
BRAZIL

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Introduction

The Brazilian report will not address category "A" (transboundary pollution) of the Guidelines, since no cases of this type could be found.

Brief Description of Brazilian Environmental Law

Environmental protection law in Brazil is of recent origin. Prior to 1981 when the National Environmental Protection Act (Law No. 6938/81) was brought into force, there were legal rules dealing with the protection of forests, fauna and fishing, but there was no comprehensive protection of the environment as such.

Therefore, Law No. 69938/81 meant a change of direction. It set the basis for modern environmental policy, introduced new legal tools, i.e. the environmental impact statement (Art. 9, III), provided for a strict liability standard for environmental damages (Art. 14, para. 1), and gave the Attorney-General standing to sue in environmental matters. Later, in 1985, Congress passed Law No. 7347/85, giving non-governmental organisations standing to sue in the same situations.

The Democratic Constitution of 1988 was the first in the country to have a whole chapter on the protection of the environment.¹

1 This is the full text of Chapter VI of the 1988 Federal Constitution:

Article 225: All persons are entitled to an ecologically balanced environment, which is an asset for the people's common use and is essential to healthy life, it being the duty of the Government and of the community to defend and preserve it for present and future generations.

- Paragraph 1 : In order to ensure the effectiveness of this right, it is incumbent upon the Government to:

- i) preserve and restore essential ecological processes and provide ecological handling of the species and ecosystems;
- ii) preserve the variety and integrity of Brazil's genetic wealth and supervise entities engaged in research and handling of genetic material;

Currently, a Committee of legal experts is drafting a Brazilian "Environmental Protection Code", a comprehensive statute which will embrace all aspects of the protection of the environment (prevention, compensation, criminal and administrative enforcement, collective access to justice mechanisms, etc.).

Criminal Law and the Protection of the Environment in Brazil

Criminal law has not been successful in eliminating pollution and environmental degradation in Brazil (civil law has not been much more successful either). In fact, criminal enforcement has been a negligible factor in the overall efforts to abate pollution in the country. Several reasons for that failure can be pointed out:

- a) the protection of the environment is a very recent (and social) concern;
- b) although the whole civil legal system has suffered major changes in order to protect the environment (with the introduction, for instance, of a strict liability standard), the criminal legal system has not been substantially altered. Often, out-dated criminal provisions from the Criminal Code of 1940 drafted

iii) determine, in all units of the Federation, territorial spaces and components which are to receive special protection, any alteration and suppression only being allowed by means of a law, and any use which adversely affects the integrity of the attributes which justify their protection being forbidden;

iv) demand, according to the law, for the installation of works or activities which may cause significant degradation of the environment, a prior environment impact study, which shall be made public;

v) control the production, marketing and use of techniques, methods and substances which represent a risk to life, to the quality of life and to the environment;

vi) promote environmental education at all school levels and public awareness of the need to preserve the environment;

viii) protect the fauna and the flora, all practices which jeopardise their ecological function, case the extinction of species or subject animals to cruelty being forbidden according to the law.

- Paragraph 2 : Those who explore mineral resources shall be required to restore the degraded environment according to the technical solution required by the proper government agency, according to the law.

- Paragraph 3 : Conduct and activities considered harmful to the environment shall subject the individual or corporate wrongdoers to penal and administrative sanctions, in addition to the obligation to repair the damages caused.

- Paragraph 4 : The Brazilian Amazon Forest, the Atlantic Forest, the "Serra do Mar" Mountain Range, the "Pantanal Mato-Grossense" and the coastline are part of the national patrimony and they shall be used, according to the law, under conditions which ensure preservation of the environment, including the use of natural sources.

- Paragraph 5 : Vacant Government lands or lands seized by the States through discriminatory actions, which are necessary to protect ecosystems are inalienable.

- Paragraph 6 : Power plants operated by nuclear reactors shall have their location defined in a Federal law and may otherwise not be installed.

for different purposes or situations, are the only means available for criminal implementation;

- c) the Attorneys-General of the different States (as well as the Federal), composed of well-paid and highly professional career lawyers, have been extensively trained on environmental civil litigation but not on environmental criminal enforcement. Most offices have a specialised "Environmental Protection Division" to deal with environmental cases, but *only* from a civil perspective. An environmental criminal prosecution of the same conduct has to be carried by the Criminal Division, where there is no specialisation on environmental matters. In the Criminal Divisions, particularly with the increase of violent crimes in the country, environmental cases are often seen as minor offences;²
- d) environmental offenders are usually corporate or wealthy individuals who can, through different means, (personal contacts, media reports, aggressive lawyers and by even changing the law), avoid a criminal prosecution or manage to be acquitted. Often, the polluter is the State itself. There is no criminal liability for legal entities. Sometimes, the polluter is a top politician (the Governor of the State of Amazonas, for example, is closely associated with mining corporations).

