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Editorial:
Oil spill Prevention and Response: introductory national, international, and comparative perspectives

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Sumário

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Editorial: Oil spill Prevention and Response: introductory national, international, and comparative perspectives

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In 2019, a vast oil spill occurred in sea areas under Brazilian Jurisdiction[1]. In 2021, the Brazilian police office identified that a Greek ship was probably responsible for the spill when it was crossing international waters roughly 700 nautical miles away from Brazilian coastal line. So far, no proper individual and/or collective compensation has been made for the affected communities, such as fishermen, tourism companies and municipalities. This catastrophe raised many questions including one related to the prevention and the reparation of damages. In the backdrop of the 2019 Brazilian Oil Spill, this special issue investigates innovative solutions for addressing environmental, social and economic issues caused by accidental oil spills from ships from an international, national and comparative perspective. The important legal issues that were pointed out as examples were: prevention and reparation of vessel-source pollution; safety management of offshore oil and gas operations; assessing economic loss caused by oil spill disasters; ecologic compensation in case of oil spill disasters; Area Based Management Tools (including Marine Protected Areas, other effective area-based conservation measures and Marine spatial planning). As an introduction to this special edition, some background, gaps and prospective solutions are presented under Brazilian, international and comparative law.

1 Brazilian perspective

Vessel-source oil marine incidents are quite frequent in Brazil[2]. There are many institutional, material and procedural limits to the management of this type of accident[3]. Even in light of several obligations and instruments that address oil spills, prevention and reparation of damages, implementation of such norms is patchy. The 2019 oil spill shows that the sectorial approach adopted in Brazil is not sufficient to deal with oil spills. An ecosystem

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[1] See in this special issue: Crônica: uma agenda de pesquisa jurídica em construção: propostas a partir do webinário "contribuições jurídicas ao enfrentamento do derramamento de óleo na costa brasileira".

[2] For instance, there were 1509 oil incidents in 2022. AGÊNCIA NACIONAL DO PETRÓLEO, *Relatório anual de segurança operacional das atividades de exploração e produção de petróleo e gás natural*, 2022, p. 74. Available at: https://www.gov.br/anp/pt-br/assuntos/exploracao-e-producao-de-oleo-e-gas/seguranca-operacional/arq/raso/2022-relatorio-anual-seguranca-operacional.pdf. Acesso em: 15 dez 2023.

[3] See on this issue: C.C. Oliveira, R.A. Lima, F. Salgueiro, 'Características do regime jurídico brasileiro de exploração dos recursos minerais marinhos: comparação da integração da variável ambiental nos setores de petróleo e de minério' in C.C. Oliveira, M.P. Lanfranchi, A.F.Barros-Platiau; G.R.B.Galindo, *A função do direito na gestão sustentável dos recursos minerais marinhos,* Rio de Janeiro: Editora Processo, 2021, 400 p.

approach,[4] based on an integrated institutional framework, would help to prevent future oil spills. Moreover, the ratification of some important treaties would also provide for access to international funds to better repair oil spill damages. In this sense, the Brazilian institutional framework to deal with oil spills in national jurisdiction will be presented as well as possible national and international instruments that would fill some gaps.

There are norms directly and indirectly related to oil spills in Brazil as well as norms resulting from the ratification of treaties (thirty-one directly related regulations and twenty indirectly related regulations). A significant number of regulations were produced between 1995 and 1999 and then from 2005 to 2009. Recently, what is being monitored is a potential increase in regulatory production and litigation resulting from the specific case of the oil spill on the Brazilian coast[5]. Regarding jurisprudence, an increasing number of costal and marine litigation can be identified after the 2019 accident. There are nine important judgments directly related to the incident on the Brazilian coast. The most recurring legal issues directly related to the 2019 oil spill are the following: expanding emergency aid to fishermen and shellfish gatherers in the states of Pernambuco and Sergipe, as well as issues related to the conflict of jurisdiction for the case, which was decided in favor of the jurisdiction of the Federal Court in Sergipe. Some relevant legal gaps can be identified in the Brazilian regulation of the issue: national funds, management instruments, integration between federal entities, participation instruments, damage compensation, damage valuation. There are also issues related to definitions and approaches which are not yet clear in Brazilian environmental law, such as an ecosystem and integrated approach.

The issue in the Brazilian case is that the responsible party has not yet been identified, leaving three suspects still being investigated. Therefore, there is no basis for civil liability at this stage, and even if the responsible party were identified, none of the three suspects, as none of them are major shipowners, would likely have the financial capacity to compensate for the socio-environmental and socio-economic damages suffered by Brazil.

