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Pollution liabilities in Brazil

Practical Guidance

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Content

Foreword

As in other parts of the world, accidental spills from tankers carrying oil as cargo in Brazil are relatively rare, with most incidents occurring during the supply or transfer of bunkers within port limits. Despite its wide coastline, extensive inland waterways, and an ever-increasing number of vessels calling its ports each year, many carrying oil and other pollutants, instances of ship-sourced spill cases in this ecologically rich country have declined substantially in recent decades.

Notwithstanding the downward trend in oil discharge accidents, the value of punitive penalties arbitrated by various authorities and civil public actions seeking compensation for environmental recovery and other indemnities, such as pain and suffering (moral injury), often without proof of actual damage, has increased significantly, even in minor spills.

To further aggravate the situation, having already paid fines and the costs of clean-up and disposal of residues, among other expenses, it can take several years for compensation claims to reach the judiciary system, whose Supreme Court (STF) understands civil actions for environmental damage are not subject to limitation periods.

Invariably, the delay in filing – and even more so in processing – civil lawsuits leads to an exponential increase in the claim amount after the accrual of monetary restatement and interest, representing a substantial financial exposure for shipowners and their liability insurers, who are unable to close their files until all legal formalities and administrative matters are resolved, whatever the extent of the spill.

As in other lawsuits in Brazil, litigation over environmental issues can take several years in the courts, with various appeals available. Even if the accused is eventually acquitted after a lengthy process, fees paid to experts, lawyers and other professionals for the defence cannot be recovered.

From our perspective and hands-on experience of nearly five decades as commercial correspondents for P&I insurers, this guide intends to offer a brief overview of the Brazilian environmental policy, explaining the role of the intervening authorities, the regulatory framework that governs pollution caused by ships and walks through the multiple liabilities to which the polluter is exposed.

While certainly not a substitute for legal advice, we hope this guide will be useful as a practical reference to help navigate Brazil's intricate maritime environmental legislation and its ever-changing regulations.

We welcome your comments and suggestions for improvements for a future edition of this publication.

REPRESENTAÇÕES PROINDE LTDA.
June 2023

1. Introduction

1.1. Background

Until the mid-1960s, Brazil did not have specific legislation on liabilities for pollution in general, let alone water pollution caused by ships and platforms. Eventually, Law 5,357 of 1967 introduced administrative fines against vessels and port facilities that dumped debris or spilt oil within six miles of Brazilian territorial waters, irrespective of fault or intent.

Law 5,357/1967, then-called "Anti-Pollution Law", instituted penalties for vessels and terminals for amounts calculated according to an equation considering the vessel's net tonnage only, whatever the extent or severity of the pollution. In case of recurrence, the value of the fine was doubled[1].

The Maritime Traffic Regulation enacted in the early 1980s also established fines on vessels that caused pollution, often for amounts even lower than those set out in the Anti-Pollution Law[2].

There was no well-defined parameter in which of the two legal statutes the penalty should be framed. In practice, in cases of severe pollution, the authority would qualify the offence according to the law that stipulated the highest fine.

1.2. Increased environmental awareness

As global ecological knowledge and environmental awareness have evolved, state environmental agencies have become increasingly interested in investigating shipboard pollution incidents – and imposing fines concurrently with the maritime authority. **Sections 6.3 & 6.4**

[1] Law 5,357/1967 ("Anti-Pollution Law") set penalties for vessels and port terminals discharging debris or oil into Brazilian waters. Law 9,966/2000 (The Oil Law") expressly revoked it. Fines were calculated using a monetary unit adjusted to inflation rates multiplied by the ship's net tonnage. Fines against port terminals were calculated at 200 times the minimum national salary prevailing at the material time

[2] The now-revoked Decree 87,648/1982, which approved Brazil's Maritime Traffic Regulation at the material time, provided for fines ranging from two to twenty times the "Biggest Amount of Reference" (MVR, in the Portuguese acronym), considerably lower than those imposed under the Anti-Pollution Law

Yet, despite the authorities' growing concern about marine pollution cases, the country still lacked adequate legal framework, organisational structure and resources to respond to incidents and seek compensation from polluters. Liabilities for shipboard oil spills tended to be limited to small fines, even though a national environmental policy had already been introduced in the early 1980s. **Section 2.1**

This regulatory landscape changed drastically after the enactment of the Federal Constitution in 1988[3] and the comprehensive and stringent environmental legislation that followed. **Sections 3.1 & 3.2**

1.3. Constitutional changes

Brazil's supreme law identifies the environment as a public good to be defended and preserved by the government and society for the sake of present and future generations. The Constitution rules that individuals and legal entities involved in procedures and activities harmful to the environment are subject to criminal and administrative sanctions without prejudice to the obligation to repair the harm caused[4].

The federal union, states, and municipalities were empowered to legislate concurrently on environmental issues, including formulating pollution policies and enforcing liabilities. At the same time, federal and state public prosecutors were tasked with investigating pollution incidents and commencing civil suits ("public civil actions") to safeguard public and social assets, the environment, and other diffuse and collective interests[5]. **Sections 3.1, 5.6 & 7.4**

At the turn of the millennium, the environmental legal framework enshrined in the Federal Constitution was eventually regulated and gradually enforced. The novel legislation introduced a broader range of liabilities for offenders, whether natural or legal persons, including criminal responsibilities, along with a strict liability regime reaffirming the "polluter pays" principle already embraced in previous legislation, providing for much heavier penalties than those applied in earlier statutes.

[3] Constitution of the Federative Republic of Brazil, promulgated in October 1988

[4] "*All have the right to an ecologically balanced environment, which is an asset of common use and essential to a healthy quality of life, and both the Government and the Community shall have the duty to defend and preserve it for present and future generations*"; free translation of art. 225 of the Federal Constitution

[5] Art. 23, VI, & Art. 24, VI, of the Federal Constitution

2. Brazilian environmental system

2.1. National environmental policy (PNMA)

The *Política Nacional do Meio Ambiente* – PNMA (National Environmental Policy) was established by Law 6,938 of 1981[6]. It sets goals and regulates various environmental-related activities to preserve, improve and restore ecological quality, seeking to create conditions for social and economic progress and the protection of human dignity.

The Federal Constitution promulgated a few years later reaffirmed the guidelines and instruments of the PNMA to pursue ecological protection and ensure that the population finds favourable conditions for sustainable socioeconomic development.

2.2. National Environmental System (SISNAMA)

The PNMA is managed through the *Sistema Nacional do Meio Ambiente* – SISNAMA (National Environmental System), a multidisciplinary structure created by Law 6,938/1981, comprising representatives from the three levels of government, agencies, and non-governmental organisations to articulate and harmonise environmental policies and guidelines across the entire public administration. Law 10,650 of 2003 enables public access to data and information gathered by SISNAMA members.

2.3. Intervening authorities

As the Federal Constitution and specific legislation allow for concurrent jurisdiction, a single pollution incident may involve, at the same time, municipal, state, and federal agencies, in addition to the port authority and the maritime authority (harbour master)[7]. Listed below are central public bodies empowered to issue and apply environmental regulations nationwide.

[6] Law 6,938 of 31 August 1981, regulated by Decree 99,274/1990, as amended)

[7] Complementary Law 140/2011 sets forth rules to harmonise public policies and measures to avoid repeated actions by different authorities to avoid jurisdictional conflict and overlapping authority and guarantee administrative action's effectiveness. It amended the National Environmental Policy

2.3.1. Ministry of the Environment (MMA)

The *Ministério do Meio Ambiente* – MMA (Ministry of the Environment) is the federal cabinet-level authority of the executive branch responsible for formulating and implementing environmental policies in articulation and cooperation with other public actors and society.

2.3.2. National Council for the Environment (CONAMA)

The *Conselho Nacional do Meio Ambiente* – CONAMA (National Council for the Environment) is a collegiate body of advisory and deliberative nature within the SISNAMA. It is headed by the minister for the environment and made up of other ministries, agencies, representatives of the private sector and environmental organisations. CONAMA advises the government on environmental and natural resource policies and deliberates on norms and standards, including methodology and content of contingency plans. **Sections 2.4 & 2.5**

2.3.3. Federal Environment Agencies (IBAMA/ICMBio)

The *Instituto Brasileiro do Meio Ambiente e dos Recursos Naturais Renováveis* – IBAMA (Institute of the Environment and Renewable Natural Resources) is an agency under the purview of the MMA, whose purpose is to implement and enforce the National Environmental Policy. As the federal environmental police[8], IBAMA conducts administrative processes and levies fines. It represents the MMA in the recently redesigned National Contingency Plan and is responsible for maintaining the newly created database on pollution incidents ("Sisnóleo"). **Sections 2.4 & 6.3**

The *Instituto Chico Mendes de Conservação da Biodiversidade* – ICMBio (Chico Mendes Institute for Biodiversity Conservation), also under the structure of the MMA, is part of the SISNAMA system. ICMBio implements measures and actions and exercises police power within the National System of Conservation Units.

2.3.4. Maritime authority (Brazilian Navy/DPC)

Brazilian Navy's *Diretoria de Portos e Costas* – DPC (Directorate of Ports and Coasts) enforces environmental standards in Brazilian jurisdictional waters in cooperation with other authorities. As the maritime authority representatives, harbour masters are entitled to launch inquiries and levy administrative penalties against vessels that spill pollutant substances into the water or otherwise violate environmental laws and maritime traffic rules. **Sections 3.2, 4.1 & 4.3**

2.3.5. National Agency of Petroleum, Natural Gas and Biofuels (ANP)

Linked to the Ministry of Mines and Energy, The *Agência Nacional do Petróleo, Gás Natural e Biocombustíveis* – ANP (National Agency of Petroleum, Natural Gas and Biofuels) is the regulatory body for oil, gas, and biofuels. The federal autarchy implements energy policies and ensures industry compliance with safety standards and rules. ANP sets the specifications and oversees the supply of marine bunker fuels following the International Maritime Organisation (IMO) regulations and investigates incidents. The O&G federal agency is also a member of the National Contingency Plan's GAA alongside the Navy and IBAMA. **Section 2.4**

2.3.6. Federal Police (DPF)

Brazil has no coast guard as such. The Ministry of Defence and Public Security's *Departamento de Polícia Federal* – DPF (Federal Police Department) has the constitutional duty to act as the maritime police to enforce the law and repress criminal acts in Brazilian waters. The federal law enforcement agency is responsible for investigating crimes against the environment without prejudice to administrative and civil enquiries and proceedings by other authorities. **Section 7**

[8] Art. 2, I, of Law 7,735 of 1989, as amended

2.3.7. State and municipal agencies

State and municipal governments are entitled to organise environmental departments and secretariats to conduct projects, regulate, control, license and inspect activities that may cause ecological harm. Therefore, in case of significant marine pollution, environmental secretaries of the municipalities and states affected may be involved, in addition to IBAMA and the local representative of the maritime authority. Each state has its own environmental agency. For example, the *Companhia Ambiental do Estado de São Paulo* – CETESB (Environmental Company of the State of São Paulo) is the state agency overseeing the Port of Santos on the coast of São Paulo, while in Rio de Janeiro, the *Instituto Estadual do Ambiente* – INEA (State Institute for the Environment) fulfils this role.

