

The International Comparative Legal Guide to:

Environment Law 2009

A practical insight to cross-border Environment Law



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1 Environmental Policy and its Enforcement

1.1 What is the basis of environmental policy in Argentina and which agencies/bodies administer and enforce environmental law?

Section 41 of the Argentine Constitution incorporates the right of all inhabitants to enjoy an environment which is healthy, balanced and suitable for human development. It sets forth the duty to correct and restore to its prior condition any damage caused to the environment (the “polluter pays” principle). Section 41 provides that the federal government will enact laws imposing certain minimum environmental standards, whilst provincial governments will enact supplemental regulations as necessary, and federal laws will not alter local jurisdiction. In this regard, on 6 November 2002, the National Congress passed the General Environmental Act No. 25,675 (“GEA”), which sets forth minimum standards and outlines a general policy for the protection of the environment and the implementation of sustainable development. This Act establishes environmental principles that regulate the interpretation and implementation of environmental regulations.

On the other hand, most provinces have enacted their own environmental protection laws, which establish principles of provincial environmental policy. Provincial laws supplement the provisions of the GEA and should be in line with the minimum environmental standards established therein.

For instance, the GEA of the Province of Buenos Aires (Act No. 11,723) seeks to protect, preserve, enhance and restore natural resources and the environment in the Province of Buenos Aires.

The Secretariat of Environment and Sustainable Development (“SESD”) is the federal department competent to consider, *inter alia*, environmental issues involving more than one provincial jurisdiction, exports and imports of waste, international treaties, and pollution in federal jurisdiction sites. There are also other federal agencies with jurisdiction over the environmental aspects of certain specific matters, such as electricity and hydrocarbons. Additionally, there is a Federal Council of the Environment, responsible for coordinating environmental policies among the federal, provincial and City of Buenos Aires governments.

Provinces, in turn, have their own environmental secretariats, with authority to enforce the law.

1.2 What approach do such agencies/bodies take to the enforcement of environmental law?

The enforcement of environmental law follows general

administrative proceeding rules. Section 4 of the GEA establishes the principles governing the enforcement of environmental law: the prevention and precautionary principles and the polluter-pays principle, among others. Government agencies rely on different means to enforce environmental law, such as environmental impact assessments (“EIA”), control of hazardous activities, environmental information, prosecution, and punishment of violations.

1.3 To what extent are public authorities required to provide environment-related information to interested persons (including members of the public)?

Federal Act No. 25,831, which governs free access to public environmental information, sets forth certain minimum environmental standards designed to guarantee access to environmental information possessed by the Government, whether federal, provincial, municipal or of the City of Buenos Aires. Environmental information may be denied only in certain specific instances, for example: when the nation’s defence, internal security or international affairs may be negatively affected; when the information requested is subject to consideration by the courts of law; when trade or industry secrecy or intellectual property rights may be impaired; when the confidentiality of personal data may be impaired; when the information requested is derived from scientific research, provided that the findings of such research have not been published; or when the information requested has been classified as “secret” or “confidential” under applicable laws and regulations. In all cases, the refusal to supply information shall be justified.

On the other hand, Section 16 of the GEA established an obligation for companies to provide environmentally-related information in connection with their respective businesses, as well as the right of all inhabitants to obtain from governmental authorities all environmental information administered by them and not regarded by law as “reserved” information.

2 Environmental Permits

2.1 When is an environmental permit required, and may environmental permits be transferred from one person to another?

At a federal level, Section 11 of the GEA provides that any work or activity that may negatively affect the environment will be subject to an EIA procedure before it can be conducted. Each province in turn has established an EIA and environmental permit procedure.

For example, the GEA of the Province of Buenos Aires (Act No. 11,723) establishes a mandatory EIA system for projects or

facilities that have or may have a negative impact on the environment or natural resources. If the EIA is approved, the agency will issue an environmental impact statement. All the works and activities subject to the EIA procedure are listed in an annex to the Act.

Environmental laws also establish permits for the operation of industries, discharge of waste waters, air emissions and hazardous waste management.

Environmental permits are associated with industrial activities and facilities and they may be transferred together with the ownership of the property or the plant.

The Industrial Zoning and Environmental Classification Act of the Province of Buenos Aires (Act No. 11,459), however, provides that an application which involves a change in ownership will be approved upon submission of the documentation evidencing such change. For the purposes of this Act, the new owner of an industrial facility will be regarded as a successor to the previous owner, and will have the same rights and obligations as his predecessor.

2.2 What rights are there to appeal against the decision of an environmental regulator not to grant an environmental permit or in respect of the conditions contained in an environmental permit?

An environmental regulator's decision not to grant an environmental permit, or to subject it to compliance with certain conditions regarded as unfavourable, is an administrative act and, accordingly, may be challenged by means of the remedies set out by the administrative procedure laws. The applicable law will be federal or provincial, depending on the governmental agency involved.