The 2019 disaster highlighted the importance of the participation of civil society in this type of case. Local and traditional communities were key to contain the oil spill as well as to monitor the accident. Thus, a reassessment of environmental sensitivity maps was carried out, incorporating the possibility of working with local communities, including educational measures to ensure that technical information can be understood by the entire population. It is important to emphasize the inclusion of traditional and fishing communities living along the coast, which are vulnerable to environmental accidents. Their traditional knowledge and presence are essential tools for making rapid response actions viable. Moreover, it is possible to establish community contingency plans based on the knowledge and practices that underlie an education founded in traditional communities engaged in artisanal fishing[6].

The costal and marine protected areas should also be seen as important regulatory provisions for such cases. Considering that these areas are the best examples of highly fragile ecosystems, it is evident that management agencies of these areas must be prepared to deal with this type of damage. To redirect the course of national marine biodiversity conservation policy, it is crucial to establish a collaborative network between government, local communities and scientific-academic actors.

As per the lack of institutional integration approach, the establishment of a centralized and coordinated entity for maritime emergency situations, facilitating collaboration between federal, state and local governments, with functions spanning both during crises and in normal times, providing practical recommendations and concrete actions (assisting with information, assessment, monitoring, etc.) would be important. An integrated approach could be better implemented by the Brazilian national commission which is responsible for marine public policies. This Commission is more connected to a safety and defense perspective than to an ecosystem approach. The Navy, via the Executive Secretariat for the Inter-ministerial Commission for

[4] See UN Convention on Biological Diversity (CBD) decisions V/6 (2000) and VII/11 (2004).

[5] See on this issue: LEAL, Sara P.; OLIVEIRA, Carina Costa de. Plano nacional de contingência para incidentes de poluição por óleo: análise da alteração legislativa após o incidente de derramamento de óleo de 2019. In: VII Congresso de Direito do Mar, 2023, Rio de Janeiro, RJ.

[6] Ver sobre o tema: VIEIRA, F.; ACCIOLY, M. D. C.; SANTOS, T. L. Mapeamento biorregional em comunidades pesqueiras: pertencimento territorial na costa do Nordeste brasileiro frente à impactos ambientais. *Revista Campo-Território*, v. 17, n. 47 Out., p. 105–129, 4 out. 2022.

Marine Resources[7], coordinates an administrative body called CIRM since 1974. CIRM is composed of a coordinator, who is a Navy commander, and 16 representatives from different federal administrative bodies. Some policies have been established since the Commission's creation through the National Policies for the Marine space[8]. However, an integrated perspective is still lacking in Brazil.

Regarding oil exploration and exploitation, the protection of the environment, which should be a central part of the oil regulation, is not integrated to the national natural-resources allocation decision-making process. The oil regulatory agency is responsible for decisions on the allocation of the resources and oftentimes the decision-making process does not consider marine environmental impacts. Consequently, the resource permit is usually granted based on the applicant's assertion that the exploitation of the resource will be profitable to local, regional and national economy. In this sense, this sectoral approach conspicuously results in and aims at a stronger focus on the economic objectives than on the environmental and the social ones.

With respect to obligations on conservation and sustainable use of the marine environment, Brazil has a consistent legal framework to prevent and repair environmental damages. Some principles, such as the precautionary principle, have been embraced by courts and in administrative procedures in cases related to the exploration and exploitation of oil in Brazil. The precautionary principle is entrenched in some norms related to marine resources, but these usually refer only to the coastal zone.[9] There have been some procedural developments, namely the reversal of the burden of proof.[10] Regarding administrative procedures, one good example of the implementation of the precautionary principle is related to the exploration of oil in the Amazonas river. The company Total E&P was granted a concession area at the Amazonas river after a bidding procedure in 2013. In April 2018, the federal prosecutors issued a recommendation to the environmental administrative body and asked it to withdraw the environmental permit to the company, based on the precautionary principle.[11] The main argument was that the scientific evidence was not sufficient to decide whether there would not be an intolerable impact to the recently discovered coral reef in the region. By now, this argument has been sustained even if there is strong pressure to exploit this area[12].

In this context, there is a key legislative reform initiative specifically related to the ocean underway. The draft statute (PL 6969) was presented in 2013, but it has not been voted by congress representatives yet. It aims at reducing this fragmented institutional framework by proposing a general policy for the integrated management, the conservation and the sustainable use of the coastal and marine environment. It proposes to assemble and harmonize important objectives, definitions, principles and instruments applicable to the marine environment. In this sense, Brazil is still in a prospective perspective to integrate different sectors and actors. From an administrative perspective, the marine spatial planning is also a possible process that will bring more synergy and coherence among different policies in Brazil. It has just started. This summary of the national context will be complemented by the international scenario.