2.3.8. Port authorities

Public and private port authorities can regulate environmental issues in ports and terminals under their operation and control. They are responsible for devising contingency plans and guidelines for responding to accidents and spills in ports and port facilities and overseeing the activities performed by vessels and port operators within their port limits.

2.4. National contingency plan

In the wake of high-profile oil spílls from the "Deepwater Horizon" in the Gulf of Mexico in 2010 and the Frade Offshore Field off Rio de Janeiro in 2011, and after calls from sectors of society and environmental organisations, the government accelerated the formulation of contingency planning for oil spill preparedness, response and control, as determined by the "Oil Law", to comply with the provisions of the OPCR 90 Convention ratified by Brazil. **Sections 3.1 & 3.3**

Eventually, the *Plano Nacional de Contingência* – PNC (National Contingency Plan) was implemented in 2013 being reformulated in 2022[9]. It seeks to establish general principles and policies on contingency and response planning for oil spills in Brazilian waters. The updated plan allocates responsibilities and establishes the organisational structure, guidelines, procedures, and actions to enable cooperation between the public administration and private sectors to expand the national capacity to respond to spill incidents[10].

The only time the 2013 PNC has been triggered to date was when a mysterious widespread oil spill hit the Brazilian coast in 2019. The updated PNC will probably only be activated in practice in major incidents deemed national concern. Decree 10,950 of 2022, which updated the PNC, is awaiting regulation to take full effect, which is unlikely to happen anytime soon.

2.4.1. "*Sisnóleo*"

Introduced by the 2013 PNC and maintained by its current version, the *Sistema de Informações Sobre Incidentes de Poluição por Óleo em Águas Sob Jurisdição Nacional – Sisnóleo* (Information System on Oil Pollution in Brazilian Jurisdictional Waters) aims to consolidate and disseminate in real-time geographic information and inventories of equipment, materials and human resources available in individual and area contingency plans. The objective is to allow better analysis, supervision, and decision-making with respect to spill prevention, preparedness, and response.

[9] Decree 10,950 of 2022 provides for the *Plano Nacional de Contingência* – PNC (National Contingency Plan) for oil pollution in Brazilian territorial waters. It partly revoked Decree 8,127/2013, which governed the previous PNC

[10] "*Oil pollution incident – an occurrence that results or may result in the discharge of oil, including those of undetermined responsibility, in waters under national jurisdiction and that represents or may represent a threat to human health, the environment, or related interests of one or more States, and which requires emergency action or other immediate response*"; free translation of art. 1, IV, Law 10,950/2022 (PNC)

Under the overhauled PNC, the federal environmental agency, IBAMA, remains responsible for developing and implementing Sisnóleo, under the supervision of the GAA, by January 2024. The federal agency is also responsible for keeping the database up-to-date[11].

2.4.2. National Authority (AN)

Within the scope of the PNC, the role of *Autoridade Nacional* – AN (National Authority) is played by the Minister of the Environment, whose primary functions are to set up a cooperative framework to support response actions, decide on the need to request (or render) international assistance to spill incidents and articulate the Integrated Performance Network (RAI). The AN is responsible for reimbursing goods and services incurred in cases where the polluter has not been identified.

2.4.3. Oversight and Assessment Group (GAA)

Grupo de Acompanhamento e Avaliação – GAA (Oversight and Assessment Group), created by the PNC, is formed by the Brazilian Navy, IBAMA and ANP. Among its multiple attributions, the GAA advises the AN on the guidelines of the PNC and the signing of international cooperation agreements. It also provides training for coastal clean-up teams and RAI members in collaboration with other public bodies.

The GAA can trigger the PNC when needed and convene the RAI whenever an action is required to facilitate or enhance responsiveness. It will also evaluate measures the polluter takes to mitigate the effects of the oil spill and any omissions, which will be considered for fixing the corresponding administrative penalties.

2.4.4. Integrated Performance Network (RAI)

Rede de Atuação Integrada – RAI (Integrated Performance Network) comprises representatives of thirteen cabinet-level ministries, the Chief of Staff and the Institutional Security Office of the Presidency. Among its many attributions, RAI is responsible for making human and material resources available, responding to requests from the AN and GAA, and promoting capacity building and training for PNC bodies and entities. The National Authority may request the participation of other public and private entities and invite representatives of state agencies to the network if there is a risk of an oil spill reaching the Brazilian coast or an occurrence in inland waterways.

2.4.5.Operational Coordinator (CO)

The GAA will appoint a *Coordenador Operacional* – CO (Operational Coordinator) to monitor and evaluate oil spill response when the offender's identity has not been established or when it involves an incident of national concern, as assessed by the GAA.

The CO is the executive figure commanding actions and measures on the scene. Preferably, the duty will be assigned to the Navy for incidents within maritime waters, IBAMA for pollution of inland waters (except in waters between the coast and the baseline from which the territorial sea is measured), or ANP in spills involving subsea drilling and oil production facilities.

The law provides that the AN approves a National Contingency Plan Manual, a technical document containing detailed operational procedures and resources necessary to enable a concerted and expanded response capacity, which the GAA must keep updated and make available to interested parties[12].

[11] Arts. 4; 8, X; & 23 of Decree 10,950/2022

[12] Art. 1, VIII, of Decree 10,950/2022

While the PNC addresses prevention and response expenditures and the polluter's duty to report incidents and take mitigating action, it does not set any compensation regime for pollution-related damage. **Sections 3.1, 5.1, 5.2 & 6.1**

2.5. Local contingency plans

In addition to the National Contingency Plan (PNC), the legislation provides for complementary plans for individual facilities, geographic areas (consolidated individual emergency plans) and regions (combined area plans) that can be assembled depending on the location and extent of the spill. **Figure 1**

The on-scene Operational Coordinator (CO) is responsible for assessing the polluter's ability to control the incident according to the supplies available in the individual and area contingency plans and allocating resources (made available through the Integrated Performance Network) accordingly.

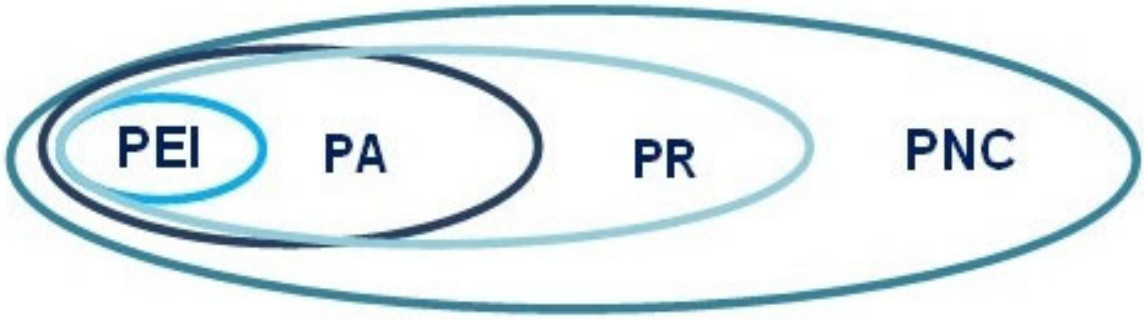

Figure 1: Interaction of Individual emergency plan (PEI), area plan (PA), regional plan (PR), and the national contingency plan (PNC)

2.5.1. Individual emergency plan (PEI)

Organised ports, port facilities, terminals and platforms must have a *Plano de Emergência Individual* – PEI (Individual Emergency Plan) approved by the environmental authority to combat pollution by oil and harmful or dangerous substances.

The document (or set of documents) must contain information and a description of the facility's response procedures to an oil pollution incident resulting from its activities, prepared following its own standards. CONAMA regulates the contents and minimum requirements of the PEI[13].

2.5.2. Area plan (PA)

The *Plano de Area* – PA (Area Plan) consolidates PEIs from a concentration of ports, port facilities, terminals, pipelines or platforms and their respective supporting facilities. The objective is to integrate the various individual plans to expand responsiveness and guide actions in the event of pollution from an unknown source[14].

2.5.32. Regional plan (PR)

Although the Oil Law provides for a *Plano Regional* – PR (Regional Contingency Plan), combining individual and area plans, none has been developed thus far.

[13] CONAMA Resolution 398/2008

[14] Art. 7 of Law 9,966/2000. Art. 2, VII, of Decree 4,871/2003

3. Regulatory framework

3.1. Federal laws

The legislative branch at the three levels of public administration legislates concurrently on environmental matters, with the federal statutes prevailing atop the Brazilian legal system, the Federal Constitution above all.

The regulation of anti-pollution[15] public policies and their enforcement is structured in an intricate set of federal, state, and municipal laws, decrees, ordinances, and normative instructions, in addition to a few international conventions signed by Brazil.

Key federal statutes and their significance for marine pollution are discussed below in the chronological order of their implementation.

3.1.1. 1981 National Environmental Policy Law

The National Environmental Policy Law (PNMA), enacted through Law 6,938/1981, imposes upon the polluter the obligation to indemnify or repair damage caused to the environment and third parties affected, regardless of fault. The act set fines and penalties of up to three years in prison for polluters who endanger humans and wildlife or exacerbate an existing peril[16]. **Sections 2.1 & 7.1**

3.1.2. 1985 Public Civil Action Law

Law 7,347 of 1985 regulates class action suits (public civil actions) seeking reparation or compensation for material and moral damages caused to the environment and diffuse or collective interests. The Union, states, municipalities, public prosecution, public defence, autarchies, and NGOs have legal standing to commence proceedings[17]. **Sections 5.5, 5.6 & 6.3**

[15] Art. 3, III, of Law 6,938/1981 defines pollution as the degradation of environmental quality resulting from activities that directly or indirectly: a) impairs the health, safety and well-being of the population; b) create adverse conditions for social and economic activities; c) unfavourably affect the biota; d) affect aesthetic or sanitary conditions of the environment, and e) dispose matters or energy in non-compliance with environmental standards

[16] Art. 4, VII, Art. 14, Pa. 1, & Art. 15 of Law 6,938/1981

[17] Art. 1, I & IV & Art. 5, I to V, of Law 7,347/1985, as amended

3.1.3. 1988 Federal Constitution

The Constitution is the groundwork of Brazil's environmental legislation. The supreme law reaffirms the polluter pays principle in line with international conventions on liabilities for marine pollution and the National Environmental Policy and allows administrative, civil, and criminal sanctions against individuals and companies directly or indirectly causing pollution[18]. **Sections 5.2, 6.2 & 7.4**

3.1.4. 1997 Waterway Traffic Law

Infractions of maritime traffic rules are subject to administrative proceedings under Law 9,537 of 1997. The *Lei de Segurança do Tráfego Aquaviário* – LESTA (Waterway Traffic Safety Law)[19] confers to the maritime authority the duty to implement and enforce rules to prevent water pollution or restrict the passage of foreign vessels that threaten the environment[20]. **Section 4.3**

3.1.5. 1998 Environmental Crime Law

Law 9,605 of 1998[21] punishes administratively, civilly, and criminally natural and legal persons that participate, directly or indirectly, in crimes against the environment, to the extent of their fault and piercing the corporate veil whenever applicable[22]. The so-called "Environmental Crime Law" allows SISNAMA members, the maritime authority in particular, to draw up infraction notices and initiate administrative proceedings to investigate and punish violations of this statute. **Section 7**

3.1.6. 2000 Oil Law

Law 9,966 of 2000[23], as regulated, deals with the prevention, control and inspection of pollution caused by the discharge of oil and other harmful or dangerous substances into Brazilian jurisdictional waters. It revoked the outdated Anti-Pollution Law of 1967. **Sections 1.1 & 3.4**

Known as the "Oil Law", the specific legislation lays down basic principles to be followed when handling oil and other hazardous substances in ports, port facilities, platforms, and ships in Brazilian waters. It applies to individuals and legal entities and subjects offenders to administrative penalties, including hefty fines, without prejudice to liabilities provided for in other statutes.