The Criminal Code of 1940 has some provisions which could be said to protect the environment. Article 271, for instance, punishes the polluter of potable water (two to five years' imprisonment). Besides, Art. 132, which makes it a criminal offence "to expose the life or health of another to direct and imminent danger" (three months to a year of imprisonment, if the conduct does not constitute a more serious offence), can be used to prosecute polluters.

On the other hand, the Misdemeanour Code has a couple of similar provisions, i.e. the prohibition of the emission of smoke, steam or gasses capable of offending or annoying others (Art. 38), punishable by just a small fine.

2 For the 1992 Rio Conference, the National Association of Public Prosecutors published a 15 page report entitled "The Office of the Attorney-General and the Protection of the Environment" - in which there was no mention of criminal implementation of environmental law. Accordingly, in the English-Portuguese-Spanish document, up to March 1992, there were 1,710 civil suits (*ação civil pública*) as a result of investigations. But not a single criminal suit was reported, although, as we will see, there were important ones already decided by the courts.

Case Reports

The Forestry Code (Law No. 4771/65, Art. 26) and the Fauna Act (Law No. 5197/67, Art. 27) have some criminal provisions.

In 1989, Law No. 6938/81 was amended and broad (and vague) criminal provisions were added to its original text.³

The 1988 Constitution (see text at the end of the document), provides for the criminal liability of legal entities, but as of 1995, seven years after its enactment, that provision had not been implemented.

In the area of enforcement, a recent development promises better application of the criminal environmental law. The State of São Paulo has started a programme of specialisation of the Civil Police, which involves the creation of Green Police Stations (Delegacia de Policia Verde) in cities considered important from an environmental perspective. Three of these stations have already been built. These stations investigate only environmental offences. Moreover, the State Academy of Civil Police has added environmental law to its curriculum.

3 "Article 15: The polluter who exposes to danger the well-being of people, animals or plants, or makes worse an existing situation of danger, shall, upon conviction, be subject to imprisonment for one to three years and a fine of 100 to 1,000 MVR (a criterion for adjusting the amount of fine in periods of high inflation. It was in use until 1991).

- Paragraph 1: The sanction is increased up to the double if:

i) it causes:

a) irreparable injury to fauna, flora or the environment;

b) serious human injury;

ii) the pollution results from industrial or transportation activities;

iii) the crime occurs at night, on Sundays or holidays;

- Paragraph 2: The sanctions also apply to the competent public official who does not take the necessary measures in order to avoid the conduct described above."

CASE STUDIES

A. Transboundary Pollution

In the absence of transboundary cases, a case dealing with hazardous waste is presented.

Ab. Hazardous waste

Ab.1 The cesium-137 case

In Goiania, a city of over 1,000,000 inhabitants and the capital of the State of Goias, a cesium-137 medical instrument (model CESAPAN F-3000, which was made in Italy), and used for radiotherapy, was left behind by three doctors when they moved their private hospital to a new building.

On 9 September 1987, poor paper gatherers took the cesium parts to their homes and sold them to a junk dealer. According to the most optimistic figures, 53 people were contaminated by the cesium, 16 were seriously injured and 4 of them died.⁴

On 30 November 1987, the Federal Public Prosecutor of Goiania brought a criminal suit against the three doctors and a physicist in charge of overseeing the use of the device, for negligent homicide and injury (Arts. 121 and 129 of the Penal Code). On 28 July 1992, a federal judge found the four defendants guilty and sentenced them to three years in prison and a fine. But because they had not committed any criminal offence before, the imprisonment was substituted for alternative civic services and the interdiction of the exercise of their profession for three years. The decision of the trial court is under appeal.

30 and a half tons of radioactive waste was generated by the de-contamination process. Thus, another Federal Public Prosecutor brought a civil suit against the State of Goias, the Federal Government and the National Nuclear Energy Commission, asking for, among other things, the construction of an appropriate deposit for the waste. There has been no decision in this case so far.

⁴ 2,000 to 10,000 people according to a scientific report issued by the Federal University of Goiás.

The State Public Prosecutor also brought a civil suit against the federal and city governments, the National Nuclear Energy Commission and the four criminal defendants asking for, among other things, compensation for all the victims of the accident. This action is still pending.

Over 200 victims - now belonging to the "Association of the Victims of Cesium" - are already receiving monthly payments from the Government.

B. Pollution Originating from the Operations of Large-Scale Plants

B1. The "Vila Soco" case

Vila Soco used to be one of the poorest slums in Cubatão, an industrial and heavily polluted city in the State of São Paulo. On 25 February 1984, at 1:30 a.m., 450 slum dwellings were razed to the ground by a fire that was caused by the leakage of from one of the gasoline pipelines of PETROBRAS. 93 people died, 8 were seriously injured and 101 were slightly injured.