In accordance with the provisions of Executive Order No. 1759/72, which implemented the provisions of the Federal Administrative Procedures Act, any interested party may file an appeal with the same authority that made the original decision, or he may file an appeal seeking a higher authority to decide the matter. The decision of such higher authority in turn may be appealed before the courts of law, within a certain period of time. In order to reach the courts, the interested party shall first exhaust all administrative remedies available to it; an appeal seeking a higher authority must be filed for this purpose.

Provinces have similar procedures, although there are a number of variations and differences in terms of the applicable procedures.

2.3 Is it necessary to conduct environmental audits or environmental impact assessments for particularly polluting industries or other installations/projects?

Under the GEA, all works and activities that may substantially and negatively affect the environment, its components, or the standard of living of the population, must follow an EIA procedure before they are conducted.

Each province has enacted its own laws that govern the EIA procedure, which establishes the works and activities subject to EIA procedures.

For example, the Industrial Zoning and Environmental Classification Act of the Province of Buenos Aires (Act No. 11,459) provides that once an industrial facility has been classified, the interested party must submit an EIA, the scope of which will vary depending on the type of facility. Such assessment is analysed by the Enforcement Authority, which either approves it or points out aspects to be reformulated and/or elaborated on, or rejects it altogether. Approval of the EIA results in a Certificate of Environmental Compliance that remains in force for two years. In

order to obtain its renewal, an interested party must submit, among other things, an environmental audit report.

2.4 What enforcement powers do environmental regulators have in connection with the violation of permits?

The GEA does not provide for any enforcement powers by environmental regulators in the event of a violation of the terms of a permit.

However, several provincial laws governing the procedural aspects of EIA and environmental permits do establish enforcement powers in the event of a violation of the terms of such permits.

For example, Section 67 of Executive Order No. 1741/96, which implemented the provisions of the Industrial Zoning and Environmental Classification Act of the Province of Buenos Aires, provides that when the Enforcement Authority determines that a facility that has obtained a Certificate of Environmental Compliance does not comply with the laws and regulations in force or does not meet the conditions to which the Certificate is subject, it must become compliant within a term to be established by the Enforcement Authority. For this purpose, the owner of the facility must submit an adjustment schedule to the Enforcement Authority for consideration and approval. Failure to comply with the proposed schedule will result in those penalties contemplated by law, in addition to termination of the Certificate of Environmental Compliance.

On the other hand, the Enforcement Authority may temporarily close down a facility, in whole or in part, as a preventive measure, where the facility has not obtained a Certificate of Environmental Compliance, or where the seriousness of the circumstances makes it advisable.

3 Waste

3.1 How is waste defined and do certain categories of waste involve additional duties or controls?

The Federal Hazardous Waste Act (Act No. 24,051) defines hazardous waste as any type of waste that may directly or indirectly damage living beings or pollute the soil, water, atmosphere or the environment generally. In particular, the Act provides that any type of waste is hazardous if included in the lists of categories subject to control under, or that exhibit the hazardous characteristics established in, the Basel Convention on Transboundary Movements of Hazardous Wastes and their Disposal. Act No. 24,051 applies to waste generated or located in territories subject to federal jurisdiction, where hazardous waste is transported outside of a province, and when - in the Enforcement Authority's opinion - any such waste may negatively affect the environment beyond the boundaries of a given province.

On the other hand, Federal Act No. 25,612 establishes certain minimum standards with regards to comprehensive management of waste derived from industrial and service activities. This Federal Act defines as industrial waste any element, substance or material, whether solid, semi-solid, liquid or gaseous, obtained as a result of an industrial process, a service activity, or an activity directly or indirectly related thereto, including emergencies or accidents, which the owner, producer or generator cannot use, disposes of or is under a legal obligation to dispose of.

Act No. 25,612 provides that producers and operators of hazardous waste must register with a Registry of Hazardous Waste Producers and Operators, for which purpose they should meet certain legal requirements, such as submitting an affidavit stating, among other

things, the estimated annual amount of each type of waste generated, and the hazardous substances used, in the event of a producer. Once those requirements are met, the Enforcement Authority will issue an Environmental Certificate authorising any such producer, transporter or operator to handle, treat, transport and dispose of hazardous waste. In this regard, it should be noted that there are hazardous waste registries at a federal and provincial level.

Household, pathological and radioactive waste, and waste derived from regular vessel operations, are governed by special laws and international treaties. For example, at a federal level, there is Act No. 25,916, which sets forth certain minimum standards regarding household waste management.