2 International perspective related to the Brazilian 2019 case

In the case of an oil spill, there is a gap in international law concerning the fact that the incident occurred in the High Seas, as was the Brazilian 2019 case, where there is little Brazil can proactively do, such as having a right of environmental visitation as is the case for other matters. Even though the United Nations Convention on the Law of the Sea (UNCLOS) does not confer jurisdiction to the coastal state to address marine pollution that takes place in the High Seas, its Part XII on the Protection and preservation of the marine environment provides for flag state obligation to take action against marine pollution. In case of flag state inaction, the coastal state and the port state have very limited possibilities

7 Hereinafter 'SECIRM'.

8 The first one was published in 1980 and the last one was published in 2005 (decree no. 5.377/2005).

9 For instance, Article 1 and Article 5, X, of decree n. 5.300/2004 and statute n. 7.661/1988. Both regulate the coastal zone. The decree 5.377/2005 approves the national policy for the marine resources also presents the principle under article 4.

10 See on this issue: C.C. Oliveira, G.G.B.Lima, F.R.Ferreira (Orgs), *A interpretação do princípio da precaução pelos tribunais: análise nacional, comparada e internacional*, São Paulo: Pontes Editores, 2019, 400p.

11 Brazil, Ministério Público Federal, *Recomendação nº 69/2018–MPF/PR/AP/GAPR4*.

12 See on this issue: https://www1.folha.uol.com.br/ambiente/2023/10/petrobras-preve-iniciar-exploracao-da-bacia-da-foz-do-amazonas-em-2024-diz-prates.shtml. Access on the 15 dec 2023.

to take action under its provisions.

There is no doubt that from an international law perspective, there is a significant preventive gap, and the Coastal State is left with no recourse and no solution when these incidents occur in the High Sea. Furthermore, in the event of serious inaction by the flag State, a 'creative' application of existing provisions can be proposed to overcome gaps. US practice has shown that creative application of its legislation to prosecute cases of ship-source discharges is possible. To this end, they have criminalized the falsification of ship's books where spills are not registered.

UNCLOS does allow for the exercise of jurisdiction beyond coastal state waters, albeit not exclusively, for crimes related to slave trafficking (Article 99), piracy (Article 100), drug trafficking (Article 108), and unauthorized transmissions (electromagnetic) (Article 109). In other words, there is no explicit provision stating that jurisdiction can only be exercised on the High Seas in these specific situations. National practice shows very different interpretations. In the case of the Spanish Supreme Court, it considered universal jurisdiction inapplicable to environmental and illegal fishing crimes taking place on the high seas since the principle of double criminality could not be applied.[13]

However, despite the lack of foresight in UNCLOS, there is a pressing need to promote regulatory changes in line with the ever increasing imperative to protect the marine environment from pollution. The destruction of marine protected areas (MPAs) must also be considered from a different perspective now that the Kunming-Montreal Global Biodiversity Framework has established that States should increase their coverage to 30%,[14] which also requires combating marine pollution,[15] since marine ecosystems are also more vulnerable than terrestrial ecosystems and the cost of inaction is higher, given the difficulty and cost of recovery of those severely affected, when restoration is possible.

In the case of marine protected areas, it is interesting to note that a recent Canadian Protection Standard has prohibited a number of activities in new MPAs, including oil and gas exploration and exploitation, and enhanced restrictions on vessel discharges have been introduced.[16]

The BBNJ treaty could have been a great opportunity, given its focus on biodiversity, to introduce a fifth possibility for jurisdiction in the case of environmental crimes, whether resulting in specific damage (and thus subject to claims by affected and

jurisdiction-asserting states) or collective harm to the global environment.

In terms of international responsibility, the discussion of international responsibility can be approached from the perspective that it affected Brazil as a subject of international law and brought not only environmental but also socio-economic problems, specifically in the fishing industry. There is indeed the possibility of discussing international accountability due to the violation of Brazil's fishing rights, as provided in Article 56 of the United Nations Convention on the Law of the Sea, which grants coastal states sovereign rights over fishing in their Exclusive Economic Zone (EEZ). However, to date, the flag state of the vessel has not been confirmed, and therefore, the third element of international responsibility, imputability, is lacking.

Furthermore, within the International Maritime Organization (IMO) and the Marine Environment Protection Committee (MEPC), there appears to be a gap in discussions about the responsibility of countries involved in irregular oil transportation in cases of oil spill accidents. A presentation on the 2019 incident was made to the IMO by Prof. Ricardo Coutinho (IEAPM) and Fernanda Pirillo (IBAMA), but no concrete actions regarding damage reparation were taken. This highlights a need for further discussions and potential improvements in international cooperation and responsibility for oil spill incidents.

