

Environment

in 21 jurisdictions worldwide

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Legislation

1 Main environmental regulations

What are the main statutes and regulations relating to the environment?

Brazilian environmental legislation is extensive and includes laws and regulations focusing on specific topics. The main statutes and regulations include the following:

- article 225 of the Brazilian Federal Constitution;
- Brazilian Environmental Policy (Law No. 6938 of 31 August 1981);
- Environmental Crimes Act (Law No. 9605 of 12 February 1998);
- Administrative Environmental Misdemeanours Law (Decree No. 6514 of 22 July 2008);
- Mining Code (Decree-Law No. 227 of 28 February 1967);
- Forest Code (Law No. 12651 of 25 May 2012);
- Conservation Unit System (Law No. 9985 of 18 July 2000);
- Brazilian Climate Change Policy (Law No. 12187 of 29 December 2009);
- Brazilian Solid Waste Management Policy (Law No. 12305 of 2 August 2010);
- Water Code (Decree No. 24643 of 10 July 1934);
- Brazilian Water Resources Policy (Law No. 9433 of 8 January 1997); and
- Representative Action Law (Law No. 7347 of 24 July 1985).

2 Integrated pollution prevention and control

Is there a system of integrated control of pollution?

Law No. 6938/81 established the Brazilian Environmental Policy and created the National Environment System (SISNAMA), comprising:

- National Environment Council (CONAMA) as the advisory and deliberative environment agency;
- Ministry of the Environment (MMA), as the central environment authority;
- Brazilian Environment and Renewable Resources Institute (IBAMA), as the federal supervisory and enforcement authority;
- regional bodies, such as statewide environment agencies; and
- local bodies, such as local environment agencies.

3 Soil pollution

What are the main characteristics of the rules applicable to soil pollution?

Brazil still lacks specific laws dealing with contaminated areas. Recently a technical rule was issued, CONAMA Resolution 420/2009, designed to establish proceedings and parameters for contaminated soil and groundwater investigation and remediation.

The state of São Paulo was the first Brazilian state to regulate the treatment of contaminated areas by specific legislation, namely State Law No. 13577/2009, regulated by State Decree No. 54645/2009 and State Decree No. 59263/2013. In its turn, the environmental protection agency of the state of São Paulo (CETESB) published its technical manual, contemplating methods, standards and deadlines for investigation and clean-up of contaminated areas.

4 Regulation of waste

What types of waste are regulated and how?

The management of solid waste is regulated by the Brazilian Solid Waste Management Policy, established by Law No. 12305/2010 and Decree No. 7404/2010, as well as by Brazilian Sanitation and Environmental Education Policies, established by Laws No. 11445/2007 and 9795/1999 respectively, which also address the issues of urban sanitation and solid waste management. In addition to the above-mentioned standards, there are several specific standards applicable to solid waste at the state and local levels.

Various types of waste are regulated by specific statutes and delegated legislation. Examples include radioactive waste (Law No. 10308/2001); hazardous civil construction waste (CONAMA Resolution No. 307/2002); hazardous health care waste (CONAMA Resolution No. 358/2005); hazardous waste in general (CONAMA Resolution No. 452/2012); batteries (CONAMA Resolution No. 401/2008); tyres (CONAMA Resolution No. 416/2009); pesticides (CONAMA Resolution No. 334/2003); and lubricating oil (CONAMA Resolution No. 450/2012).

5 Regulation of air emissions

What are the main features of the rules governing air emissions?

The standards are determined considering levels of concentration of air pollutants which if exceeded may adversely affect the health, safety and welfare of the population and damage the flora and fauna and the environment in general.

The main technical rules relating to air emissions are as follows:

- CONAMA Resolution No. 05/1989, which establishes the Brazilian air quality control programme (PRONAR);
- CONAMA Resolution No. 03/1990, which establishes standards for air quality and levels of concentration of air pollutants;
- CONAMA Resolution No. 08/1990, which establishes nationwide limits for emission of air pollutants (emission standards) for external combustion processes conducted by new stationary sources of pollution with total power ratings up to 70MW and higher;
- CONAMA Resolution No. 382/2006, which establishes emission limits for air pollutants from stationary sources;
- CONAMA Resolution No. 436/2011, which establishes the maximum levels of emission of air pollutants applicable to stationary sources that were established before 2 January 2007 or whose application for an installation licence was made before this date; and

- Law No. 12187/2009, which establishes the Brazilian climate change policy.

6 Climate change

Are there any specific provisions relating to climate change?

