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The International Comparative Legal Guide to:

Environment & Climate Change Law 2019

16th Edition

A practical cross-border insight into environment and climate change law

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EDITORIAL

Welcome to the sixteenth edition of *The International Comparative Legal Guide to: Environment & Climate Change Law*.

This guide provides corporate counsel and international practitioners with a comprehensive worldwide legal analysis of environment and climate change laws and regulations.

It is divided into two main sections:

Four general chapters, which explore topical issues affecting this area of law, particularly from a multi-jurisdictional perspective.

Country question and answer chapters. These provide a broad overview of common issues in environment and climate change laws and regulations in 26 jurisdictions.

All chapters are written by leading environmental lawyers and industry specialists, and we are extremely grateful for their excellent contributions.

Special thanks are reserved for the contributing editor Jonathan Isted of Freshfields Bruckhaus Deringer LLP for his invaluable assistance.

Global Legal Group hopes that you find this guide practical and interesting.

The International Comparative Legal Guide series is also available online at www.iclg.com.

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Chapter 1

Future Horizons: The Next Generation of UK Environmental Law

United Kingdom Environmental Law Association (UKELA)

Simon Tilling

Introduction

It is a privilege to author this introductory chapter to *The International Comparative Legal Guide to: Environment & Climate Change Law 2019*, on behalf of the UK Environmental Law Association, known to its members and friends as UKELA. It is also timely. In 2018 UKELA celebrated its 30th birthday. Of course, as with any big anniversaries, we took the opportunity to look back on all that the first generation of UK environmental lawyers had achieved, from the UK's ground-breaking Environmental Protection Act 1990 onwards. But more importantly, we have been looking forward, towards the challenges ahead for the next generation of environmental lawyers, and indeed of UK environmental law itself. In this chapter I share some perspectives gained from the vibrant debates and discussions that have taken place this year, within UKELA and indeed between UKELA and others, including the UK Government. I do not claim in this article to speak on behalf of UKELA: UKELA is far too broad a church to have 'a point of view', and that is one of its great strengths. No other organisation brings together the full spectrum of voices in environmental law: regulators, campaigners, solicitors, barristers, consultants, academics, senior members of the judiciary, students and the voices of tomorrow, and those from other professions who are simply concerned to ensure the preservation and development of good law for the benefit of the environment. When we make our interventions into public debate, we have the ear of Government and Parliament, and our reputation as an impartial, objective voice on matters of good environmental law is unparalleled. As the whole country wonders what will happen next for UK environmental protection, UKELA as an organisation has never been so relevant, or so vital. All I can seek to do here is to reflect on those excellent debates and discussions throughout 2018, and to offer you my own perspective.

A Period of Change

As I write this chapter at the beginning of December 2018, the UK Government's deal with the EU-27 is facing Parliamentary scrutiny and objection, with great uncertainty over what will happen next. To seek to address (and predict) political events in this chapter would be futile and foolish. But what we can say for sure is that this is a period of change. How the UK leaves the EU, or even if the UK leaves the EU, the idea of a so-called #GreenBrexit has started a public discussion that will not be forgotten. The public is more engaged with, and energised about, environmental issues than ever before. Climate change, air quality and its impacts on public health, and loss of biodiversity, have all been big issues in the UK public debate. However, the game-changer was the *Blue Planet II* effect, named after the global hit series from the BBC's excellent natural history department, which elevated marine plastic waste to a level where politicians were scrambling to be the first to announce tough action on single-use plastics. With it came a reassessment of our disposable society and questions over what happens to our society's waste: the era of 'throw and forget' is coming to an end.

These issues and public concerns have been used to further the Brexit agenda. For example, free from the EU's common agricultural policy, the £3 billion in subsidies that go to support UK agriculture could be used for environmental benefits, or in the words of Michael Gove MP, the Secretary of State for Environment, Food and Rural Affairs (DEFRA), we can adopt a policy of 'public money for public goods', using a natural capital approach.

Of course, there are others who argue Brexit provides an opportunity to row back on the 'green tape' from Brussels, and gives us more freedom to drive economic growth without what some see as unnecessary regulation. Certainly, regardless of one's perspective, it is possible to achieve the same objectives and high environmental standards of EU environmental law through different, potentially more 'British' methods. For some, though, there is concern that the drive for international competitiveness and the willingness to sign free trade agreements will be to the detriment of environmental protection, with environmental laws sacrificed as unduly restrictive non-tariff barriers. The EU's flagship chemicals regulation, the REACH Regulation, is often-cited as anti-free trade, although after a decade of significant investment, many in the chemicals industry would much prefer to stay part of it. For environmentalists, REACH is lauded as a landmark regime for incorporating the 'polluter pays' and precautionary principles into chemicals regulation by making those who profit from chemicals pay for the costs of evaluating the potential hazards to human health and the environment, and there is strong opposition to rolling back those protections. Another example is the concern of environmentalists that the regimes for the protection of habitats will be watered down in a desire to promote development, with the predominantly European laws often cited as a barrier to progress by those who wish to obtain consents for new schemes.

Whatever a person's point of view may be, it is undoubtedly the case that the public is anticipating change. Whatever happens with Brexit itself, those conversations have started. The green genie is out of the bottle.

The Devolution Agenda

One of the loudest conversations is between UK Government and the devolved administrations. The devolution settlements in the past 20 or so years were formulated when exiting the EU was low on the agenda and on the fringes of political debate. At that time (as now)

the European institutions set common environmental objectives for the Member States, in many cases allowing the Member States to decide how best to achieve them, while always ensuring that the common market was protected through common rules about the products placed on the market. Against that framework, it was relatively uncontroversial to devolve the implementation of environmental law to the devolved administrations. However, Brexit would open up the freedom to do much more with environmental law – a point championed by the UK Government – and this in turn creates a risk (or some might say opportunity) for significant divergence within the UK. Business and industry have naturally expressed concern over the potential for fragmentation of the UK's own common market and the question is causing more than theoretical concern. Should deposit return schemes for plastic bottles be coordinated by Westminster? Should Wales be allowed to ban chemicals it considers are harmful to insects? Should thresholds for cadmium in electronics be a matter for Holyrood?

Of course, the devolution impact of Brexit goes much further than just environmental law, but environmental law is a good illustration of some of the issues that now have to be grappled with.

Environmental Governance and Principles

One of the big debates of 2018 has been over how the Government and public institutions will be held to account for environmental performance outside of the EU. Within the EU, Member States that do not meet EU environmental law can be held to account, through complaints to the European Commission by concerned citizens and, after a period of warning shots, through the ultimate sanction of a referral by the European Commission of non-compliant Member States to the Court of Justice of the European Union. These mechanisms are flexible enough to tackle different forms of non-compliance, from a complete failure to implement a directive through to a failure to meet targets set down at EU level. The possibility of significant fines exists but in most cases the political pressure is enough to ensure prompt rectification of non-conformities, and the UK has to a large extent been good at the administrative tasks such as ensuring directives are implemented promptly and accurately. Where the UK has struggled more is around absolute targets for environmental protection. A good (and topical) example is compliance with the Ambient Air Quality Directive, where the UK has consistently struggled to meet the limits set for nitrogen dioxide, while at the same time the public awareness of the health impacts of nitrogen dioxide has grown significantly. It is undoubtedly true that there are no easy solutions to the air quality issues in the UK's cities, and that the various solutions require weighing up competing policy objectives. However, such political issues did not stop the European Commission from referring the UK (along with France and Germany) to the Court of Justice in May 2018 for failure to take sufficient action to reduce nitrogen dioxide exceedances in the shortest possible time.

The potential departure from the EU raises the question of who holds Government to account for its environmental obligations, in the absence of the European Commission.

These concerns generated significant debate during the passage of the European Union (Withdrawal) Bill through Parliament in the summer of 2018, and indeed led to a motion by parliamentarians to amend the Government's Bill to address this very point. In what is now section 16 of the European Union (Withdrawal) Act 2018, there is a requirement placed on the Secretary of State to bring forward primary legislation to set down "*provisions for the establishment of a public authority with functions for taking, in circumstances provided for by or under the Bill, proportionate enforcement action (including legal proceedings if necessary) where the authority considers that a Minister of the Crown is not complying with environmental law*" (section 16(1)(d)). The inserted section also requires this new Bill to set down the environmental principles to which ministers of Government must have regard in setting UK policy, and sub-section 16(2) goes as far as to set down a non-exhaustive list, including the 'polluter pays' principle, the precautionary principle and the principle of sustainable development. These principles mirror long-established principles of EU environmental policy-making, set down in the EU Treaties and often repeated in the recitals to EU environment directives and regulations, but it is a somewhat unusual step within English law to enshrine such principles in Acts of Parliament. The fact that this amendment was inserted in the Withdrawal Bill during its passage in Parliament shows the strength of feeling within the UK over the protection of environmental law.

In parallel to the passage of the Withdrawal Bill, the UK Government was itself consulting on its own version of an Environmental Principles and Governance Bill, which the Government held up as "the creation of a new, world-leading, statutory and independent environmental watchdog to hold government to account on our environmental ambitions and obligations once we have left the EU". Much of what Parliament inserted into the Withdrawal Bill was already on the table in the consultation, and although Parliament has made this new body a statutory obligation, it has left a fair degree of freedom as to what exactly it will look like.

UKELA's response to the consultation[1] was UKELA at its best: we engaged with the 1,400-strong membership, including an hour-long debate of over 200 members at our annual conference in Canterbury, and brought together a thoughtful and well-reasoned response document.

At the time of writing, we await the Government's draft Environmental Principles and Governance Bill, which will fulfil the statutory obligations of section 16 and reflect the outcome of the Government's consultation, but we are confident that UKELA's intervention will have influenced the drafting of this hugely important legislative instrument and helped ensure that this watchdog has real teeth to protect our environmental interests.

The 25 Year Environment Plan

One of the criticisms of the political world is that it works in short electoral cycles that encourage short-term thinking, whereas the solutions for environmental concerns require long-term vision and clear and stable policies. To address this, and to build a case for a #GreenBrexit, the Government launched its 25 Year Environment Plan for England at the start of 2018. The 25 Year Environment Plan seeks to deliver on the Government's stated ambition for this generation to be the first generation to leave the environment in a better state than we found it. Yes, the Plan is light on detail, but that was not necessarily a surprise. It is intended to be read as a statement of intent, setting the direction of travel for future Government policy and providing promises against which the Government can be held to account. Importantly for business, the Plan lays down a blueprint for policies and legislative interventions that will follow. This allows businesses to consider how best to adapt and to make the most of opportunities.

At the heart of the Plan is the Government's promise not just to arrest the decline of England's natural resources but to enhance them. The Plan makes it clear the Government wants to hold the gold standard in environmental protection and enhancement on the world stage, maintaining and, where necessary, increasing EU environmental safeguards after exit from the EU. In making these commitments, the Government seeks to answer those who were

concerned that Brexit would mean sacrificing environmental protection for short-term economic gain.

Implementation is, of course, of central importance to the Plan's success and it proposes to use clear metrics with annual reporting against those metrics which – coupled with the statutory body independent of Government discussed above – is designed to ensure that the public can hold both this and subsequent Governments to account. To deliver on its ambitions, it will need strong action to follow the strong words.[2]

The Climate Change Act 2008

The promises in the 25 Year Environment Plan and the accountability mechanisms expected in the forthcoming Environmental Principles and Governance Bill have echoes of another UK Act of Parliament: one which was ground-breaking at the time, is still holding strong a decade on, and which could provide some valuable lessons for dealing with the environmental issues of the future.

In 2008, Parliament passed the Climate Change Act and created the Committee on Climate Change. The Act gives the Committee the task of holding the Government to account for implementing climate policy and for producing future recommendations in annual reports.

The Climate Change Act was seen as ambitious by many. The Act makes it the responsibility of the Secretary of State for the Environment to ensure that the net carbon account for the six Kyoto Greenhouse Gases is less than 80% of 1990 levels by the year 2050. The UK was under no requirement by either EU regulations or international law to produce such a stretching pledge to mitigate climate change: it did so due to a cross-party campaign of Parliamentarians worried about short-termism in politics which caught the imagination of many and, ultimately, received Government support. Some might say, an example of Parliament acting as a supreme power and taking control.

The Act has the ambition of ensuring that the UK becomes a leading low-carbon economy in the future. It has created 'micro goals' in the shape of five-year carbon budgets which must be achieved in order to stay on target for an 80% reduction in carbon emissions by 2050.

The Act has been a success in helping to shape policy for low-carbon and renewable energy, and the UK has met its previous carbon budgets and is on course to reach the 2022 budget. There are of course concerns that there are more difficult challenges ahead and the Climate Change Act does not have the answers: it is only a mechanism to ensure accountability, a tool to influence policy-makers, not one that sets the policies. Nevertheless, the Climate Change Act has been regarded as a 'triumph' by many, including Lord Deben, the current Head of the Committee on Climate Change, and provides an example of how UK environmental law might operate outside of the EU.

Innovation

On the subject of facilitating change, but allowing others to come up with the answers, we now turn to the role of regulation and incentives in environmental law. At the time of writing, England is anticipating a new resources and waste strategy, promised in the 25 Year Environment Plan. There is strong support in both the EU and the UK for a drive to a circular economy, with the Earth's resources used again and again, rather than lost to landfill, or dispersed into the environment. There are good economic reasons for a circular economy, but since *Blue Planet II* shone the spotlight on marine plastics, there is also a groundswell of public opinion for change.

However, it is also acknowledged that a lot of hard thinking needs to be done to solve these issues. The headline-grabbing initiatives, such as bans on plastic straws, or a 'latte-levy' tax on disposable coffee cups, laudable as they may be, do not really go to the heart of the issue, which is that the current economic model is that it is cheaper to produce and discard. The issues pervade the whole life-cycle of an object, from poor design through to inadequate recycling options at the end of life. Does the market need to be corrected to internalise the costs to the environment of the poor use of our resources and the damage it can do if released into the environment? Currently policy thinking suggests that the answer is yes, and the options to achieve this include extended producer responsibility schemes where those costs are factored into the price that consumers must pay, which drives investment in more sustainable options to obtain market advantage.

Whatever comes forward in the new resources and waste strategy, the UK must be careful to incentivise the right behaviours and regulate in an appropriate manner that facilitates innovation and drives change. We are good at legislating for yesterday's mistakes, but the solutions of tomorrow may be radically different. We need to allow the new ideas to come through and give them a 'regulatory sandbox' to play in, so that the UK can foster the ideas which not only can provide solutions to the problems that face the world, but also nurture and grow the green economy that is one of the pillars of the UK's industrial strategy.