Although the pipelines of PETROBRAS had a bad record of leakage, the company denied any responsibility for the accident. The pipelines, connecting the City of São Paulo to the City of Santos, which has the most important harbour in South America, started operating in 1951 and during the period 1971 to 1975 had leakages from the pipeline almost every ten days. Corrosion was a major problem.

In 1983, Mr. Shigeaki Ueki, Chairman of PETROBRAS, sent a letter to the Governor of the State and the local authorities warning them of the danger of fires and explosions in the area crossed by the pipeline. He requested that the people living in Vila Soco be removed. Three months later the accident happened.

PETROBRAS, although knowing the high risk of its old pipelines, continued to operate them without any safety precautions. It should be mentioned that in 1979, the Federal Congress enacted Law No. 6766 requiring a *non aedificandi* area of 15 m on each side of a pipeline.

On 4 June 1984, the State Office of the Attorney-General charged 24 persons with negligent arson followed by death and physical injuries, including Mr. Shigeaki Ueki, Chairman of PETROBRAS, Mr. José Oswaldo Pasarelli, the Mayor of the City of Cubatão after 1982, Mr. Telmo Beck Reifschneider, responsible for the Department of Transport of PETROBRAS, Mr. Eugenio Koslinski, the engineer responsible for the pipelines of PETROBRAS, Mr. Waldo de Olivira Magalhães,

the chief engineer of the Division of Safety Engineering and Environment of PETROBRAS and Mr. Romilson Longo Bastos and Mr. Marco Cesar Ribeiro both of whom were engineers responsible for the area where the accident occurred.

On 11 June 1984, the trial judge dismissed the charges against the mayor of Cubatão and six other defendants. He accepted the prosecution of the others, including the top officials of the PETROBRAS company.

Before the final decision of the trial judge, the top officials of PETROBRAS were able, through *habeas corpus* to the Supreme Court, to exclude themselves from the criminal proceedings. Finally, on 16 August 1985, the trial judge found 7 of the original 24 defendants guilty and sentenced them to 1 year 7 months and 26 days in prison. But since they had not committed any criminal offences before, they had their imprisonment sanction suspended for 2 years. The defendants and the Public Prosecutor appealed.

On 6 August 1986, the State of São Paulo Court of Appeals granted the appeal of the defendants and acquitted them all. Although the judge who wrote the opinion stated that the "safety system of PETROBRAS was very bad", he did not find the defendants guilty of negligent conduct. In his final remarks, he stressed the need for better and more modern criminal laws "in order to punish the managers of major public and private corporations".

The State Office of the Attorney-General brought civil suits against PETROBRAS and because of that, the surviving victims and relatives of those who died received compensation for the damages suffered.

B2. The Ajinomoto case

Why this case is important:

The Ajinomoto Case is important because:

- a) the toxic waste placed the health of thousands of people at risk;
- b) it received nation-wide press coverage;
- c) it involved a multi-national during the military dictatorship;
- d) it reflected an effort by the Brazilian Judiciary to give a more flexible construction to the provisions of the 1940 Penal Code; and

- e) paradoxically, the higher court was more sensitive to environmental protection than the lower court.

The legislation applied:

The Ajinomoto Case involved the enforcement of Art. 271 of the 1940 Penal Code, which reads:

"Article 271: Contamination or pollution of potable water for common or private use, rendering it improper for consumption or harmful to health. Penalty - two to five years' imprisonment."

The facts, holding and decision:

Americana is a city of approximately 110,000 people located 130 km from São Paulo and has undergone rapid industrial growth over the past 20 years.

On 26 May 1975, with plans to build a plant on the banks of the Jaguari River in the Piracicaba River Valley, the Ajinomoto Interamericana Chemical Company applied to the CETESB (the Environmental Protection Agency of the State of São Paulo) for approval of its industrial development project. Initially, the agency was against the project for the risk it might bring to the sources of Americana's water supply. The plant design did not include an effluent treatment system, "only a procedure to dilute the more polluting waste with fresh water". Later, on 2 October 1975, on the strength of information provided by the company that "final waste water is mostly cooling water of very low pollutants content", CETESB gave its approval. To secure the license, Ajinomoto also agreed to re-utilise waste originating in processed monosodium glutamate (a spice sold under the brand name of "Ajino-moto") to produce organic fertilisers, given its high ammonia content.

On 3 January 1977, the company applied to CETESB for a license to operate and started up even before it was issued. The license was received only on 13 September 1977 and even then on a temporary three-month basis pending a check of pollution control equipment.

