

**ANALYSIS OF THE IMPACT OF BRAZIL'S ENVIRONMENTAL  
PROTECTION LEGAL MECHANISMS ON FOREIGN INVESTMENT  
ACTIVITIES**

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**ABSTRACT:** Environmental protection measures and trade activities have always influenced each other. In recent years, governments of different countries have increased their focus on environmental protection issues, and relevant environmental protection regulations were improved. A new environment and trade relationship is forming. As a large developing country, Brazil's environmental protection legal system is praised by many countries worldwide. At the same time, Brazil, as one of the world's four largest emerging economies, attracts a large amount of foreign investment. Therefore, foreign investment activities in Brazil are also influenced by Brazil's stringent environmental protection regulations. After exploring the relationship between environmental protection measures and international trade activities, this article further analyzes the impact of Brazil's environmental protection regulations on foreign investment activities through case analysis. The article will hopefully provide some experience and lessons for other countries to establish their own legal mechanisms.

**KEY-WORDS:** Environmental protection — International trade — Brazil — Foreign investment

Environmental protection measures and trade activities have always influenced each other. On the one hand, the environment provides some basic conditions for the development of trade activities, and trade activities include buying and selling of natural resources and other raw materials. On the other hand, the development of trade activities would also affect the environment. International cooperation and exchange of environmental protection technologies help to enhance environmental protection but also cause pollution transfer and environmental damage.

**I. Relationship between environmental protection and international trade**

Generally, environmental protection and international trade have some relationships such that they may promote or restrict each other's activities.

The impacts of international trade on environmental protection include attracting foreign investment that may bring environmental-friendly technologies and financial support to help the host country achieve sustainable development and potentially cause pollution and damage to the local environment during some instances of production and processing.

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The two impacts occur at the same time, and international trade's influence on the environment has positives and negatives.

In practice, to improve economic development and attract more foreign investment, the country's government would lower its environmental standards, reducing the potential cost of companies in environmental management. To avoid being at a competitive disadvantage, other countries would lower their environmental standards, reducing a large-scale setback of environmental protection standards, which is the theory of "race to the bottom"<sup>1</sup>. This phenomenon is not uncommon in international trade activities.<sup>2</sup> Then, subsequent international pollution transfer activities would cause severe environmental pollution and environmental damage and cause severe disasters for the residents. The Bhopal tragedy in India is the most famous such disaster.<sup>3</sup> In 1984, a chloride leak occurred in the plant of Union Carbide India Limited, a subsidiary of Union Carbide Corporation in the United States, which eventually caused 25,000 direct deaths, 550,000 indirect deaths, and more than 200,000 severe disabilities. Research on the reasons for this accident shows that it was influenced by the transfer of polluting industries and imperfect environmental regulations with the development of international trade. The oil pollution case in Ecuador and the pesticide case in Costa Rica<sup>4</sup> are also examples of the contradiction between international trade activities and environmental protection requirements.

The impacts of environmental protection measures on international trade are reflected in the fact that changes in environmental rules would affect the content of international investment law to some extent, thereby influencing relevant foreign investment activities. Correspondingly, international investment law would also be a useful method to achieve goals of environmental protection, especially when environmental protection rules are incorporated into relevant international investment agreements. In 2011, the Organization for Economic Cooperation and Development issued a statement titled "Harnessing Freedom of Investment for Green Growth Using Investment Freedom to Promote Green Growth"<sup>5</sup>, which focused on using international investment policies to help countries achieve the goals of green growth. The objectives of environmental and investment policy should be complementary. Multi-departmental cooperation and the social responsibility of relevant enterprises should be strengthened, and the government is recommended to develop a complaint feedback mechanism toward violations of relevant guidelines. In addition, the "United Nations Global Compact," "OECD Guidelines for Multinational Enterprises," and other global environmental standards and business principles have established the social responsibility guidelines of foreign-invested enterprises, of which environmental protection standards are notable examples. This role is also one played by

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<sup>1</sup> The race to the bottom is a socio-economic phrase to describe government deregulation of the business environment, or reduction in tax rates, in order to attract or retain economic activity in their jurisdictions.

<sup>2</sup> Jorge E. Viñuales, *Foreign Investment and the Environment in International Law*, United Kingdom: Cambridge, 2012, pp. 28-29, at p. 25.

<sup>3</sup> M. R. Anderson, *Litigation and Activism: The Bhopal Case*, *Third World Legal Studies*, 1993, pp. 177-88.