Private Sector Action

In an article about the future of the UK legal regimes for environmental protection, it might be thought odd to include a line or two about private sector voluntary action. However, to solve the environmental issues faced by the next generation of environmental professionals will require all parts of society to play their roles, and some parts of the private sector are already showing leadership. In 2018 UKELA has been considering the important role that investment policies based on environmental, social and governance ("ESG") factors can play in influencing corporate behaviour and driving change. Such policies go far beyond platitudes and green-wash, and indeed beyond concepts of corporate social responsibility. Rather, the logic of ESG is that only those businesses that combine strong governance with sound strategies for resource use, environmental impact, labour relations and a multitude of other considerations will truly retain and grow value. Those businesses which only pay lip service to such factors (or worse) are exposed to significant risks, such as stranded assets due to abrupt changes in climate change policy, for example. The game-changing concept of ESG is that investments based on ESG principles are beneficial for both the environment and the return on investment: it is no longer seen as a choice between the two.

Strong ESG policies also protect against the rise of shareholder activism and a growing trend to hold large international parent companies to account for the actions and inactions of their subsidiaries around the world.[3]

Conclusion

During the year of our 30th anniversary, UKELA has looked at what has been achieved in the past 30 years and the lessons we can learn from those achievements. We discovered that we have good reasons to be optimistic. Yes, some may argue our successes were the easy ones, the 'low-hanging fruit', and that the enormous challenges of the next 30 years are going to be much more difficult. Yes, we are faced with tackling climate change, population growth and a

growing middle class in emerging economies, and the huge decline in biodiversity, to name just a handful of issues. But if you listen to the enthusiasm and ambition of our younger voices, as we did with our members in 2018, you will find much cause for hope.

This is a period of change like no other for those who are environmental lawyers, and we have the opportunity to shape the future. We must seize that opportunity. Some of us are optimistic, others have doubts, but there is one thing that is beyond doubt: it has never been a more exciting time to be involved in environmental law.

Endnotes

1. https://www.ukela.org/content/page/6683/UKELA%20EPG%20consultation%20reponse%2031.7.18.pdf
2. https://www.burges-salmon.com/news-and-insight/legal-updates/the-25-year-environment-plan/
3. For further discussion, please see chapter 3 – *The Parent Trap: When is a Parent Company Liable for Environmental Harm Caused by a Foreign-Registered Subsidiary?* by Jonathan Isted and Ian Jones of Freshfields Bruckhaus Deringer LLP.

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Simon Tilling is Vice-Chair of the UK Environmental Law Association and a partner in Burges Salmon's market-leading environmental law team. His practice encompasses the full breadth of environmental law, from chemicals regulation to contamination claims. Simon is qualified in England, Wales, Scotland and the Republic of Ireland and his experience encompasses UK, EU and international environmental law. He is recommended in *Chambers*, where he has been described as "extremely bright and a very skilled lawyer" and he is nominated for *The Legal 500*'s "Real Estate (outside London) solicitor of the year 2019" for his environmental work. Simon's work with UKELA includes promoting the organisation's international networks and he chaired the 30th anniversary conference in Canterbury, UK, in the summer of 2018.

The Courts as Guardians of the Environment – New Developments in Access to Justice and Environmental Litigation

Jerzy Jendrośka

Moritz Reese

European Environmental Law Forum (EELF)

Introduction

Around the globe, and in Europe in particular, we are witnessing a dynamic development towards wider judicial protection of environmental laws and resources. Whereas in the past court review was mostly confined to vested individual interests and matters of subjective concern, we now see a continuing trend towards public interest litigation and judicial enforcement – including that of merely "objective" environmental laws – with non-governmental organisations (NGOs) playing an ever stronger role as litigators and trustees of the environment. This development comes as a reaction to the fact that most of the important global and collective environmental "goods" – such as a stable climate, biodiversity, genetic resources, water quality and ambient air quality – are increasingly being jeopardised and, at the same time, particularly prone to a deficit and disregard for enforcement. The extension of judicial control to objective environmental law and the widening of court access – especially to NGOs – can thus be deemed a key factor for the effective protection of collective environmental goods and the respective environmental laws. To date, these developments are still progressing, with a lot of open questions as to how far they will go and what consequences they entail for developers, investors, litigators, NGOs, administrations and judges.

This contribution provides an overview of the state of play, chiefly from a European perspective. Europe has positioned itself as a frontrunner in terms of procedural environmental rights through the adoption of the so-called Aarhus Convention (United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters). This Convention was adopted as early as 1998 and entered into force in October 2001. The Convention has a compliance mechanism which has some distinctive features differentiating it from the compliance mechanisms of other international environmental agreements. The Compliance Committee is composed of independent experts serving in a personal capacity and the procedure can, and usually is, triggered by communications from the public. Although it is not a court, its opinions provide an authoritative interpretation of the provisions of the Convention.

The process of developing access to environmental justice is still ongoing and far from being completed, as explained in section 1 below, where we also provide some insight into global development beyond the Aarhus process. In the second section we look at the state of affairs in the EU, where the Court of Justice of the European Union (CJEU) has strongly moved to open its doors in the light of the Aarhus Convention. Thirdly, we take a look at the recent surge in environmental litigation and at attempts in specific case law to refer States and polluters to court for breach of environmental responsibilities.

1 The Aarhus Convention as a Motor of Access to Justice in Environmental Matters

Roots of the Convention and its provisions on access to justice

The need for legal guarantees of public involvement is increasingly being reflected in international environmental law and in the number of instruments adopted after 1990 which have mentioned the necessity of assuring access to information and public participation in environmental decision-making. The key role in this respect has no doubt been played by Principle 10 of the Rio Declaration.

Although the Rio Declaration belongs to the instruments of so-called "soft law" (i.e. having no binding legal force but merely constituting recommendations or political declarations), Principle 10 is commonly considered to be significant as a clear global expression of the developing concepts of the role of the public in relation to the environment. Soon after its adoption, it was acknowledged as an international benchmark against which the compatibility of national standards could be compared, and as a forecast of the creation of new procedural rights which could be granted to individuals through international law and exercised at the national and possibly international level.

Contrary to access to information and public participation, as far as global treaty regimes are concerned, the strongest support for access to justice in environmental matters was, for a long time, to be found in human rights regimes rather than in multilateral environmental agreements. Thus, access to justice in environmental matters was traced back to such generally recognised principles as the right to be heard and to appeal decisions, as is guaranteed by human rights conventions. The developments in national legislation were not immediately followed at the international level and access to environmental justice – as compared to public participation and access to information – was relatively rarely addressed in international environmental law outside the context of liability regimes and assuring equivalent access to justice in the transboundary context.

The third pillar of the Aarhus Convention appears to be the most under-developed in terms of the clarity and precision of the legal scheme envisaged therein. This stems largely from the fact that – as opposed to the two other pillars of the Convention – it covers an area in which very few prior provisions existed to address environment-specific issues, within a plethora of diverse and longstanding traditional approaches in domestic legislation concerning general access to justice. This pillar was thus effectively constructed on the spot (i.e.

during the negotiations) out of scarce, fragmented elements and amid intense debates reflecting totally opposite views as to its content, scope and legal nature. The eventual construction of this pillar, in particular of paragraphs 2 and 3 of Article 9, provides a basis for many interpretations which increasingly interfere with the traditional approaches used in the respective legislation of almost all parties. This has resulted in an increasing number of legal disputes concerning the way this pillar is implemented, both at the national and at the EU level.

The scope of the Convention's third pillar on access to justice essentially addresses three issues:

- review procedures relating to access to information (Article 9.1);
- review procedures relating to access to public participation under Article 6 (and possibly other provisions) of the Convention (Article 9.2); and
- review procedures for public review of acts and omissions of private persons or public authorities concerning national law relating to the environment (Article 9.3).

Moreover, Article 9.4 obliges parties to the Convention to provide, within the review procedures, for adequate and effective remedies, including injunctive relief. Furthermore, the procedures shall be fair, equitable, timely and not prohibitively expensive.

Article 9.5 regulates practicalities, such as the obligation to provide the public with sufficient information on access to administrative and judicial review procedures.

Implementation in the UNECE region

The cases in front of the Aarhus Compliance Committee showed a number of problems, in particular with regard to standing for NGOs and the scope of review in countries which have a system of judicial review based on infringements of rights (for example, cases ACC/31/Germany, ACC/48/Austria or ACC/50/Czech Republic). In some instances, the respective requirements of the Aarhus Convention seem to call for fundamental changes of certain well-established arrangements concerning standing. In countries with a common law system (i.e. the UK and Ireland), the biggest challenge seems to be related to the issue of costs, in particular related to the obligation to pay the costs of the winning party. Quite common in many countries are prolonged judicial procedures which do not meet the requirement of timeliness. Other problems relate to minimum standards applicable to access-to-justice procedures and remedies in Article 9, paragraph 4, of the Convention, including fair and equitable procedures, injunctive relief and costs.

Global reception of the Aarhus Convention and developments beyond the UNECE region

The role of the Aarhus Convention is well recognised in the academic literature of this field. It is described as "the first multinational environmental agreement that focuses exclusively on obligations of the nations to their citizens and nongovernmental organizations",[1] and the first binding international instrument attempting to comprehensively and exclusively address issues of citizens' environmental rights. Furthermore, it is considered to be a "driving force for environmental democracy" in Europe[2] and "at the forefront" of developing the legal framework in this respect worldwide.[3]

Globally, significant impetus for implementing Principle X and the further development of citizens' environmental rights was provided by the "Guidelines for the Development of National Legislation on Access to Information, Public Participation in Decision-making and Access to Justice in Environmental Matters" adopted in 2010 in Bali, Indonesia by the United Nations Environment Programme Governing Council, Global Ministerial Environment Forum (Bali Guidelines). They are considered "an important milestone in international standard-setting and the establishment of good practices related to application of Principle 10".[4]

The Bali Guidelines include a number of provisions (Guidelines 15–26) related to access to environmental justice. They are very similar to the above-described provisions of Article 9 of the Aarhus Convention and include all the respective elements of access to the environmental justice legal framework. They are, however, only guidelines and have no binding legal force.

It must be noted that there is no consensus in the international community that human rights obligations specific to the environment have been established in any globally applicable, binding instrument or as a matter of customary international law. In other regions, however, there are some initiatives aimed at following the example of UNECE and developing their own legal instruments to implement Principle 10.

Recently (in March 2018), the Regional Agreement on Access to Information, Public Participation and Justice in Environmental Matters in Latin America and the Caribbean (the Escazú Agreement) was adopted. The Agreement has not yet entered into force but most of the LAC countries have moved quickly to ratify it. Compared to the Aarhus Convention, the Escazú Agreement provides much more specific norms of considerable importance for public interest litigation in relation to environmental issues (for example, a dynamic burden of proof and clear reference to the precautionary principle). Without any detailed analysis, it may be noted that while the Aarhus Convention provides generally clear, legally binding international norms, the provisions of the Escazú Agreement, especially those related to access to justice, leave a large measure of discretion to the State Parties concerning their implementation.

2 Access to Justice in EU Law – the CJEU Opens its Doors Ever Wider

EU legislation on environmental standing and the struggle with the "*Schutznorm*" approach

In the European Union, the Arhus Convention has triggered far-reaching advancements towards wider access to justice – particularly as regards environmental NGOs (ENGOs). On the side of the Community, the Convention was essentially transposed through Directive 2003/35 amending Directive 87/337/EEC on the assessment of the effects of certain public and private projects on the environment. According to that amendment to the EIA Directive (now codified as Directive 2011/92/EU), Member States are obliged to ensure "that in accordance with the relevant national legal system, members of the public concerned (a) having a sufficient interest, or alternatively (b) maintaining the impairment of a right, where administrative procedural law of a Member State requires this as a precondition, have access to a review procedure before a court (…) to challenge the substantive or procedural legality of decisions, acts or omissions subject to the public participation provisions of this Directive". Moreover, it is provided that "what constitutes a sufficient interest and impairment of a right shall be determined by the Member States, consistently with the objective of giving the public concerned wide access to justice" and "to that end, the interest of any non-governmental organization meeting the requirements referred to in Article 1(2) shall be deemed sufficient for the purpose of point (a)" and furthermore "such Organizations

shall also be deemed to have rights capable of being impaired for the purpose of point (b)". A similar provision was also included in the Industrial Emission Directive 2010/75/EU (IE Directive) extending the above-referenced access to justice to permit decisions covered by this Directive.

When these provisions were adopted in 2003, they met with considerable reluctance among national governments and courts to give the public concerned wide access to justice. Most States, instead, tried to maintain their traditional limitations on public interest litigation as far as – seemingly – possible by proclaiming a very narrow interpretation. Of course, this was not accepted by the NGOs, and as a consequence, it was eventually in the hands of the CJEU to clarify the intention of both the Convention and the implementing norms of the EIA Directive. It is not a coincidence that most of the leading cases in this matter have been raised in Germany. The country is widely known for its strong traditional bias against public interest litigation and a stringent observance of the so-called "*Schutznormtheorie*" (protective norm approach), according to which standing is only granted to applicants who can reasonably claim the violation of a law that is protecting their individual interest. With its reluctance to overcome this "subservient" tradition on the one hand and its active environmental NGOs (ENGOs) and judiciary on the other, Germany has indeed served as a major instigator of a remarkable yet continuing series of leading cases by which the CJEU has rejected almost all essential containments the country has tried to uphold against NGO action and public interest litigation.

Landmark decisions towards wide court access for ENGOs

The first of these landmark decisions concerned the applicability of the protective rights doctrine to ENGO action. As a first attempt to transpose Directive 2003/35, Germany adopted in 2006 its first edition of a "Law on actions in environmental matters" (*Umweltrechtsbehelfsgesetz*). With this Act, NGO action was introduced with regard to all permit decisions subject to environmental impact assessment as demanded by the Directive. However, far-reaching restrictions on standing and scope of review were maintained and, most notably, this included the subjective rights doctrine. This means that NGOs could effectively only bring an action if – and as far as – individual rights are affected, and they were not permitted standing with regard to "objective" environmental laws. ENGOs had to wait until 2011 for this fundamental restriction to be turned down by the CJEU in its famous *Trianel* judgment (C-115/09). The German law needed to be revised accordingly – but, again, major restrictions on ENGOs' court access continued. Two years later, the CJEU had to clarify in *Altrip* (C-72/11) that Germany could not limit standing on EIA issues to cases in which no environmental impact assessment was carried out at all, while not extending it to cases in which such an assessment was carried out but was irregular. As to the consequences of such procedural defects, the Court declared, however, that the national court may uphold the administrative decision if it is conceivable, having regard to the circumstances of the case, that the contested decision would not have been different without the procedural defect invoked by the applicant.