Early in August 1977, the Americana Water and Sewage Department (DAE) detected high ammonia rates at its water treatment stations. Ajinomoto was identified as the source of the pollution. Since the situation did not improve, DAE technicians visited the plant and were received by company managers, who indicated they were fully aware of the problem. They admitted that the plant had been dumping industrial waste of extremely high ammonia and organic matter content

and vaguely promised corrective action. However, they continued to dump roughly 20,000 cu m/day of plant waste into the river.

Throughout September and early October, the ammonia rates remained high at water in-take points, resulting in further talks between State experts and the company management. On 17 October 1977, there was an enormous amount of dead fish in the Jaguari River around the Ajinomoto's discharge site, and extending also to the Piracicaba River and the DAE water up-take point. According to the Public Prosecutor, "the body of the river looked desolate, with thousands of dead fish and huge stains or organic matter in suspension". The polluted water reached the water treatment stations and blocked any attempt at treatment, causing a shut-down of the water supply to Americana that lasted 33 hours. The news made headlines throughout the country. Both the City Council and the State Legislature met to demand action.

The four defendants (two directors, one manager and one chemical engineer) claimed that there had been an accident and that, for the enforcement of Art. 271, the Penal Code required the water to be potable, which was not the case in the Piracicaba River. They brought into the files legal opinions from famous Brazilian Criminal Law scholars.

In the opening of his judgement issued on 14 November 1981, and as if to justify his final decision in advance, the Trial Judge *José Aguiar Pupo Ribeiro* stated that since the town had its water cut off for over 30 hours, "the event took on an emotional connotation among the entire population. They now want punishment at all costs to set an example. In fact, the defence alleged that Ajinomoto had been treated as a 'scapegoat'. Ajinomoto is a multi-national. Just in passing, it is a known fact that when the Esther Plant caused pollution in August 1979, there was no legal proceeding. The same is true of the mayors of Piracicaba River Valley towns who discharged their raw sewage directly into the river basins. A judge is only empowered to enforce the laws of the country. If those laws are not good, the blame lies with the legislators. The case must be tried according to the Penal Code in force".

The judge felt the defendants should be acquitted because the Piracicaba River water was already polluted and required treatment for consumption. Therefore, it could not be deemed to be "potable water" in the terms of Art. 271: "Surely water that is already polluted warrants no criminal protection under the current Penal Code. The law sanctions pollution of potable water ... The extensive or amplified construction intended by the Public Prosecutor in fact is no more than recourse to

analogy, which is rejected in criminal matters by the principle of *nullum crimen, nulla poena, sine lege*, embodied in Art. 1 of the Penal Code currently in force".

The Public Prosecutor appealed, and the decision of the lower court was reversed by the State Supreme Court, with one dissenting opinion. Justice *Marino Falcão* opened his opinion with a question: "Can anyone believe that Brazilian criminal legislators have left the waters of our rivers unprotected from criminal action, exposing them to all sorts of pollution and especially to industrial pollution of consistently dramatic consequences? Can anyone believe that the 1940 legislators were guilty of such awesome omission, when even the old *Ordenações do Reino* addressed the issue and afforded proper protection? ... Can anyone believe, finally, that the 1940 Penal Code - a statute that may have aged in some provisions as time inexorably passes and practices change, but which has always been deservedly praised by scholars - closed its eyes to reality, to the common welfare, leaving our rivers criminally unprotected?" He concludes by saying that "this whimsical construction of Art. 271 of the Penal Code ... is truly absurd". It would be tantamount to "tell companies that they may freely and with impunity dump their plant wastes into rivers, though this might cause (as in the current instance) effective ecological devastation". Thus, "the water at stake in this criminal procedure was potable 'for all practical purposes' since it was consumed by the people of Americana after proper treatment".

Although the decision of the lower court was reversed, the higher court acknowledged that the criminal offence had been negligent conduct under Art. 271, with a sanction of just two months to one year of imprisonment. Because of the time elapsed (more than four years), the sentences were suspended by virtue of the statute of limitations.

C. Small Enterprises or Individual Polluters

C1. The bird barbecue case

Why this case is important:

This is a relevant case because:

- a) it had major repercussions in the national media;
- b) it clearly shows the conservatism of Brazilian higher courts;

- c) it involves an environmental criminal offence committed in broad daylight and with great publicity;
- d) the offenders were affluent individuals and elected officials;
- e) an NGO played a key rôle in denouncing the fact;
- f) although criminally acquitted by the Federal Appellate Court, through the public civil suit brought by the Office of the Attorney-General, the Court of the State of São Paulo condemned the defendants to remedy the damage done.