Maritime authority's standard NORMAM-07/DPC regulates procedures for assessing administrative violations under the Oil Law. **Sections 3.2 & 6.4**

3.1.7. 2002 Civil Code

Civil infractions that give rise to the obligation to pay compensation are defined in the Brazilian Civil Code (Law 10,406 of 2002), under which the party liable for damage is responsible for full reparation. Under the Civil Code, the obligation to repair generally entails the existence of subjective fault and causal link. Liability would only be strict when expressly determined by law or when one's activity implies potential risks for third parties[24]. A typical example of a duty to pay indemnity regardless of fault or intent is that arising from environmental pollution[25]. **Sections 5.1 & 5.2**

[18] Art. 225, Pa. 3, of the Federal Constitution

[19] Law 9,537 of 1997 establishes the *Lei da Segurança do Tráfego Aquaviário* – LESTA (Waterway Traffic Regulation), as regulated)

[20] Arts. 3 & 5 of LESTA

[21] Law 9,605 of 1998 is regulated by Decree 6,514 of 2008, as amended

[22] Arts. 2 to 4 of Law 9,605/1998

[23] Law 9,966 of 2000, as regulated by Decree 4,136/2002, as amended

[24] Art. 927 of the Civil Code states, "*Anyone who, by an unlawful act, [articles 186 and 187] causes damage to another party is liable to repair it. Sole paragraph: There will be a duty to compensate, regardless of fault, when specifically stated in the law, or when the activity performed by the party who caused the damage implies, by its nature, a certain risk to third parties.*" (Free translation)

[25] Art. 225, Pa. 3, of the Federal Constitution; art.14, Pa. 1, of the National Environmental Policy (Law 6,938/1981)

3.1.8. 2010 National Solid Waste Policy Law

Law 12,305 of 2010, as amended, instituted the *Política Nacional de Resíduos Sólidos* – PNRS (National Solid Waste Policy) and amended the Environmental Crime Law, among other measures. This statute prohibits the release of solid waste or tailings on waterbodies, including inland waterways and the sea[26].

3.2. Maritime Authority standards

As a representative of the maritime authority, the Directorate of Ports and Coasts (DPC) issues a series of norms and standards known as "*Normas da Autoridade Marítima*", or NORMAM in the Portuguese acronym. NORMAMs regulate a wide range of subjects and activities. The main objectives of the standards are to safeguard human life at sea, ensure safe waterway traffic and prevent water pollution[27].

The maritime authority standards apply to vessels and platforms of any flag transiting or staying in Brazilian waters. While most NORMAMs feature pollution prevention, control and repression elements, the ones listed below deal more specifically with marine pollution.

3.2.1. NORMAM-04/DPC

The "*Maritime Authority Standards for Operation of Foreign Ships in Brazilian Jurisdictional Waters*", coded NORMAM-04/DPC, were first issued by the DPC in 2013 and have been updated since then to regulate safety aspects of the operation of foreign-flagged vessels in the country.

Among its many provisions, NORMAM-04/DPC establishes specific procedures for ships carrying oil, oil derivatives and biofuels. It imposes condition surveys for bulk carriers over 18 years intending to load mineral bulk and livestock cargoes at Brazilian ports[28]. It also requires livestock carriers covered by P&I insurance providers outside the International Group of P&I Clubs to produce an insurance policy (or certificate of entry) confirming covers for wreck removal and pollution, including that caused by livestock cargo[29].

3.2.2. NORMAM-07/DPC

Chapter 4 of the "*Maritime Authority Standards for the Naval Inspection Activities*" (NORMAM-07/DPC), edited in 2013 and last updated in 2022, regulates the administrative procedure for the assessment of offences to the Oil Law, in addition to those provided for in international conventions ratified by Brazil. **Sections 4.1, 4.3 & 6.5**

3.2.3. NORMAM-08/DPC

The "*Maritime Authority Standards for the Traffic and Permanence of Ships in Brazilian Jurisdictional Waters*" (NORMAM-08/DPC) of 2013, revised in 2022, establish procedures for the safety of navigation, safeguarding human life at sea and prevention of pollution.

NORMAM-08/DPC regulates potentially polluting special ship operations, such as bunkering and ship-to-barge transfers of oil, oil products and biofuels. It also demands detailed ballast water information of visiting ships as a condition for granting sailing passes.

[26] Art. 47 of Law 12,305/2010, as regulated by Decree 10,936/2022

[27] The maritime authority standards are frequently updated. The DPC website provides links for a free download of the version of the NORMAMs currently in force (in Portuguese only): https://www.marinha.mil.br/dpc/normas

[28] Rule 0302 of NORMAM-04/DPC establishes that bulk carriers, ore-oil and ore-bulk-oil carriers aged 18 or older that call at Brazilian ports to load solid bulks with a specific weight equal to or greater than 1.78 t/m^3, such as ores and phosphates, as well as those to load livestock cargo

[29] Rule 0314, item 'd' of NORMAM-04/DPC

3.2.4. NORMAM-09/DPC

Casualties and incidents involving vessels operating in national waters are investigated following the "*Maritime Authority Standards for Administrative Enquiries into Casualties and Facts of Navigation and the Investigation on Safety of Marine Casualties and Incidents*" (NORMAM-09/DPC) issued in 2003 and updated in 2021, without prejudice to other investigations to determine civil and criminal liabilities. **Sections 4.1 & 4.2**

3.2.5. NORMAM-20/DPC

In 2005, in the wake of the IMO Ballast Water Convention adopted the previous year, DPC issued the "*Maritime Authority Standards for Management of Ship's Ballast Water*" (NORMAM-20/DPC). As its name suggests, it exclusively regulates ballast water control, management, and administrative proceedings to investigate violations. **Sections 3.3 & 6.5**

Until recently, specific maritime standards for oil pollution other than those briefly covered by NORMAM-04/DPC and NORMAM-08/DPC did not exist. The management and control of biofouling were dealt with under a separate DPC regulation, the "*Maritime Authority Standards for the Control of Antifouling Systems in Vessels*" (NORMAM-23/DPC)[30].

In its third edition, in force since 2022, NORMAM-20/DPC was renamed "*Maritime Authority Standards for Water Pollution Caused by Vessels, Platforms and their Supporting Installations"* and revoked NORMAM-23/DPC, incorporating its procedures related to antifouling systems.

The revamped NORMAM-20/DPC also incorporated administrative proceedings for pollution cases within the scope of the Oil Law, including parameters to assess the environmental impact and impose the corresponding penalties. **Section 6.5**

[30] NORMAM-23/DPC used to regulate IMO International Convention on the Control of Harmful Anti-Fouling Systems on Ships, adopted in 2011 and entered into force in 2008. It was revoked by the 3rd Edition of NORMAM-20/DPC, which incorporated the revoked regulation

3.3. International conventions

Brazil has signed just a few of the many international conventions adopted by the International Maritime Organization (IMO). Notably, the country did not adhere to some relevant key IMO treaties dealing with pollution matters, such as the Bunker Convention, the FUND92, the HNS Convention and the Nairobi Convention on the Removal of Wrecks.

Below are some of the main conventions on marine pollution by oil and other harmful substances in Brazil, in chronological order. Other international treaties may also apply to the matter.

3.3.1. CLC Convention 1969

Brazil ratified the *International Convention on Civil Liability for Oil Pollution Damage* of 1969 (CLC/69)[31]. However, the country is not party to the CLC Protocol of 92 (CLC/92), which provides higher compensation limits and broader coverage, or to the IOPC Funds[32].

After a massive oil spill hit the Brazilian coast in August 2019, lawmakers and the government are now considering taking the longstanding advice of the Navy and the maritime law community for Brazil to join CLC/92, whose states parties today account for about 98% of the world's tonnage[33].

3.3.2. Intervention Convention 1969

The *International Convention Relating to Intervention on the High Seas in Cases of Oil Pollution Casualties*, 1969 (Intervention 1969) asserts coastal states' right to take necessary measures on the high seas to prevent, mitigate or eliminate serious and imminent dangers to their coastline due to oil pollution following a maritime casualty. Brazil ratified the Intervention Convention and its 1973 Protocol, which extended the regime to substances other than oil[34].

3.3.3. London Convention 1972

The *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* (London Convention) of 1972 was ratified by Brazil[35]. However, it has not signed the *London Protocol* of 1996 that sought to update the Convention.

3.3.4. MARPOL 1973/1978

Brazil is a signatory to the *International Convention for the Prevention of Pollution from Ships* of 1973, the Protocol of 1978 (MARPOL 73/78) and its various Annexes[36].

3.3.5. Basel Convention 1989

The *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal* (Basel Convention), adopted by the United Nations in 1989, seeking to protect human health and the environment against the effects of hazardous wastes, was acceded by Brazil in 1992. IBAMA is the competent authority under the Basel Convention[37].

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[31] CLC/69 entered into force in 1975 to regulate compensation for oil pollution by vessels carrying oil as cargo. CLC/69 was promulgated in Brazil through Decree 79,437/1977 and regulated through Decree 83,540/1979

[32] CLC/92 amended CLC/69 to introduce higher compensation limits and broaden the treaty's scope to cover damages caused by pollution in the EEZ and apply it to both laden and unladen tankers, including spills of bunker oils from these ships. The International Oil Pollution Compensation Fund is part of an international regime providing compensation for pollution damage caused by spills of persistent oil from tankers (when the damage occurs in a state signatory to the CLC/92) if the amount available under that Convention is insufficient to cover all the admissible claims

[33] As of June 2022, CLC/92 had 146 signatories, corresponding to 97.6% of world tonnage, according to IMO

[34] The Intervention 1969 entered into force in 1975, and the 1973 Intervention Protocol in 1983. Brazil ratified this Convention and Protocol in 1995, which were promulgated through Decree 6,478/2008

[35] The London Convention was ratified by Brazil in 1982 and promulgated through Decrees 87,566/1982 and 6,511/2008

[36] MARPOL was ratified by Brazil in 1995 and promulgated through Decree 2,508/1998, with subsequent Annexes by the IOPC Funds approved by Decree 10,984/2022

[37] The Basel Convention was ratified by Brazil through Decree 875/1993 and Decree 4,581/2003

3.3.6. OPCR 90

Brazil ratified the *International Convention on Oil Pollution Preparedness, Response and Co-operation* of 1990 (OPCR 90), which set forth measures to deal with marine oil pollution incidents nationally and in cooperation with other states. The 2000 Protocol, expanding OPCR 90's provisions to cover hazardous and noxious substances carried by vessels (OPRC-HNS Protocol), was not signed by Brazil but is incorporated in the Oil Law and further regulated in Chapter 1 of NORMAM-20/DPC, among others[38]. **Sections 3.2 & 3.3**

3.3.7. AFS Convention 2001

The *International Convention on the Control of Harmful Antifouling Systems in Ships* of 2001 (AFS Convention)[39], which prohibits antifouling systems that contain harmful substances, was ratified by Brazil. The Convention is regulated in Chapter 3 of NORMAM-20/DPC. **Section 3.2**

3.3.8. BWM Convention 2004

The *International Convention for the Control and Management of Ships' Ballast Water and Sediments* of 2004 (BWM Convention)[40] was ratified by Brazil and is enforced by the maritime authority through Chapter 2 of NORMAM-20/DPC. **Section 3.2**

3.4. Brazilian jurisdictional waters

Brazil is a vast country with continental dimensions. It spans 4,378 km on the south-north axis and 4,327 km on the east-west axis, with 15,719 km of land borders and an extensive coastline of 7,367 km along the Atlantic Ocean on the eastern coast of South America[41].