3.2 To what extent is a producer of waste allowed to store and/or dispose of it on the site where it was produced?

Pursuant to the provisions of Section 11 of Federal Act No. 25,612, producers must adequately treat and finally dispose of industrial waste generated by their own activity, on-site, in order to reduce or eliminate its hazardousness, harmfulness or toxicity. When that is not possible, this must be done at authorised treatment or disposal plants, where waste must be transported by authorised transporters. The Act does not provide a maximum term for which producers are authorised to store industrial waste before it is delivered off-site to treatment or final disposal plants.

In some provincial jurisdictions, however, there are rules in place which establish the maximum term permitted for on-site storage of waste. For example, Section 25 of Executive Order No. 806/97, which implemented the provisions of Hazardous Waste Act No. 11,720 (Province of Buenos Aires), provides that hazardous waste producers cannot store such waste on-site for a term in excess of one year; a special consent should be requested to the Environmental Authority for longer terms.

3.3 Do producers of waste retain any residual liability in respect of the waste where they have transferred it to another person for disposal/treatment off-site (e.g. if the transferee/ultimate disposer goes bankrupt/disappears)?

According to Section 43 of Act No. 25,612, a polluter's liability for damages arising from hazardous waste does not disappear as a result of the transformation, specification, development, evolution or treatment thereof, except when damages are caused by increased hazardousness arising from an improper treatment of waste at a treatment or final disposal plant, or when such hazardous waste is used as part of another production process. Also, Section 41 of Act No. 25,612 provides that transfer of title or voluntary abandonment of hazardous waste do not release producers from third party claims.

3.4 To what extent do waste producers have obligations regarding the take-back and recovery of their waste?

Whilst there is no regulation establishing to what extent waste producers have obligations regarding take-back and recovery of their waste, Section 17 of Act No. 24,051 provides that hazardous waste producers should take steps designed to reduce the amount of hazardous waste generated by them. Additionally, Section 11(a) of Act No. 25,612 provides that industrial waste producers must take all steps necessary to minimise waste generation, for which purpose they may adopt gradual technological adjustment programmes for their industrial processes, which give priority to waste reduction, reusing or recycling. Section 11(e) of the Act in turn provides that industrial waste producers must reuse their waste as raw materials

or otherwise as part of other production processes, or recycle them.

At a provincial level, hazardous waste laws also include provisions designed to reduce the amount of this type of waste. For instance, Section 25 of Hazardous Waste Act No. 11,720 (Province of Buenos Aires) provides that waste producers must take gradual steps designed to reduce the amount of hazardous waste they generate, in accordance with a schedule to be agreed upon with the Enforcement Authority. This provincial Act also establishes that waste producers may be exempted from registration fees if they prove that waste is used as part of other production processes.

4 Liabilities

4.1 What types of liabilities can arise where there is a breach of environmental laws and/or permits, and what defences are typically available?

There are several kinds of liability which may arise where there is a breach of environmental laws and/or permits.

- **Environmental Liability.** Section 27 of the GEA defines environmental damage as any relevant alteration that negatively affects the environment, natural resources, the ecosystems' balance, or collective goods or values. The Act stipulates strict liability for anyone who causes environmental damage; they will be under an obligation to restore the environment to its previous condition. When that is not technically feasible, the polluter must pay compensation in an amount to be established by the court, payable into the Environmental Compensation Fund.
- **Administrative Liability.** The exercise of the Government's environmental policing is expressed through legislative Acts, executive orders and resolutions that establish requirements subject to which the authorities will issue concessions, consents, permits, certificates, etc. These laws and regulations, in turn, establish certain obligations, and non-compliance may result in several penalties imposed by administrative bodies with jurisdictional powers. The enforcement authority may impose on violators a number of penalties, such as warnings, fines, closure of facilities, etc.
- **Civil Liability.** As set out in the Argentine Civil Code, it arises from damages caused to third parties as a result of pollution. Section 1113 of the Argentine Civil Code imposes strict liability on the owner or custodian for harm resulting from the risks or defects of a good. This section does not define "risky or defective goods", but the language has been widely interpreted in case law to include pollution and toxic substances resulting from industrial activities.

On the other hand, Section 2618 of the Argentine Civil Code imposes liability for nuisance caused by smoke, heat, smell, light, noise, vibrations and the like, arising from activities in neighbouring areas. Liability arises when normal tolerance levels are exceeded as a result of such disturbances, taking into account the nature of the place, even if an administrative permit exists.
- **Criminal Liability.** Pursuant to the provisions of Section 55 of the Hazardous Waste Act (Act No. 24,051), criminal liability exists whenever hazardous waste pollutes the soil, water, air or the environment in a way that jeopardises human health. There are two types of criminal liability, depending on whether the person convicted acted wilfully or negligently, and the resulting penalties differ. These provisions are currently in force, in spite of the enactment of Act No. 25,612 which governs industrial and service waste, because of the Presidential veto imposed through Executive Order No. 1343/02.

