubt Pro Environment**
  1. Under scientific uncertainty of the environmental risk—protect the human lives and the environment
5. **Reparation**
  1. National Environmental Policy Act (Law 6.938/81) provides for strict liability regime for reparation of environmental damages. Art. 14, § 1-“...the polluter obliged, regardless of the existence of guilt, to indemnify or repair the damage caused to the environment and to third parties affected by its activity.”



# Environmental Liability System

- Constitution-based

Art. 225, § 3 of the Federal Constitution of 1988:

“Conducts and activities deemed harmful to the environment will subject the offenders, individuals or corporations, to **criminal** and **administrative** sanctions, regardless of the **obligation to repair** the damage caused.”

- Triple repercussion for environmental damages
- Federal (IBAMA), States and Municipal Authorities: who does what?

# Environmental Liability System

- **The National Environmental System (Brazilian NEPA):** Federal Law 6,938 of 1981
  - Deliberative, Legislative and Advisory Body: National Council of the Environment ("Conselho Nacional do Meio Ambiente- CONAMA")
  - Central Authority: Ministry of the Environment ("Ministerio do Meio Ambiente - MMA")
  - Administrative/Executory Body: Brazilian Institute of the Environment and Renewable Natural Resources ("Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renovaveis - IBAMA")
  - Sectional Bodies: state environmental agencies responsible for implementing programs and projects for the control and supervision of activities capable of causing environmental degradation
    - Local Bodies: municipal environmental agencies responsible for the control and supervision of activities in their respective jurisdictions ("local impact")
- **Environmental Permitting**

Article 2 of CONAMA Resolution 237 of 1997: the construction, installation, expansion and operation of activities that use environmental resources or are considered potentially polluting or capable of causing environmental degradation, will require prior environmental licensing



# Environmental Liability System

- **Triple repercussion**
  - Offenders (individuals or legal entities) may be exposed to all the three, independently and simultaneously, with respect to the same event.
  - Absence of liability in one of these areas does not necessarily exempt the offender from liability in any of the other areas.
- **Civil liability: strict, joint and several.** Obligation to adopt remedial actions on contaminated areas and compensate for environmental damages may be imposed before:
  - i. the polluter and its successors;
  - ii. the owner of the contaminated area;
  - iii. the tenant;
  - iv. the holder of the area, and/or
  - v. parties which benefit directly or indirectly from the activity carried out at the contaminated area, independently or simultaneously.

# Environmental Liability System

- **Administrative liability:** action or omission that violates an environmental rule
  - Offenders subject to warning; fines of up to R\$ 50MM; seizure of illegal earnings, products and means employed to commit the offence; suspension of activities; closing of premises; demolition of facilities and restriction of rights.
- **Criminal liability:** action or omission defined as a crime (e.g. pollution). Requires fault or willful action. May extend beyond legal entity and reach management, technical and/or shareholders who contributed towards committing the offence.
  - Offenders subject to warning; fines; seizure of illegal earnings, products, and means employed to commit the offence; suspension of activities; closing of premises; demolition of works and restriction of rights, as well as fines and imprisonment for individuals.

# Private and Public Litigation

- Brazilian Procedural Code: no rigid limits to right of action
- Can be extensive and broad
- Investigation/Prep time: Civil Inquiries
- Civil Public Action Private litigation: affected parties
- Reimbursement Claims
- Evidence Production Claims
- Insurance Company related Claims
- Labor (work environment) related Claims: inspections, investigations, union claims and individual claims

# Shareholders—Directors & Officers—Liability

- Piercing the Corporate Veil—broad provisions
- Civil liability: regardless of fault or willful misconduct if framed under the category of indirect polluters
  - Key issue: did conduct create the risk or contribute to damage?
- Administrative and criminal: not strict—subjective—requires proof of fault or willful misconduct on the individuals

# Liability for Pollution

- Who is responsible for the clean-up?
  - Current Owners/Operators vs. Third Parties (neighboring site, former owner or operator)
- Potential Risks to Purchaser of Contaminated Land
- Contractual Liability Allocation
- Statute of Limitations
- Timing: Permits and Administrative Authorizations
- Titles, Registries
- Environmental Insurance

# Liability Mitigation

- Jurisdiction over contamination
  - Environmental authorities (administrative)
  - Public Prosecutors (civil and criminal)
- Environmental Due Diligence
  - Legal requirement or best practice?
  - Access to Information
  - Minimum Scope: Phase 1 and Phase 2
- Attention to liability triggers:
  - Disclosure/reporting obligations
  - Addition site evaluations (proactive or compliance)

# It's a Crisis—Now What?

1. Line up and set up situation management team/leadership
2. Identify priority stakeholders and engagement strategy
3. Review internal documentation (licenses, inspections/operational reports, board/executive decisions, budget provisions concerning investments and maintenance)
4. Promote cooperation between internal and external: cohesion of statements/actions to reduce risk of liability escalation
5. Employees or service providers among the victims: engage Unions and Labor Public Prosecutor Office to ensure proper flow of information and adequacy of investigation outputs



# It's a Crisis—Now What?

6. Search for positive and negative evidence re company/shareholders and management
7. Engage insurance experts to assess the situation and, more importantly, to comply with any notification requirement under relevant policies (these tend to contain very short notification deadlines)
8. Prosecutors: match their level of focus and dedication.
9. Engage technical teams to build arguments/evidences to assist litigators (also to be set up and engaged for readiness) to build up defense arguments to resist any such operations suspension attempts in courts
10. Correspondences should ALL be marked as "**Privileged & Confidential –Attorney Work Product/Communication**" and consultants should ALWAYS add a lawyer to the loop

# Questions?

Thank you!



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