<sup>4</sup> P. C. Johnson, *Regulation, Remedy, and Exported Tobacco Products: The Need for a Response from the United States Government*, 25 *Suffolk University Law Review*, 1991, p. 61. *Barrantes Cabalceta v. Standard Fruit Co.*, 667 F. Supp. 833 (S.D. Fla. 1987), David Gonzalez With Samuel Loewenberg, "Banana Workers Get Day in Court", *The New York Times*, <https://www.nytimes.com/2003/01/18/business/international-business-banana-workers-get-day-in-court.html>.

<sup>5</sup> "Harnessing Freedom of Investment for Green Growth", available at <http://www.oecd.org/daf/inv/investment-policy/harnessingfreedomofinvestmentforgreengrowth.htm>, 28 February, 2021.

foreign investment policies in enhancing environmental protection mechanisms. At present, the international investment agreements increasingly include environmental protection clauses. Specifically, most international investment agreements regulate environmental protection obligations in their preambles.<sup>6</sup> Some international investment agreements clearly stipulate the right of contracting parties to take environmental protection measures and the obligation not to lower environmental standards.<sup>7</sup> In recent years, some countries have begun to stipulate procedural provisions of environmental protection in their international investment agreements.<sup>8</sup>

Conflicts arise between environmental protection policies and international trade rules. These conflicts are mainly reflected in two aspects. The first aspect is the conflict between the legal rules regulating foreign investment activities and the legal rules regulating environmental protection measures, also known as the “norm conflict.” The second aspect comprises the conflicts of different legal systems in operation, such as determining the illegality of relevant environmental protection rules in accordance with foreign investment laws and regulations.<sup>9</sup>

For instance, a norm conflict is a conflict in which people cannot comply with the requirements of two conflict regulations at the same time. If one regulation allows people to discharge wastewater into a river, whereas another regulation, in force at the same time, prohibits people from discharging wastewater into the river, a regulation conflict occurs. For another example, the environmental regulations adopted by a country to protect the environment may be protested by investors from other countries who believe that the environmental regulations violate relevant international trade rules and requirements.

Conflict between international trade regulations and environmental protection policies seems inevitable. First, relevant conflicts result from different requirements of governments toward the improvement of international trade and enhancement of environmental protection. In detail, international trade and foreign investment activities ask for government decentralization, improving market liberalization, and even economic globalization. In this process, relevant activities require the governments to delegate powers as much as possible and reduce control to fully respect the autonomy of the market. By contrast, due to the externality of environmental issues,<sup>10</sup> lack of governmental control often leads to the “free rider” phenomenon and “common land” tragedies.<sup>11</sup> Therefore, enhancing environmental protection requires governments to actively guide relevant activities and adopt specific regulations to protect the ecological environment and achieve sustainable development and utilization of natural resources. Therefore, the conflict

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<sup>6</sup> For instance, the bilateral investment treaties signed by the United States, Japan, Canada, and some other countries have these provisions.

<sup>7</sup> For instance, article 1114 of the North American Free Trade Agreement (NAFTA) stipulates that “The Parties recognize that it is inappropriate to encourage investment by relaxing domestic health, safety or environmental measures.”

<sup>8</sup> For instance, the additional agreement of NAFTA stipulates that relevant citizens and non-governmental organizations can submit a petition to the Secretariat if the governments fail to comply with environmental protection regulations.

<sup>9</sup> Jorge E. Viñuales, *Foreign Investment and the Environment in International Law*, United Kingdom: Cambridge, 2012, pp. 28-29.

<sup>10</sup> “The uncompensated impact of one person’s actions on the well-being of a bystander” is called externality. See N. Gregory Mankiw, *Principles of Microeconomics*, Harvard University, 2009, p. 204.

<sup>11</sup> N. Gregory Mankiw, *Principles of Microeconomics*, Harvard University, 2009, p. 204.

between international trade regulations and environmental protection policies is influenced by different requirements of governments toward these two issues.

Second, differences exist between the goals and focuses of international trade regulations and environmental protection policies. In detail, conflict occurs between the objectives of relevant international trade and environmental protection activities. International trade regulations and agreements mainly regulate international trade activities and aim to create a good environment and provide convenient conditions for relevant activities. Environmental protection is not the primary purpose of these regulations and agreements. Environmental protection rules in different countries and international environmental treaties are mainly aimed at protecting the ecological environment, preventing environmental degradation, and achieving the rational utilization of natural resources. To protect the ecological environment and natural resources, relevant rules would restrict some trade activities that may cause environmental damage. Therefore, relevant restrictions may conflict with some international trade regulations.