The UNFCCC and the Kyoto Protocol have been ratified by the Brazilian government and enacted in Brazil under Decree No. 5445/2005. It is important to clarify, however, that Brazil is not a party to Annex I of the protocol. Accordingly, notwithstanding the applicability of the convention and the protocol, Brazil has not agreed to any reduction commitment. It is in this sense that the protocol applies in Brazil. However, with that caveat, it is equally important to point out that the Clean Development Mechanism projects and voluntary GHG reduction commitment show how Brazil is acting in this area. In addition, the Vienna Convention for the Protection of the Ozone Layer and the Montreal Protocol on substances that deplete the ozone layer have also been ratified by Brazil and are in effect under Decree No. 99280/90.

Federal Decree No. 7992/2013 enacted the Instrument of Creation of the Restructured Fund 'Global Environment Facility' (GEF), signed in Geneva on 16 March 1994. Brazil's participation in this fund had been authorised by Legislative Decree No. 266 of 29 December 2000. The creation of the fund in question took effect at the international level for Brazil on 7 July 1994.

7 Protection of fresh water and seawater

How are fresh water and seawater, and their associated land, protected?

The use of water resources is regulated by Decree No. 24643/34 (Water Code) and Law No. 9433/97 (Brazilian Water Resources Policy). In this context, Law No. 9433/97 created the Brazilian Water Resources System to coordinate and manage surface water and groundwater issues.

The legislation provides that fees are to be charged for use of water resources and such fees vary in accordance with the purpose and volume of water resources used by the person in question. This has been gradually implemented throughout the country.

8 Protection of natural spaces and landscapes

What are the main features of the rules protecting natural spaces and landscapes?

The protection of forests, biodiversity and flora is regulated by three major federal laws.

- Law No. 12651/12 (new Forest Code), which regulates and restricts activities in specific environmental protected areas: Permanent Preservation Areas and Legal Reserve Areas: Permanent Preservation Areas surround water body areas, for example, and others defined by law, and Legal Reserve Areas are defined as a portion of native vegetation preserved in rural properties or areas for rural use, in percentages ranging from 20 to 80 per cent of the rural area, depending on the location;
- Law No. 9985/00, which establishes the Brazilian Nature Conservation System, contemplating the creation, management and use of green areas called Nature Conservation Units and classified either as Full Protection Units or Sustainable Use Units. The uses and activities allowed in relation to these areas vary on the basis of this classification; and
- Law No. 11284/06, which was set up to control illegal logging, created the Brazilian Forest Service, responsible for the management of public forests, and established the National Forest Concession, for sustainable exploitation of timber resources in units and pursuant to management plans approved by the government.

9 Protection of flora and fauna species

What are the main features of the rules protecting flora and fauna species?

As expressly provided in the Brazilian Federal Constitution, the Amazon Rainforest, the Atlantic Forest, Pantanal, Serra do Mar and the coastal areas are considered national heritage and are therefore subject to special protection. This is detailed in state laws. The protection of green areas and other forms of vegetation is contemplated by the Forest Code (Law No. 12651/12), whereas the protection of fauna is primarily found in Law No. 5197/67 (Hunting Code) and Decree-Law No. 221/67 (Code of Fisheries). In general, hunting is forbidden in Brazil, except in very exceptional circumstances, such as where population control of a species is required. In its turn, commercial fishing is regulated by the environmental authorities.

10 Noise, odours and vibrations

What are the main features of the rules governing noise, odours and vibrations?

CONAMA Resolution No. 01/90 establishes the Brazilian federal noise level requirements. These regulations incorporate two standards issued by the Brazilian Association of Technical Standards (ABNT), namely Standards NBR 10151 (Noise Assessment in Inhabited Areas – to promote well-being) and NBR 10152 (Noise Levels for Acoustic Comfort – procedures).

Both standards provide noise limits and assessment procedures for different activities and different locations. In addition, federal regulations authorise state and municipal authorities to impose more stringent noise limits than indicated in the above-mentioned standards, when necessary.

11 Liability for damage to the environment

Is there a general regime on liability for environmental damage?

Under Brazilian law, there are three different and independent forms of environmental liability: civil, administrative and criminal.

Civil liability

Civil liability results from action or omission on the part of the offender causing any type of environmental damage. In this area the applicable standard is strict liability. The applicable penalty is remedying or compensating the damage caused to the environment and additionally any resulting damage sustained by third parties.