The country has twelve different hydrographic basins with about 63,000 km of potentially navigable inland waterways (rivers, lakes, and lagoons). Nevertheless, less than a third of them are commercially navigated[42]. **Figure 2**

As defined by the maritime authority, Brazilian jurisdictional waters comprise the inland waters and maritime spaces in which the country exercises jurisdiction over activities, people, facilities, ships and living and non-living natural resources found in the liquid mass, in the seabed or marine subsoil, for control and inspection purposes, within the limits of international and national legislation.

Brazil's maritime spaces comprise the range of 200 nautical miles counted from the baseline, plus the waters overlying the extension of the continental shelf beyond 200 nm, wherever it occurs[43].

3.4.1. Territorial sea

Brazil's territorial sea extends 12 nautical miles (22 km) beyond its baseline, where the country exercises full sovereignty over the liquid mass, the overlying airspace, and the sea floor and subsoil. Foreign vessels in the Brazilian territorial sea are subject to regulations established by the federal government and standards issued by the maritime authority[44].

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[38] The OPRC 90 entered into force in 1995. Brazil promulgated it through Decree 2,870/1998; however, it did not sign the 2000 Protocol to the Convention relating to hazardous and noxious substances (the *OPRC-HNS Protocol*) but adopted HNS provisions in the Oil Law (Law 9,966/2000)

[39] The AFS Convention, adopted by IMO in 2001, entered into force in 2008. Brazil signed it in 2002, and it entered into force through Legislative Decree 797/2010. It is regulated in Chapter 3 of NORMAM-20/DPC

[40] BWM Convention *w*as adopted by the International Maritime Organization (IMO) in 2004 and entered into force in 2017. It was approved by the National Congress in 2010 and promulgated through Decree 10,980/2022. It is regulated in Chapter 2 of NORMAM-20/DPC, among other regulations

[41] *Brasil em Números* (Brazil in Numbers), 2017, Rio de Janeiro, by the Brazilian Institute of Geography and Statistics (IBGE)

[42] *Aspectos Gerais da Navegação Interior no Brasil* (General Aspects of Inland Navigation in Brazil) 2019, Brasilia, by the National Industry Confederation (CNI)

[43] Rule 0101 of NORMAM-04/DPC; Rule 0101 of NORMAM-08/DPC; Chapters 2 & 3 of NORMAM-20/DPC

[44] Arts. 2 to 4 of UNCLOS; Arts. 1 to 3 of Law 8,617/1993

Figure 2: Brazil's political-geographic map and the waters within its jurisdiction. Source: IBGE

3.4.2. Contiguous zone

The contiguous zone of Brazil stretches for a further 12 nm (22 km) over the 12 nm of the territorial sea, where the country can take measures to prevent and suppress infringements of its customs, tax, immigration, and sanitary laws and regulations within its territory or its territorial sea[45].

3.4.3. Exclusive economic zone

The exclusive economic zone (EEZ) extends from Brazil's baseline to 200 nm (370 km). The country has sovereign rights within its EEZ, an area of about 3.5 million square kilometres, for prospecting, exploiting, conserving, and managing the natural resources and waters overlying the seabed and its subsoil, including energy production from water and wind[46].

Also called the *Amazônia Azul* (Blue Amazon), Brazil's EEZ comprises an offshore area of about 3.6 million km^2 along the east coast of South America[47]. in Brazil submitted a claim to the United Nations seeking to extend its EEZ[48]. **Figures 2 & 3**

[45] Art. 33 of UNCLOS. Arts. 4 & 5 of Law 8,617/1993

[46] Arts. 55 to 57 of UNCLOS. Arts. 6 to 10 of Law 8,617/1993

[47] The Federal Constitution considers the inland waters, the territorial sea, the natural resources of the EEZ and the continental shelf as property of the Union. The Union, states, and municipalities have the right to share the royalties from the exploitation of petroleum or natural gas, hydric resources for generating electric power, and other mineral resources in the Brazilian waters (Art. 20 of the Constitution)

[48] Due to having an area equivalent to 67% of Brazil's territory, with dimensions and biodiversity similar to the "Green Amazon", the Brazilian Navy refers to the ZEE as the "Blue Amazon". Since 2004, Brazil has claimed with the UN CLCS) the extension of the continental shelf

3.4.4. Continental shelf

It comprises the seabed and subsoil of the submarine areas that extend beyond the territorial sea or 200 nm (370 Km) from its baseline, whichever is greater. Brazil exercises sovereign rights to explore and exploit natural resources of the continental shelf[49].

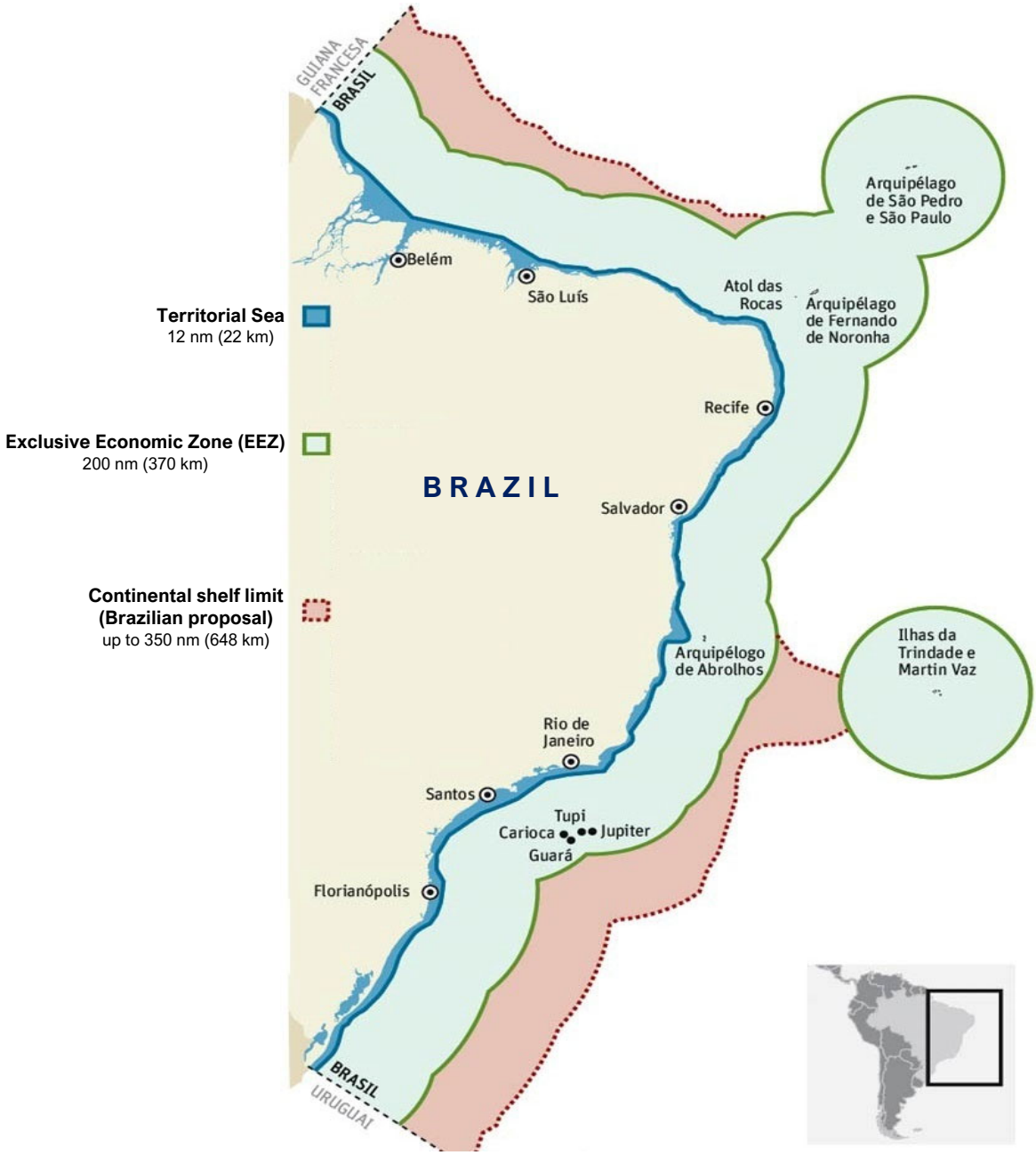


Figure 3: Brazil's territorial sea, EEZ and continental shelf. Source: IBGE/Brazilian Navy

The geographic limits of the area where Brazil exercises jurisdiction and rights are defined in the Law of the Seas (UNCLOS) and domestic legislation[50]. **Figure 3**