Finally, transnational issues would exacerbate relevant conflicts. Foreign investment and other international trade activities are all transnational issues. Generally, states are relatively independent subjects at the world level, and relevant governments have considerable legislative and regulatory power over trade activities and environmental protection policies within their own territories. The differences in trade policy and environmental protection rules in different countries would cause additional difficulty for transnational activity subjects to understand and coordinate relevant policies. At the same time, the conflict of trade policies and environmental protection rules between different countries would also affect relevant foreign investment activities. For example, because different national environmental protection regulations may be different or in conflict, some environmental protection measures in host countries may be considered trade barriers and trigger trade disputes. Thus, transnational issues would exacerbate relevant conflicts.

Generally, the determination and adoption of a country's policy result from negotiation and compromise between various interest groups. For instance, representatives of various industries and environmental protection groups debate on the content of relevant national policies, and the results would demonstrate the needs of different interest groups to some extent. Then, due to the lack of participation of foreign players, environmental standards for foreign products are often easier to be adopted because these regulations have less impact on domestic interest groups. A similar situation also happens during the negotiations of international environmental agreements or international trade agreements. The representatives of different countries are inclined to support relevant higher standards and requirements of the issues toward which their countries have more developed environmental technologies and standards, thereby giving play to their own competitive advantages.

In addition, environmental rules sometimes are regarded as trade protectionism. Article 20 of the General Agreement on Tariffs and Trade stipulates the principle of non-discrimination and its exceptions, meaning that trade measures imposed because of reasonable environmental protection requirements would not be considered

discriminatory measures or unreasonable restrictions on international trade. Many international environmental treaties also stipulate similar provisions. This role is effective for governments implementing their environmental protection policies. However, this role may enable protectionist regulations in the name of environmental protection. Currently, the main measures of environmental protection include the implementation of an environmental labeling system, a green packaging system, and the collection of environmental import and export additional taxes. On the one hand, these measures are implemented under the requirements of protecting the ecological environment, human health, and natural resources, which are generally justified. On the other hand, these measures are often based on the provisions of international environmental treaties or national environmental laws. Thus, they are legitimate to a certain extent. Therefore, determining whether a national environmental measure is a trade protectionism measure is difficult.

In recent years, the World Trade Organization (WTO) has dealt with many trade disputes about “green trade barriers,” such as the famous tuna-dolphin case<sup>12</sup> and the shrimp-turtle case<sup>13</sup>. Rulings of the WTO on these disputes are different. Generally, whether the environmental standards and environmental rules of different countries can be recognized as “trade barriers” needs to be analyzed case by case.

In addition to trade barriers, the impact of environmental protection policy on trade is also reflected in the fact that more international environmental treaties play a role in international trade activities. For instance, some international environmental treaties require contracting states to restrict or prohibit the import and export of certain products of polluting industries to reduce the corresponding environmental damage. In addition, international lending organizations tend to increase their environmental protection requirements. For instance, the World Bank regards the results of environmental impact assessment as one of the essential considerations for issuing loans.

## **II. Environment for foreign investment in Brazil**

According to Brazilian law, unless the law clearly stipulates otherwise, foreign investment activities should be treated the same as domestic ones should. Notably, in Brazil, international commercial arbitration has developed rapidly in recent years. In 1996, Brazil promulgated a new arbitration law, and the Convention on the Recognition and Enforcement of Foreign Arbitration Awards (New York Convention) was ratified in Brazil in 2002. These measures have made Brazil a good place to file business arbitrations and attract relevant foreign investors.

The government of Brazil also provides certain tax incentives for foreign investors who set up subsidiaries or branches in Brazil. For instance, companies established in the Manaus Free Trade Zone can obtain tax incentives that have been regulated. As regards the import and export of goods related to oil and gas exploration and production, Brazil implements a special customs system, in which the collection of a series of taxes on goods directly used for oil and gas exploration and production is suspended. For projects related

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<sup>12</sup> Available at [https://www.wto.org/english/tratop\\_e/dispu\\_e/cases\\_e/ds381\\_e.htm](https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds381_e.htm), 28 February, 2021.

<sup>13</sup> Available at [https://www.wto.org/english/tratop\\_e/envir\\_e/edis08\\_e.htm](https://www.wto.org/english/tratop_e/envir_e/edis08_e.htm), 28 February, 2021.

to the development of the Amazon basin and northeastern Brazil, the government of Brazil has implemented a tax relief system to encourage the inflow of foreign investment in the corresponding regions. Projects related to Brazil's infrastructure construction can also obtain tax incentives provided by the government.