The legislation applied:

The "Hunt Code" (Law No. 5197/67) provide as follows:

- Article 1: Animals of any species, at any stage of development, living naturally not in captivity and thereby constituting wildlife, their nests, shelters and natural breeding grounds shall be deemed to be government property and their use, pursuit, destruction, hunting or trapping shall be strictly prohibited.

- Article 27: Violations of Article 1, ... constitute misdemeanours punishable by either three months to one year's imprisonment or by a fine equal to one to ten times the monthly minimum wage in force at the location and on the date of the violation, or by both penalties cumulatively.

- Law No. 7683 of 12 February 1988 (enacted after the criminal offence discussed here) amended the Hunt Code and renamed it the "Wildlife Protection Act". It also changed misdemeanours into criminal offences and therefore provided for stronger punishment. The wording of the applicable provision was amended as follows:

- Article 27 (...) § Violations of the provisions of Articles 1, (...) constitute crimes punishable by one to three years' imprisonment.

The facts, holding and decision:

Embu is a pleasant town about 28 km from São Paulo. The population is made up of middle- and upper-class *Paulitanos*. Over the years, it has become the home of artists and craftsmen.

On 29 July 1984, Mayor Nivaldo Orlandi and his father Davi Orlandi hosted a luncheon for friends and party supporters (roughly 1,000 guests), at which they barbecued over 5,000 wild birds. Before the party, the hosts had printed invitations sent out with a map of the location and titled *Bird Barbecue Get-together*.

One of the invitations fell into the hands of the Embu Ecological Association. They informed the Federal Environmental Agency (IBDF) which, in turn, re-

requested assistance from the police. On the day of the event, and with the media present, the major and his father were caught with several of the birds already on skewers. The fact was all over the newspapers, magazines, national radio and television making a huge impact.

The criminal offenders were prosecuted by a Federal Assistance Attorney-General at the City of São Paulo Federal Court because the issue of bird protection falls under Federal jurisdiction. On 8 November 1984, Federal Justice *Laurindo Minhoto Neto* acknowledged that the fact "indeed caused a scandal because the defendants' behaviour was scandalous and an insult to the moral values of the average citizen". He sentenced the defendants to the maximum term of imprisonment, i.e. one year plus a fine equivalent to ten years the minimum wage, but put them on probation for two years. According to the Justice, "If there were a heavier punishment chosen by the legislator, it would have been applied". Because "the number of guests, nearing 1,000, the brutal nature of a banquet akin to the feasts promoted by Caligula involved the slaughter of about 5,000 specimens of wildlife".

The defendants alleged that the barbecue was mostly quail, which are bred and raised in captivity. The few wild birds used had come from the State of Rio Grande do Sul, where the legislation allows the hunting of a few bird species under license. However, experts who examined pictures of the birds on skewers stated in no uncertain terms that none had the physical features of quail or of birds seasonally hunted in Rio Grande do Sul. The defendants appealed to the Federal Court of Appeals. On 28 October 1986, Justice *Dias Trinidad* issued his decision acquitting the criminal offenders with the assenting votes of Justices *Ilmar Galvão* and *Washington Bolívar*. According to him, "As in similar cases, there was a great deal of noise about the event with ample coverage by the media in São Paulo and elsewhere in Brazil, and protests from so-called environmentalists reproaching the attitude of the barbecue hosts".

The defendants were acquitted on the argument that no evidence indicated that they had hunted the wild birds themselves. "It was just assumed that if the birds were found dead there, they had to be responsible for their trapping or slaughter." The justice forgot, however, that the language of the statute talks about the "use" - precisely what the defendants were doing!

His decision closed as follows: "Furthermore, we are faced with an emotional situation created by the enormous repercussion of the luncheon in the press, added to massive political exploitation, since one of the appellants is mayor of the town where the celebration was held. The judiciary cannot be moved by such motives to

the point of passing a verdict such as the one subject to this appeal, which applied the maximum sanction solely on the stated grounds that were there a heavier punishment chosen by the legislator, it would have been applied. In the face of emotionalism, the sedate judgement of those empowered to decide constitutes one of the best guarantees of individual freedom."

The civil liability:

The civil liability suit brought by the State Office of the Attorney-General to determine civil liability for damages to the environment had a different outcome. On 5 September 1985, State Judge *Roberto Caldeira Barioni* held that defendant Davi Orlandi had in fact caused damage to the environment and therefore, was guilty of strict liability pursuant to Law No. 6938/81. Damages were not assessed at the time but deferred pending evaluation by experts, despite the claim made by the State Office of the Attorney-General for an amount equal to the market price of 5,000 birds in view of the difficulty of estimating actual damages. According to the experts who testified during the proceedings, among the slaughtered birds were species of native Brazilian wildlife like thrushes, talpacoti doves and sparrows.