[49] Arts. 76 & 77 of UNCLOS. Arts. 11 to 13 of Law 8,617/1993

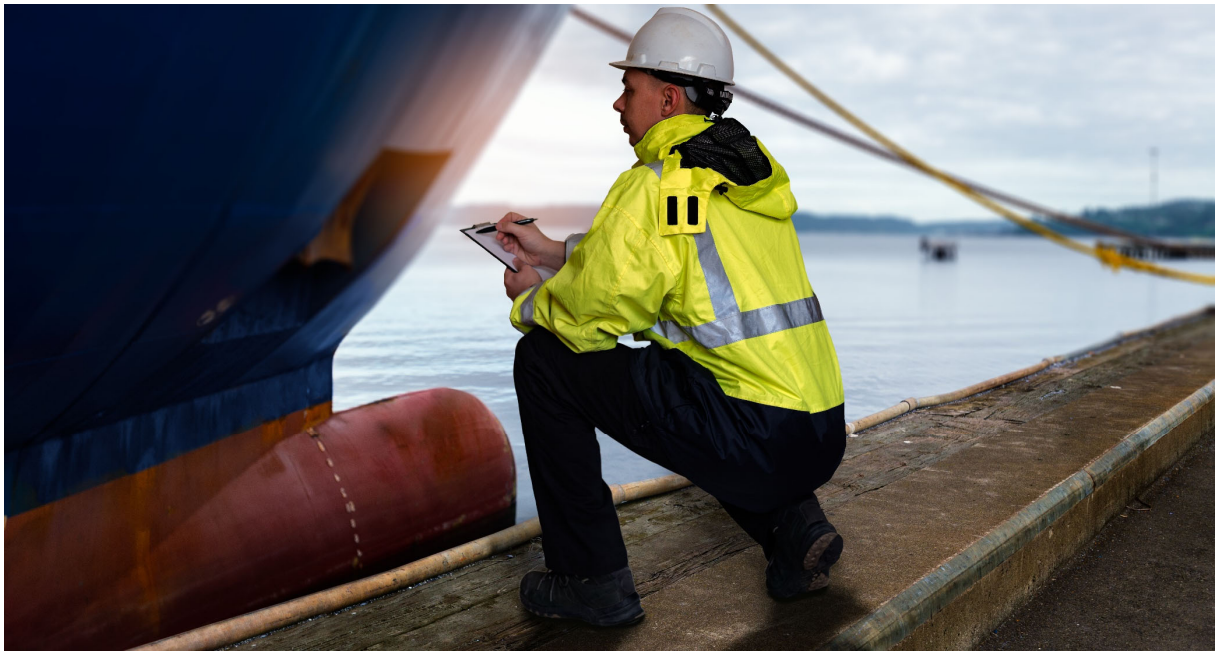
[50] *The United Nations Convention on the Law of the Sea* (UNCLOS), adopted in 1982, and in force in 1994. It was ratified by Brazil in 1988 and promulgated through Decree 99,165/1990. Law 8,617/1993 regulates Brazil's territorial sea, contiguous zone, EEZ and continental shelf

4. Maritime investigations

4.1 Administrative inquiry

Whenever the maritime authority, by any means of communication, becomes aware of pollution resulting from a marine casualty or fact of navigation, it must open an *Inquérito Administrativo Sobre Acidentes e Fatos da Navegação* – IAFN (Inquiry on Casualties and Facts of Navigation). The Navy Commander or the Maritime Tribunal may also order the local port captaincy to initiate the investigation at the request of an interested third party or the Navy Special Prosecutor's Office[51].

The findings of the IAFN are subject to consideration and judgement by the Maritime Tribunal under the adversarial system with full right of defence. The specialised administrative court will establish the cause, extent and circumstances of the incident, apportion liabilities and impose the corresponding sanctions. When applicable, the court decision will indicate preventive measures to improve the safety of navigation[52].



Although the decision of that specialised administrative court does not address civil or criminal liabilities, nor is it binding on the judiciary, it can decisively influence the outcome of a legal dispute, as in the case of pollution resulting from allisions and collisions, for example. The Maritime Tribunal judgement bears significant weight as technical evidence in legal proceedings. It constitutes *prima facie* evidence, though it is always subject to review by a judicial authority[53].

The penalties eventually imposed by the Maritime Tribunal are issued without prejudice to environmental fines imposed by the maritime authority or other members of the National Environmental System (SISNAMA) and assessed through separate administrative proceedings[54].

[51] Art. 33 of Law 2,180/1954; Items 0103 & 0106 of NORMAM-09/DPC

[52] Art. 68 of Law 2,180/1954

[53] Art. 18 of Law 2,180/1954: "*The technical matter of the decisions from the Maritime Tribunal in respect of accidents and facts of navigation is a piece of evidence presumed correct however liable to review by the Judiciary Power.*" (free translation). Art. 19 of Law 2,180/1954: "*When discussing in court an issue arising out of a matter under the jurisdiction of the Maritime Tribunal, which technical or technical-administrative aspect falls within its attributions, a copy of the final decision must be attached to the court proceeding.*" (free translation)

[54] For detailed information on maritime investigations, our publication "*Maritime Casualties and Incidents in Brazil – Practical Guidance*") is available for free download on our secure website: https://proinde.com.br/manuals/maritime-casualties-and-incidents-in-brazil-practical-guidance/

4.2. Maritime safety investigation

Administrative inquiries into high-profile marine casualties, including pollution, may be supplemented by maritime safety investigations conducted by the Directorate of Ports and Coasts (DPC) under the Casualty Investigation Code (CIC)[55].

Unlike the IAFNs adjudged in the Maritime Tribunal, the safety investigation does not assign fault or determine liabilities as it aims to avert or minimise future similar maritime casualties or incidents.

4.3. Maritime traffic infractions

Violating the Waterway Traffic Law (LESTA) subjects the infractor to penalties assessed through administrative proceedings. Fines for offences to the LESTA that involve pollution are issued regardless of other penalties applied under environmental legislation.

[55] The International Standards and Recommended Practices for an Investigation About Safety of Maritime Casualties and Incidents, known as Casualty Investigation Code (CIC), approved by IMO Resolution MSC.255(84), and the Procedures of Safety Investigation of Maritime Casualties and Incidents (MCI). Administrative inquiries and maritime safety investigations are regulated by NORMAM-09/DPC

5. Civil liability

5.1. Duty to repair

Under the Brazilian Civil Code, anyone who culpably causes damage to another commits an unlawful act (tort)[56] and must repair it[57].

Civil legislation adopts the principle of full reparation. Indeed, the first remedy proposed by the National Environmental Policy (Law 6,938/1981) for environmental damage is restoring the affected ecosystem to the *status quo ante* (conditions as they previously existed); otherwise, monetary compensation must be paid. The duty to compensate encompasses material and moral (pain and suffering) damage and reasonable loss of income[58].

Notwithstanding the obligation to fully repair (or indemnify) damage, non-compliance with the necessary measures to preserve or correct inconveniences caused by pollution, as directed by the competent authorities, may lead to increased administrative and criminal liabilities. **Chapters 5.4 & 6.1**

5.2. Polluter-pays principle

Although civil liability implies, as a general rule, a culpable action (or omission) by the agent, the Civil Code established the duty to repair regardless of fault when so expressly provided for by the specific law or when the activity carried out by the polluter poses a risk to third parties[59]. In this sense, Law 6,938/1981 imposes – and the Federal Constitution reaffirms – the polluter's strict liability to remedy environmental and-third party damages[60].

[56] Art. 186 of the Civil Code: "*The party who, through action or voluntary omission, negligence or imprudence, violates the right or causes damage to the other party, even if exclusively moral, commits an unlawful act.*" (free translation)
[57] Art. 927 of the Civil Code: "Whoever, by unlawful act (arts. 186 and 187), causes damage to another, is obliged to repair it." (free translation)

[58] Art. 4, VII, of Law 6,938/1981 & arts. 402 to 405 of the Civil Code

[59] Art. 927, Pa. 1, of the Civil Code

[60] Art. 14, Pa. 1, of Law 6,938/1981 & art. 225, § 3, of the Federal Constitution

Brazilian environmental legislation reiterates the principle enshrined in international conventions that the polluter must bear the costs and expenses arising from pollution in the civil sphere, irrespective of fault or wilful misconduct. To this end, the causal link between the damage and the activity carried out by the agent suffices[61]. **Sections 5.1 & 5.2**

5.3. Damage assessment

The regulatory framework does not establish specific parameters or standards to assess environmental damage and quantify (or value) compensation when the ecosystem cannot be recovered to its pre-pollution state. Given the absence of clear criteria, environmental compensation claims are largely subjective, and the quantum varies considerably from state to state and court to court.

Due to economic constraints, the leading federal authorities concerned with preventing and controlling marine pollution lack sufficient resources to conduct effective and regular inspections of potentially hazardous activities. When responding to incidents, public authorities rarely assess and monitor the impact of pollution on the affected ecosystem in the wake of a spill and over time, not least because they tend to attend on-site long after the incident, if at all. Furthermore, they would rarely have recent, reliable data on local fauna and flora and sources of chronic or pre-existing pollution and degradation on which to rely for proper assessment.

In practice, despite collaborative programs and mechanisms to tie the three levels of government and organisations for concerted oil spill preparedness and response – and effective cost recovery – only high-profile incidents that attract the media and public are thoroughly followed and investigated in terms of the cause and extent of the pollution and environmental impact.

It is expected that, when fully implemented, the 2022 National Contingency Plan (PNC) will enable a more efficient and organised response to oil spills and an adequate environmental damage appraisal, allowing fair compensation. **Section 2.4**

5.4. Claim quantification

Domestic environmental legislation does not offer criteria for setting the amount of indemnity; therefore, strict liability to fully repair damage prevails[62]. **Sections 5.1 & 5.2**

Damage is a fundamental element of civil liability, without which there is no duty to repair. Nevertheless, given the lack of timely and adequate assessment and monitoring of potential damage in the wake of marine pollution, most public prosecutors sue the polluter – often many years after the spill – based on abstract models without evidence of actual damage. They consider that all spills cause long, lingering environmental effects, no matter how insignificant the amount of oil released into the water.

Some judges understand that for lack of specific legal stipulation to quantify environmental losses, methodologies such as that developed by the state agency CETESB[63] should be used to calculate the compensation owed by the polluter. Others use such formulas as a benchmark and apply them only if they believe the result is reasonable and proportionate, often following the *in dubio pro natura* principle and reversing the burden of proof. Still, some magistrates would dismiss environmental claims lacking evidence of damage that would otherwise give rise to the polluter's strict liability to repair (or fully compensate).

[61] Art. 927 of the Civil Code; Art. 225, § 3, of the Federal Constitution; art.14, § 1, of Law 6,938/1981; Principles 16 & 17 of the Rio Declaration on Environment and Development, issued at the United Nations Conference on Environment and Development - UNCED, (ECO 92), Rio de Janeiro

[62] Notwithstanding the adoption of the CLC/69, Brazilian courts do not usually apply the compensation regime established by the Convention to calculate indemnity for pollution by a cargo of oil transported by tankers

[63] *Companhia Ambiental do Estado de São Paulo* – CETESB (Environmental Company of the State of São Paulo) is the environmental agency overseeing the ports of São Paulo, including Santos, Brazil's largest port

CETESB Formula

In the early 1990s, at the request of the public prosecutor's office, The São Paulo state agency for the environment, CETESB, formulated a method for the monetary valuation of damage caused by spills of oil and its derivatives in the marine environment, best known as the "CETESB formula"[1]. It assigns multipliers to various factors following an exponential equation, where:

$$Value\ (US\$) = K\ [10^{(4.5 + x)}]$$

"K" is the number of previous incidents by the same offender[1], and "x" is the sum of the weights of five variables, namely:

i. The volume of oil spilt

This variable makes no difference whether the vessel spilt less than one litre or a thousand litres (1 m^3), as any volume lower than a cubic metre would weigh the same (0.1) in "x"[1].

ii. Sensitivity of the affected area

The higher the degree of vulnerability of the ecosystem, the greater the weight. The score ranges from 0.05 (exposed rocky shores) to 0.5 (marshes and mangroves)[1].