In order to prove that no environmental damage exists, there are

several technical and scientific defences available, depending on the circumstances of the case. For environmental damage to exist under the GEA, there must be a “relevant” alteration that “negatively” affects the environment. That is to say, not all kinds of environmental alteration can be regarded as environmental damage resulting in liability.

In environmental claims where remediation is sought, potential defences are the absence of environmental damage; lack of a cause-and-effect relationship; or the previous existence of a claim seeking remediation of environmental damage, in which case, other third parties may only become involved as “interested” third parties, etc.

In the case of civil liability, there are procedural defences, such as the statute of limitations; lack of legal standing of the plaintiff; absence of causation, etc.

With regard to penalties arising from non-compliance with administrative rules, there are defences such as lack of jurisdiction of the relevant administrative agency; non-compliance with formal requirements applicable to inspection reports; arbitrary acts of the Administration, etc.

With respect to criminal liability, there are some important procedural defences available, associated with lack of direct involvement in the alleged crime; lack of crime for failure to fulfil the requirements of the penal provisions and absence of causation; statute of limitations, etc.

4.2 Can an operator be liable for environmental damage notwithstanding that the polluting activity is operated within permit limits?

An operator may be liable for environmental damage notwithstanding that the polluting activity is operated within permitted limits. Compliance with the law will not prevent liability, when risks or damage to human health or the environment are found. In this case, the responsible party must redress the damage and court may establish more stringent limits. There are a number of legal precedents in this regard.

Thus, a recent decision by the Federal Court of Appeals seated in La Plata upheld that “*exposure to electromagnetic fields within the lawfully permitted limits does not release the electricity company from liability for damages to health of the people of Ezpeleta, and does not release ENRE (the Electricity Enforcement Authority) from liability arising from flawed exercise of its police powers*” (Case 3801/02, “*Asociacion Coordinadora de Usuarios, Consumidores y Contribuyentes c/ ENRE-EDESUR*”, La Plata Federal Court of Appeals, Panel II - 07/08/03).

Section 2618 of the Argentine Civil Code in turn expressly provides that when a neighbouring building generates disturbances in excess of normal tolerance levels, a court may - depending on the circumstances - order compensation to be paid or disturbance to cease, even when administrative permits are in place.

4.3 Can directors and officers of corporations attract personal liabilities for environmental wrongdoing, and to what extent may they get insurance or rely on other indemnity protection in respect of such liabilities?

Pursuant to Section 31 of the GEA, when environmental damage is caused by a corporation, liability will be imposed on its directors and managers, to the extent they were involved.

Section 57 (criminal liability) of the Federal Hazardous Waste Act (Act No. 24,051) provides that, in the case of a corporation, the applicable penalties will be imposed on its directors, managers, statutory auditors or representatives involved in the act. In order to

be held liable, members of a corporation must have participated in the punishable action, either through their act or failure to act. In this regard, the courts have traditionally considered the existence of control over the cause of damage as grounds to hold them liable.

As far as administrative liability is concerned, Section 50 of Act No. 25,612 provides that when the violator is a corporation, the individuals responsible for the direction, administration or management of the legal entity will be jointly and severally liable for the violation.

There is insurance available in Argentina designed to protect directors or managers from environmental liability.

4.4 What are the different implications from an environmental liability perspective of a share sale on the one hand and an asset purchase on the other?

Any business transaction involving the sale of shares, assets or the purchase of properties of a corporation results in the total or partial transfer, as the case may be, of past environmental liability. Accordingly, the buyer will try - through the relevant contractual provisions - to avoid inheriting unknown or not sufficiently evaluated environmental liabilities, or at least to reduce them so as not to alter the business equation.

4.5 To what extent may lenders be liable for environmental wrongdoing and/or remediation costs?

Argentine legislation does not provide lenders with special protection from environmental liability. In the event that environmental damage is generated at the time when a lender takes over a company’s management, and notwithstanding the parties’ stipulations regarding their respective liabilities, a third party will be entitled to sue the lender for liability and remediation costs, since damage was caused by the company under the lender’s management and control.

5 Contaminated Land

5.1 What is the approach to liability for contamination (including historic contamination) of soil or groundwater?

Section 41 of the Constitution provides that environmental damages result primarily in an obligation to remediate. Likewise, Section 28 of the GEA provides that whoever causes environmental damage must remediate this damage, and where that is not technically feasible, they must pay compensation to be determined by court, payable to the Environmental Compensation Fund.

Whilst the GEA does not provide that its application is retroactive for historical pollution, the trend is for courts to force companies to take remediation steps where the impact of pollution extends over time and continues to the present date. In a number of cases, the courts have decided that there is no statute of limitations for environmental damages.