Judge *Barioni* acquitted Mayor Nivaldo Orlandi ("his part in the event involved only signing the invitations, nothing else"), but condemned the father Davi Orlandi ("the planner and promoter of the bird barbecue"). His holding states: "I remember that as a child in Lucélia, Alta Paulista, no one would shoot thrushes - the subjects of poems and songs by Gonçalves Dias and Chico Buarque, for instance - because they were lovely song birds and ate insects. Anyone who shot a thrush would fall out of grace with us! Thrushes and other species were killed in great numbers for the party hosted by the defendant and the consequences of this are not just moral or sentimental".

Davi Orlandi and the Attorney-General's Office both appealed Judge *Barioni's* decision. On 26 June 1986, the State Supreme Court accepted the plaintiff's arguments and reversed the decision. Justice *Marcio Bonilha* called it an "unfortunate event" and found Nivaldo Orlando jointly and severely liable for damages to the environment. He further assessed the damages claimed by the Attorney-General's Office, ordering them paid into the Diffuse Interests Fund.

C2. The case of the Liberato Salzano Municipality

Why this case is important:

This is a benchmark case in Brazil although there are indications that others will follow.

For the first time ever, an elected public official was prosecuted and criminally convicted for degrading the environment.

The case is even more relevant considering that the mayor was condemned based upon Art. 15 of Law No. 6938/81 (National Environmental Policy Act), which addresses the crime of environmental pollution and only recently became effectively enforced.

Even in the wealthiest and most industrialised Brazilian State, São Paulo, it is not unusual to find situations similar to that which led to the imprisonment of the Mayor of Liberato Salzano. This is enough evidence of how important the Rio Grande do Sul precedent was. If properly disclosed and tapped, it can have a major impact throughout the country.

It should not be forgotten that the offence was prosecuted in the State of Rio Grande do Sul, one of the most developed in Brazil, with a broad-minded judiciary whose members are essentially of German and Italian descent.

The legislation applied:

As indicated, Law No. 6938/81 (National Environmental Policy Act) is the foundation of a contemporary Brazilian Environmental Law. It contains a single criminal provision added in 1989:

Article 15: Any polluter who exposes human, animal or plant life to harm or who may be guilty of further aggravating an existing harmful situation shall be liable to one to three years imprisonment plus a fine for the amount of one hundred to one thousand MVRs.⁵

§ 1 The fine may be doubled if:

- i) it results in:
 - a) irreversible damage to wildlife and the environment;
 - b) severe bodily injury;

⁵ A criterion for adjusting the amount of fine in periods of high inflation. It was in use until 1991.

- ii) said pollution results from industrial or transportation activities;
 - iii) the offence is committed at night, on Sundays or holidays;
- § 2 Identical charges will be brought against any official who fails to take the necessary steps to prevent the practices listed above.

The facts, holding and decision:

Liberato Salzano is a small town in the State of Rio Grande do Sul.

Mayor Eduardo Gomes was prosecuted by the State Attorney-General for ordering the town's garbage disposed of at a site on the banks of the Várzea River from early 1989 to mid-1991.

The suit was brought directly before the State Supreme Court because, as mayor, the offender is under privileged jurisdiction, i.e. he cannot be tried by a local judge.

The State Attorney-General charged the mayor for the offence under Art. 15 of Law No. 6938/81 (the National Environmental Policy Act).

In his defence, besides procedural issues, the defendant alleged that:

- a) neither irreversible damage to animal wildlife nor hazard to humans and wildlife could be proven;
- b) he was not familiar with the legislation; and
- c) the previous mayor had done the same thing.

The Supreme Court Panel (made up of three judges), with one dissenting opinion, found him guilty and convicted him with one year's imprisonment plus a fine. He was, however, put on probation for two years.

Justice *José Domingues C. Ribeiro*, speaking for the majority, said at the outset that ignorance of the law under Brazilian law does not preclude a verdict of guilty for the defendant. Next, he rejected the defence's claim that there had been no "irreversible damage to wildlife". According to him, Art. 15 provides for a type of crime where effective damage is not required but solely the likelihood of damage. Furthermore, he said, the fact that the previous mayor had acted in a similar fashion was irrelevant, "since Art. 15 of Law No. 6938/81 also provides that aggravating an existing harmful situation is in itself a criminal act". He closed by qualifying the defendant as "strongly guilty".

The dissenting opinion issued by Justice *Marcelo Bandeira Pereira* was based almost entirely upon the flaws of formal technicalities. However, his closing argument seems to be the rationale of the preceding ones: the town had to dispose of the garbage it collects somewhere; since finding a suitable site especially for that purpose takes time, "this reality will surely be considered by the judges".