By that time, the EU Commission had also filed an infringement procedure against Germany. In addition to the points decided in *Trianel* and *Altrip*, the Commission turned against another important and long-standing national restriction to access to justice, the so-called "preclusion" rules. These regulations restrict the right to bring action, and also the scope of the court review, to only those objections that were already raised within the time limit set during the administrative procedure which led to the adoption of the contested decision. Since the time limit for raising objectives in the administrative procedure is rather short in Germany (usually four weeks from the publication of the project plans), this preclusion rule often strongly limits the possibilities of ENGOs to thoroughly assess the environmental impacts and legality of a permit decision, and it thus posed a great practical barrier to effective judicial review. In its ruling in this case (C-137/14 of 15 October 2015), the Court followed the Commission's complaint and held that the German preclusion rules are not compatible with Article 11 of the EIA Directive and Article 25 of the IE Directive – yet another victory for access to justice and public interest litigation.

Another ground-breaking victory for ENGO action was celebrated in the famous case of the *Slovakian Brown Bear* (C-240/09). In this case, the court was asked if Member States were to grant NGOs standing also with regard to decisions that are not subject to environmental impact assessment – such as those regarding species protection under the EU Habitat Directive – and thus not covered by the above-mentioned European norms on NGO action. In its ruling, the CJEU clarified that these EIA-related EU norms transpose the Aarhus Convention only partially, and that it remains the responsibility of the Member States to implement the Convention in other fields of environmental decision-making through national legislation. Moreover, the Court indicated that all EU environmental laws must be applied in conformity with the Aarhus Convention. With regard to Article 9(3) of the Convention, this implies, according to the court, an obligation of the national courts to interpret the national procedural rules, as far as possible, in a way that allows NGOs standing with regard to all (national) environmental norms flowing from European law. However, the CJEU did not go further to conclude that conflicting national procedural laws are effectively overruled by EU law and thus to be waived by the national courts if they find no room for compliant interpretation. To that extent, the court left the interpretation of Article 9(3) to the discretion of the Member States.

On our way to *actio popularis*? – The *Protect* judgment

This "last resort" of the national legislators was eventually conquered in the latest path-breaking CJEU judgment on environmental standing, which was handed down in the Austrian *Protect* Case in December 2017. In this case, the referring Austrian Court had asked the CJEU whether it follows from its previous adjudication that NGOs must be able to contest before a court a decision granting a permit for a water use that may be contrary to the obligation to prevent the deterioration of the status of bodies of water as set out in Article 4 of the EU's Water Framework Directive. Again, this concerns a decision outside the scope of the EIA and IE Directives, i.e. the areas where EU law explicitly provides court access to ENGOs. In its judgment, the deciding Chamber gave up the cautious position of the *Brown Bear* judgment, and eventually attributed direct effect to its wide interpretation of Article 9(3) of the Aarhus Convention as a measure for access to justice in relation to the (implementation of) EU environmental law. The Court based this result on the fundamental right to judicial protection as provided in Article 47 of the Charter of Fundamental Rights of the European Union. It found that this – directly applicable – right was breached by any national procedural law that hinders adequate implementation of Article 9(3) of the Aarhus Convention. What remains unclear, however, is whether the wider standing derived from the court's interpretation is strictly limited to ENGOs or whether and to what extent it must also be applied to *individual* "members of the public concerned" in the meaning of Article 9(3) and 2(5) of the Aarhus Convention. The judgment does not explicitly address this question

but it contains some indications that the court may well include qualified individuals in the scope of this Article.

With this question, amongst others, the play will now go back to Germany, as in April 2018 the German Federal Administrative Court referred several questions to the ECJ regarding, in particular, the implications of the above *Protect* judgment. The underlying case concerned, again, the implementation of water quality standards under EU water law. The German Court asked, *i.a.*, whether not only ENGOs but individuals, too, must be able to instigate judicial review with regard to the implementation of these water quality standards despite the fact that they do not protect individual interests. The German Court took the view that this is not the case and that both the Aarhus Convention and EU law do not preclude national legislators from confining individual standing to laws protecting individual interests and – respectively – to applicants who reasonably claim that such a norm was breached. Furthermore, the German Federal Administrative Court held that the courts may limit the scope of review to whether the contested decision is in compliance with the protective norm(s) on which the applicant's standing is based, and that the judicial scrutiny does not need to extend to further applicable laws that merely serve the public interest.

It is now in the hands of the CJEU to take a (further) fundamental decision which goes to the heart of the national judicial systems: whether to establish in the entire EU a fully-fledged *actio popularis* with regard to all environmental laws, or to preserve the subjective rights approach with regard to individual applicants and confine the assertion of "objective" laws to ENGOs. It is self-evident that this decision is going to be of tremendous relevance for the national judicial systems, investors and relevant administrations, and – above all – for the effectiveness of environmental law.

Besides this, there are two further grand bastions of "judicial calm" that have not been taken by the Aarhus movement. The above openings for ENGO action and public interest litigation have, so far, only been discussed with regard to land-use related decisions and procedures. However, the principles established by the Aarhus Convention and CJEU jurisdiction are also applicable to the wide field of product- and substance-related regulation, including the various registration, certification and authorisation regimes. As a consequence, we should expect this field to become subject to NGO action as well. The second bastion concerns administrative acts of the EU itself, e.g. authorisation of pesticides and chemicals or genetically modified organism (GMO) products. In this regard, access to the General Court and the CJEU is strictly limited by Article 263(4) of the Treaty on the Functioning of the European Union (TFEU) to applicants who are individually and directly concerned by the contested act. In a long line of judgments, the CJEU has always interpreted this provision very strictly and – according to its "*Plaumann* doctrine" – allowed standing only to applicants alleging a direct breach of their vested individual rights. It appears that this strict interpretation is not compatible with what the court has decided in the above-reported judgments. Consequently, the *Plaumann* doctrine is subject to growing criticism, and it has been impugned as incompatible with the Aarhus Convention by the Aarhus Compliance Committee. Only recently, the *Plaumann* doctrine has been challenged, again, by a complaint from several families who claim that insufficient and unlawful EU climate policies are jeopardising their fundamental rights to health and property, as further discussed in the next section.

3 Climate Change Litigation in the EU: the *Urgenda* Legacy

The global surge of climate litigation reaching Europe – the *Urgenda* case

While access to justice in environmental litigation in Europe is mostly linked to public law proceedings, private law proceedings can also play an important role. Arguably inspired by developments in the United States of America and Australia, climate change litigation in the EU is witnessing an increasing reliance on tort law.

The *Urgenda* case can be seen as the landmark case in this field. As this case has been extensively covered in academic literature, it needs little introduction here. In short, the The Hague District Court (the Netherlands) on 24 June 2015 upheld the claim of an NGO called Urgenda against the Dutch State and ordered the latter to take additional measures to ensure that the Netherlands will reach the target of lowering its greenhouse gas emissions by 25% by 2020 in comparison to its 1990 emissions (ECLI:NL:RBDHA:2015:7145). This judgment was confirmed in appeal on 9 October 2018 (ECLI:NL:GHDHA:2018:2591). Whether the judgment will also be confirmed in cassation remains to be seen.

The *Urgenda* case is facilitated by the fact that, under Dutch tort law, environmental organisations can bring proceedings to protect the interests of third parties, including future generations, under Article 3:305 a-b of the Dutch Civil Code. From a substantive perspective, this case rests on the claim that the Dutch State is breaching its duty of care to comply with the greenhouse gas emissions reduction target for the Netherlands associated with the international commitment made under the Paris Agreement to keep global warming well below 2 degrees Celsius, thereby impairing the right to life (Article 2, European Convention on Human Rights) and the right to respect for family and private life (Article 8, European Convention on Human Rights).

Whether from a *substantive* perspective this judgment will indeed lead to better performance by the Netherlands in the fight against climate change is unclear. Three years have passed since the date of the first degree judgment and no substantive melioration can be seen. The Dutch legislator is discussing the adoption of a Climate Act, but its content is programmatic in nature and hence it has yet to be translated into concrete actions and results. The *Urgenda* case certainly has strong *symbolic* value. It inspires NGOs to undertake similar actions at national level, as discussed in the next section, and at EU level, as discussed in the following section. Yet, it also has a *negative* connotation. It shows that public law is failing to address this major inter-generational challenge.

The legacy of *Urgenda* at national level: *Milieudefensie*, *RWE* and *Plan B*

With the *Urgenda* case as a source of (legal) inspiration, other NGOs have started tort law-based proceedings to protect the environment in the Member States of the EU. With more cases pending or in preparation (for an overview see www.eufje.org), three cases reached a diametrically opposite outcome to the one seen in *Urgenda*, thereby highlighting the difficulties characterising tort law-based environmental litigation.

First of all, in the Netherlands, an environmental association called Milieudefensie initiated two actions based on tort law against the State for failure to protect human health at several locations. The argumentation scheme of the plaintiff in this case resembles that used in the *Urgenda* case in many aspects. This notwithstanding, despite it being undisputed that the Netherlands is not complying with EU standards on air quality, the The Hague District Court ruled in December 2017 that Milieudefensie did not provide enough evidence to support the claim that a specific damage was caused by the State's failure to comply with air quality thresholds (ECLI:NL:RBDHA:2017:15380). It therefore dismissed the claim.

A different outcome might be obtained by a Peruvian farmer who brought a lawsuit before the Higher Regional Court of Essen, Germany (*Landgericht Essen* [Essen District Court], *Lliuya v RWE AG*, 15 December 2016 – No 2 O 285/15). In contrast to the *Urgenda* case, the Peruvian claimant targets a private party, the energy concern RWE. The claimant's main argument is that RWE knowingly contributes to climate change, resulting in the melting of a glacier in Peru, which puts the claimant's house at risk of flooding. As in the *Milieudefensie* case, the national court of first instance ruled against the claimant and held that the causal linkage between RWE's greenhouse gas emissions and the damage threatening the claimant was not (sufficiently) proven. The importance of establishing a causal link was confirmed in appeal (*Oberlandesgericht Hamm*, 30.11.2017 – 5 U 15/17). However, the appeal court overruled the decision of the court of first instance and ordered the plaintiff to provide further evidence in order to sufficiently establish the alleged causal linkages. The case is still pending, and it remains to be seen whether the claimant is going to succeed.

Finally, in the *Plan B* case in the United Kingdom (Royal Courts of Justice, *Plan B and Others v Secretary of State for Business, Energy and Industrial Strategy*, [2018] EWHC 1892 (Admin)), still a Member State at the moment of writing this contribution, reliance on tort law to protect the environment was rejected. The main claim of the applicants was that the UK government should go beyond the targets stipulated under the Climate Change Act 2008 in order to meet its Paris Agreement target. The national court dismissed all grounds of appeal because, among other reasons, the executive has wide discretion to assess the advantages and disadvantages of any particular course of action and the statutory Climate Change Committee had advised that it is not yet necessary to amend the 80% target in force today.

In each of these cases, an appeal has been launched. Further developments are thus awaited. It is, in any case, already possible to recognise an initial trend. First of all, the legacy of *Urgenda* at national level has been quite unsuccessful so far. This picture, however, might be less negative than it appears at first glance. Indeed although, until *Urgenda*, the main hurdle for initiating this kind of case came from *standing* requirements, obstacles now come from other elements of the tort-law doctrine, such as causation and the burden of proof. The initial hurdle (standing) seems to have been overcome, at least in certain Member States. Accordingly, we can speak of a development in the judicial practice concerning this kind of action.

The legacy of *Urgenda* at EU level: German Farmers' Complaint to the CJEU

The *Urgenda* case has not only been a source of inspiration for proceedings at national level; it has also served as an example for starting proceedings at EU level. In May 2018, Mr. Carvalho and 36 other claimants lodged a case challenging the lawfulness of several legislative acts of the EU in the field of climate change, namely the 2018 amendments to the ETS Directive, the Effort Sharing Regulation, and the Land Use, Land-Use Change and Forestry (LULUCF) Regulation.

The relevance of the *Urgenda* case for these proceedings is evident in the two main pillars of this action. First, Carvalho and others rely on the provisions on non-contractual liability of the Union (Articles 268 and 340 TFEU) to seek an injunction requiring the Union to set deeper emissions reduction targets at the level required by international law. Second, and as indicated above, they rely on human rights in order to broaden the standing requirements in force under the action for annulment of binding EU acts (Article 263 TFEU).

Both pillars can, independently from one another, potentially revolutionise the field of environmental litigation at EU level. It is difficult to predict how the CJEU will rule on each of these pillars. The pillar based on non-contractual liability of the Union is a novelty in climate law, and, more generally, non-contractual liability is an action not extensively discussed in academic literature. The pillar based on the broad interpretation of the standing requirements under Article 263 TFEU will face the traditionally restrictive approach by the CJEU in this area, as discussed in section 2 above. Still, (environmental) lawyers have been putting pressure on the Court to change its approach for years. The possibility cannot be ruled out that the importance of climate change will make the Court change its approach, once and for all.

Endnotes

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3. J. Ebbeson, 'Public participation', (in) *The Oxford Handbook of International Environmental Law*, D. Bodansky, J. Brunnee and E. Hey, Oxford University Press, 2007, p. 686.
4. S. Stec, 'Developing standards for Procedural Environmental rights through Practice', (in) *Procedural Environmental Rights: Principle X in Theory and Pratice*, J. Jendrośka and M. Bar (eds), European Environmental Law Series, Intersentia, p. 5.

Acknowledgment

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EELF
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The authors contribute to this Guide in their honorary capacity as members of the advisory and managing boards of the European Environmental Law Forum (EELF). The EELF is a non-profit network of environmental law scholars and practitioners from across the continent aiming to support intellectual exchange on the development and implementation of international, European and national environmental law in Europe. The EELF serves as an organisational platform to facilitate, *i.a.*, an Annual European conference. For further information please visit www.eelf.info.

