

"AN UPDATE ON THE AFTERMATH OF THE DAM FUNDÃO DISASTER" AND LEGAL PERSPECTIVE UPON ENVIRONMENTAL INSURANCE IN BRAZIL.

First, forgive me for any spelling mistakes that I shall make, or for any misunderstandings.

1 - Ladies and gentlemen, good afternoon.

For me it is a great honour to participate in this meeting, representing the Brazilian section of AIDA, at the invitation of and with the kind permission of Mr. Tim Hardy, to whom I am very grateful. through whom I now welcome all colleagues here. I also extend my gratitude to AIDA Europe and its Chairman, Mr Colin Croly. I record my congratulations to all the organizers for arranging such an important meeting.

2 - Allow me an introduction.

The Brazilian section of AIDA, since 2009, has a National Working Group dedicated to environmental issues. Its current name is the National Working Group for the Environment, Climate Change and Sustainability. I believe that even with this designation it is well aligned with the new name of this "AIDA Climate and Catastrophic Events Working Party".

Our group in Brazil, which I have the honour to chair, has an important academic and practical output on diverse topics related to insurance and the environment - with a broad approach, including published articles and events held.

These themes, moreover, are the subject of my doctoral studies in law.

3 - As a starting point I want to emphasize, first, that when we talk about insurance, environment, climate change and disaster (or disasters), it must be clear that we have, starting two areas of very different issues: first, (i) damage to the environment or natural resources (pollution) and to third parties and, on the other, (ii) the social and economic impacts of climate change.

I believe that in the context of this meeting, this distinction is obvious to all, but I must emphasize this because in Brazil this issue is not very clear. In both cases we may be facing disaster, but legally the treatment is different, especially as it relates to the involvement of insurance and the Insurance Law.

One thing is to talk about insurance products for pollution. Another thing is to talk about the impacts of climate change in the management of various insurance portfolios.

Incidentally, on the environmental issue, there would still be a third correlation possible, with regard to insurance, namely the issue of waste generated in insurance operations - focusing on car insurance, but which applies to all property, and involves some peculiarities particular in the health sector.

Among others, the following questions arise: where is this intended to be applied, who manages and who is responsible for the waste generated and, more than that, who will be responsible if these residues cause harm to others or to the environment?

Unfortunately there is no time now to address the issue of waste, an issue that we consider highly important. We recently worked upon the production of studies for CNSeg – the National Confederation of Insurance Companies in Brazil on this issue, in which we concluded the need for the adoption of policies and actions of "compliance", not only internal, but also for the insurance companies with all their partners and providers. In Brazil we have a specific law that introduces the concept of "shared responsibility for product life-cycle management and reverse policy", i.e. reassigning economic utility waste whenever possible (recycle, reuse, etc.).

Dr. Maria da Gloria Faria, known to many of you, has already presented a study that we did, in a recent meeting of AIDA Europe, which I believe is available via the website of AIDA on the Brazilian law on solid waste and other law, which deals with the dismantling of vehicles and the re-use of parts.

As I said, there is no way in discuss it today. Nor to address another issue of

considerable financial importance, which is the Brazilian policy of adaptation to climate change. The impact of climate change is very significant in Brazil, especially in southern Brazil, from agriculture to the infrastructure of major cities, in addition to financial and human impacts. It is well known how this new reality impacts the insurance industry. And how many new opportunities open up, highlighting social and economic gains (currently parametric insurance is thought of as being an important feature to be introduced in Brazil).

These two questions, which I have treated briefly, also involve the commitment made by various insurance companies in Brazil, but also CNSeg (National Confederation of Insurance Companies) and SUSEP (Superintendence of Private Insurance) and the PSI: Principles for Sustainability insurance, which is an initiative of UNEP / UN, known by all.

4 - I will focus my speech, which will run for a few minutes more, on a suggestion of Mr Tim Hardy, that is, dealing with "an Update on the aftermath of the Fundao Dam disaster".

However, I will consider a little more, as it is necessary to correlate highly catastrophic events such as this disaster in Minas Gerais (which is a Brazilian state, which is in the Mariana County, where they operate miners involved), with the issue of insurance.

Finally, post-Mariana, much has been said about the adoption (and mandatory adoption) of environmental insurance, or insurance for pollution situations.

I will deal with this in two approaches: (i) the episode, update and current developments; and (ii) the debate on the possibility of adopting, by law, environmental insurance in Brazil, impacting activities for the environment.

5 - First an explanation: I believe there is, on the part of a number of you present, and certainly especially Mr Tim Hardy, special interest in the issue of the Brazilian Samarco case, and the disruption of Fundão Dam, in November 2015.

I confess that I do not feel very comfortable talking about it. Although it is an issue of great interest to me, and with which I am very involved, having already made some statements and written some texts on the subject, the reality is that the scenario of this Brazilian disaster is still very uncertain. I often say that this is a case that will never end. But on second thought, is this not also the case with environmental damage - with their human, social, cultural and economic impacts - which has no end? At least one fitting end ...

The absurd amount of information - and misinformation - produced since the occurrence, last November, makes it really impossible to talk with certainty about the real extent of impacts. The unfolding of this court case, of course, is a black, unknown hole. There are numerous class action suits pending with various applications and objects. There are thousands of individual actions pending proposals for each of the affected victims. There is a conduct adjustment agreement (TAC), a kind of agreement, in broad terms, signed by the parties involved, public and private, including government agencies that have the responsibility of protecting and safeguarding the environment and the community interests. This adjustment agreement provided for a compensation of 20 billion reais (something close to 5.71 billion euros). However, the approval of this agreement was suspended by a higher court (STJ), for alleged lack of competence / judge award which approved the agreement.