At the same time, Brazil actively participates in international organizations and ratified international treaties related to trade liberalization. Relevant international organizations include the WTO, Mercosur, Latin American Integration Association, Organization of American States, The Community of Latin American and Caribbean States, and the Union of South American Nations. Brazil has also signed agreements with some countries and regions to regulate issues of commodity import and export and tariffs. Relevant countries and regions include India (2004), Israel (2007), the Southern African Customs Union (2009), Egypt (2010), and Palestine (2011). Brazil has also signed some agreements on cooperation and facilitation of investments with Mozambique, Angola, Mexico, Ethiopia, Chile, Peru, and Colombia. To date, although Brazil has signed bilateral investment treaties with many countries, none of these agreements have been adopted by Congress.<sup>14</sup>

Although Brazil is generally a country that is open to foreign investment, some industries in Brazil are only open to Brazilians or require authorization from the competent authority for foreign investment activities. Currently, the government of Brazil has issued some restrictions on foreign investment in several industries or requires additional authorization before foreign investors participate in these industries, such as the financial industry, manufacturing and printing industry, domestic chartered airlines, postal industry, security and transportation industry, nuclear energy industry, and rural real estate industry. In addition, foreign investors first should register with the Brazilian Central Bank before they operate activities, and foreign investment activities in the capital market should also be registered with the Brazilian Securities Commission. All foreign investment subjects in Brazil should also appoint a representative residing in Brazil.

For foreign investment activities in Brazil, except for import and export goods and service contracts, foreign exchange, foreign loans, and lease agreements, other trade activities should be settled in Brazilian real; otherwise, they would be deemed invalid. The Brazilian currency or foreign currency with a value of more than BRL 10,000 entering or exiting Brazil should be managed through financial institutions that are authorized by the Central Bank of Brazil. Then the institutions would review the legality of relevant transactions, and they can require the foreign investors to submit necessary documents.

Overall, Brazil has attracted a large number of foreign investors to invest in the country because of its abundant natural resources, vast domestic market, convenient international trade conditions, and developed export industries. However, at the same time, foreign investment activates in Brazil still face some challenges: (1) higher labor protection standards may increase labor costs, (2) infrastructure construction needs to be improved, (3) the financial system is relatively cumbersome, (4) the number of industries that can accept foreign investment is limited, (5) Brazilian commodity prices fluctuate greatly in

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<sup>14</sup> Countries that have signed bilateral investment treaties with Brazil include Germany, Chile, South Korea, Cuba, Denmark, Finland, France, the Netherlands, Italy, Portugal, the United Kingdom, Switzerland and Venezuela.

the international market, (6) political and social tensions and corruption remain, and (7) high-quality labor resources are insufficient.

### **III. Impact of Brazil's environmental protection mechanisms on foreign investment**

Compared with other countries, Brazil has a relatively sound environmental law system. Its environmental protection legal system consists of the environmental protection requirements regulated in the Constitution and separate environmental laws and regulations. The federal government of Brazil, state governments, and federal district governments can legislate on environmental protection issues within their jurisdiction. According to the current legislative regulations of Brazil, the federal government can legislate on general environmental issues, and state and municipal governments can make supplementary legislation on local environmental issues and specific implementation issues.

According to statistics from the Ministry of Finance of Brazil, foreign investment activities in Brazil mainly relate to industries of electricity and gas, commodities, transportation, oil and gas mining, minerals mining, animal husbandry, and chemical products.<sup>15</sup> Among them, the exploitation of oil, natural gas, and minerals is closely related to the protection of natural resources. The electricity, gas, and chemical industries may result in environmental pollution and are regulated by specific environmental rules. Therefore, the environmental law of Brazil has a considerable influence on relevant foreign investment activities. The enterprises would take corresponding liability if they cause environmental damage in their production activities.

#### **Case 1: Leakage of Oil of Locomotives on Railway – Rumo Malha Paulista S.A.**

In December 2017, the Federal Public Prosecution (MPF) filed a public civil action against the company Rumo Malha Paulista S.A. (prior ALL - América Latina Logística Malha Sul SA). The MPF requested that on the merits of the lawsuit, ALL - Malha Sul SA should be legally obliged to recover the degraded area on the railroad tracks, where the environmental damage was caused by an oil spill. The public prosecutor held that the company is responsible for the maintenance of the railway locomotives and, according to the complaint, the occurrence of several spills of lubricating oils from engines along the network had been identified. The MPF believed that the maintenance of equipment was below the necessary standard. In addition, the MPF requested an injunction granting early judicial protection so that the defendant could immediately adopt all conservation measures or installation of sufficient equipment to prevent the leakage of the railway, stipulating a fine of R\$ 5,000 for each oil deposition on the track. The MPF also requested that environmental damage should be recovered in the affected area within 45 days; otherwise, another daily fine would be set by the court.<sup>16</sup>

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<sup>15</sup> Ricardo Barretto Ferreira, Azevedo Sette Advogados, "Investing in Brazil", Thomson Reuters Practical Law, available at [https://uk.practicallaw.thomsonreuters.com/7-596-2711?transitionType=Default&contextData=\(sc.Default\)&firstPage=true&comp=pluk&bhcp=1](https://uk.practicallaw.thomsonreuters.com/7-596-2711?transitionType=Default&contextData=(sc.Default)&firstPage=true&comp=pluk&bhcp=1), 15 January, 2021.