C3. The case of the Municipality of Campos do Jordão

Why this case is important:

This case was important because it provided a comparison and contrast with the *Liberato Salzano* case. Both dealt with solid waste pollution produced by the town mayor. Although the circumstances were, in fact, the same, the outcome in terms of enforcement were totally distinct. In *Liberato Salzano*, the Office of the Attorney-General brought a criminal lawsuit, while in *Campos do Jordão* only a civil lawsuit was filed. In both instances, the same practical result was achieved, with garbage dumping being halted and the cleaning-up of the site.

The *Campos* case reflected very accurately the status of environmental criminal prosecution in Brazil. Although the Attorney-General's Office had no choice but to bring a criminal lawsuit when an offence is committed, in fact there were thousands of civil lawsuits while the number of criminal prosecutions was still very small. Each of those civil cases usually masks one or several criminal offences. But they are not normally brought before criminal courts.

The legislation applied:

The civil lawsuit was brought mainly in the terms of the Forestry Act (Law No. 4771/65) and of the National Environmental Policy Act (Law No. 6938/81).

Since it was a civil lawsuit, none of the criminal provisions of Laws 4771/65 and 6938/81 was applied.

However, the mayor might have been charged with a number of offences; the crime provided for under Art. 15 of Law No. 6938/81 (applied to the City of *Liberato Salzano* Government) or the forestry crimes embodied in Law No. 4771/65, since forest tracks were destroyed without prior authorisation to set up a city garbage dump.

The facts, holding and decision:

Campos do Jordão, a city of 33,000 people located between Rio de Janeiro and São Paulo, is a mountain resort and spa standing at an altitude of 1,710 m on Serra da Mantiqueira. It is beautifully set in a long valley. In the summer the wealthy Paulistas flock there for vacations or weekends.

For many years the city had been dumping urban solid wastes, including hospital wastes, at an outdoor dump near Itapeva Peak. As problems started to mount the mayor's office began to look for another site for the disposal of 15 tons of garbage collected daily. It finally selected a site located in an environmentally protected area adjacent to the town and a mere fifteen metres from the Ribeirão das Perdizes River that supplies the town with water. In addition, the water table is just three metres deep and the soil is highly permeable. On 22 June 1987 the site went into operation.

In response to a petition from the residents, the Office of the Attorney-General brought a public civil lawsuit on 10 July 1989. It filed for a ban on the disposal site, removal of the garbage already dumped and reclamation of the soil, of surface and ground waters and of the native vegetation.

The judge issued a preliminary injunction. On 22 December 1987, he tried the suit and upheld the claims and arguments of the plaintiff, giving the municipality thirty days to carry his holding order under penalty of a daily fine. His decision was based upon the lack of the environmental impact statement required by Brazilian law and of a license from CETESB, the Environmental Protection Agency of the State of São Paulo.

The municipality appealed to the State Supreme Court. On 25 October 1988, Justice *Luiz de Ázevedo* dismissed the defendant's appeal and stated that "an area originally designed to channel water to the population had been relegated to being a dump for their garbage".

C4. The case of the hearts of palm theft

Why this case is important:

This case is important because it reflects a very new trend in actions taken by the Attorney-General's Office on matters involving the protection of natural resources owned by the Government (parks, reserves, etc.). As a rule, in cases of exploitation of timber and other resources found at Government-owned conservation

units, the only punishable criminal offences were those embodied in the Forestry Act (Law No. 4771/65), where penalties were negligible. Lately, however, the offence of theft provided under the Penal Code was applied, involving very severe sanctions.

The legislation applied:

The 1940 Penal Code provides that:

Article 155: Taking the personal property of another for oneself or a third party: Penalty - one to four years' imprisonment and a fine.

Criminal offences under the Forestry Act, on the other hand, are qualified as misdemeanours, with sanctions ranging from either three months to one year's imprisonment or a fine or both enforced simultaneously (Art. 26).

The facts, holding and decision:

On 21 August 1987, six illegal hearts of palm harvesters known as "palmiteiros" from the town of Iporanga, located in the poorest area of the State of São Paulo, were caught in the Alto da Ribeira State Park - PETAR - carrying 75 dozen hearts of palm *in natura*.

They were prosecuted in the lower court for attempted theft and sentenced to pay a fine and serve a little over one year in prison. They were placed on probation for two years.

The defendants appealed alleging ignorance of the actual Park boundaries. They thought they were harvesting hearts of palm in "no-man's land". Justice *Ribeiro Machado* rejected their plea on the rationale that the defendants "could not be aware of their criminal offence albeit such acts were quite frequent in the area despite the efforts of those in charge of guarding the forest reserve". His rationale concludes that "what one sees is just the usual and regrettable disregard of Brazilians for public property".