The Parent Trap: When is a Parent Company Liable for Environmental Harm Caused by a Foreign-Registered Subsidiary?

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Under English law, in order to show that a defendant owes a duty of care to a claimant, the claimant must establish three key factors: that the harm caused by the negligent act or omission was reasonably foreseeable; that there was sufficient proximity between the parties; and that it would be fair, just and reasonable to impose liability on the defendant (known as the "*Caparo* test").[1] Applying this principle, there are circumstances under which a parent company could be held directly liable for the loss and damage suffered by third parties as a results of the acts or omissions of a subsidiary.[2]

Recently, we have seen a trend developing through which claimant groups have sought to take advantage of this principle, by seeking to hold UK-domiciled parent companies responsible for the acts or omissions of a foreign subsidiary, in order to have their claims heard before the English courts. In the last 18 months alone, the English Court of Appeal has considered three cases dealing with parent company liability for acts primarily associated with foreign-registered subsidiaries. These cases, all involving allegations of environmental harm, provide further guidance on when a parent company could owe a duty of care to those affected by the activities of a foreign subsidiary. This developing area of law is of importance to all businesses with an impact on the environment and, in particular, businesses in the manufacturing and resource industries.

It is worth noting that each of these three cases (discussed further below) concerned applications for claims to be struck out at the jurisdictional stage, on the basis that the claimants had no arguable case that a duty of care existed. Thus, even where in the first case discussed below (*Vedanta*) the Court held that a duty of care *could* exist, whether or not such duty *actually* existed (and whether it was breached) will be a matter to be determined at trial.

Lungowe v Vedanta Resources PLC: The degree of control exercised by the parent company suggested an assumption of responsibility for the acts of its subsidiary[3]

In the *Lungowe* case, Zambian citizens made allegations of personal injury, damage to property, and loss of income, amenity and enjoyment of land due to pollution and environmental damage caused by toxic discharges from a copper mine operated by a Zambian company, KCM. Vedanta, an English company, was the holding company for a group of base metal and mining companies, including KCM.

Vedanta and KCM applied for a declaration that the English court did not have jurisdiction to try the Zambian claimants' action – this application was refused by the High Court at first instance, and the Court of Appeal dismissed KCM and Vedanta's appeals against that decision. In doing so, the Court of Appeal relied heavily on the *Caparo* test. It found that parent company liability could arise where that company took direct responsibility for devising a material health and safety policy, the adequacy of which was the subject of the claim, or where it controlled the operations giving rise to the claim. The degree of control that Vedanta exercised over KCM suggested an assumption of responsibility by Vedanta: it had an 80% majority shareholding in KCM, and there was evidence that the board had been involved in the direct management of subsidiaries including KCM.

The Vedanta story isn't over yet, however – in March 2018, the Supreme Court granted KCM and Vedanta leave to appeal the decision of the Court of Appeal, and that appeal is currently outstanding.

Okpabi v Royal Dutch Shell PLC: The mere existence of group policies does not indicate sufficient control over a subsidiary to establish a duty of care by a parent[4]

In *Okpabi*, claimants in Nigeria brought claims against Royal Dutch Shell (RDS, a UK-incorporated parent) and SPDC (a subsidiary of RDS) arising out of an alleged breach of duty of care to the claimants in respect of pollution and environmental damage caused by oil leaks from pipelines and associated infrastructure operated by SPDC.

At first instance, the High Court found that on the facts of the case, RDS did not owe the claimants a duty of care. The Court of Appeal confirmed this decision, dismissing the claimants' appeal. The Court considered that the evidence did not demonstrate (either in individual documents or cumulatively) a sufficient degree of control by RDS of SPDC's operations in Nigeria, such as would be needed to establish the required degree of proximity to support a claim that RDS owed a direct duty of care to the claimants.

In contrast to the *Lungowe* case, where the degree of control exercised by the parent company suggested an assumption of responsibility for the acts of its subsidiary, the evidence in *Okpabi* suggested a more remote nexus between the parent and subsidiary: it was made clear that the issuing of mandatory policies, standards and manuals which applied to SPDC were not sufficient to establish a duty of care in favour of any person or class of persons affected by those policies. These policies did not indicate control; that control remained with SPDC which was responsible for its own operations. SPDC operated its pipeline pursuant to a joint venture with three other parties (including the Nigeria National Petroleum Corporation, which held the majority shareholding in the venture), which meant that SPDC (and, by extension, its parent, RDS) had a more limited capacity to avoid the breaches alleged by the claimants.

***AAA & Others v Unilever PLC and Unilever Tea Kenya Limited*: No duty of care is owed by the parent where the subsidiary retains day-to-day responsibility for its operations, in the absence of additional steps by the parent to exert operational control**

Most recently, the Court of Appeal considered claims against two Unilever group companies, concerning alleged liability in negligence for acts of violence committed by third parties against employees and local residents on a Kenyan tea plantation during large-scale civil disorder following the 2007 Kenyan presidential election. The claimants had alleged that the UK-registered parent company Unilever PLC (UPLC) and its Kenyan-registered subsidiary, Unilever Tea Kenya Limited (UTKL), were each liable to UTKL employees and their families for a failure to adopt adequate safeguards to protect them from the ethnic violence that erupted in Kenya following the 2007 presidential elections.

In March 2017, the High Court struck both claims out because they were, in its assessment, "bound to fail":[5] under English law, the claimants were required to demonstrate a "good arguable claim" in order to establish jurisdiction for the English courts to hear the claims, and the High Court decided that the claims did not meet the necessary threshold; and, additionally, that the events at issue were not sufficiently foreseeable, such that it was not "fair, just and reasonable" to impose the alleged duty of care on the defendants.

In July 2018, the Court of Appeal upheld the High Court's decision to strike out the claims against Unilever, albeit on different grounds.[6] The Court of Appeal found that the judge at first instance had been correct in her conclusion that UPLC did not owe the claimants a duty of care in negligence and that the claimants were therefore unable to demonstrate a properly arguable case. The High Court had therefore been entitled to strike out the claims against UPLC and UTKL on this preliminary issue without progressing to trial. However, in dismissing the Claimants' appeal, the Court of Appeal formulated its decision on different grounds. It held that the evidence relied upon by the Claimants failed to disclose a level of control by UPLC over UTKL's operations that was sufficient to warrant the imposition of a duty of care. Crucially, as in *Okpabi*, the relationship did not have sufficient proximity.

A key point arising from the *Unilever* decision is the Court of Appeal's distinction between a parent company with a group-wide system of mandatory policies in place to ensure that proper controls were adopted by its subsidiaries, and circumstances where a parent company sought to exert control and influence directly over the relevant subsidiary. Accordingly, where a subsidiary retains day-to-day responsibility for its operations, the existence of group-level policies is not, in itself, sufficient to establish a duty of care owed by the parent company to those affected by the relevant activities. Additional steps to exert operational control directly over the subsidiary would be required before a duty of care could exist. On the evidence before it, the Court of Appeal in the *Unilever* case concluded that the parent company, UPLC, did not have superior knowledge or expertise in relation to the security risks. While UPLC imposed various requirements on its subsidiaries in relation to risk preparedness and planning, the relevant operating procedures were developed and implemented at subsidiary level.

The Court of Appeal identified two broad scenarios which might give rise to parent company liability, depending on the facts of a particular case: (i) where the parent has in substance taken over the management of the relevant activity of the subsidiary in place of (or jointly with) the subsidiary's own management; or (ii) where the parent has given relevant advice to the subsidiary about how it should manage a particular risk.

The Court of Appeal's judgment provides additional clarity regarding the difficulties to be faced by claimants seeking to bring proceedings in the English Courts against a UK-registered company for activities occurring abroad and primarily relating to a foreign-registered subsidiary. However, the *Unilever* judgment (and those in *Lungowe* and *Okpabi*) leaves open the possibility that UK-registered companies may still be found liable in negligence in English proceedings for acts occurring overseas. This will depend on whether there is a duty of care, as the Court of Appeal found to be the case in *Lungowe*. As each of these judgments demonstrates, the degree of control exercised by the UK-registered parent is likely to have significant importance in any such proceedings. Where it is possible to demonstrate that the UK parent has assumed a sufficient degree of responsibility for the actions of its subsidiary, this will typically support a finding that a duty of care is owed.

While it will remain attractive for many businesses to conduct their foreign operations using UK-registered companies, it is particularly important, in light of these recent decisions, to balance this against the increased risk of litigation that it may bring, particularly in the manufacturing, extractive and other resource-based industries, and to conduct appropriate risk audits and adopt other measures in effective mitigation. While group-level operating procedures and guidelines instigated by a group parent company may well be necessary and appropriate features of an effective and responsible business, these should be combined with regular "heat mapping" of potential environmental, health and safety and human rights risks and the adoption of appropriate safeguards. Parent companies should ensure that such policies are applicable to all group companies, as opposed to specific subsidiaries. In addition, the responsibility for effecting these policies should be at subsidiary level, which will reduce the risk of a duty of care arising.

Endnotes

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2. *Chandler v Cape PLC* [2012] EWCA Civ 525.
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4. *Okpabi v Royal Dutch Shell PLC* [2018] EWCA Civ 191.
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Overview of Trends in Environmental and Climate Change Law in Sub-Saharan Africa

Mandy Sherwin

Michael Vermaak

Bowmans

Introduction

Optimism about the economic future of the continent continues to fuel interest in the business opportunities Africa has to offer. As with any region around the world, doing business in African countries, whether in the form of financing or direct involvement in mining, energy, infrastructure or other developments, requires an understanding of country-specific environmental laws and compliance requirements.

There has also been a growth in recent years of the need for multijurisdictional and cross-border environmental and other regulatory advice within Africa. As outlined in this chapter, the complexities of the sub-Saharan African (**SSA**) inter-jurisdictional environmental legal landscape should be recognised (as should the risk that some of the freely available online legislation resources are not necessarily always reliable or up to date).

A good place to start is to consider the progress regional inter-governmental bodies are making in environmental and climate change matters, and to outline some environmental law trends based on a review of selected SSA countries. An analysis of this kind indicates the levels of development and maturity of environmental regulation in many SSA jurisdictions and reveals some similarities, but also certain distinct differences, in the approaches of the SSA jurisdictions.

For the purposes of this chapter, we have only mentioned selected national legislation applicable in Kenya, South Africa, Tanzania and Uganda. While we have also looked into environmental and climate change related regulatory developments in other jurisdictions, including Nigeria, Cameroon, Mozambique, Angola and Republic of Congo, along with a number of other jurisdictions, we do not address the developments in these countries specifically in this chapter.

The SSA countries we considered have already developed and are implementing comprehensive laws for the regulation and protection of the environment and, in some respects, for the mitigation of climate change. As would be expected, however, there is limited alignment evident in the laws from jurisdiction to jurisdiction. This is why, when contemplating a project or development in a particular jurisdiction, it is always necessary to obtain sound local law advice as any given country will have its unique features.

First, the big picture

Regional co-operation among many of the SSA countries is regulated through their participation in inter-governmental bodies, such as the **East African Community** (**EAC**), the **Economic Community of West African States** (**ECOWAS**), and the **Southern African Development Community** (**SADC**). In total, 35 SSA countries belong to one of these three Regional Bodies, with Tanzania being the only country belonging to two, namely the EAC and the SADC.

The membership of each of the Regional Bodies is shown in the table below.[i]

EAC	SADC	ECOWAS
Burundi	Angola	Benin
Kenya	Botswana	Burkina Faso
Rwanda	Democratic Republic of Congo	Cabo Verde
South Sudan	Eswatini (formerly Swaziland)	Côte d'Ivoire
Tanzania	Lesotho	Gambia
Uganda	Madagascar	Ghana
	Malawi	Guinea
	Mauritius	Guinea Bissau
	Mozambique	Liberia
	Namibia	Mali
	Seychelles	Niger
	South Africa	Nigeria
	Tanzania	Senegal
	Zambia	Sierra Leone
	Zimbabwe	Togo

While the EAC, ECOWAS and SADC have differing purposes and are regulated by separate founding treaties, achieving and furthering economic, social and political stability within their Member States can be broadly described as an overarching goal of these Regional Bodies. The goals of these Regional Bodies include protecting the environment and, more recently, considering the impacts of climate

change. Each of the Regional Bodies has adopted founding treaties that, among other things, seek to ensure the protection of the environment.

In turn, the treaty obligations that the Regional Bodies impose on their members are translated into country-specific regulatory requirements around environmental protection. As forms the focus of this chapter, these include environmental impact assessment (**EIA**) processes, waste-related regulatory controls and the recent attention being given across SSA broadly on mechanisms to address the practicalities of imposing climate change legislation or policy – a key global issue – at a country-specific level.

Here are some of the results of our analysis of the environmental protection and climate change mitigation approaches at a regional and country-specific level in the selected SSA countries.

Environmental Protection Imposed at a Regional Level

The founding treaties of each organisation require Member States to protect the environment as part of the broader drive to further their purposes.

- The **East African Community Treaty**, which became effective in 2000, specifically provides at Article 5, item 3(c), that the Community must ensure '*the promotion of sustainable utilisation of the natural resources of the Partner States and the taking of measures that would effectively protect the natural environment of the Partner States*'.[ii]

  Chapter 19 of the EAC Treaty also provides for the '*Co-operation in Environment and Natural Resources Management*' between Member States, with certain obligations being imposed on Member States in terms of Chapter 19. These include obligations to:

  (i) '*develop special environmental management strategies to manage fragile ecosystems, terrestrial and marine resources, noxious emissions and toxic and hazardous chemicals*' (article 112(1)(b));

  (ii) '*adopt environmentally sound management techniques for the control of land degradation, such as soil erosion, desertification and forest encroachment*' (article 112(2)(e)); and

  (iii) to prevent illegal trade and movement in toxic chemicals, substances and hazardous wastes, members must '*co-operate and adopt common positions against illegal dumping of toxic chemicals, substances and hazardous wastes within the Community from either a Partner State or any third party*' (article 113(1)).