At a federal level, Annex II to Resolution No. 185/99, enacted by the SESD, sets forth the administrative and technical requirements to obtain approval of remediation actions. Those requirements include: a written description of the operations to be carried out; estimated environmental impact and related mitigation actions; amount of waste and its nature; specific environmental monitoring plans, etc.

5.2 How is liability allocated where more than one person is responsible for the contamination?

Under Section 31 of the GEA if environmental damage is caused by two or more persons and their specific liability cannot be separated, they will all be jointly and severally liable for remediation, without prejudice to their right to seek repayment from one another. In order to determine the amount to be repaid by each party, the court may determine the degree of each party's liability.

5.3 If a programme of environmental remediation is 'agreed' with an environmental regulator can the regulator come back and require additional works or can a third party challenge the agreement?

At a federal level, the administrative procedure to obtain approval of a remediation action does not include any specific provisions which allow the Enforcement Authority to require additional works. In practice, however, the Enforcement Authority will require additional works if in the course of supervising the remedial action it determines that there are technical reasons which warrant it.

In accordance with Section 19 of the GEA, third parties may express their opinion and participate in administrative proceedings associated with environmental matters, but that opinion is not binding on the authorities involved. Additionally, third parties may file legal actions to challenge a remediation agreement executed by the enforcement authorities and another party, when they do not agree with the methodology or scope of the remediation tasks contemplated thereby.

5.4 Does a person have a private right of action to seek contribution from a previous owner or occupier of contaminated land when that owner caused, in whole or in part, contamination; and to what extent is it possible for a polluter to transfer the risk of contaminated land liability to a purchaser?

Whilst the Argentine Civil Code does not include a specific provision setting out the private right of action to seek contribution from a previous owner or occupier of contaminated land, it does stipulate a "redhibitory action" that may be filed in the case of transfer of ownership where a hidden defect is detected which was not evident to the buyer at the time of the transaction.

Section 2174 of the Argentine Civil Code, which governs redhibitory actions, provides that the buyer may file such an action seeking termination of the agreement, whereupon the item sold will be returned to the seller and the buyer will recover the price paid, or may file an action seeking to reduce the price paid by an amount equal to the loss of the value of the real property as a result of pollution. Additionally, if the buyer chooses to terminate the agreement, he will be entitled to compensation for damages, provided that the seller, because of his profession or activity, was or should have been aware of the hidden defects in the item sold, and failed to disclose them.

Furthermore, a buyer may file a legal action against a seller seeking damages for historical pollution. The seller must pay for such damages if the buyer proves that the seller actually caused the damages.

With regards to a polluter's ability to transfer the risk of contaminated land liability to a purchaser, the parties may include in their agreement provisions which limit the seller's environmental liability, both for past and future acts; these provisions, however, are not enforceable against third parties.

5.5 Does the government have authority to obtain from a polluter monetary damages for aesthetic harms to public assets, e.g., rivers?

Pursuant to Section 28 of the GEA, the federal government has the authority to recover from polluter monetary damages for aesthetic harms to public assets. Section 28 establishes that a party which is liable for environmental damages must restore the environment to its previous condition; where that is not technically feasible, the polluter should pay compensation in an amount to be determined by the court, payable into the Environmental Compensation Fund.

Thus, for instance, in "*Municipalidad de Tandil c/ Transportes Automotores La Estrella S.A. y otro*" (Court of Appeals seating in Azul, Panel 2, 10/2296, JA 1997-III-224), the court ordered defendants to pay for the "emotional distress" to the community arising from aesthetic harm caused by the destruction of a sculpture, in addition to the artistic and historical value of the work of art, and the necessary restoration work which would take anywhere from ten to twelve months. Additionally, the court ordered the defendants to pay for the reduction in value of the work, which would not recover its original quality despite the restoration work.

6 Powers of Regulators

6.1 What powers do environmental regulators have to require production of documents, take samples, conduct site inspections, interview employees, etc.?

As a rule, environmental agencies are granted broad enforcement authority under the laws that govern their administrative rights and obligations. Some powers are also established in general and special environmental regulations on certain environmental aspects, such as waste, liquid effluents and air emissions.

Governmental powers are broad, and include: granting permits and certificates; control and supervision, by means of inspections and taking samples; the ability to take preventive action, such as monitoring and closing down facilities; and the ability to impose penalties, such as warnings, fines, remediation of environmental damage, temporary closure of facilities, and disqualification.

At a provincial level, for example, the Industrial Zoning and Environmental Classification Act of the Province of Buenos Aires (Act No. 11,459) establishes that the Secretariat of Environmental Policy, in its capacity as enforcement authority, is empowered to evaluate and supervise compliance with the provisions of the law on a permanent basis, for which purpose the Secretariat has authority to require from the owner of an industrial facility or his employees documentation which evidences environmental compliance and other permits applicable to the facility. Agents and officials of the relevant agencies, following instructions from the enforcement authority, may immediately enter any industrial facilities located in the Province of Buenos Aires, at any time and without any restrictions.