<sup>16</sup> Judgment on Instrument Appeal of Process No. AG 5005621-11.2018.4.04.0000 5005621-11.2018.4.04.0000, available at <https://trf-4.jusbrasil.com.br/jurisprudencia/659249071/agravo-de-instrumento-ag-50056211120184040000-5005621-1120184040000/inteiro-teor-659249246>, 20 October, 2020.

**Case 2: Rupture of Dam in Mariana – Samarco Mineração S/A**

On November 5, 2015, the Fundão dam of the mining company Samarco, controlled by Vale and BHP Billiton, broke down, causing a large mud flood. The disruption of the Fundão dam released a volume of mixture equivalent to 25,000 Olympic pools. The mixture, which, according to Samarco, was composed of iron oxide, water, and mud, was not toxic but capable of causing considerable damage. The leaked mud greatly damaged the surrounding environment. In addition to the death of fish, microorganisms and other living things were also affected and the food chain in some affected environments was destroyed. Shortly thereafter, a preliminary deed of undertaking agreement was signed by the MPF and mining company Samarco, whose owners are Vale and the Anglo-Australian BHP, for the payment of a R\$ 1 billion social and environmental bond. In addition, the Brazilian Institute of Environment and Renewable Natural Resources fined the company BRL 250 million. The MPF also filed a public civil action to ask for up to BRL 155 billion compensation for this environmental accident.<sup>17</sup>

The two cases indicate that enterprises would take corresponding liability if they cause environmental damage in their production activities. Among Brazil's environmental protection legal methods, the environmental permit mechanism and environmental crimes law have the greatest impact on business activities.

**A. Environmental permission and authorization mechanism in Brazil**

According to article 177 of the Constitution of Brazil, the following are the monopolies of the Union: prospecting and exploitation of deposits of petroleum and natural gas, refining of domestic or foreign petroleum, and import and export of the products and basic by-products resulting from these activities. The Constitution also stipulates that the Union may contract with state-owned or with private enterprises for the execution of these activities. Therefore, state-owned or private enterprises can execute oil and gas exploration or production activities according to the signed contract after winning the bidding called by the National Petroleum Agency of Brazil.

Any foreign investment activities that involve any use of environmental resources and may cause environmental pollution or damage should be approved by relevant agencies before proceeding. Relevant licenses mainly include the Previous License (LP), Installation License (LI), and Operating License (LO). In detail, the entrepreneurs should apply for the LP in the preliminary phase of the project planning. After relevant analysis, the licensing agency will issue a technical conclusive report and establish the mitigation measures that should be considered in project deployment. Then, the entrepreneurs should apply for the LI and provide a breakdown of parts of project engineering that relate to environmental issues. Finally, the entrepreneurs should apply for the LO before operating relevant projects. The entrepreneurs are obliged to implement environmental control measures and other conditions set forth. The lack of such permits would influence

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<sup>17</sup>Joint Judgement of Proceedings No. 23863-07.2016.4.01.3800 and 69758-61.2015.4.01.3400, dated 31.08.2018, available at <http://organon.ufes.br/acao-judicial/52/0023863-07.2016.4.01.3800/> ; also see <https://g1.globo.com/mg/minas-gerais/desastre-ambiental-em-mariana/noticia/processos-e-acordos-marcam-30-meses-do-desastre-da-barragem-de-mariana.ghtml>, 20 October, 2020.

relevant foreign investment activities in Brazil, and the entrepreneurs would take corresponding liabilities.

At present, the rules about environmental impact assessment mechanisms that affect foreign investment activities in Brazil mainly include the following laws and regulations.

**Table 1: List of main laws and regulations of Brazil on environmental impact assessment mechanisms<sup>18</sup>**

Names	Year of Adoption	Content
Decree No. 134 (Rio State Government)	1975	Provides regulations on environmental pollution control and prevention in Rio State
Decree No. 1633 (Rio State Government)	1977	Establishes an environmental permit system
Resolution CONAMA No. 237 (Brazilian National Environmental Council)	1977	Specifies projects and enterprises that need to obtain environmental permits
Resolution CONAMA No. 1 (Brazilian Environmental Council)	1986	Defines standards and effects of environmental impact reports
Law No. 1356 (Rio State Government)	1988	Provides specific procedures for the issuance, analysis, and approval of environmental impact reports
Law No. 1898 (Rio State Government)	1991	Provides an environmental hearing system
Decree No. 21470 (Rio State Government)	1994	Regulates the environmental hearing system

Therefore, to engage in foreign investment activities in Brazil, entrepreneurs should increase their focus on the specific provisions of the above laws to prevent violations of laws of Brazil and negative influence on investment activities.