- Similarly, the **Southern African Development Community Treaty**, originally adopted in 1992, and subsequently amended, requires Member States to co-operate '*to foster regional development and integration on the basis of balance, equity and mutual benefit*' in a number of areas. Among them are food security, land and agriculture, trade, industry, finance, investment and mining, and natural resources and the environment (article 213 (a), (c) and (f)).[iii]

- Finally, Chapter VI (Co-operation in Environment and Natural Resources) of the **ECOWAS Revised Treaty**, adopted in 1993, provides that '*Member States undertake to protect, preserve and enhance the natural environment of the region and co-operate in the event of natural disasters*'. It goes further, saying that '*To this end, they shall adopt policies, strategies and programmes at national and regional levels and establish appropriate institutions to protect, preserve and enhance the environment, control erosion, deforestation, desertification, locusts and other pests*' (article 39).[iv]

  Article 30 further provides that '*Member States undertake, individually and collectively, to take every appropriate step to prohibit the importation, transiting, dumping and burying of hazardous and toxic wastes in their respective territories*'. What's more, '*They further undertake to adopt all necessary measures to establish a regional dump-watch to prevent the importation, transiting, dumping and burying of hazardous and toxic wastes in the region*'.

These treaties provide the broad framework for environmental protection within Member States. At a practical level, when it comes to protecting the environment, it is up to members themselves to further the objectives of the Regional Bodies, including by adopting legislation at a country-specific level.

Country-Specific Environmental Protection

Environmental protection is indeed addressed in countries throughout SSA and, in many of the jurisdictions we have considered, not only are environmental laws highly developed and diverse, but they are also keeping pace with certain global environmental regulatory trends as well as addressing country-specific environmental concerns.

To name a few, and among other SSA jurisdictions, environmental rights are directly enshrined in the constitutions of Angola (2010), Cameroon (1996), Democratic Republic of Congo (2005), Kenya (2010), Mozambique (1990), Nigeria (1999), Rwanda (2003), Republic of Congo (2015), South Africa (1996), Uganda (1995), and Zimbabwe (2013). Tanzania, despite being a member of two Regional Bodies, is the only country in our key sample group whose Constitution does not expressly provide for environmental rights. This may be due the Tanzanian Constitution being the oldest of all in the countries reviewed, dating from 1977, before environmental protection became such a key global focus point and before any of the three Regional Bodies were established and adopted founding treaties.

The approaches to environmental legislative protection in jurisdictions around SSA are multifaceted and the results of the analysis we have undertaken unavoidably need to be restricted for purposes of this chapter. In the key jurisdictions considered, as would be expected, environmental protection is directly regulated in terms of statutes at a national level, and national EIA, waste and climate change laws form the focus of our analysis in this chapter. We have not covered state or provincial; municipal or local government; or other tiers of legislation, nor have we specifically addressed water, air pollution related or other environmental legislation in all jurisdictions, other than to generally mention some examples below.

Over-arching national environmental statutes are commonly supported in SSA jurisdictions by other sector-specific or environmental medium-specific (such as air, water and biota) statutes, or through regulations under the over-arching environmental statutes. Sector-specific laws, ensuring that the environment is protected when activities such as waste management and mining are undertaken, are frequently found across SSA countries, and many SSA jurisdictions also have statutes or regulations addressing impacts on or utilisation of water, air or biological resources, as well as other specific environment-related considerations.

To illustrate this, we include a few examples in the table below:

Kenya	The main national environmental legislation includes, among a range of other laws, the Environmental Management and Co-ordination Act of 1999 and its Regulations, which include the Environmental (Impact Assessment and Audit) Regulations, 2002. Environmental aspects such as water quality and waste are addressed through regulations promulgated in terms of this Act; namely, the Environmental Management and Co-ordination (Water Quality) Regulations, 2006, and the Waste Management Regulations, 2006, respectively. Water use is also regulated in Kenya through the Water Act, 2002. Various other regulations have been promulgated in terms of the Environmental Management and Co-ordination Act, which include regulations addressing aspects such as air quality, wetlands, noise and biodiversity protections. The Kenyan mining industry is regulated by the Mining Act (No. 12 of 2016), which itself also includes certain environmental protection provisions.
South Africa	The National Environmental Management Act 107 of 1998 is the principal environmental statute. Aligned with it are a number of so-called 'specific environmental management Acts', which address areas such as waste, air quality and water use, among others. Examples include the National Environmental Management: Waste Act 59 of 2008, the National Environmental Management: Air Quality Act 39 of 2004, and the National Water Act 36 of 1998. These statutes are all supported by a wide range of regulations, including relating to EIAs. Other legislation that deals with environmental issues includes the Mineral and Petroleum Resources Development Act 28 of 2002, which focuses on mineral prospecting and mining, and oil and gas exploration and production (although environmental controls in these and other sectors are now principally addressed under the National Environmental Management Act and specific environmental management Acts).
Tanzania	The Environmental Management Act, 2004, the Environmental Management Act, Regulations, 2004, and the Environmental Impact Assessment and Audit Regulations, 2005, are among the key national laws dealing with environmental matters. The Solid Waste Management Regulations, 2009 and Environmental Management (Hazardous Waste Control and Management) Regulations, 2009, both published in terms of the Environmental Management Act, 2004, regulate the management of solid and hazardous wastes. Other legislation also addresses environmental media, and, for example, water is regulated in terms of the Water Supply and Sanitation Act, 2009, and the Water Resources Management Act, 2009, while air quality is regulated in terms of the Environmental Management (Air Quality Standards) Regulations, 2007, published in terms of the Environmental Management Act, 2004. Mining is regulated under the Mining Act, 2010.
Uganda	The National Environment Act, 1995 and Environmental Impact Assessment Regulations, 1998, published thereunder, are certain of the primary laws dealing with environmental protections and the EIA process in Uganda. Separate laws have been adopted regulating waste- and mining-related activities. For example, waste management is addressed in terms of the National Environment (Waste Management) Regulations, 1999, published in terms of the National Environment Act, 1995, and mining activities are regulated in terms of the Mining Act, 2003. Other aspects of environmental protection are also regulated through specific legislation, such as the Water Act, 1997.

Through laws, such as those mentioned above, a range of permits, licences and authorisations are likely to be required across these SSA countries for undertaking activities or developments that may significantly impact on the environment.

Although we have not covered anything other than selected national legislation in this chapter, the importance of the state, provincial, municipal and local government level of laws and controls cannot be ignored in undertaking any development or activity. For example, in South Africa, the Constitution provides that the 'environment' is an area of concurrent national and provincial legislative competence, while some of the more specific environment-related considerations, including air pollution, potable water supply systems and domestic wastewater and sewage disposal systems, are within the executive and administrative authority of municipalities (local government). Authorisations, licences or permits are therefore typically required under municipal legislation in South Africa for activities such as the storage of flammable substances or dangerous goods, the discharge of effluent into municipal sewers and undertaking listed scheduled trades. Permits are also required under South African provincial legislation, such as for activities that impact protected animal or plant species.

Environmental Impact Assessment

Around the world, one mechanism that is widely used for achieving environmental protection is to require some form of EIA and the issuing of an authorisation before certain types of regulated activities or developments may proceed. In this way, the possible environmental and social impacts of developments come to the attention of decision-makers and the public before they may be authorised. Legislation establishing such EIA procedures within a jurisdiction provides a key indicator of a country's regulatory instruments and controls to ensure protection of the environment.

All SSA countries specifically considered in this chapter have some form of EIA legislation in place which contains mandatory requirements as to the EIA procedure to be followed in specified instances. Although the specific requirements of each jurisdiction clearly would have to be properly considered in any country where a development or activity is planned, the types of projects or developments that frequently require an EIA include:

- mining and related activities;
- urban development activities;
- construction of telecommunication services (such as towers and masts);
- forestry-related activities;
- construction of power stations; and
- construction of pipelines (including for the transport of substances such as oil and gas).

While each jurisdiction we considered has legislation requiring that an EIA be conducted in certain circumstances, the EIA process varies from jurisdiction to jurisdiction. For example, while all EIA-related legislation in the SSA countries reviewed calls for public participation, the scope and timing of public consultation differs from country to country. Typically, in addition to the laws which deal with environmental protection through the EIA process, some of the SSA countries have, or are still in the process of forming, policies and guidelines to refine their EIA processes.

Waste Management and Control

As briefly set out in the table above, the storage, handling, transporting, treatment and disposal of hazardous wastes are regulated by specific legislative provisions in the various SSA countries considered for purposes of this chapter.

In many of the countries considered for this chapter, the laws require certificates, approvals or authorisations to be granted for the transport, handling and storage of hazardous wastes. In addition, there are often requirements for disposing of hazardous wastes in accordance with certain provisions (for example, at specific hazardous waste disposal facilities), and for certificates confirming the correct disposal of hazardous wastes to be issued to the generators of the waste.

Membership of the EAC and ECOWAS also goes hand-in-hand with obligations in respect of the management of hazardous wastes. In light of this, and the country-specific legislation in place, it is worth noting that the majority of Member States of the SADC, EAC and ECOWAS have ratified the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (the **Basel Convention**). In addition, various non-member countries, such as the Republic of Congo and Cameroon, have also ratified the Basel Convention.

Another framework that has implications for hazardous waste management is the Bamako Convention of 1998. It was adopted by the Organisation of African Unity (the predecessor to the African Union). The Bamako Convention has been ratified by 27 African countries, including Angola, Botswana, Republic of Congo, Cameroon, Côte d'Ivoire, Uganda, Tanzania and Mozambique. The Bamako Convention sought to prohibit the import of hazardous wastes, including nuclear wastes, into African countries. In order to achieve this, signatories must fulfil:

(i) the obligation to '*take appropriate legal, administrative and other measures within the area under their jurisdiction to prohibit the import of all hazardous wastes, for any reason, into Africa from non-Contracting Parties*'. Going further, the Bamako Convention states that '*Such import shall be deemed illegal and a criminal act*' (article 4(1)); and

(ii) the obligation to '*adopt legal, administrative and other appropriate measures to control all carriers from non-Parties, and prohibit the dumping at sea of hazardous wastes, including their incineration at sea and their disposal in the seabed and sub-seabed*' (article 4(2)).[v]

Climate Change

SSA is seen as being particularly vulnerable to the impacts of climate change, with anticipated higher land and ocean temperatures resulting in more floods, droughts and intense weather events. At a regional level, climate change is a relatively new focus area and the three Regional Bodies are implementing various policies, or programmes.

The SADC, together with the EAC and the Common Market for Eastern and Southern Africa (**COMESA**), is facilitating the implementation of a Tripartite Programme on Climate Change Adaptation and Mitigation.[vi] This programme seeks to address the impact of climate change in the SADC, EAC and COMESA regions.

In addition, all SADC Member States are party to the United Nations Framework Convention on Climate Change and the Ramsar Convention on Wetlands, which includes resolutions dealing with climate change and its impacts, adaptation and mitigation measures. The SADC has not adopted any additional protocols or treaties directly addressing the impact and mitigation of climate change in the SADC region; however, a regional climate change programme is being finalised.[vii]

In addition to its involvement in the Tripartite Programme on Climate Change Adaptation and Mitigation, the EAC has developed a Climate Change Policy to assist Member States in addressing climate change in their region. Member States can also rely on the EAC Climate Change Master-Plan and the Climate Change Strategy as a framework for adapting to and mitigating climate change.[viii]

ECOWAS has established a Scientific and Technical Consultative Group on Climate Change that has met twice since February 2017, most recently in September 2018.[ix] At the most recent meeting, ECOWAS was still at the stage of identifying the dynamics to better guide the fight against climate change.

At a regional level, frameworks and guidelines are therefore being developed or are available as a baseline. At this stage, Kenya is one of the few of the sample group countries with Regional Body membership that has progressed beyond the policy, action plan and strategy phases, and already has climate change legislation in place. Our research indicates, however, that there has been some progress on the development of climate change legislation in Angola, Cameroon, Republic of Congo, Nigeria, Mozambique, South Africa, Tanzania and Uganda. For the most part, though, indications are that these countries are still largely at the stage of integration into national development plans and the development of climate change policies, or developing draft legislation. South Africa, which has a Climate Change Bill and Carbon Tax Bill, also already has regulations under the National Environmental Management: Air Quality Act 39 of 2004 which require greenhouse gas reporting, declare certain greenhouse gases as 'priority air pollutants', and require pollution prevention plans to be submitted in respect of certain production processes.

Here are some of the steps countries are taking towards the legislative regulation of climate change:

Kenya	Legislation regulating climate change has been passed, in the form of the Climate Change Act (No. 11 of 2016). This Act seeks to provide for a regulatory framework for an enhanced response to climate change and to establish mechanisms and measures to achieve low-carbon climate development.
South Africa	In addition to greenhouse gas regulations already in place under the National Environmental Management: Air Quality Act 39 of 2004, the country is in the process of developing a range of specific climate change legislation and, in 2018, a Climate Change Bill was published for comment. A revised draft of the Bill is expected during 2019 and, in its present form, the Bill seeks to provide for an integrated response to climate change. The implementation of a proposed Carbon Tax Bill, intended to impose a tax on greenhouse gas emissions, has been delayed since initially being proposed in 2010 and is now expected to be implemented in 2019.
Tanzania	The Tanzanian Parliament voted in April 2018 to ratify the Paris Agreement and followed through with ratification in May 2018.
Republic of Congo and **Cameroon**	Both countries have passed decrees that address climate change. Cameroon has passed a decree to reduce emissions due to deforestation and address degradation, sustainable management and conservation of forests.[x] It has also passed a decree setting out how to protect the atmosphere generally.

Conclusion

Protecting the environment and mitigating the impacts of climate change is a focus area of many SSA governments, through their membership of Regional Bodies and through measures imposed by a range of legislation in the SSA jurisdictions. Environmental matters and impacts of activities and developments are strictly

regulated in the SSA countries we have considered. There is also current regional, and in some instances country-specific, impetus on addressing climate change through regulatory mechanisms. As anticipated economic growth and development proceeds in future years and the impacts, both positive and negative, become more manifest, one must expect the environmental and climate change laws in SSA countries to be further developed and adapted as appropriate. SSA is no different from any other region: keeping a finger on the pulse of current laws and policy, and also on the anticipated future direction and revisions to policy and laws, will be a key factor in doing business in SSA countries and managing compliance risks.