7 Reporting / Disclosure Obligations

7.1 If pollution is found on a site, or discovered to be migrating off-site, must it be disclosed to an environmental regulator or potentially affected third parties?

The GEA does not establish a specific obligation to report pollution or environmental contingencies, but it does force polluters to carry out remediation work.

Section 14 of Executive Order No. 831/93, which implemented the

provisions of Hazardous Waste Act No. 24,051, provides that any corporation which, as a result of its acts or of any process, operation or activity, produces waste regarded as hazardous, in an unplanned or accidental manner, must notify the SESD within a term not exceeding 30 business days after the date upon which the event took place. Notice shall be accompanied by a report from an expert in the field, and be signed by the owner of the facility. The polluter must also register with the Secretariat's Registry of Hazardous Waste, in a capacity as "potential generator", and pay the applicable hazardous waste generation charge.

There are also other rules that govern certain specific areas of industry and impose an obligation to report environmental contingencies. Thus, the Secretariat of Energy Resolution No. 1102/04 (hydrocarbons) sets forth that any person or corporation that stores, distributes or markets fuels and hydrocarbons in bulk and compressed natural gas, whose facilities are affected by leaks or spills which may result in pollution of the soil or groundwater, must report any such event to the Secretariat of Energy within 24 hours.

7.2 When and under what circumstances does a person have an affirmative obligation to investigate land for contamination?

When an obligation exists to report pollution incidents, there is also an obligation to look into the matter by means of studies and monitoring. Governmental authorities will demand a report on the outcome of any such research work or risk assessment, and a remediation proposal. Likewise, since the GEA establishes a general obligation to remediate environmental damages, before any remediation work actually starts, a site investigation must be conducted.

7.3 To what extent is it necessary to disclose environmental problems, e.g. by a seller to a prospective purchaser in the context of merger and/or takeover transactions?

Whilst there is no specific obligation on a seller to disclose to a buyer unknown environmental problems of the company or real property being sold, failure to do so will expose the seller to the risk that the buyer may terminate the sale agreement and seek damages. Section 2176 of the Argentine Civil Code provides that where a seller is or should be aware of the hidden defects in an item sold and fails to disclose them to the buyer, in addition to the redhibitory action provided by Section 2174 of the Civil Code (see question 5.4 above), the buyer will be entitled to monetary compensation for damages.

8 General

8.1 Is it possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, and does making a payment to another person under an indemnity in respect of a matter (e.g. remediation) discharge the indemnifier's potential liability for that matter?

The parties to a business transaction may agree on environmental indemnities to allocate the risk of environmental liability between themselves by contract. These indemnity clauses, depending on the case, may vary as to term of validity, maximum amount of indemnity, etc.

The parties may also agree on a safety clause which stipulates the creation of a reserve fund or execution of an escrow agreement, in order for the buyer to be protected from any unknown environmental contingencies.

In any case, however, these clauses are only effective as between the parties, which mean that both the Administration and third parties may directly sue whoever is legally responsible.

8.2 Is it possible to shelter environmental liabilities off balance sheet, and can a company be dissolved in order to escape environmental liabilities?

There is no legal or regulatory provision forcing companies to include in their balance sheets those environmental liabilities that have not been the subject matter of environmental or administrative claims. Accordingly, a company could be wound up as a way of avoiding environmental liability. This, however, will not relieve the company's directors and managers from liability for the company's acts or failure to act, to the extent of their involvement.

8.3 Can a person who holds shares in a company be held liable for breaches of environmental law and/or pollution caused by the company, and can a parent company be sued in its national court for pollution caused by a foreign subsidiary/affiliate?

The general rule is that a shareholder's liability is limited to its capital contribution. Shareholders of a corporation or limited liability company cannot be held liable for the company's non-compliance with environmental laws and regulations. Where pollution exists, the person causing it will be liable. A parent company, in principle, cannot be held liable for liabilities of its subsidiaries. However, under very specific circumstances (i.e. fraud) a parent company can be sued for pollution caused by its subsidiary, to the extent that it can be proved that the acts of the subsidiary were adopted as a result of the controlling company's decisions.

8.4 Are there any laws to protect "whistle-blowers" who report environmental violations/matters?

There is no such environmental law or regulation.

8.5 Are group or "class" actions available for pursuing environmental claims, and are penal or exemplary damages available?

Federal environmental laws do not contemplate group or class actions. Section 30 of the GEA, however, contemplates two types of action in the case of environmental damages. On the one hand, there is a remediation action, which may be filed by any party affected by environmental damage, the Ombudsman or NGOs, or the federal, provincial or municipal governments. On the other hand, there is an environmental protection action (injunction) which makes an environmentally damaging activity cease, and which may be filed by any party that proves that it has a legally relevant interest.