Administrative liability

Administrative liability arises out of action or omission on the part of an economic agent resulting in violation of an environmental protection rule.

Criminal liability

Criminal liability requires the offender – being either an individual or legal entity – to act with negligence or malice and arises where the action or omission on the part of the offender is characterised as an offence under criminal law.

In this regard, the Federal Supreme Tribunal (STF), the Brazilian court for constitutional issues, in a recent trial recognised the possibility of criminal prosecution of a legal entity, even though there was no criminal prosecution against an individual in relation to the environmental offence.

This has changed the understanding of the Superior Court of Justice (STJ), the highest Brazilian court for non-constitutional issues, which made the criminal prosecution of a legal entity conditional on the simultaneous prosecution of an individual in the case of environmental offences.

12 Environmental taxes

Is there any type of environmental tax?

The environmental control and inspection tax (TCFA) was established by Law No. 10165 of 27 December 2000, amending the Brazilian Environmental Policy (Law No. 6938/1981).

The TCFA is levied by IBAMA for the monitoring and inspection of potentially polluting activities and users of natural resources in accordance with the Brazilian Environmental Policy.

The tax amounts vary according to the relevant company's size and pollution potential and the level of use of natural resources.

Some Brazilian states have also established similar taxes.

IBAMA Instruction No. 17/2011, among others, regulates the TCFA set-off mechanism in relation to state and municipal levies.

Hazardous activities and substances

13 Regulation of hazardous activities

Are there specific rules governing hazardous activities?

The Brazilian Environmental Policy (Law No. 6938/1981) provides that environmental licensing by the appropriate agencies is required for construction, establishment and operation of activities involving use of natural resources if such activities are actually or potentially polluting or could otherwise cause environmental degradation, such as hazardous activities.

Complementary Law No. 140/2011 and CONAMA Resolutions Nos. 237/2007 and 01/1986 establish rules regarding licensing procedures, the jurisdiction of environment agencies and applicable environmental studies for impacting activities (considered hazardous).

Pursuant to Brazilian environmental law, the licensing procedure involves three consecutive phases, corresponding to the issuance of three different licences:

- preliminary licence (LP) – issued during the preliminary planning phase, this licence approves the location and design of an undertaking or activity, confirms its environmental feasibility and establishes the basic and conditional requirements to be satisfied during the next implementation phases;
- installation licence (LI) – authorises the undertaking or activity in accordance with the specifications contained in the approved plans, programmes and projects, including applicable environmental check measures and other conditions; and
- operating licence (LO) – authorises operation after confirmation actual satisfaction of the conditions contained in the preceding licences.

14 Regulation of hazardous products and substances

What are the main features of the rules governing hazardous products and substances?

The definition of hazardous product or substance is not clear in our legislation. However, environment agencies use the waste classification contained in ABNT Technical Standard NBR 10004. Pursuant to this standard, any waste that is toxic, corrosive, flammable or reactive is hazardous. There are some specific rules regarding hazardous waste, among others: CONAMA Resolution No. 307/2002, which provides that civil construction waste contaminated with asbestos is classified as hazardous waste and therefore should be properly handled and disposed of; CONAMA Resolution No. 401/2008, which specifies the maximum amounts of lead, cadmium and mercury in batteries and also establishes environmental management rules.

Industrial accidents

15 Industrial accidents

What are the regulatory requirements regarding the prevention of industrial accidents?

As indicated above, potentially polluting activities are subject to environmental licensing with the appropriate environment agency, which consists of obtaining the respective environmental licences (preliminary, installation and operating licences). Accordingly, industrial activities are subject to environmental licensing, specifying the standards and limits applicable to the environmental issues involved in the activity, including prevention plans, pursuant to applicable law.

Environmental aspects in transactions

16 Environmental aspects in M&A transactions

What are the main environmental aspects to consider in M&A transactions?

Environmental matters should be considered in every type of transaction since any party involved in a project could be held liable for environmental damage if there is causation between the activity and the respective damage.

The objective of an environmental due diligence is to evaluate environmental compliance, considering the environmental applicable law in force.

Usually, an environmental due diligence is conducted by environmental advisers in coordination with environmental lawyers who perform a legal due diligence.

Environmental lawyers play an important role in ascertaining the potential contingent liabilities that could arise in a transaction. This is relevant where the financial amount of any environmental non-compliance may influence the final transaction amount.

17 Environmental aspects in other transactions

What are the main environmental aspects to consider in other transactions?

As indicated above, environmental matters should be considered in every type of transaction, since any party involved in a project could be held liable for environmental damage if there is causation between the activity and the respective damage.