Another gap in Brazil concerning oil spill damages compensation is Brazil's non-adherence to the International Oil Pollution Compensation Fund, as stipulated in the Protocol to the International Convention on Civil Liability for Oil Pollution Damage of 1992. This fund would have allowed for complementary international

[13] See T. Fajardo del Castillo. "To Criminalise or Not to Criminalise IUU Fishing: The EU's Choice". *Marine Policy*, Volume 144, October 2022, 105212, available at https://authors.elsevier.com/sd/article/S0308-597X(22)00259-7

[14] CBD decision 15/04 (2022), Annex, Target 3.

[15] CBD decision 15/04 (2022), Annex, Target 7.

[16] Government of Canada, *Federal Marine Protected Areas Protection Standard* (2023), Cat. No. Fs23-701/2023E-PDF ISBN 978-0-660-47320-8, available at https://waves-vagues.dfo-mpo.gc.ca/library-bibliotheque/41110353.pdf

compensation for the 2019 case.

Hence, international law encounters various limitations in addressing oil spills originating in the High Seas. Regional and national law emerge as the pivotal arena for potential solutions.

3 Comparative perspectives

The Erika shipwreck, which had severe consequences for the French coastline, highlighted the erosion of public opinion regarding such accidents and raised criticisms against the IMO, which was expected to review its instruments and ensure their implementation and compliance. The European legislative response was also noteworthy, with the enactment of three legislative packages (Erika 1, Erika 2, and Erika 3), containing short- and medium-term measures to mitigate damages and harmonize European maritime legislation. Subsequently, the European Maritime Safety Agency (EMSA) was established to oversee the development of this legislation, its modernization, implementation, and enforcement. This European experience underscores the importance of setting clear goals and concrete measures with reasonable timelines, ensuring that legislation and measures do not become outdated or lose their relevance by the time they are implemented. Establishing a robust framework with well-defined objectives and regulatory agility is essential for responding effectively to environmental incidents and preventing their recurrence.

As regards new proposals to combat marine pollution, it should be noted that the European Union is currently amending its Directive 2005/35/EC on ship-source pollution with a view to introducing sanctions, including criminal sanctions, for pollution offences. The reform of Directive 2005/35/EC aims to extend its scope from illegal discharges of oil to include discharges of noxious liquid substances from ships at sea, in accordance with the rules laid down in the International Convention for the Prevention of Pollution from Ships (MARPOL 73/78). In this way, the Directive transposes the MARPOL rules into EU legislation and aims to ensure that those responsible for illegal discharges of polluting substances are subject to dissuasive, effective and proportionate sanctions, in order to improve maritime safety and better protect the marine environment from pollution by ships. The proposal is one of the EU's initiatives to reduce shipping pollution on its seas and is part of the Commission's Maritime Safety Package. In its Article 3.2 (h) it says "Member States shall ensure that the following conduct constitutes a criminal offence when it is committed intentionally: the ship-source discharge of polluting substances falling within the scope of Article 3 of Directive 2005/35/EC of the European Parliament and of the Council, into any of the areas referred to in Article 3(1) of that Directive, provided that such ship-source discharge does not satisfy the exceptions set in Article 5 of that Directive, and which causes or is likely to cause deterioration in the quality of water or damage to the marine environment".[17] When adopted, it may become a model for tackling non-accidental marine ship-source pollution.

The national, comparative, and international gaps and solutions underscore the complexity of the issue. This edition endeavors to illuminate diverse perspectives across various regions, potentially fostering a cross-fertilization of state regulations and practices concerning the management of oil ship-source marine pollution. This edition is a result of several projects financed by national funding agencies[18].

[17] Proposal for a Directive of the European Parliament and of the Council on the protection of the environment through criminal law and replacing Directive 2008/99/EC- Confirmation of the final compromise text with a view to agreement, available at https://data.consilium.europa.eu/doc/document/ST-16069-2023-INIT/en/pdf. Access on the 15 dec 2023.

[18] CNPQ, projeto: A litigância ambiental no contexto da gestão sustentável dos recursos marinhos. Projeto Financiado pelo do CNPQ de 2022 a 2024. Edital Universal – 2021 - 404153/2021-6. Coordenação do projeto: Carina Costa de Oliveira; FAP-DF. Litigância ambiental nacional e internacional como meio para a conservação e o uso sustentável dos recursos ambientais. Coordenação: Carina Costa de Oliveira. Projeto de Pesquisa Científica número 00193.00001489/2021-13. Edital 04/2021, FAP-DF. Brasília, 2022; Desenvolvimento de métodos inovadores para avaliação do derramamento do óleo ocorrido em 2019 nos ecossistemas da costa brasileira. Projeto sob a Coordenação do IEAPM, Prof. Ricardo Coutinho. Financiado pelo Edital CNPQ/MCTI 06-2020.

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