9 Emissions Trading and Climate Change

9.1 What emissions trading schemes are in operation in Argentina and how is the emissions trading market developing there?

By Acts No. 24,295 and 25,438, Argentina ratified the Convention on Climate Change and the Kyoto Protocol. Back in 2002, by Executive Order No. 2213, the President of Argentina appointed SESD as the authority charged with the administration of the Kyoto Protocol.

By Executive Order No. 822/98, the President of Argentina created

a Bureau for the Clean Development Mechanism (“CDM”), which reports to the SESD, and includes a Climate Change Unit created by Resolution No. 56/03. To date, the number of projects submitted before the Argentina Office of Clean Development Mechanism is 32. The actual condition of these 32 projects is the following:

- 14 have been approved at national level and have been registered at international level;
- 20 have been approved at national level, but have not been registered at international level;
- one has been approved at national level, but has been rejected at international level;
- seven are being assessed;
- four have been suspended; and
- one has been rejected.

Executive Order No. 1070/05, in turn, created the Argentine Carbon Fund. The purpose of this fund is to promote the use of the CDM established in the Kyoto Protocol, and to help finance enterprises designed to expand industrial production capacity, increase energy efficiency, replace conventional sources of energy with renewable sources, and expand the supply of energy, in a context of sustainable production.

On the other hand, the Fund calls for proposals from experienced independent consultants on CDM. As of this date, 249 Potential CDM Projects have been submitted in order to obtain a no-objection letter. This letter can be obtained through a previous and optional consultation before the SESD. At the moment, 49 projects obtained the no-objection letter.

10 Asbestos

10.1 Is Argentina likely to follow the experience of the US in terms of asbestos litigation?

It seems unlikely that Argentina will follow the steps of the United States in terms of asbestos litigation. The few asbestos-related claims filed to this date are individual actions by workers that were resolved by Labour Courts, and the trend is to grant compensation to employees.

10.2 What are the duties of owners/occupiers of premises in relation to asbestos on site?

At a federal level, Resolution No. 577/91 (Ministry of Labour and Social Security), establishes the provisions applicable to workers exposed to asbestos. This Resolution sets forth certain basic procedures for personal and group prevention; protective steps for the use and handling of asbestos in any form; procedures for the elaboration of products containing asbestos; and for the transportation, storage and disposal of related waste.

Resolution No. 823/01 in turn prohibits the production, importing, marketing and use of asbestos fibre of the “*crisotilo*” variety and products containing any such fibres, throughout the territory of Argentina, effective from 1 January 2003.

11 Environmental Insurance Liabilities

11.1 What types of environmental insurance are available in the market, and how big a role does environmental risks insurance play in Argentina?

Section 22 of the GEA establishes an obligation for anyone engaged

in environmentally hazardous activities to take sufficient insurance to ensure remediation of environmental damage.

Through Resolution No. 177/2007 and its amendments, Resolutions No. 303/2007 and 1639/2007, the SESD established some rules to Section 22 of the GEA. Among them, it set forth regulations for insurance policies and it listed the activities included in the regulation and the categorisation of activities in accordance with their environmental complexity level. Resolution No. 177/2007 determines that the coverage of the environmental insurance will be limited to collective environmental damages. An Evaluation of Environmental Risk Unit (“UERA”), created by this Resolution within the SESD area, will determine the minimum amounts of coverage, update the list of activities included in this regulation, and decide the approval of remediation plans.

At the end of 2007, the SESD and the Secretariat of Finance (area where the insurance supervisory authority depends) passed a Joint Resolution No. 98 and 1973/2007 that approves the Basic Guidelines of Contractual Conditions for Insurance Policies on collective environmental damages. This Resolution establishes the different types of insurance allowed (liability insurance and bonding insurance), the scope of coverage (sudden or gradual collective environmental damage) and the extent of remediation activities, etc. The possibility of performing an Initial Assessment of Environmental Situation (“SAI”) to exclude pre-existing damages from the coverage is also regulated by this Joint Resolution.

Recently, the SESD has approved through Resolution 1398/08 minimum mandatory amounts of coverage. For the moment, only a small bonding insurance company has got the approval of a product focused on small and medium companies and several other players in the market are exploring and developing their products which could be approved during this year.

It is worth noting that the Argentine insurance market traditionally - and currently - includes in the comprehensive liability insurance policies coverage for damages to the environment, soil and water, if such damages arise from an unexpected and accidental event. This particular insurance coverage is not based on GEA rules (collective environmental damage) but only in the Civil Code.

11.2 What is the environmental insurance claims experience in Argentina?

Since the local environmental insurance market is not well developed, the insurance claims experience in Argentina has not been significant so far. As of this date, there have been instances of environmental damage arising from unexpected and accidental events (e.g. fire), which are covered by the above mentioned comprehensive liability policy.