Therefore, an appropriately tailored environmental due diligence is recommended in any transaction, to evaluate the environmental management employed in the economic activity in question and analyse environmental compliance due to legislation in force.

Environmental assessment

18 Activities subject to environmental assessment

Which types of activities are subject to environmental assessment?

The degree of complexity of the environmental assessments required under Brazilian law varies in accordance with the environmental impact caused by a project. CONAMA Resolution No. 001/86 contains a list of activities requiring an environment impact assessment (EIA) and environmental impact report (RIMA), such as railways, ports and terminals used for ore, petroleum and chemicals, airports, and oil and gas pipelines, among others.

19 Environmental assessment process

What are the main steps of the environmental assessment process?

The characteristics of the environmental assessment process will depend on the type of assessment required by the environmental licensing agency.

The proceeding rules applicable to an EIA are set out in CONAMA Resolution No. 01/86 and consider the following in particular: technology and location alternatives, survey and assessment of the impacts that may be caused by the project in its various phases of implementation, public policies established by the government for the region, development of preventive measures or mitigation of environmental damage and monitoring impact on the area.

The study should be submitted for public consultation before the preliminary licence is issued, in which case a minimum quorum has to be present. The environmental study is reviewed by a multidisciplinary team and this may involve several government agencies, such as the environment agency, water agency, archeological agency, artistic and cultural heritage protection agencies and the agency responsible for the protection of indigenous peoples.

Regulatory authorities

20 Regulatory authorities

Which authorities are responsible for the environment and what is the scope of each regulator's authority?

After the enactment of the 1988 Federal Constitution, the three federation levels (federal union, states and municipalities) became responsible for the protection of the environment, inspecting potentially polluting activities, and preserving forests, fauna and flora.

Pursuant to the Brazilian Environmental Policy (Law No. 6938/81), environment agencies have authority to review and enforce penalties for administrative environmental offences. The authority to grant environmental licences and permits is shared by federal, state and local authorities pursuant to Complementary Law No. 140/11. This statute also provides that a penalty imposed by a licensing agency prevails over any penalties imposed by other agencies.

21 Investigation

What are the typical steps in an investigation?

A civil investigation is commenced by the public prosecution following a complaint relating to an environmental issue affecting the public in general. Upon completion of the civil investigation, a representative action may be brought against the offender under Law No. 7347/1985.

A civil investigation has three separate phases:

- commencement, implemented by a public prosecutor office after receiving a request or claim;
- discovery – the collection of evidence from testimonies, documents, surveys, examinations, investigations or any evidentiary element; and
- completion, when the investigation is interrupted due to: certainty of the authority that there are no environmental issues, or a public civil judicial action filed by the competent authority or interested third party, or the involved parties entered into an adjustment conduct term before the public authority.

22 Powers of regulatory authorities

What powers of investigation do the regulatory authorities have?

Environment agencies have authority to review and enforce penalties for administrative environmental misdemeanours. The authority to grant environmental licences and permits is shared by federal, state and local authorities pursuant to Complementary Law No. 140/11. This statute also provides that a penalty imposed by a licensing agency prevails over any penalties imposed by other agencies.

The rules and administrative penalties are set out in Decree No. 6514/08, state and municipal laws. Penalties include warnings, single fines, daily fines, demolition and interruption of activities, among others. Administrative sanctions can be challenged in administrative and legal proceedings.

23 Administrative decisions

What is the procedure for making administrative decisions?

Law No. 9784/1999 regulates federal administrative proceedings. The basic principles of administrative law include the principles of legality, purpose, motivation, reasonableness, proportionality, morality, due process, legal certainty, public interest and efficiency.

Decree No. 6514/08 establishes specific administrative proceedings to protect the environment.

24 Sanctions and remedies

What are the sanctions and remedies that may be imposed by the regulator for violations?

Law No. 9605/1998 describes crimes against the environment and Decree No. 6514/2008 regulates administrative environmental infractions and the respective penalties.

Administrative liability is characterised by a breach of Decree No. 6514/2008 and other state or municipal laws. In the particular case of a potentially polluting operation without a licence or authorisation from the appropriate environment agency, the applicable penalties include a fine of up to 50 million reais, besides demolition, suspension of activities and penalties restricting rights (suspension or cancellation of the licence, authorisation or registration), among others.

25 Appeal of regulators' decisions

To what extent may decisions of the regulators be appealed, and to whom?