The MARIANA CASE IN NUMBERS AND DIMENSIONS

- 05/11/2015 - Dam breaks and flood of mud destroys Mariana district
- 35 million cubic meters of ore tailings mud leaked from the dam break.
- In 40 minutes the mud reached the first town, Bento Rodrigues, a small village, which was severely impacted. 82% of Bento Rodrigues buildings were destroyed by the mud. Of the 252 buildings, 207 were in the affected area
- 17 fatalities
- 11 tons of dead fish
- 1500 hectares of vegetation destroyed by mud
- In addition to the precipice of the dam, the other three are linked to the mine that was exploited (Joy), two of which, Santarém and Germano, according to information from the authorities, are at risk of breaking. As Fundão, this is due to excessive load.

- 7 communities and sub-districts were affected by the mud. Thus, 329 families were left homeless in a total of approximately 1,265 homeless
- 39 cities were affected, including the inability to capture water. These cities located along the Rio Doce, which extends from Minas Gerais to the coast of Espirito Santo, where the river connects to the Atlantic Ocean.

There is much debate about demarcating responsibilities in this case. Only one, for instance: what recovery framework that should be used for repair of Rio Doce and all the badly affected environment? After all, since it was already a polluted river it was not in its original pure condition. As I said, many cities are located on the banks of the Rio Doce. And the rivers, as usual, unfortunately, are discharge points of various substances and waste. Lack of sanitation in Brazil, is a serious reality.

On the other hand, in Brazil there is a system of triple responsibility for damage to the environment: criminal, administrative and civil liability.

On civil liability, already we made reference to pending lawsuits, whose objective is to meet the following dimensions of damages:

- } PERSONAL INJURY REFLECTIONS
- } ECOLOGICAL DAMAGES (SS) - natural resources
- } DIFFUSE DAMAGES (loss of environmental quality: impact on society and the economy)

About the administrative responsibility, there was embargo of the activity, in addition to fines, penal in nature at the time initially set at 250 million reais (69.8 million euros). Generally these fines are often not paid, being challenged in court.

About criminal responsibility. There is characterization, in theory, of various crimes. The following complaints were offered:

- 21 people accused of aggravated homicide with eventual intent - when it assumes the risk of killing
- 1 accused by false environmental report presentation crime
- mining company Samarco and 14 employees of the management of the

company for environmental crimes. In Brazil there is criminal responsibility forecast of the company for environmental crimes.

These numbers scare. Design a case without end, as we have said.

In terms of responsibilities, Brazil does not go through good times in recent years ... maybe in the last 500 years.

And in fact, this legal and judicial scenario of uncertainty is harmful, among others, for their own insurance business.

Anyway, for a broad understanding of the accident itself, I think that an important contribution is the report by Terra Brasis Reinsurance, on which I think Dr. Beatriz Amerizano, who is present here, can you tell us briefly, if at all possible. Anyhow, such material is available on the website "terrabrasis.com.br".

6 - The fact is that such an event has sparked numerous debates about the need to include financial guarantee instruments in commitments for the government to carry out activities that impact the environment.

These include the obligation to provide environmental insurance, or pollution insurance, with legislative proposals.

However, the requirement, the underlying way it has been discussed, raises many concerns.

The fact is that, at present, there is both very low supply and demand for such insurance in Brazil. In addition, legal regulation does not exist. Not to mention the marketing difficulties, which in part are related to the legal uncertainty of environmental issues still reigning in Brazil, as already noted. Our reflections, today, relate to the definition of what is, after all, environmental insurance, or insurance for pollution that may be required of companies that manage environmental impact. There is need to answer questions such as:

- What are the limits of indemnity and guarantee for these insurances?
- What are the covers that should be included? For what types of risks and damage?
- What is the best way to trigger /implement? Occurrence, event or complaints?
- Who are the beneficiaries? Third parties, the community and / or the environment?

• To incremental or gradual events? Currently, in Brazil, it is very common to add to general liability insurance, a cover called Sudden pollution. However, such coverage is confined to pollution so defined. Its scope is very limited, it favours only the third parties, not including the recovery of natural resources, and with very strict criteria for its characterization: pollution in question must have started at a date clearly identified and finished within 72 hours and be due to facilities or pipelines located on the surface or above the surface. That is, there is a multitude of situations, perhaps the vast majority, which are not covered by the concept of this sudden pollution coverage. Anyway, we still have much to build in this area. Even for such insurance sector to develop sustainably in Brazil.

I had the opportunity last week to visit the British Library in London. In a brief search using the keywords insurance and environmental, I had access to numerous and valuable materials. Many, indeed, already dated from the 1980s. In Brazil we still have a major lack of materials. Our intention is to contribute to this development.

7 - Finally a communication and invitation. As is already known, Brazil will host, in Rio de Janeiro, the AIDA Word Congress 2018 on 10 to 13 October 2018, when even one of the chosen themes, and to be reported by Brazil as host country, will be " Pollution Insurance - Methods, Coverage and Beneficiaries ". You're all invited.

8 - I am available for any questions and clarifications, if you have patience to formulate them.

Thank you.