III. Toxicity of the product

CETESB adopted two criteria to evaluate the product toxicity, a water-soluble fraction test, with a weight ranging from 0.1 to 0.5, or through analysis of samples of water collected from below the oil slick for chronic toxicity tests. Where harmful effects have been detected, it will add a weight of 0.5; otherwise, it will be zero[1].

IV. Persistence of the product in the environment

This criterion is based on the specific gravity of oil and its density relative to pure water. Products classified as persistent will weigh 0.5, while non-persistent products will be zero[1].

V. Mortality of fish, birds and mammals

If there is evidence of significant mortality of fish, birds and mammals, the weight will be 0.5; if not, it will be zero[1].

CETESB highlights that its formula does not intend to quantify the damage; it aims to calculate financial compensation to be paid by the spiller based solely on the amount and properties of the spilt product and the ecosystem in which it was released.

This abstract method does not consider the response and clean-up efforts made by the polluter to avert or minimise the environmental impact. Following the simplistic formula, a spill of up to one litre (0.001 m^3) of fuel oil during bunkering at the port of Santos (considered a mangrove area), without animal mortality and toxicity, could lead to an indemnity value similar to a spill of one thousand litres (1 m^3), which is potentially much more harmful to the environment and requires greater response efforts and anti-pollution material inventories.

Internationally-renowned environmental organisations, such as the International Tanker Owners Pollution Federation Ltd. (ITOPF), consider that oversimplified formulas such as the one developed by CETESB lead to misrepresentation of the actual effects of a given oil spill incident.

5.5. Legal standing

In the civil sphere, claims for environmental damage can be commenced by federal and state public prosecution or the public defence through public civil actions. The Union, states, municipalities, public companies, and environmental associations also have active legitimacy to resort to this legal remedy[64]. Likewise, any citizen can file people's legal action, free of charge, to annul an act harmful to the environment, even if not directly affected by its consequences[65].

[64] Art. 129, III, of the Federal Constitution; Art. 1, I & IV & Art. 5, I to V, of Law 7,347/1985

[65] Art. 5, LXXIII & Art. 225 of the Federal Constitution; Art. 1 of Law 4,717/1965

The polluter with standing to be sued may be an individual or legal entity governed by public or private law. It includes shipowners, charterers, traders, cargo owners, and port operators, among other parties directly or indirectly involved with the polluting ship.

The shipping agency acts only as a mandatary agent of the shipowner or charterer, not exercising control over polluting vessels or their operations, commercial management and manning. Nevertheless, it is not uncommon for environmental prosecutors to include the local shipping agents in civil public actions, along with other parties, just because they represented and cleared the vessel before the authorities, even if strictly under the scope of the commercial mandate given to them. **Section 6.5**

5.6. Jurisdiction for civil claims

The Brazilian judicial authority is competent to hear claims on pollution in national waters regardless of the vessel's flag or the crew's or owners' nationality. The court of the place where the damage occurs has jurisdiction to hear the case[66].

Prosecutors bring public civil actions for pollution in national waters before the federal court system, whose judges also have jurisdiction over crimes (including those against the environment) committed on board vessels.

The federal courts can also adjudge the case when a national public entity is involved in the litigation as a plaintiff, defendant or interested third party[67].

The state civil court system has jurisdiction to prosecute civil claims brought by third parties whose businesses, economic activities and livelihoods have been affected by the pollution. These include fishers, fish farmers, marinas and yacht clubs.

[66] Art. 2 of Law 7,347/1985; Art. 21 of the Civil Procedure Code (Law 13,105/2015)

[67] Arts. 20 to 22 & Art. 109, I & IX, of the Federal Constitution

6. Administrative liability

6.1. Duty to report

Relevant environmental laws and regulations require ports, port facilities, platforms, ships, and pilots to communicate immediately, directly or through their operators or agents, casualties or incidents that may cause pollution or endanger human life, irrespective of the measures taken to control them.

Notification of environmental incidents or emergencies on board vessels must be made to the port captaincy with jurisdiction over the affected port. Platforms and supporting ships operating in offshore oil fields must report to the federal O&G agency, ANP. In either case, the Brazilian Institute of Environment and Renewable Natural Resources (IBAMA) must also be informed[68].

As appropriate, the notification must be made to the port captaincy with jurisdiction over the affected site, the state environmental agency and federal agencies IBAMA and ANP.

The federal environmental agency manages the National System of Environmental Emergencies (SIEMA), which enables reporting of environmental occurrences and other accidents through IBAMA's website.

Anyone who witnesses an environmental violation can report it to the nearest port captaincy or any National Environmental System (SISNAMA) member[69].

Prompt communication of an imminent threat of environmental damage and active collaboration with the competent authorities constitute mitigating circumstances for penalties[70]. On the other hand, ports, port facilities, platforms, and ships that fail to report any incident that may cause water pollution are subject to fines ranging from BRL 7,000 to BRL 1 million, plus BRL 7,000 charged for every hour the incident remained unreported.

[68] Art. 8, V & art. 12 of Law 9,537/1997; art. 22 of Law 9,966/2000; Item 0112 of NORMAM-09/DPC; Art. 13 of Decree 10,950/2022; art. 3 of ANP Resolution 882/2022. ANP published its *Manual de Comunicação de Incidentes* (Incident Reporting Manual) with detailed guidance to regulated agents on new reporting criteria and requirements, effective from 1 February 2023.

[69] Art. 70, § 2, of Law 9,605/1998 & art. 8 of Decree 4,136/2022

[70] Art. 14, III, of Law 9,605/1998

Should it is impossible to report the incident swiftly, the date and time of the unsuccessful communication attempt must be recorded in the vessel's logbook in front of witnesses, and the incident must be reported at the earliest opportunity[71].

As the legislation does not assign minimum values for discharges of potentially harmful or polluting substances, all such incidents in Brazilian jurisdictional waters must be communicated regardless of quantity.

6.2. Fault-based liability

Any action or omission that violates the legal norms of use, enjoyment, promotion, protection and recovery of the environment constitutes an administrative infraction. Unlike civil liability, there is no need for actual damage to occur to give rise to an administrative liability; a behaviour (whether by action or omission) in breach of the law suffices as a triggering event[72].

While the civil obligation to repair the damage is strict and only requires a causal link between the harm and the activity performed by the polluter, environmental administrative liability is fault-based. Therefore, the authority must prove that the conduct was culpable or intentional as a condition for imposing administrative sanctions under the law.

6.3. Jurisdiction

Authorities may impose administrative penalties at the three levels of the federation independently of other applicable civil and criminal sanctions[73]. Likewise, any SISNAMA member may initiate administrative proceedings and apply fines according to municipal, state or federal legislation. Penalties will be applied cumulatively if the infractor commits two or more offences simultaneously[74].

Administrative proceedings launched under the Environmental Crime Law, somewhat rare in shipboard pollution cases, tend to be conducted by state or federal environmental agencies, sometimes involving public prosecutors. On the other hand, administrative proceedings founded on the Oil Law are typically handled by the maritime authority through the local river or port captaincy as regulated by NORMAM-07/DPC. **Sections 3.2 & 6.4**

In case of marine pollution resulting from accidents and navigation facts, the Maritime Tribunal may also be involved. Its role will be to determine responsibilities from the point of view of navigation safety and impose the corresponding penalties concurrently with other sanctions imposed by specific regulations. **Section 4.1**

6.4. Penalties

A pollution incident can result in multiple administrative penalties stipulated in various statutes at the three levels of the federation. Nevertheless, different authorities often apply repeated fines for the same infraction, theoretically disregarding the *non-bis in idem* legal doctrine.

In a judgement on a special appeal handed down in March 2023, the Superior Court of Justice (STJ), Brazil's highest court for infraconstitutional issues, reaffirmed its previous ruling in the sense that a fine imposed by the maritime authority (Port Captaincy) does not exclude the possibility of IBAMA applying another penalty for the same infraction.

[71] Arts. 46, 47, single paragraph of art. 49 and Annex I of Decree 4,136/2022

[72] Arts. 70 & 72, § 1, of Law 9,605/1998; arts. 17 & 26 of Law 9,966/2000; art. 2 of Decree 6,514/2008

[73] In the case of administrative infractions under the Environmental Crimes Law, the payment of a penalty issued by the state or municipality offsets the federal fine imposed for the same triggering event (art. 76 of Law 9,605/1998)

[74] Art. 23, VI, & Art. 24, VI & VIII of the Federal Constitution; Art. 70, § 1, & Art. 76 of Law 9,605/1998; Art. 27 of Law 9,966/2000

The reasoning behind the decision was that the two federal bodies have powers to impose sanctions arising from different statutes – IBAMA's legitimacy to impose fines stems from the Environmental Crime Law (Law 9,605/1998), while that of the maritime authority derives from the Oil Law (Law 9,966/2000).

Depending on the legal regime violated, administrative sanctions may include a warning, fixed fine, daily fine (for offences prolonged over time), seizure, suspension of activities and restriction of rights[75].

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a) Environmental Crime Law

In addition to crimes against the environment, Law 9,605/1998 imposes administrative sanctions for environmental infractions besides the obligation to repair the damage. **Section 3.1**

Penalties: fines ranging from BRL 5,000 to BRL 50 million, applied after the environmental agency issues a technical report identifying the extent of the damage and grading its impact[76]. Should the offender commit another environmental violation within five years, the fine may be doubled or tripled if the same infraction is committed[77].

Environmental fines can be converted into services for the preservation, improvement and recovery of the quality of the environment. Discounts for early settlements or payment in instalments are available under the regulation[78].

Typical offences:

- Cause pollution of any nature at levels that result or may result in damage to human health, or that cause the death of animals or significant destruction of biodiversity;
- Cause water pollution that interrupts the public water supply;
- Cause air pollution that results in evacuation of affected areas or significant respiratory or olfactory discomfort of the population;
- Hinder or prevent the public use of beaches by releasing substances and effluents;
- Release solid, liquid or gaseous residues, debris, tailings, oil or oily substances into any waterbody violating relevant regulations.

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b) Oil Law

Pursuant to Law 9,966/2000 and regulations, any discharge of harmful or dangerous substances resulting from a fact or intentional or accidental action that causes potential risk, damage to the environment or human health subjects the offenders to administrative sanctions without prejudice to civil and criminal liabilities.