C5. *The pesticide case*

Why the case is important:

This case is important because:

- a) it shows that long-standing legislation enacted back in the forties can be enforced to protect the environment;
- b) it took place in one of Brazil's remotest areas where environmental concerns are not a tradition.

The legislation applied:

As indicated previously, the Brazilian Penal Code contains several provisions that directly or indirectly afford protection to the environment.

Two such provisions were mainly enforced by the Public Prosecutor:

Article No. 270: Poisoning potable water for common or private use or any food or drug designed for consumption: Penalty - five to 15 years' imprisonment.

Article No. 271: Contamination or pollution of potable water for common or private use, rendering it unsafe for consumption or harmful to health Penalty - two to five years' imprisonment. Both offences have a negligent conduct version with much shorter imprisonment terms.

C6. The "Pantanal" (Wetlands) case

The "Pantanal Matogrossense" is a vast swampy area about half the size of France, located at the far west corner of Brazil. It encompasses the States of Mato Grosso and Mato Grosso do Sul and borders on Bolivia and Paraguay. It is one of the world's great wildlife preserves and unquestionably among the country's most beautiful sites. A sizeable area is still considerably well preserved and thinly settled although it is a strong cattle ranching region. Much of this huge alluvial plain is flooded by the Paraguay River and its tributaries during the wet season, from October to March.

The facts, holding and decision:

On 5 April 1978, 18 individuals dumped a toxic substance known as "Petrothene grade NA 679/50" into the Miranda River in Mato Grosso do Sul, killing roughly 40 tons of fish by asphyxiation and causing gastric disorders among the poor who lived by the riverside.

The local public prosecutor charged the offenders for the crimes of "poisoning potable water" (Art. No. 270), "contamination or pollution of potable water" (Art. 271) and "damage" (Art. No. 163, sole §, III).

On 11 April 1983, the Bonito town judge found the defendants guilty and sentenced them to one year's imprisonment for the criminal offence of negligent water poisoning (Art. No. 270, § 2). According to the decision, the poisoned water (Art. No. 270) is necessarily also polluted (Art. No. 271). Thus, the verdict could not be based on both provisions. All of the defendants were put on probation for two years.

The judge's holding seems to have been influenced by the fact that human beings were also affected by the contaminated water.

DATA COLLECTION SCHEME

Ab.1 The cesium-137 case

- *Details of the incident*
 - *details of the offender: who is the polluter?*
 - accidental/first time offender individual
 - recurrent offender non-physical person
 - *details of the event: description of the fact*
 - one act continuous (including wrong development over time)
 - *harm/endangerment involved: assessment of the damage*
 - for people for the environment (nature, wildlife, etc.)
 - *monetary assessment of the damage (please provide the approximate amount in US\$): [no final assessment available]*
 - *place of the event: [the city of Goiania, capital of the State of Goiás, Brazil]*
 - *time/duration of the event:*
 - single act
 - length of the ongoing act
 - *relevance of the fact for public opinion:*
 - reports in newspapers and TV public demonstrations
 - other (please describe)
- *How was it brought to the attention of the authorities?*
 - *when? [Immediately after the accident. The health authorities were informed by the doctors who helped the victims.]*
 - *by whom?*
 - private person local community

B.1 The "Vila Soco" case• *Details of the incident*- *details of the offender: who is the polluter?*

- accidental/first time offender individual
 recurrent offender non-physical person

- *details of the event: description of the fact*

- one act continuous (including wrong
development over time)

- *harm/endangerment involved: assessment of the damage*

- for people for the environment (nature,
wildlife, etc.)

- *monetary assessment of the damage (please provide the approximate amount in US\$): [not available]*-- *place of the event: [Cubatão, in the State of São Paulo, Brazil]*- *time/duration of the event:*

- single act
 length of the ongoing act

- *relevance of the fact for public opinion:*

- reports in newspapers and TV public demonstrations
 other (please describe)

• *How was it brought to the attention of the authorities?*

[by the surviving victims and the media]

- *when? [immediately after the accident]*- *by whom?*

- private person local community
 public groups (green movements,
mass media, etc.) police
 administrative agencies others (please describe)

- *What was the final reaction of the competent authority?*
 - no reaction
 - administrative measures and sanctions
 - duty to co-operate with the agency
 - special duty (to inform, to stop pollution, to close down, to restore the environment, etc.)
 - non-criminal fines
 - sanctions under criminal law
 - special duty (to inform, to stop pollution, to close down, to restore the environment, etc.)
 - criminal fines
 - imprisonment
 - case still pending
 - sanctions by civil law
 - warning

- *Was the handling of the case considered positive or negative by public opinion?*
 - positive
 - negative