Nonetheless, in 2008 there were several court decisions forcing (as an injunction) those companies sued for environmental damages to contract this specific insurance (i.e. “*Asociación para la Protección Medioambiental vs. Provincia de Buenos Aires et al.*”).

12 Updates

12.1 Please provide, in no more than 300 words, a summary of any new cases, trends and developments in Environment Law in Argentina.

One of the most important environmental case of the last years has been “*Mendoza, Silvia Beatriz et al vs. Estado Nacional et al.*”. Such Court decision involves not only the cleaning up of the Matanza-Riachuelo Basin -which surrounds the Buenos Aires city-

but also the highest public exposure.

The lawsuit was filed by a group of plaintiffs against 44 companies with facilities allegedly discharging wastewaters into the Matanza-Riachuelo Basin, the National Government, the City of Buenos Aires, the Province of Buenos Aires and 14 municipalities. The plaintiffs sought: (i) monetary compensation for individual damages; and (ii) collective damage: remediation of the Matanza Riachuelo Basin by the implementation of a Fund.

During 2007, the Supreme Court declared *sua sponte* it had no jurisdiction to decide on toxic tort actions, considering that the issue had to be instituted before local courts, but it accepted its original jurisdiction over the claim for collective environmental damages, regarding the fact that the water resource involves different jurisdictions and that the National, Provincial and City governments were parties. The Court of last resort even created special procedural rules for this case, such as public hearings.

In 2008 the Court decided about the remediation and prevention of environmental damages. In this regard, the Court set forth a Programme through which the National, Provincial and City governments in equal parts had to, among others: (i) release environmental public information; (ii) clean-up the river course;

(iii) extend the water network; and (iv) establish an emergency medical care plan; etc.

Regarding industrial pollution, from the date of such decision, all facilities involved in the litigation must be inspected by the River Basin Authority (ACUMAR) in order to determine their polluting level. The governments will implement a restructuring plan, including credit facilities, for those whose results make them fall into the “polluters” category.

During 2008 ACUMAR has passed several resolutions in order to regulate the situation in the Basin, for example Resolution 8/2007 that approves the River Matanza Riachuelo Basin Remediation Plan.

Regarding legislation development, the following regulations have been recently approved: Resolution No. 1139/08 passed by the SESD that approves the “Restructuring Industries Program”; Decree No. 91/09 that regulates the Minimum Standards for Forest Protection established by Law No. 26.331; and the Resolution on environmental insurance referred to in question 11.1.

At a provincial level, Resolution No. 335/08 (Province of Buenos Aires) created the Precarious Wastewater Discharge Permit for groundwater resulting from clean-up activities.

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Mr. Macchiavello is a founding partner at RMA&PR. He graduated from the University of Buenos Aires in 1985 and he completed a graduate course on Environmental Law and Natural Resources in 1987. He has advised international corporations on various environmental matters, including commercial transactions, investments and mergers and acquisitions. He has broad experience in complex toxic tort and clean-up cases.

He served the National Environmental Department and participated in the development of environmental policies for the City of Buenos Aires. He was counsel to the Inter-American Development Bank. He coordinated an Environmental Institutional Strengthening Program to develop comprehensive environmental legislation for the oil and gas industries. In 1998 the World Bank hired him to implement the Environmental Protection Regulations for the Mining Industry in Argentina.

His affiliations include: Buenos Aires Bar Association, International Bar Association, Inter-American Bar Association, Environmental Law Institute, Rocky Mountain Mineral Law Foundation, Center for International Legal Studies, and Latin American Environmental Law Association. He is also a founding member of RIELA, an Inter-American network of environmental lawyers. He is former chairman of the Environmental Department of the Argentine Industrial Association.

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She worked for the Argentine Judiciary when she was a Law School student. In 1997 she obtained her law degree from the University of Buenos Aires. During 1998, she worked *pro bono* at CEDARENA (Environmental and Natural Resources Law Center), in Costa Rica, and participated in the project "Environmental Conflict Management in Central America". Meanwhile, she attended the University for Peace (UN) and participated in seminars on alternative dispute resolution of environmental conflicts. She has been a member of the Buenos Aires Bar Association since 1999. She completed a graduate Programme in Environmental Law at Universidad Austral in 2001.



Set up by partners with a vast experience, most of whom have studied and practised locally and abroad, RMA&PR can offer the energy and muscle of a modern, sophisticated and fully bilingual organisation, while assuring clients working methods developed and improved over many years.

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Through strong relationships forged by its partners with first-tier law firms in the US, Canada, Latin America, Europe, the firm can assist both local and multinational companies in transactions involving multiple jurisdictions.

The Firm is a member of RIELA (Inter-American Network of Environmental Lawyers).