Endnotes

i. See https://www.eac.int/overview-of-eac, https://www.sadc.int/member-states/, and http://www.ecowas.int/member-states/.

ii. As extracted from http://eacj.org/?page_id=33.

iii. As extracted from https://www.sadc.int/documents-publications/sadc-treaty/.

iv. As extracted from http://www.ecowas.int/ecowas-law/treaties/.

v. As extracted from https://www.informea.org/en/treaties/bamako/text.

vi. https://www.sadc.int/sadc-secretariat/directorates/office-deputy-executive-secretary-regional-integration/food-agriculture-natural-resources/tripartite-programme-climate-change-adaptation-and-mitigatio/.

vii. https://www.sadc.int/themes/meteorology-climate/climate-change-adaptation/.

viii. https://www.eac.int/environment/climate-change/eac-climate-change-policy-framework.

ix. http://www.ecowas.int/ecowas-strategizes-to-curb-effects-of-climate-change-in-the-region/.

x. Law No. 94-01 of 20 January 1994 to lay down Forestry, Wildlife and Fisheries Regulations (EN) and Prime Ministerial Decree No. 103/CAB/PM regarding the creation, organization and operation of the Steering Committee for activities to reduce emissions from deforestation, degradation, sustainable management and conservation of forests (REDD+).

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Disclaimer

This chapter is intended to provide a selective overview of certain regional and national laws and trends in certain jurisdictions based on research undertaken into selected legislation in those jurisdictions. It is not intended as and should not be relied upon as legal advice. Full and specific legal advice by appropriate professional counsel should be sought where required.

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Chapter 5

Australia


Michael Winram


Patrick Ibbotson

Maddocks

1 Environmental Policy and its Enforcement

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

Environmental law is based both on common law principles (in particular negligence and nuisance) and legislation. Increasingly, legislation is influenced by or implements international treaties. Governments have adopted ESD principles and implemented them to various degrees.

There are three tiers of government – Commonwealth, State or Territory (State) and Local. The Commonwealth also asserts policy positions through controls on grants and revenues.

The Constitution gives the Commonwealth Government limited jurisdiction in environmental issues, typically: external affairs (international treaties); Commonwealth land; some aspects of heritage; aspects of water; and matters that affect aboriginal peoples. The Commonwealth has the power to legislate in respect of trading and financial corporations and could use this power to increase the scope of its environmental regulation. To date, it has generally not done so.

The Commonwealth Government can implement policies in cooperation with the States and Territories. For example, the Commonwealth has established a number of new bilateral agreements between itself and the State and Territories which allow the Commonwealth to 'accredit' particular State/Territory environmental assessment and approval processes.

State legislation is the predominant form of environmental legislation. There are eight State or Territory Governments. In each State, there is legislation relating to all relevant environmental aspects (pollution, waste, contaminated land, threatened species, heritage, planning, etc.) and to all economic sectors (mining, agriculture, infrastructure, manufacturing, etc.), as well as an Environment Protection Authority (EPA).

Local Councils are established under State legislation and are responsible for administering local government areas. Typically, the members of the Council are elected by people who live in the local government area. Generally, local government powers relate to local land use planning, development controls, local roads and traffic control, building regulations, community waste management, minor pollution incidents or nuisances and public health.

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

The approach taken varies between and within jurisdictions. Typically, agencies take a risk-based approach to the enforcement of environmental law. Because of limited resources, they will usually enforce more serious offences through the courts and issue penalty notices for offences with minor consequences.

Many environmental laws have 'open standing' provisions, which allow any person to bring enforcement proceedings in a civil jurisdiction to ensure compliance with those laws. For example, an individual that seeks orders from a court to rectify development on neighbouring land if it is carried out in breach of conditions. Similarly, environmental groups can seek civil orders against offences of environmental law.

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

There are very extensive public disclosure requirements. There is a wealth of information available to the public either online or on request.

Typically:

- Approval processes for new developments will include some form of public notification. Major developments may need to exhibit detailed environmental assessments.
- Material pollution incidents are required to be reported and the reports can be publicly available.
- There are registers kept of environmental approvals.
- There are registers or publicly available records relating to contaminated land.
- Approvals may impose obligations on the approval holder to make certain information available to the public or the local community.

The Commonwealth Government also has publicly available records of greenhouse gas emissions through the National Greenhouse Gas and Energy Reporting Scheme and of other emissions through the National Pollution Inventory.

In all jurisdictions, there is also legislation that entitles any person to seek access to information under the control of the Government, typically with a presumption in favour of granting access to information.

2 Environmental Permits

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

There are many approval requirements in each jurisdiction. There may also be a need to obtain both State and Commonwealth approvals. The following are typical:

New development	Planning approval e.g. 'development consent'
Mining	Exploration or Mining Lease or similar
Pollution or specified polluting activities	Environment Protection Licences, Water Pollution Licences
Waste	Authorisations for transport and disposal and sometimes for generation
Hazardous substances	Licences to store or use above certain quantities or in certain situations
Threatened species	Licences to damage, disturb or take
Water use	Licences for extraction and use and to establish works to extract water
Radiation	Licences for certain devices
Ozone	Licences for keeping, use, maintenance and disposing of prescribed ozone-depleting substances
Aboriginal objects or areas	Licences to disturb or enter
Specific locations	Specific licences for entry, use or to disturb

In most jurisdictions, environmental licences are required for specified industrial activities such as chemical industries, large-scale crushing or grinding works, certain mining, extractive industry and related activities, heavy industrial or manufacturing uses, intensive agriculture, and waste facilities.

It is very common for multiple approvals to be required.

Typically, the benefit of planning approval can be relied on by any person carrying out the approved development on the land to which the approval requires – they do not need to be transferred.

Most other environmental approvals are personal to the holder. These can usually be transferred with the consent of the relevant agency. However, the agency is not required to consent. In some jurisdictions, the agency could refuse consent because, for example, the transferee or its directors are not a fit and proper person to hold the licence.

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 applicant for an approval usually has a right of appeal to a court or administrative tribunal. Typically, appeals may be:

- merits appeals; or
- administrative law (i.e. judicial review) appeals.

The nature of appeal rights varies for different approvals and jurisdictions.

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

Typically, these requirements arise in the following ways:

- when seeking approval for a new development;
- as a condition of an approval;
- by regulatory order during the operation of the development;
- as an order of a court consequent upon prosecution;
- by a voluntary scheme; or
- by industry or activity-specific legislation.

New developments

For all new developments, other than the most minor, an environmental assessment is carried out to obtain planning approval. The level of detail required will vary with the jurisdiction, the nature of the activities and the risks presented by the activities.

For major industrial facilities, major infrastructure, large-scale chemical storage, large generation facilities and mines, a very detailed environmental assessment will normally be required. Typically, applications and assessments are publicly available.

Approval conditions

The conditions of an approval may require management plans, assessments, environmental audits and reporting. Many environmental licences and permits will require periodic review and reporting of compliance.

Orders

Typically, regulatory authorities can order that an operator of a facility conduct audits or a review. A court can also do this if a person is prosecuted and found guilty of a pollution offence.

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

There are very broad enforcement powers across each jurisdiction.

Environmental regulators can:

- investigate;
- demand information;
- serve infringement notices;
- prosecute;
- suspend approvals;
- cancel approvals;
- impose new approval conditions;
- serve investigation, clean-up or abatement orders;
- serve orders requiring works;
- obtain court orders requiring compliance, response, auditing; and
- claim against bonds or other security provided.

3 Waste

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

Typically, waste is very broadly defined to include any discarded,

rejected, unwanted, surplus or abandoned substance, whether or not it is intended to be (or can be) reprocessed, re-used or recycled.

Waste classification processes or categories are also defined on the basis of either some or all of:

- the source of the waste;
- the risks presented by waste;
- the physical characteristics of the waste; and
- the content of the waste.

Certain types of waste do have significant additional controls. The controls may include restraints on generation, storage, transport, handling and disposal.

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?

These controls vary with location, industry type and the risks presented. Controls are imposed by:

- approvals/licences – in particular, planning approvals and licences to store or dispose of waste;
- specific legislative requirements; and
- community concerns and pressures.

In all jurisdictions, it is an offence to dispose of waste in a manner that harms or is likely to harm the environment. Often, the owner of the waste, as well as the person disposing of it, will be held liable.

Typically, waste produced on-site can be stored on-site temporarily, pending its treatment or off-site disposal or its reuse. The volumes and types of waste allowed to be stored will depend on the location, the waste and the risks. There will be both environmental controls and safety controls that apply. There will be very few opportunities for on-site disposal of waste on the site where it is produced unless the waste is demonstrated to be inert and suitable to be used, for example, as fill.

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)?

Generally, there are no superfund acts which link waste back to the generator once it has been lawfully disposed of. Typically, each of the producers (often called generators), consignors, transporters or receivers of the waste can have some liability for the waste if an incident occurs before waste is lawfully disposed of. However, once waste is lawfully disposed at a waste facility, the liability of the generator and transporter cease.

In New South Wales (NSW), for example, s115 and s116 of the *Protection of the Environment Operations Act 1997* create offences relating to the unlawful disposal or escape of waste. Both the person causing the incident and the person who is the owner of the waste commit an offence. The producer of waste will be the owner of the waste unless they have transferred ownership to another person. This is possible with properly documented transfer documents.

Where the incident occurs in the transport of waste, then the producer of the waste may retain liability under transport safety legislation as a consignor of the waste.

The common law principles of negligence may also apply to create liability for the producer of the waste.

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

There are some voluntary waste take-back schemes.

For packaging waste, there are some industry waste reduction plans that require waste reduction initiatives. These can be imposed if the industry participants do not sign up to and comply with the national packaging covenant, which is a voluntary scheme for the reduction of packaging waste.

The Commonwealth and States have agreed to a National Waste Policy. Under this policy, there is a national television and computer recycling scheme which is currently being implemented where consumers can return items to designated free drop-off points. Under the scheme, liable parties (importers and local manufacturers) must be members of an approved co-regulatory arrangement, and commitments are made to certain collection and recycling targets. Some States have also introduced container deposit schemes, such as the 'Return and Earn' scheme in NSW. Other initiatives proposed include co-regulatory schemes for mercury (containing lamps, tyres and plastics).

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 both civil and criminal penalties for breach of environmental laws. Penalties include remediation orders, fines and, for the most serious cases, imprisonment.

Maximum penalties can be severe, with the maximum penalties in most jurisdictions for the worst offences exceeding $1 million for each separate offence. Further, penalties can be imposed for each day an offence continues. Typically, the courts do not impose the maximum penalty, but set out in their judgments principles that will be followed to determine an appropriate penalty in the circumstances.

Where a natural person commits an offence, gaol terms can also be imposed.

The offence provisions fall into one of four types:

- absolute liability – there is no defence if the defendant is found to have breached the requirement;
- strict liability – a defence is available if the offence occurred because of an honest and reasonable mistake of fact;
- qualified strict liability – a defence is available if the person exercised due diligence and exercised reasonable precautions or in other circumstances set out in the legislation; and
- offences requiring proof of intent, negligence, recklessness or other deliberation.

Other liabilities include:

- infringement or penalty notices;
- clean-up or response orders;
- compensation;
- publication of offence;
- contribution to environmental funds; and
- common law claims for damages.

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

The purpose of some licences is to specifically permit certain types of pollution. For example, an environment protection licence in NSW may specifically permit the pollution of water by specified substances at specified points up to specified limits. However, there remain risks, such as:

- the pollution might breach other legislation or another approval – for example, a planning approval;
- the circumstances giving rise to the pollution might constitute a breach. For example, if there is a failure to operate in a proper manner; or
- the circumstances of the incident may fall outside the specified controls in the licence.

It should not be assumed that the fact that a licence is held will be a defence for a claim for damages under the common law principles of negligence or nuisance.

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?

In all jurisdictions, there are provisions that have the effect that directors and some other officers or managers are personally liable for some offences committed by the corporation.

Generally, a defence is available if the director can demonstrate that they exercised due diligence to prevent the commission of the offence by the corporation. In some instances, the due diligence defence has multiple other elements beyond the mere exercise of due diligence, including, for example, establishing that the director was not in a position to control or influence the relevant conduct of the corporation.

A company can indemnify its directors. However, the usefulness of the indemnity may be limited in circumstances where there is also a finding that the director has not acted in good faith within the meaning of s199A(2) of the *Corporations Act 2001*. Further, the traditional common law position has been that an indemnity against a criminal sanction is not enforceable (that proposition may be doubtful for strict and absolute liability offences).

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?

A company remains liable for its acts and omissions regardless of what happens to its shares or assets. When shares are acquired, the liability usually stays with the acquired company. The acquired company may still be prosecuted, sued or incur orders in the future for those pre-acquisition acts.

There are (limited) circumstances in some States where the seller could remain liable for the performance of the clean-up obligations, even after the sale. For example, in circumstances where a clean-up order has been served on the polluting company, this is subsequently sold as part of a scheme to avoid compliance.

A further exception is for offences occurring prior to a sale. If a pollution incident occurs and then the polluting company's shares are sold, the seller and the people who were directors, officers and managers of the polluting company remain potentially exposed to prosecution on the basis of the derivative liability provisions discussed in question 4.3 above.

When assets are purchased, normally the liability for the past actions of the seller stays with the seller. However, in an asset sale, if the assets acquired include land that is contaminated, then the people who might be liable for the contamination and ordered to clean it up include the owner and occupier of the land at the time that regulatory action is taken. As a result, an order might be served on the purchaser of the assets in respect of the contamination that was caused prior to the acquisition, but which persisted after the acquisition.

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

Generally, lenders are not liable for environmental harm. However, lenders may be at risk if they are:

- concerned in the management of the defaulting company;
- directly involved in decisions that cause a pollution incident;
- aiding, abetting, counselling or procuring the offence;
- a 'shadow director' – being (in loose terms) a person whose instructions the directors follow;
- in occupation of land on which or from which a pollution incident occurs; and
- in control of or an owner of plant, equipment or substances involved in a pollution incident.

Particular care needs to be taken in NSW and Victoria.

5 Contaminated Land

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

Contaminated land is generally regulated by State legislation.

Most legislation adopts a 'polluter pays' principle but this might be read as a 'government pays last' principle. The range of people who may be liable for contaminated land varies from State to State, but includes:

- the person responsible for the contamination;
- the person who carried out activities on the land of a sort that are likely to cause the contamination;
- the occupier of the land;
- the owner of the land;
- a person who exacerbates the risk from the contamination; and
- certain public authorities (as a last resort).

There is a National Environment Protection Measure on contaminated land that seeks to provide a consistent framework for assessing contaminated land and making management decisions.

Contaminated land issues also need to be considered in the process of obtaining planning approval for new developments. This can result in requirements for environmental assessments to be carried out before approvals are granted and possibly for remediation to be carried out either prior to the approval or as a condition of the approval.