### **Case 3: Deforestation - Salvação Empreendimentos Imobiliários**

In 2013, the Public Prosecution the State of Pará filed a complaint against Salvação Empreendimentos Imobiliários and its administrators for the offense provided in article 60 of Law No. 9605/98, the Environmental Crimes Law. The public prosecution agency held that the defendant had deforested an area of more than 186.24 hectares and built residential communities without obtaining the permits of the relevant environmental agency and submitting an environmental impact assessment report in advance. The judge of the State Court of Pará stated: “I note that the defendant’s culpability is extremely serious in that, through deliberately, through its administrators, it has operated, without license from the competent environmental agency, a potentially polluting work or service making use of the Municipality of Santarém environmental license when it was aware

<sup>18</sup> Available at <http://br.mofcom.gov.cn/article/ddfg/qita/200905/20090506245705.shtml>, 22 January, 2021.

that this public entity could not issue the license, causing, as a consequence, serious environmental damage before the clearing of the existing vegetation in the site.” The judge finally ordered the defendant to pay a fine and sentenced the administrators to 4 months and 12 days of detention. The judge stated: “It is clear that both defendants were fully aware of the facts, having been responsible, as administrators of the legal entity, for the commission of the criminal offense provided for in article 60, of Law 9.605 / 98, and therefore cannot seek to evade the imputations.”<sup>19</sup>

#### **Case 4: Industrial Residues and Waste Exposure - Iharabras S. A. Indústrias Químicas**

In 1999, Iharabras S. A. Indústrias Químicas began to provide services for disposing of industrial waste after obtaining a license from the State Department of Science, Technology and Environment. Then, the Public Prosecutor of the State of Pará filed a public civil action against the company, requiring it to take responsibility for causing environmental damage because of the exposure of tailings and industrial waste produced by it. The public prosecutor stated that during the investigation, some technicians of Iharabras S. A. Indústrias Químicas were found to be unqualified, and the license was devoid of legal validity because State Law No. 5.887/95 prohibited the receipt by the State of Pará of toxic substances from other States. Then, the company failed to provide suitable places to deal with toxic waste and caused serious pollution to the environment. Finally, the court decided to freeze the assets of the defendant up to BRL 1 million and required it to be responsible for assessing and restoring the environmental damage caused.<sup>20</sup>

#### **B. Environmental crimes regulations in Brazil**

Brazil has not made any special regulations regarding the entrepreneurs' responsibilities for environmental damage caused by their foreign investment activities. Therefore, once their foreign investment activities cause ecological damage or environmental pollution, they would take liability in accordance with the provisions of current Brazilian law. Compared with other countries' environmental crimes law, that of Brazil provides detailed and strict provisions on environmental protection, pollution prevention, and punishments.

The No. 9605 Law of Brazil promulgated in 1998 regulates a series of illegal and criminal acts involving ecological destruction and environmental pollution and

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<sup>19</sup> Judgement on the Opposition by Objection on Process No. 00021369320138140051, available at <https://consultas.tjpa.jus.br/consultaprocessoportall/consulta/visualizacaoCompleta.action?cdProcesso=0002136-93.2013.8.14.0051&cdInstancia=3&cdDocumento=>; Judgement issued on Process No. 00021369320138140051, available at <https://consultas.tjpa.jus.br/consultaprocessoportall/consulta/visualizacaoCompleta.action?cdProcesso=0002136-93.2013.8.14.0051&cdInstancia=3&cdDocumento=>, 20 October, 2020.

<sup>20</sup> Decision on Preliminary injunction, dated 29 May 2019, available at <https://consultas.tjpa.jus.br/consultaprocessoportall/consulta/baixarDocumento.action?cdDocumento=20190215960422&cdProcesso=00034139120198140130&cdInstancia=1>; Judgement of Appeal of Instrument of Process No. 0804823-56.2019.8.14.0000, dated 01 July 2019, available at <http://www.tjpa.jus.br/CMSPortal/VisualizarArquivo?idArquivo=838261>, 22 October, 2020.

corresponding punishments. Relevant entrepreneurs should pay attention to these regulations while conducting foreign investment activities in Brazil.