Penalties: the value of the fines is classified in ranges according to the seriousness of the offence. For cargo vessels, penalties for administrative infractions under the Oil Law are generally in the form of fines. The acceptable amount varies according to the type of ship, cargo on board and seriousness of the violation. **Table 1**

[75] Art. 72 of Law 9,605/1998; art. 25 of Law 9,966/2000; art. 9 of Decree 4,136/2022; art. 3 of Decree 6,514/2008

[76] Arts. 6 & 72 of Law 9,605/1998; arts. 61 & 62 of Decree 6,514/2008

[77] The five years are counted from the date of the final administrative decision for the previous violation (art. 11 of Decree 6,514/2008

[78] Art. 96, § 5, "c", of Decree 6,514/2008

Group	Range of fines (in BRL)
A	1,000 to 10,000,000
B	1,000 to 20,000,000
C	1,000 to 30,000,000
D	1,000 to 40,000,000
E	1,000 to 50,000,000
F	7,000 to 35,000
G	7,000 to 70,000
H	7,000 to 700,000
I	7,000 to 7,000,000
J	7,000 to 1,000,000 (adding 7,000 for every hour after the incident)

Table 1: Fine grading by groups. Source: Decree 4,136/2002, as amended

Typical offences:

- Failure to carry on board and maintain up-to-date MARPOL 73/78-approved oil record book, logs of oil transfers and ballast exchanges, cargo log books, where required, CLC/69 and other required certificates. Penalty: Group H fine and detention;
- Discharge harmful substances[79], classified in the category "A". Penalty: Group E fine;
- Discharge substances of categories "B, "C", and "D", except when the release falls within MARPOL 73/78, the ship is not within ecologically sensitive areas, or the relevant authorities have approved it. Penalty: Group C fine;
- Discharge oil, oily mixtures and garbage, except in situations permitted by MARPOL 73/78 and when the vessel or platform is not in ecologically sensitive areas or the relevant authorities have approved it. Penalty: Group E fine
- Discharge sanitary sewage and wastewater, except in situations permitted by MARPOL 73/78 and when the vessel or platform is not within ecologically sensitive areas or the relevant authorities have approved it. Penalty: Group A fine
- Continuously dispose of process or production washwater in violation of specific environmental regulations. Penalty: Group C fine
- Dump plastic, synthetic cables, fishing nets and plastic bags. Penalty: Group E fine
- Failure to notify the authorities of any incident that may cause pollution, regardless of measures taken to control it. Penalty: Group J fine

Obligation to repair: regardless of the permission for discharge, the party responsible remains liable for repairing damage caused to the environment and indemnifying economic activities and public and private property and assets for losses resulting from the discharge. **Sections 6.1 & 6.2**

Reimbursement of costs: The owner or operator of ships and platforms and the concessionaries in the O&G industry responsible for releasing polluting substances are liable to reimburse the competent bodies for the expenses incurred to control or minimise the pollution caused, regardless of prior authorisation and payment of a fine[80].

[79] For the purposes of the Oil Law, harmful or dangerous substances are classified into categories according to the risk produced when released into water, namely: Category A: high risk both for human health and ecosystem; Category B: medium risk to human health and ecosystem; Category C: moderate risk to human health and ecosystem; and Category D: low risk to human health and ecosystem. (Art. 4 of Law 9,966/2000)

[80] Arts. 21 & 23 of Law 9,966/2000

6.5. Administrative procedure

Environmental liability and corresponding sanctions are determined through administrative proceedings that may vary depending on the public authority concerned and the applicable legal statute. Any authority that becomes aware of an environmental violation must investigate it.

The procedure outlined in NORMAM-07/DPC for processing penalties under the Oil Law is summarised below.

6.5.1. Shipping agents standing

After the implementation of the new legal framework in the early 2000s, environmental agencies across the three levels of the federation set out to apply pollution fines to shipping agents, sometimes concomitantly with other penalties imposed on the shipowner by another authority for the very same administrative offence. **Sections 5.5 & 6.4**

Over the years, consistent jurisprudence has been formed in the appellate courts on the understanding that mandated agents do not have passive standing to be fined in lieu of their principals. Eventually, in 2010, the Federal Attorney General's Office (AGU) enunciated that "*the shipping agent is not responsible for sanitary or administrative infractions committed inside vessels*"[81]. Notwithstanding this significant decision in the administrative sphere, shipping agents remain exposed jointly and severally to civil claims for damage compensation.

6.5.2. Notice of infraction

The *auto de infração* (infraction notice) is the document issued by the relevant authority to record the administrative breach of a regulation and notify the offender to produce a defence. The infraction notice must contain a detailed description of the offender's misconduct and legal framing.

[81] Free translation of Enunciation AGU No. 50 issued by the Federal Attorney General's Office (AGU) on13/08/2010

6.5.3. Term for defence

The offender has a term of 20 (twenty) working days to present a defence challenging the notice of infraction, counted from the date the offender, its legal representative or agent acknowledged receipt of the document with the assessment of the environmental violation.

The maritime authority must process the notice of infraction within 60 (sixty) working days from the tendering of the administrative defence or, if one is not presented after the deadline to challenge the penalty has expired.

As a condition for imposition of a fine, the maritime authority is responsible for issuing the *Laudo Técnico Ambiental* – LTA (Technical Environmental Report) within 60 (sixty) days after the term to present the defence has expired and tendering it to the local maritime authority for delivery to the infractor, who is entitled to supplement the defence within 20 (twenty) days of receipt of the LTA, after which the maritime authority will have 30 (thirty) days to issue a decision[82].

6.5.4. Administrative appeal

The offender who disagrees with the decision can appeal to the Directorate of Ports and Coasts (DPC), the last administrative instance, within 20 (twenty) days from the date the offender acknowledged receipt of the decision, and DPC will hear the appeal within 30 (thirty) days.

No bond or security has to be placed as a condition to present a defence or an appeal. The penalty enforcement remains halted until a final and unappealable administrative decision.

6.5.5. Fine assessment

According to NORMAM-07/DPC, to determine the level of environmental impact, the main feature of the LTA, the authority must consider certain specific parameters, which will dictate the grading of the seriousness of the spill. **Table 2**

Level	Level of Environmental Impact
1	Light
2	Moderate
3	Severe
4	Very serious
5	Extremely severe

Table 2: Environmental impact of the Technical Environmental Report (LTA). Source: NORMAM-07/DPC

Vessels that unlawfully spill oil and oily mixtures into national waters are subject to a fine in the Group E range, anywhere from one thousand to fifty million Brazilian Real. For the calculation of the exact amount, the following parameters are taken into consideration:

- **Spilt volume**: volume, in litres, of oil or oil derivatives spilt into the aquatic environment;
- **Persistence:** the oil's ability to remain in water varies depending on its specific gravity (density relative to pure water), volatility, viscosity, and pour point. The most common oil types were standardised into four groups based on density and persistence (in days) and have been adopted for the assessment of the fine; **Table 3**

[82] Arts. 50 & 51 of Decree 4,136/2002

- **Environmental sensitivity:** classified in different sections within Brazilian jurisdictional waters according to their geomorphological features, as per the environmental sensitivity charts prepared by the Ministry of Environment

Group	Density (ton/m^3)	Persistence (in days)
I	< 0.8	1 - 2
II	0.8 to 0.85	3 - 4
III	0.85 to 0.95	6 - 7
IV	> 0.95	> 7

Table 3: Grouping of oil types by density. Source: ITOPF/NORMAM-07/DPC

The authority will also consider the aggravating and attenuating circumstances that influence the assessment of the fine, including response action, recidivism, and the economic situation of the infractor. If the offender commits another environmental infraction covered by the Oil Law within 36 months, the fine will be tripled.

6.5.6. Fine payment

The fine must be paid within five days of receipt of the payment notice, which will be sent when the deadline for appeal has elapsed, without one having been presented, or after the offender acknowledges receipt of the decision issued by the maritime authority.

7. Criminal liability

7.1. Criminal penalties

Regardless of the actual damage, releasing or dumping pollutants or hazardous substances into national jurisdictional waters can give rise to criminal liability whenever there is gross negligence or intent. This liability exists without prejudice to cumulative administrative sanctions and the polluter's duty to repair or compensate for civil damages[83]. **Sections 5.1, 5.2 & 6.2**

The regulatory framework defines which behaviours are considered harmful to the environment and, as such, unlawful and punishable with penalties ranging from the restriction of rights (community services, restraining orders, suspension of activities, monetary compensation and home detention) to deprivation of liberty (imprisonment).

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a) Environmental Crime Law

The Environmental Crime Law (Law 9,605/1998) establishes criminal sanctions for environmental damage resulting from misconduct and licensed and unlicensed activities. It typifies crimes against the fauna, flora and the environment and imposes the corresponding penalties[84]. **Section 3.1**

On the subject of environmental crimes caused by pollution, Law 9,605/1998 decrees:

Crime: causing pollution at levels that harm or pose a risk to human health, cause the death of animals or produce significant degradation of the flora.

Penalty: imprisonment from one to four years, plus a fine.

Mitigating circumstance: if the crime results from culpable negligence, the penalty is six months to one year in prison and a fine.

Aggravating circumstances: the penalty of imprisonment may reach five years if the crime:

- renders an urban or rural area unfit for human occupation;
- causes air pollution leading to the removal of residents from affected areas;
- causes direct damage to the health of the population;
- cause hydric pollution that requires interruption of the public water supply;
- hinders or prevents public use of beaches; or
- occurs by the release of waste or debris, oil or oily substances in disagreement with the relevant laws and regulations

Anyone who fails to adopt precautionary measures in case of risk of serious or irreversible environmental damage when instructed by a competent authority is subject to the same aggravated penalty.

Intentional environmental pollution increases the penalties i) from one-sixth to one-third if it results in irreversible damage to flora or the environment; ii) from one-third to one-half if it results in severe bodily injury to another person; or iii) doubled up if it results in the death of another person.

[83] Art. 225, § 3, of the Federal Constitution

[84] Arts. 54 & 58 of Law 9,605/1998

b) National Environmental Policy

In addition to imposing upon the polluter the obligation to indemnify or repair the damages caused to the environment and to affected third parties, regardless of fault, the National Environmental Policy Act (PNMA) also provides for administrative and criminal sanctions. **Sections 2.1 & 3.1**

Crime: exposing human, animal or plant safety to danger or aggravating an existing peril[85].

Penalty: imprisonment from one to three years and a fine.

Aggravating circumstances: if the crime results in irreversible damage to fauna, flora and the environment, serious bodily injury, or pollution due to transport activities, or if the crime is committed at night, on weekends or on holidays, the penalty is doubled.

7.2. Punishment assessment

The imposition and gradation of the penalty will consider the seriousness of the violation and the consequences for public health and the environment, the history of compliance with environmental regulations and the offender's economic situation in the event of a fine[86].

Criminal penalties for individuals consist of fines, restriction of rights, and community services. Companies are subject to suspension and temporary interdiction and an impediment to contracting with the public administration and obtaining subsidies, grants or donations from it. Liabilities for crimes of lesser offensive potential can be determined immediately with a penalty restricting rights or a fine, providing the party responsible has already settled the environmental damage compensation[87].

[85] Art. 15 of Law 6,938/1981

[86] Art. 6 of Law 9,605/1998

[87] Arts. 3, 21, 22 & 27 of Law 9,605/1998; Arts. 74 & 76 of Law 9,099/1995

7.3. Criminal prosecution

Crimes against the environment are subject to public criminal actions brought exclusively by public prosecutors' offices before federal and state courts[88].

All those who, in some way, contribute to an environmental crime are subject to penalties to the extent of their involvement in the criminal act. Both individuals and corporate persons have the standing to be prosecuted criminally under the terms of the Environmental Crime Law.

Legal entities can also be held liable where the environmental infraction is committed by a decision of their representatives, shareholders or board of directors in their interest or benefit. It includes the company's director, administrator, counsellor, manager, agent or legal representative who, knowing the criminal conduct, fails to prevent its practice.