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

The rules for apportioning liability are different amongst the States and Territories. However, as a general proposition, an order can be

served on one person (usually the person most responsible or the owner or occupier) and they have a right to recover costs against a person who may have contributed to the need to remediate. For example, in NSW, the EPA can serve orders on either the person responsible for the contamination, the owner of the land, the person carrying on activities on the land or a public authority.

Contracts can apportion liability between parties as well.

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?

Generally, yes.

The powers of the authorities are different in each State and Territory but, for example, an authority may well be able to require additional work if the land use changes, there is new information, the original information was incomplete or there is a risk to human health or the environment. To the extent that an authority does enter into an 'agreement' with a person, the agreement only binds the parties to it – not to other authorities.

The rights of a third-party challenge will depend on the context in which the 'agreement' is made and implemented. There may be rights to obtain review of administrative decisions, for example, on the grounds of irrationality or want of jurisdiction. In the context of remediation proposed as part of a new development, objectors might, in limited circumstances, have rights to appeal on the merits.

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?

In some States, if a person carries out a remediation order but is not responsible for the contamination of the land, they may recover a portion of the costs of carrying out the order from each person responsible for the contamination.

Generally, a polluter cannot transfer the risk of liability contractually.

In respect of contractual liabilities, it is possible to agree to novate these with the consent of all parties. It is possible to obtain releases as between the parties to the contract, for example, a polluter could obtain a release from the purchaser. However, the polluter would still be potentially liable under legislation and, to manage that, should obtain an indemnity from the purchaser as well.

Of course as a general rule, the polluter cannot contract out of any criminal liability for offences that may have caused the contamination.

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

Generally, relevant government agencies' rights will be limited to the costs of responding to and mitigating the impacts of incidents.

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.?

Environmental regulators have very broad investigative powers to:

- enter premises;
- take samples, photographs and videos;
- inspect premises, plant and equipment;
- seize offending articles or other evidence;
- carry out monitoring and assessment;
- require the production of documents;
- interview employees;
- require responses to questions; and
- require notification of incident.

In some States, voluntary environmental audits cannot be required to be produced.

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 obligation is different in each State, but the triggers are typically:

- pollution incidents (including soil or groundwater pollution) that have a prescribed level of materiality or significance;
- in circumstances set out in approval conditions; and
- when contamination exceeds certain levels as set out in guidelines or regulations.

Normally, notification must be made to the regulator. It may be prudent to notify adjoining land owners or occupiers if there are health risks or a risk of property damage.

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

The legislative position is different in each State. Generally, the affirmative obligation will arise if:

- there is evidence of impact on groundwater or surface water resources;
- there is off-site migration;
- there is a risk to the safety of people (in particular workers);
- there is an order; or
- new development is proposed on the land.

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?

Transfer of land

The obligations are different in each State, but generally it is prudent to disclose contamination and asbestos. In some States, there are obligations to disclose contamination and asbestos.

Take-overs

There is not an express obligation to notify environmental liabilities upon the sale of shares.

Misleading conduct

In all transactions, there is a possibility that statements about the site conditions or other environmental aspects may be misleading or deceptive, resulting in potential offences and claims for compensation or damages. Silence about a state of affairs may also constitute a misrepresentation.

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?

An indemnity will not operate to remove the primary liability. What an indemnity does is enable the indemnified party to recover the amount of the primary liability once it is incurred.

The traditional view is that an indemnity against fines would not be enforceable.

The payment of an amount under an indemnity would not relieve the paying party from liability except from liability under the indemnity itself and then to the extent of the payment only and subject to the terms of the indemnity.

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

The *Corporations Act 2001* (Cth) and Australian accounting standards establish requirements for financial records and reports. Environmental liabilities that are either actual or contingent liabilities within the meaning of relevant accounting, auditing and reporting standards need to be dealt with in accordance with those standards.

Section 299(1)(f) of the *Corporations Act 2001* requires reporting '*subject to any particular and significant environmental regulation*' to address environmental performance in corporations' annual Directors' Reports.

There are situations in which a company could be dissolved to avoid environmental liabilities and this has occurred. However:

- liabilities are usually referrable to the date of the relevant environmental harm. As a result, directors and managers of corporations may remain liable for offences committed by the company prior to its dissolution;
- there are anti-avoidance provisions in some environmental legislation (notably the CLM Act in NSW) that would have the result that directors and holding companies may be liable if companies are wound up as part of a scheme to avoid compliance;
- where a company holds an environment protection licence, there may be restrictions on surrendering the licence and the licence may prevent the dissolution of the company; and
- there are provisions requiring directors to certify solvency before voluntary winding up occurs.

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?

Generally, the 'corporate veil' operates to shield shareholders from liability, so a shareholder in that capacity is not liable for the environmental liabilities of the company.

A parent company generally is not liable for the environmental liabilities of its subsidiary unless:

- the parent company has such a level of control over the management of the subsidiary that the subsidiary company is properly an agent of the parent company;
- where the corporate structure perpetrates a fraud;
- if there is insolvent trading; or
- if the parent company is in fact a shadow director.

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

There are limited protections in some jurisdictions, mostly relating to public sector workers.

Typically, EPAs will keep confidential the identity of a person who provides them with information on an environmental incident.

There are some protections for whistleblowers in companies under the *Corporations Act 2001* (Cth), though this is limited in relation to environmental obligations.

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

There are provisions for 'class actions' or 'representative actions'. These are generally in the Federal Court of Australia or the Supreme Court of Victoria. In other jurisdictions, these forms of proceedings are less well established.

The Federal Court has limited jurisdiction in environmental matters.

There are 'open standing' provisions in many environmental statutes which permit any person to bring an action to restrain breaches of the relevant legislation. These provisions often facilitate 'public interest litigation', where not-for-profit environmental organisations or action groups can bring matters before the courts.

Exemplary or punitive damages can be awarded by the courts for nuisance or negligence. These are extremely unusual. They are generally not available in claims for personal injury. The practice is not the same as in the USA.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

There are very limited circumstances in which individuals and public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation.

The general rule is that costs follow the event and the unsuccessful party will be ordered to pay the reasonable costs of the successful party. The mere categorisation of litigation as having been brought in the public interest is, on its own, not sufficient to justify departure from the usual order that costs should follow the event.

To succeed in justifying a departure from the usual costs order, a party needs to establish that special circumstances apply. Examples of special circumstances include:

- Where the matter litigated raised questions concerning individuals who are unable to take action on their own behalf to determine their rights.
- The pursuit of the litigation was motivated by the desire to ensure obedience to environmental law and preserve the habitat of endangered species.
- A significant number of members of the public share the concern such that it can truly be said that there is public interest in the outcome of litigation.
- The basis of the challenge is arguable and has raised and resolved significant issues in relation to the interpretation and future administration of statutory provisions relating to environmental law.

Establishing one of these special circumstances will generally not be enough. The courts are not usually willing to deprive a successful party of the benefit of a costs order.

An example of where a costs order has been made include where the Government has amended legislation or otherwise used legislative powers to defeat the litigation once litigation has commenced.

9 Emissions Trading and Climate Change

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

On 17 July 2014, the Federal Government repealed the existing carbon pricing scheme under the *Clean Energy Act 2011* and replaced it with the 'Direct Action Plan'. On 24 November 2014, the Australian Parliament passed the Carbon Farming Initiative Amendment Bill 2014, which gave legislative effect to the Emissions Reduction Fund (ERF), the centrepiece of the Federal Government's Direct Action Plan.

The aim of the ERF is to reduce Australia's emissions five per cent below 2000 levels by 2020 by crediting emissions reductions, purchasing emissions reductions, and safeguarding emissions reductions.

The ERF is administered by the Clean Energy Regulator and seeks to provide an incentive for low-cost emissions reductions by crediting and purchasing those emissions reductions in the form of Australian carbon credit units (ACCUs) on the basis of least cost, through reverse auctions or other competitive tendering processes. The ERF will purchase carbon abatement from businesses that reduce their emissions intensity below their 'business-as-usual' or baseline levels.

It is proposed through the ERF that the Government will call for tenders for emissions abatement beyond baseline levels. Funds will be allocated through a reverse auction, starting with the lowest priced abatement. The ERF will only purchase emissions abatement when the emissions savings have been independently verified. While long-term contracts for abatement will be available to assist organisations to secure finance to undertake projects, payment from the ERF will only occur once it has been proved that genuine abatement has occurred.

Under the scheme, there will be an expansion of the Carbon Farming Initiative, which permits land managers to earn carbon credits by storing carbon or reducing greenhouse gas emissions on the land.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

In 2007, Australia introduced the National Greenhouse and Energy Reporting Scheme (NGER). This scheme allows for the registration and deregistration of corporations for reporting, management of the National Greenhouse and Energy Register, receiving reports, monitoring compliance and enforce external audits, and publishing and management of security of NGER data.

Corporations that meet a National Greenhouse and Energy Reporting threshold must register and then report greenhouse gas emissions every year.

In addition to the Commonwealth scheme, each State has its own legislation in relation to the monitoring and reporting of greenhouse gas emissions. For example, in NSW, the *Electricity Supply Act 1995* and the *Electricity Supply (General) Regulation 2001* establish a Greenhouse Gas Reduction Scheme. The Greenhouse Gas Reduction Scheme establishes State-wide greenhouse gas reduction targets, and requires individual electricity retailers and certain other parties who buy and sell electricity, to meet certain benchmarks. Organisations that fall within the Greenhouse Gas Reduction Scheme are required to monitor and report greenhouse gas emissions.

Occasionally, licences to pollute will include conditions that require monitoring. Industry groups also voluntarily monitor greenhouse gas emissions.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

The repeal of the carbon pricing scheme under the *Clean Energy Act 2011* marked a shift in the overall policy approach to climate change regulation; however, the primary objective of Direct Action continues to be to reduce carbon emissions.

In 2016, Australia also ratified the Paris Agreement and the Doha Amendment to the Kyoto Protocol. The Federal Government has committed to reduce carbon pollution by five per cent of 2000 levels by 2020.

The main mechanism for achieving this goal is through the purchase of carbon abatement from businesses that reduce their emissions below their baseline levels. The central goal of the Direct Action Plan is to provide incentives to companies who reduce their emissions. On this basis, there are no penalties for continuing to operate at baseline levels (both actual and baseline emissions are measured using data reported under the National Greenhouse and Energy Reporting Scheme). Where companies emit above baseline levels, financial penalties may be incurred.

Certain key activities will have support from the Emissions Reduction Fund, including energy efficiency, land sector abatement, cleaning up waste coal mine gas, cleaning up power stations and landfill gas.

States and Territories have implemented their own climate change policies; for example, NSW and Victoria have Climate Change Policy Frameworks in place to achieve net-zero emissions by 2050.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

Asbestos has been a significant issue in Australia for a number of

decades. There has been a large volume of asbestos-related litigation. A number of specialist tribunals or specialist court lists have been established to manage these cases; for example, in NSW the Dust Diseases Tribunal. These typically have procedures that are designed to deal with the particular difficulties of these claims. Asbestos continues to attract significant media and policy attention.

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

In each State, there are laws that seek to protect people from the hazards of asbestos. These typically require identification of asbestos materials, labelling, risk assessment, control measures (e.g. asbestos management plans) and in some circumstances, health monitoring.

People who work with asbestos products need training, and, in some instances, also an accreditation certification.

In some jurisdictions, for example, Queensland, an asbestos audit must be provided to the purchaser in respect of the sale of certain property.

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 your jurisdiction?

Environmental insurance plays a limited role in Australia. Various insurance policies are available in Australia. However, the market in Australia is not well-developed.

11.2 What is the environmental insurance claims experience in your jurisdiction?

As far as we are aware, claims have been limited.

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 your jurisdiction.

There have been a number of significant legal changes affecting the waste industry in 2018.

On 1 January 2018, the People's Republic of China (China) introduced import restrictions on recyclables. The effect of these restrictions has been to substantially close the China market to Australian processors of recyclables.

As a result, Australian processors of recyclables have had to try and find other markets to sell their processed recyclables. The flood of recyclables into the international market resulting from China ceasing its purchase of recyclables has meant a significant reduction in the price for certain processed material in the international market. This collapse in the processed recyclables market has affected processors of recyclables and local councils alike. Each recyclables processing contract is different, and each affected party has had to consider how their contract responds to this market change.

Another significant change in the waste industry in 2018 is the introduction in NSW, the Australian Capital Territory and Queensland of container deposit schemes (joining existing schemes in South Australia and the Northern Territory), whereby eligible empty containers are able to be exchanged for a 10 cent refund. Each scheme is different, and will have different legal implications for suppliers, processors, local councils and consumers. Western Australia has announced that it will introduce a container deposit scheme in 2020, and a model framework is being considered in Tasmania.

The response to and regulation of impacts of per- and poly-fluoroalkyl substances (PFAS) in fire-fighting foam continues to be an important issue. Three class-actions have been commenced against the Commonwealth in different locations in Australia claiming that the Commonwealth's use of an Aqueous Film Forming Foam containing PFAS at defence bases, which has contaminated surrounding land, was negligent and is a continuing nuisance. The claims are that the contamination has resulted in economic loss of residential land owners and businesses surrounding defence sites.

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Belgium

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1 Environmental Policy and its Enforcement

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

Belgium is organised as a federal state. Most of the environmental law is a matter for the Flemish, Walloon and Brussels Capital regions. The federal state retained only a relatively small field of competences, i.e., product standards, protection against ionising radiation and permits for offshore activities. The protection of the environment (such as soil, air, water, noise), the granting of permits, waste management, climate change, nature conservation, etc. have been devolved to the regions. Each of the regions therefore adopts its own environmental legislation. Although there is a tendency to codify the environmental legislation into one single environmental code in the three regions (e.g. the Flemish Decree on general environmental policy provisions, the Walloon Environmental Code or the Brussels Code on the inspection, prevention, determination and sanctioning of environmental offences, and environmental liability), most of the regional environmental legislation is still scattered over various distinct pieces of legislation. For certain matters, cooperation agreements are entered into between the federal state and the regions, such as those relating to the so-called Seveso installations or the management of soil contamination generated by underground fuel tanks. An increasing part of the environmental legislation is sourced in European Union environmental law through directly applicable regulations (such as REACH or the waste shipment regulation) or national implementation of directives (such as the Industrial Emissions Directive or the EU Emissions Trading System Directive).