Decree No. 6514/2008 regulates administrative environment misdemeanours and the respective penalties and also establishes the federal administrative proceedings used to investigate such misdemeanours.

Pursuant to this decree, after the first administrative decision, the violator can also appeal against this decision to a higher administrative authority for final analysis. If the infraction is punishable by a fine, the appeal will have the effect of suspending the fine until the final administrative decision.

Judicial proceedings

26 Judicial proceedings

Are environmental law proceedings in court civil, criminal or both?

In Brazil, there are three major proceedings available to defend collective interests such as the environment, namely class action (Law No. 4717/65), collective writ of mandamus (Law No. 12016/09) and representative action (Law No. 7347/85).

The federal and state public prosecution services have authority to commence civil investigations and bring representative actions in relation to environmental damage and criminal actions for crimes against the environment.

Law No. 9605/98 describes crimes against the environment and provides that a legal entity may be held criminally liable in case of violation resulting from a decision made by a representative of the entity or one of its corporate bodies in the interests or for the benefit of the company.

27 Powers of courts

What are the powers of courts in relation to infringements and breaches of environmental law?

Courts may order remediation or compensation (if it is not possible to restore the environment). In addition, the offender may also be ordered to indemnify anyone who was directly or indirectly affected by any environmental damage.

28 Civil claims

Are civil (contractual and non-contractual) claims allowed regarding breaches and infringements of environmental law?

Civil liability arises in the case of infringement of environmental law resulting in environmental damage or potential damage. The claim could be raised by the public prosecutor who could start an investigation proceeding or a public civil action.

29 Defences and indemnities

What defences or indemnities are available?

From a civil liability, the applicable penalty is remedying or compensating the damage caused to the environment and additionally any resulting damage suffered by third parties. Because the standard of strict liability is applicable, an offender will be held liable irrespective of negligence if the offender's action or omission results in environmental damage.

30 Directors' or officers' defences

Are there specific defences in the case of directors' or officers' liability?

This needs to be analysed on a case-by-case basis. In general, the criminal liability of corporate entities does not exclude the liability of individuals acting as offenders or co-offenders.

As such, all individuals that contribute to an offence (by way of action or omission) could be held liable to the extent of their culpability.

31 Appeal process

What is the appeal process from trials?

At the judicial level, appeals are initially analysed by the local federal or state court, while a subsequent appeal is generally decided by a regional federal court. The court of appeals of last instance is located in Brasilia.

The Superior Court of Justice (STJ), the highest Brazilian court for non-constitutional issues, admits a special appeal in two cases: where a judgment entered by an appellate court violates a provision of federal law, or where two or more appellate courts rule differently on the same federal statute.

All judicial orders and rulings entered in the course of the proceedings may be appealed. One or more types of appeal may be available for each type of judicial order or ruling.

Update and trends

In January 2013, the federal attorney general proposed three Direct Unconstitutionality Actions, seeking a declaration of the unconstitutionality of several provisions in the New Forest Code (Federal Law No. 12651/2012). These legal provisions are related to the intervention in Permanent Preservation Areas (APP) and Legal Reserves (RL). The trials of these actions are currently pending.

Furthermore, the vote on the law bill of the new regulatory framework for mining (Law Bill No. 5807/2013) was scheduled to take place in October 2013. If the current text of the bill is approved, it will significantly change the concession rights model to exploit mineral deposits in the country, as well as create a new regulatory agency for the sector.

International treaties and institutions**32 International treaties**

Is your country a contracting state to any international environmental treaties, or similar agreements?

The major international treaties and conventions on the environment signed by Brazil are the following:

- UN Convention on Biological Diversity;
- UN Framework Convention on Climate Change;
- Montreal Protocol on Substances that Deplete the Ozone Layer;
- Convention on the Conservation of Antarctic Marine Living Resources;
- Vienna Convention on Civil Liability for Nuclear Damage;
- Paris Convention – UNESCO; and
- Convention on the Law of the Sea.

The Nagoya Protocol will come into force when it has been ratified by 50 countries. Currently only 18 of the nearly 100 countries that signed the agreement have ratified it internally. The environment minister announced that Brazil should ratify the protocol until 2014, when the meeting of the UN Convention on Biological Diversity (CBD) will be held in South Korea.

33 International treaties and regulatory policy

To what extent is regulatory policy affected by these treaties?

International treaties and agreements signed by Brazil are incorporated into the Brazilian legal system, and as such are binding upon the government and the population, except as otherwise specifically provided.



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