(1) Crime against fauna. Killing or capturing wildlife animals without or in disagreement with the appropriate permission, license or authorization will violate this law and the penalty includes detention for six months to one year and a fine.<sup>21</sup> The same penalty would also be given to whoever trades, puts up for sale, exports, or transports eggs, larva, or species of wildlife animals, as well as products or objects derived from it, from a non-authorized breeding area or without the appropriate permission, license, or authorization from the competent authority.

(2) Crime against flora. According to this provision, those who destroy or damage a forest considered a permanent preservation forest, even if under formation, or use it infringing protection norms, are in violation of environmental protection rules and will be punished by detention for one to three years or a fine, or both penalties cumulatively. Whoever extracts stones, sand, lime, or any type of mineral from publicly owned forests or those considered permanent preservation forests, without prior authorization will be punished by detention for six months to one year and a fine. Whoever cuts or transforms into charcoal noble timber for industrial, energetic purposes and in disagreement with legal determinations will be punished by imprisonment of one to two years and a fine.<sup>22</sup>

In practice, Case 3 is a typical deforestation case. In that case, the corporate managers violated the No. 9605 Law of Brazil and were punished.

(3) Pollution and other environmental crimes. Entrepreneurs should increase their focus on their foreign investment activities to avoid causing environmental damage to humans, animals, and plants. The environmental crimes law of Brazil stipulates that whoever causes pollution of any nature at such a level that it results or could result in damage to human health or that it could cause the death of animals or significant destruction of flora will be punished by imprisonment of one to four years and a fine. Whoever carries out research, mining, or extraction of mineral resources without permission, concession, or licensing will be punished by detention for six months to one year and a fine. Whoever produces, packages, imports, exports, trades, transports, stores, has in warehouse, or uses products or substances that are toxic, dangerous, or noxious to human health or the environment, contrary to the requirements established in laws or regulations, will be punished by detention for one to four years and a fine. Those who disseminate disease or plague or species that may cause damage will also be subject to criminal penalties.<sup>23</sup>

Foreign investors also need to pay attention to the regulations on the omission of environmental obligations. According to article 66 of the No. 9605 Law of Brazil, people who fail to comply with an obligation of relative environmental interest by whoever has the contractual or legal duty to do so will be punished by detention of one to three years. Furthermore, if the crime is without malice, the penalty is three months to one year, without prejudice of a fine.

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<sup>21</sup> Article 29 of No. 9605 Law of Brazil.

<sup>22</sup> Article 38, 44 and 45 of No. 9605 Law of Brazil.

<sup>23</sup> Article 54, 55, 56 and 61 of No. 9605 Law of Brazil.

**Case 5: Oil spill - Petrobras Transporte S/A**

In April 2013, a spill originated at the pier at Terminal Almirante Barroso (Tebar), operated by Transpetro, a Petrobras subsidiary. The incident caused severe environmental damage on the northern coast of São Paulo, with the contamination of over 10 beaches and the suspension of economic activities in the region. Transpetro was initially civilly convicted for damages resulting from the oil spill in the São Sebastião canal. Then, the company was denounced by the MPF in 2014 in public criminal action for causing pollution that resulted in damage to human health, animal death, and flora destruction, as well as preventing the public use of beaches. According to article 54 of No. 9605/98 Environmental Crimes Law, the penalty for this crime is one to five years in prison. Later, the public civil action filed by the Public Prosecutor of the State of São Paulo in 2016 required the company, together with Petrobras, to pay R\$ 16 million to repair collective material and moral damages, as well as indemnify cooperatives of fishers and agriculturists of the region.<sup>24</sup>

In addition to environmental permission mechanisms and environmental crimes regulations, relevant courts in Brazil have also established some precedents through typical environmental cases involving commercial companies. For instance, causality needs to be clarified in Brazilian courts when judges decide whether relevant entrepreneurs should take environmental liabilities.

**Case 6: Rupture of Barrage - Mineração Rio Pomba Cataguases**

The accident occurred in January 2007 and hit cities in Minas Gerais and Rio de Janeiro, leaving several families homeless. Approximately 2 billion liters of bauxite-contaminated waste (toxic mud) leaked from the company's dam after heavy rain. Then, shortly after the accident, the government of Minas Gerais ordered the closure of the Mineração Rio Pombas Cataguases. Considered a recidivist in ruptures of dams, Rio Pomba Cataguases received the largest fine imposed in the history of the State Environmental Foundation: R\$ 75 million. Relevant victims also filed more than 3,900 and 500 civil lawsuits in the municipality of Muriaé and Miraf, to ask for compensation from the company responsible for the accident. Then, the Superior Court of Justice held that “the liability for environmental damage is objective, informed by the theory of integral risk, with causal connection being the binding factor that allows the risk to be integrated into the unit of the act, and the invocation by the company responsible for environmental damage of excluders of liability to exclude their obligation to indemnify.” Ultimately, Mineração Rio Pomba Cataguases was sentenced by the Superior Court of Justice to pay compensation for moral and material damages resulting from a toxic mud leak. The decision of the Supreme Court was important because it would guide the resolution of identical cases in the lower courts.<sup>25</sup>