The criminal liability of legal entities does not exclude that of natural persons who can be sued as culprits, co-culprits, or participants in the same act.

The law allows disregarding the legal entity (piercing the corporate veil) whenever its legal personality hinders the effective recovery of environmental damage[89].

7.4. Power to prosecute

The state and federal courts have jurisdiction to prosecute individuals and companies for environmental violations committed within their judiciary territory. The public prosecution has exclusive standing to bring criminal actions on behalf of society and diffuse interests.

[88] Art. 129, I, of the Federal Constitution; Art. 26 of Law 9,605/1998

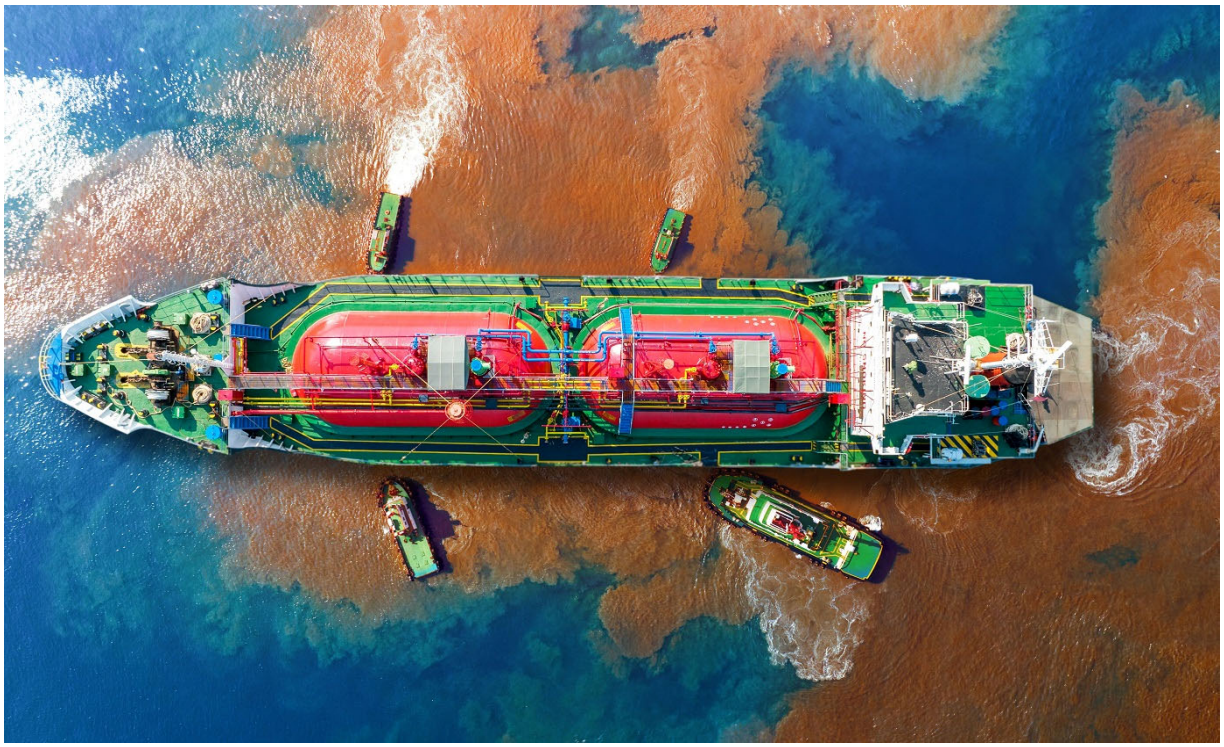
[89] Arts. 1 to 4 of Law 9,605/1998

8. Limitations and exclusions

8.1. Limitation of liability

Brazil's legal system provides unlimited civil liability with the duty to repair (or compensate for) environmental damage. Individuals or legal entities, public or private, who are directly or indirectly responsible for pollution may be jointly and severally liable for full compensation[90]. **Sections 5.1 & 5.2**

Due to its compensatory nature, although environmental legislation does not cap civil liability, reparation cannot exceed the harm suffered to avoid unjust enrichment. Thus, the level of compensation due is measured by the extent of damage caused. If it is excessively disproportionate to the severity of the fault and the harm produced, the judge may equitably reduce the indemnity owed by the polluter[91].



We are unaware of precedent cases before Brazilian higher courts in which owners of oil tankers that caused pollution by oil (carried as cargo) managed to limit their liability under the rather obsolete CLC/69 convention, to which Brazil remains one of the few signatories[92]. **Section 3.3**

8.2. Exclusion of liability

8.2.1. Fortuitous event & force majeure

The only exceptions to the duty of integral reparation in civil law are damages resulting from a fortuity ("Act of God") or *force majeure*[93]. However, extreme doctrinal and jurisprudential currents defend that environmental damage caused by ships falls within the theory of full risk and strict liability of the polluter, even in case of fortuitous or extraordinary events.

[90] Art. 3, IV, Law 6,938/1981; Art., 3 of Law 9,605/1998; Arts. 42 & 45 of the Civil Procedure Code

[91] Arts. 884 and 944 of the Civil Code

[92] Art. Art. 5, § 1 of the CLC/69 Convention

[93] "*The fortuitous event or force majeure is verified in the necessary fact, whose effects it was not possible to avoid or prevent.*". Art. 393, Sole §, Civil Code (free translation)

On the other hand, CLC/69 establishes that the shipowner will not be held responsible if it proves that the damage arising from the spillage of the oil cargo resulted from an exceptional, inevitable and irresistible natural phenomenon[94].

Unlike civil environmental liabilities that do not require subjective criteria for determining the obligation to repair the damage, criminal and administrative liabilities imply a link between the agent's action or omission and the harm caused. Therefore, incidents resulting from an Act of God, *force majeure*, or the exclusive third party's fault exclude these liabilities.

8.2.2. Third-party fault

At the same time that the legislation imposes strict civil liability for pollution, it assures the polluter the right to recover compensation paid when the damage was caused by the fault of a third party[95], as in the case of a collision in which the oil was released by the innocent vessel.

CLC/69 also relieves shipowners when third parties' intentional action or omission entirely causes oil pollution damage[96].

8.3. Time bars

8.3.1. Environmental civil claims

In general, civil reparation claims are subject to a three-year time bar[97]. However, there has always been uncertainty about whether environmental damage is subject to a limitation period and, if so, what it would be.

As environmental laws are silent on statute of limitations, some argue that, in the absence of specific stipulations, time bars should be dictated by the Civil Code, which provides a three-year time bar for civil damages in general and ten years for unspecified matters. Nevertheless, recent jurisprudence and doctrine maintain that the environment is a fundamental, inalienable and diffuse asset essential to life. The damage caused protracts over time, affecting society collectively in the long term; therefore, there should be no limitation period for compensation for environmental damage.

In a plenary session held in April 2020, the Federal Supreme Court (STF) ruled that the redress of environmental damage cannot be frustrated by time. By majority vote, Brazil's highest court for constitutional matters established the legally binding thesis that claims for environmental damages are not subject to a statute of limitations[98].

8.3.2. Environmental fines

The time bar for the public administration to pursue environmental infractions is five years, counted from the date of the offence or, in the case of permanent or continuous violation, from the date it ceased.

[94] Art. III, § 2, "a", of CLC/69 Convention

[95] Arts. 188, II, & 930 of the Civil Code

[96] Art. III, § 2, "b" & "c", of CLC/69 Convention

[97] Art. 206, § 3, V, of the Civil Code

[98] Federal Supreme Court's plenary decision with binding effect on the Extraordinary Appeal (RE) 654.833/AC dated 20/04/2020

The investigation by the competent authority begins with the drawing up of the infraction notice, and the time bar applies to procedures that have developed for more than three years, pending judgement or order, whose records will be filed away by the authority itself or at the request of the interested party.

When the fact object of the infraction notice also constitutes a crime, the statute of limits will be governed by the time bars outlined in criminal law.

The time bar for the punitive claim (fine) imposed by the authority does not preclude the polluter's obligation to repair the environmental damage.

8.3.3. Environmental criminal prosecution

Before the court decision becomes final and unappealable, the statute of limitations is regulated by the highest penalty applicable to the crime committed[99]. **Table 4**

Time bar	Condition
20	If the maximum sentence exceeds twelve years
16	If the maximum sentence is over eight years and does not exceed twelve years
12	If the maximum sentence is over four years and does not exceed eight years
8	If the maximum sentence is over two years and does not exceed four years
4	If the maximum sentence is equal to one year or, if greater, does not exceed two years
3	If the maximum sentence is over eight years and does not exceed twelve

Table 4: Institute of Limitations for crimes against the environment. Source: Brazilian Criminal Code

If the sentence is *res judicata*, the time bar will be dictated by the penalty applied, following the same calendar of actions pending a final court decision, but increased by one-third if the convict is a repeat offender[100].

[99] The time bar before the final sentence is final will be: I - in 20 years if the maximum penalty is greater than 12 years; II - in 16 years if the maximum sentence is more than eight years and does not exceed 12 years; III - in 12 years if the maximum sentence is more than four years and does not exceed eight years; IV - in 8 years if the maximum sentence is more than two years and does not exceed four years; V - in four years if the maximum penalty is equal to 1 year or, if greater, does not exceed two years; VI - in 3 years if the maximum penalty is less than one year. The same time limits set for deprivation of liberty apply to restrictive penalties. (Art.109 of the Criminal Code)

[100] Arts. 109 & 110 of the Criminal Code

9. Conclusion

Keeping up with the global downtrend, the number of accidental discharges of oil or other harmful substances by ships in Brazilian waters has steadily declined. Yet, despite the drop in the number of cases and volumes spilt, the value of fines and legal actions claiming environmental has been increasing substantially. Many of these lawsuits, filed in the form of civil public actions, mainly those related to spills in Brazil's busiest port, Santos, do not provide proof of actual damage and calculate the amount of compensation based on formulas that assume that any unlawful causes environmental damage, no matter how small. The fines and claims do not consider the polluter's clean-up efforts after an incident.

Although the quantum of environmental lawsuits has increased, the country's readiness and resources to respond to spills, especially resulting from large casualties, have not kept pace with the level of claims. Furthermore, with the current legal regime and the concurrent – and overlapping – jurisdiction of various authorities in the three levels of the federation to legislate on environmental matters and enforce liabilities, any spill incident becomes a major challenge, regardless of its extent and severity.

In an attempt to promote greater cooperation in preparing and responding to major marine casualties in Brazil, following suit with other South American countries, in early 2023, the International Group of P&I Clubs (IGP&I) and the International Tanker Owners Pollution Federation Ltd. (ITOPF) entered Memoranda of understanding (MoU) with the Brazilian Navy's Directorate of Ports and Coasts (DPC). The move demonstrates the long-term commitment of these major global organisations to disseminate best practices and establish and implement sustainable cooperation among stakeholders at regional, national and international levels for swift and efficient responses, particularly to those casualties involving wreck removal operations or potential threats of environmental damage.

We hope this guide has provided an overview of the country's complex pollution liability landscape. And we will endeavour to keep this publication up-to-date with the latest developments.

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