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<sup>24</sup> Judgment of Public Civil Action No. 0000884-4420144036135, dated May 09, 2019, available at <https://www.jusbrasil.com.br/diarios/documentos/706159091/andamento-do-processo-n-0000884-4420144036135-09-05-2019-do-trf-3>;

Judgment of Criminal Public Action No. 0000019-21.2014.403.6135, dated May 24, 2019, available at <https://politica.estadao.com.br/blogs/fausto-macedo/wp-content/uploads/sites/41/2019/05/2019-05-28petrobras.pdf>, December 28, 2020.

<sup>25</sup> Judgement of Special Appeal No. 1.374.284 - MG (2012/0108265-7), available at [http://www.stj.jus.br/repetitivos/temas\\_repetitivos/pesquisa.jsp?&l=10&i=1&tt=T](http://www.stj.jus.br/repetitivos/temas_repetitivos/pesquisa.jsp?&l=10&i=1&tt=T);

Furthermore, when judges determine the amount of fines, they do not simply calculate the existing loss of environmental damage caused by the actor. They would also measure the relevant accident's long-term impact on the ecological environment.

#### **Case 7: Pesticide pollution - Fazenda Guaicuhy Agropecuária**

The public prosecution of Minas Gerais filed a public civil action against Fazenda Guaicuhy Agropecuária and requested compensation for having caused damage to the environment in the Várzea da Palma district in northern Minas Gerais. According to the information provided by the public prosecution, the application of pesticide on a rice crop caused the death of hundreds of wild birds, constituting a serious environmental violation. In the first instance, the judge of the district of Várzea da Palma upheld the claim and sentenced those responsible for the farm to pay R\$ 150,000 in compensation to repair the local fauna. Later, the company's appeal was also dismissed by the Third Civil Chamber of Minas Gerais, which held that civil liability for environmental damage was objective, that the polluter is obliged to indemnify or repair the damage caused to the environment and third parties affected by its activity, and that asking whether the polluter acted guilty is irrelevant. Therefore, Fazenda Guaicuhy Agropecuária carried out an activity that has caused damage to the environment. Hence the compensation should be fixed taking into account the death of 1,300 birds. In addition, the court stated that the punishment for environmental damage is educational in nature and intended to prevent the repetition of the fault. As regards the review of the compensation, the judges felt that considering only the unit value of each bird was not possible. "The measurement of ecological damage is not exhausted by the simple numerical composition of dead animals, but also the harmful effects arising from the ecological imbalance due to the action taken."<sup>26</sup>

#### **IV. Conclusion**

Generally, environmental protection and international trade have some relationships such that they may promote or restrict each other's activities. The impacts of international trade on environmental protection include attracting foreign investment that may bring environmental-friendly technologies and financial support to help the host country achieve sustainable development and causing possible pollution and damage to the local environment during some production and processing. The impacts of environmental protection measures on international trade are reflected in the fact that changes in environmental rules would affect the content of international investment law to some extent, influencing relevant foreign investment activities. Correspondingly, international investment law would also a useful method to achieve goals of environmental protection goals, especially when environmental protection rules are incorporated into relevant international investment agreements. Brazil, as one of the world's four largest emerging economies, attracts considerable foreign investment, and it has established several

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Judgement certificate of Process No. 2012/0108265-7, available at <https://ww2.stj.jus.br/websecstj/cgi/revista/REJ.cgi/ATC?seq=38326467&tipo=41&nreg=201201082657&SeqCgrmaSessao=&CodOrgaoJgdr=&dt=20140905&formato=PDF&salvar=false>, 20 October, 2020.

<sup>26</sup> Judgement of the Special Appeal No. 1.164.630 - MG (2009/0132366-5), dated 18 November 2010, available at [https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ATC&sequencial=13038496&num\\_registro=200901323665&data=20101201&tipo=5&formato=PDF](https://ww2.stj.jus.br/processo/revista/documento/mediado/?componente=ATC&sequencial=13038496&num_registro=200901323665&data=20101201&tipo=5&formato=PDF), 08 November, 2020.

preferential policies and restrictive measures toward foreign investment activities in Brazil. Brazil's environmental protection mechanisms, especially its environmental permission mechanisms and environmental crimes regulations, have significant impacts on foreign investment activities. Brazil's environmental protection legal system helps prevent foreign investment activities from damaging its ecological environment, and relevant mechanisms should be further explored and researched.

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