The administrative organisation of the implementation and enforcement of environmental law consists of either an environmental regional department (the Walloon environmental department), environmental agencies (the Brussels Environmental Management Institute) or a combination of both (the Flemish environmental department together with agencies such as the Flemish Public Waste Agency). Local authorities also have certain specific powers relating to environmental matters (permits and enforcement).

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

The environmental authorities have supervisory powers and can impose administrative measures (such as warnings, but also closing of activities). In the Flemish region, the authorities can impose administrative lump-sum penalty payments (e.g. per day, per infringement, or per measure) in case of failure to implement the administrative measures on time. These administrative lump-sum penalty payments are capped at EUR 1 million or EUR 100,000 depending on whether these were imposed by regional or by local supervisory authorities.

Both criminal (imprisonment and/or fines) and administrative sanctions (fines and, in the Flemish region, also deprivation of benefits) can be imposed in case of environmental infringement. In principle, imprisonment could range from a few days to 15 years for the most serious offences, and criminal fines could amount to currently EUR 160 million for the most serious offences committed by legal entities. In addition, criminal courts can impose repair measures or order the site to be closed. Currently, administrative fines can amount to EUR 2 million. As a rule, any non-compliance with environmental legislation, regulations or permits will first be referred to the public attorney and will only give rise to administrative fines in cases where no criminal prosecution is initiated. In the Flemish region, certain infringements deemed less serious are exclusively subject to administrative sanctions. Criminal prosecution of environmental offences will depend on the seriousness of the offence committed. Criminal courts mostly impose fines and rarely hand out actual prison sentences. In the Flemish region, a five-year environmental enforcement programme has been adopted that will, in the future, also encompass the enforcement of land and town planning regulations.

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

Access to public information in general is a fundamental right enshrined in the Belgian Constitution. In addition, the European directives on public access to environmental information have been transposed into national law, resulting in legislation at both the federal and regional levels imposing upon a wide range of authorities an obligation of active and passive disclosure of environmental information. Exceptions to the passive disclosure obligations are to be construed restrictively. The public also has a right to participate in public consultations on plans and programmes, as well as on environmental or single permit applications.

2 Environmental Permits

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

In the three regions, specifically listed activities that are likely to have an impact on human health and the environment are subject to an environmental permit. In the Flemish region, the environmental permit is replaced by a single permit covering the former environmental, building, allotment and nature conservation permit as well as the permit for retail activities. In the Walloon region, certain projects require a single permit, covering both the environmental and building permit.

In the three regions, the environmental or single permit can be transferred from the current operator to a new operator, upon notification of the environmental authorities. In the Walloon region, the current operator will be jointly liable with the new operator for damage due to non-compliance with the environmental operating conditions, as long as the environmental authorities have not been notified of the transfer of the environmental permit. In the Flemish region, the current operator will remain liable for the charges imposed by the single permit unless the environmental authorities have agreed to the substitution of their debtor.

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?

In case of refusal of an environmental or single permit, or of burdensome environmental conditions, the person applying for the permit can file an administrative appeal with the higher environmental authority, except in cases where the initial permit decision has been issued by the regional authorities (which is the case for large projects in the Flemish region). Strict time limits are provided for initiating such appeal.

Permit decisions on administrative appeal can be challenged within strict time limits by an appeal (including summary proceedings) before a judicial review body, i.e., the (federal) Council of State for permit decisions in the Walloon and Brussels Capital region, and the (regional) Council for Permit Disputes in the Flemish region.

Third parties, including not-for-profit organisations for the protection of the environment can, under certain conditions, also file administrative and judicial appeal against permit decisions. In the Flemish region, it is in principle required that third parties file objections during the public consultation phase in the application procedure for the single permit, in order for the subsequent appeals against the permit decisions to be admissible.

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

The European directives on environmental impact assessment for plans, programmes and projects have been transposed in the three regions. For listed activities that are particularly polluting, a prior environmental impact assessment must be carried out, which will also entail a public consultation, before the environmental or single permit can be applied for.

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

Environmental authorities can issue notice letters, followed by administrative measures (such as an order to cease the operation) in case of unsatisfactory action by the operator. Furthermore, non-compliance with the permit conditions is an environmental offence that can be subject to criminal sanctions (prison sentence or fine) or alternatively to administrative sanctions consisting of a fine and, in the Flemish region, deprivation of benefits. With respect to legal entities, a prison sentence is converted into a fine.

3 Waste

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

As in the European Waste Framework Directive, waste is defined in the three regions as any substance or object which the holder discards or intends or is required to discard. The three regions have also implemented the European provisions relating to by-products and end-of-waste status.

Additional obligations apply to specific categories of waste, such as industrial waste in general, hazardous waste and special waste. The special waste category contains among others waste oil, used tyres, used batteries, end-of-life vehicles, medical waste or asbestos containing waste. For certain categories of waste, such as electronic ("WEEE") or packaging waste, sector organisations (e.g. Recupel; FostPlus) are created by the persons legally responsible for the collection and processing of such waste, to collectively organise such collection and processing.

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?

In general, the producer of waste has the obligation either to treat its waste itself or to hand it over to a person that has the required permit, notification or accreditation for receiving such waste. The definitive storage or disposal of waste is subject to a prior environmental or single permit, even if the waste will be treated on the site where it was generated. However, short-term temporary on-site storage of waste awaiting collection by an accredited party is allowed without a specific permit, provided the operator takes all measures reasonably required to prevent harm to human health and the environment.

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)?

Waste legislation in the three regions explicitly provides that the costs for waste management are to be borne by the initial producer of the waste or by the current or previous waste holders.

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

Waste producers have the obligation to either treat their own waste themselves or hand it over to duly authorised, registered or

accredited persons that can receive this waste. Waste producers do not have an obligation to take back the waste they have generated. Producers of specific products may have the legal obligation to collect and process waste generated by these products at the end of their economic life (the extended producer responsibility for, e.g., tyres, electronic waste, batteries, etc.). The same applies to persons responsible for introducing packaging into the market as regards the collection and management of the packaging waste.

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?

First, third parties having suffered a loss due to a breach of environmental laws or permits, can invoke the civil law tort liability of the person having caused the loss if that third party can establish the existence of a faulty behaviour, its loss and a causal link between both. Faulty behaviour can consist of non-compliance with both specific rules and conditions and with the general duty of care. The burden of proof rests on the victim, who might have difficulties in proving the faulty behaviour (in particular, when the loss was not recently caused or when the permit was complied with) or the causal link between such behaviour and its loss.

Civil law liability can also be based on a strict liability regime provided for in specific laws which do not require the proof of faulty behaviour, such as the liability of the operator of a nuclear plant, the producer of toxic waste or the operator of a facility subject to an environmental or single permit for recent soil pollution caused by emissions from its facility. Also, the person causing nuisance that exceeds the so-called "normal neighbourhood nuisance" will be liable without the need for proof of faulty behaviour. Losses caused by defective goods (such as polluted land) can also be recovered from the guardian of such defective good, without the need to establish that the defect is due to faulty behaviour.

Breaches of environmental law can also give rise to administrative measures imposed by the environmental authorities, such as an injunction to cease operations or the removal of illegal waste. Environmental offences can entail criminal or administrative fines imposed upon the operator.

Finally, under specific conditions operators of certain listed activities will be responsible *vis-à-vis* the authorities to prevent or remedy damage caused to the water, the soil or the protected species and natural habitats, based on the national implementation of the European Environmental Liability Directive.

Depending on the legal basis of any claim or action, as well as on the nature of the liability involved, the operator should verify whether all conditions for the liability are present to defend itself against such claim or action.

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

Operators of activities subject to an environmental or single permit must comply with the general obligation to avoid, reduce or mitigate any risks, dangers or losses caused by the activity, in addition to mere compliance with the environmental or single permit conditions. They can therefore be liable for not having complied with this environmental duty of care, even if no environmental limit value was exceeded.

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?

In principle, a director or officer of a corporation can be liable *vis-à-vis* third parties for any faulty behaviour consisting of non-compliance with specific legal or regulatory provisions or with the general duty of care. When the director or officer acts in the performance of their function, the company will be jointly liable *vis-à-vis* third parties for losses caused by this behaviour. If the director or officer is an employee of the corporation, their civil law liability will only be triggered in case of fraud, gross negligence, or of minor fault when such fault occurs in a usual way. The director or officer can also be held criminally liable for environmental offences, either alone if they committed the most serious fault or, if the director or officer wilfully and knowingly committed the offence, together with the company, for offences committed until 29 July 2018. For offences committed after that date, directors and officers can be held criminally liable either on their own or as co-offenders or accomplices together with the company, without the need to establish whether it was the individual or the legal entity that committed the most serious fault.

Civil law liability of directors and officers can be insured by the corporation; however, fraud will not be covered. Gross negligence can in principle be covered, but specific cases of gross negligence can be excluded from cover. Criminal sanctions, such as fines, cannot be covered by insurance.

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?

In a share sale, the purchaser buys the company with all its liabilities, including those relating to previous sites. In an asset purchase, the past liabilities remain, in principle, with the previous operator. However, it may prove difficult to distinguish between the previous and the new operator with respect to certain impacts on the environment (such as soil contamination) if the previous activities are not discontinued.

In an asset deal relating to activities subject to an environmental or single permit, the new and previous operators must notify the permit-granting authorities of the transfer of the permit. Such notification of transfer is not required in the event of a share sale, as the operator remains the same entity.

Moreover, an asset sale triggers transfer obligations under the soil legislation in the Flemish and Brussels Capital region, imposing on the transferor of a plot of land (and in the Brussels Capital region, of an environmental permit for risk activities) the obligation to hand over to the transferee a soil certificate issued by the environmental agency and to at least perform a soil survey prior to closing if specific listed activities, likely to cause soil contamination, are or have been carried out on-site. If further surveys or soil remediation are required, the closing must be postponed and may require that the transferor provide the agency with an undertaking to clean up the contamination, covered by a financial guarantee. These obligations can also be assumed by the transferee. In the Walloon region, as from 1 January 2019 the transferor of a plot of land or of an environmental permit must hand over to the transferee an extract of the database relating to the condition of the soil. These soil obligations do not apply in the event of a share sale.

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

Lenders are, in principle, not liable for environmental damage caused by the borrower. However, lenders could incur civil law liability for losses caused by the borrower if they behave as a *de facto* director or officer of the borrower. The mere fact of informing the lender of decisions made by the borrower, or the right for the borrower to present a candidate for a directorship or to attend the meetings of the board of director as an observer, does not entail such extended liability. As regards criminal liability for environmental offences, lenders could be deemed co-offenders or accomplices if they participate willingly and knowingly in these offences in an indispensable or useful manner.

5 Contaminated Land

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

A distinction is made between the regulatory framework (i.e., the legal obligation to perform soil surveys and remedial activities), and the civil liability for the costs and losses caused by soil contamination. On the one hand, the legal survey and clean-up obligations are contained in the specific pieces of legislation on soil contamination that identify, among others, the persons that must perform the surveys and remediation, even if they did not cause the contamination. Environmental agencies will only turn to these identified persons in order to impose surveys and remediation. On the other hand, civil law liability for soil contamination is dealt with either in the specific soil contamination legislation or in the general liability rules.

The three regions have adopted specific soil contamination legislation, applying to any contamination, independent from the time it was generated. These specific pieces of legislation deal with the legal responsibility for performing soil surveys and soil remediation.

In the Flemish region, the responsibility for performing soil surveys and soil remediation is cascaded down, starting from the operator of a listed activity, to the user, and ultimately to the owner of the land. Historic soil contamination (predating 29 October 1995) will only have to be cleaned up if it poses a serious threat, based on risk assessment. New contamination must be cleaned up as soon as specific standards are exceeded.

In the Brussels Capital region, a distinction is made between single, mixed or orphan contamination. Depending on the nature of the contamination, the person having the legal responsibility for survey and treatment (the current operator or the person having caused the contamination; the person holding rights *in rem*) as well as the remediation method (risk management or clean-up) may vary.

In the Walloon region, the legal obligations to perform soil surveys and remediation fall, in descending order, upon the person that voluntarily performs these obligations, the person that caused the contamination, the operator, or the holders of rights *in rem* on the land and eventually the owner of the land. Historic contamination (caused prior to 30 April 2007) will need to be cleaned up when it cumulatively exceeds certain standards and poses a threat, whereas new contamination must be cleaned up as soon as these standards are exceeded.

The soil legislation provides for various triggering factors for the performance of soil surveys, which are different in the three regions. The legislation also provides for specific exemptions from the legal responsibility to perform surveys and remediation.

In the three regions, the person having performed the surveys and carried out the remedial activities can turn to the person that is liable under general civil liability law to recover the costs thereof. In addition, the soil contamination legislation contains specific strict liability rules that may apply under certain conditions, rendering the polluter liable for the costs caused by the contamination. Third parties having suffered a loss can also claim compensation based on the general civil liability rules or on the specific liability rules contained in the soil legislation.

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

Two situations can occur where contamination was caused by distinct persons: either only one person has the legal clean-up obligation, or more than one person has the legal clean-up obligation for that contamination. In the latter situation, the environmental authorities can impose a joint clean-up upon all persons concerned. The allocation for payment of the costs of the clean-up between parties will either be determined based on civil liability rules or by the environmental agency.

As regards the civil liability regime for losses caused to third parties by contamination for which more than one person is liable, this liability will either be *in solidum* or joint and several, depending on whether distinct faults concurred or whether there was only one common faulty behaviour that caused the contamination.

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?

In each of the three regions, the remediation plan must be approved by the environmental agency or administration in charge. Such decisions can be challenged by the person filing the plan, as well as by third parties through an administrative or judicial review appeal (although third parties cannot file an administrative appeal in the Walloon region). The relevant environmental agency can modify the remediation plan upon request of the person carrying out the remediation or upon its own initiative.

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?

A person can, in principle, claim compensation from a previous owner or occupier for costs associated with contamination caused by the latter, provided the conditions for civil liability are established and the claim is not time-barred. Such compensation can be based on an extra-contractual or a contractual basis (specific representations and warranties, indemnification or "hold harmless" clause in a sale agreement).

The legal obligations to clean up the contamination will, depending on the region, in most cases not lie with the previous owner/occupier. However, in general the legal obligation to clean up contaminated land can under certain circumstances be shifted to a third party (such as a purchaser of the land), provided the latter provides a financial guarantee to the authorities covering the estimated costs of such clean-up.

Civil law liability *vis-à-vis* third parties cannot be shifted, but depending on the economics of a sale, a polluter might obtain contractual protection from its purchaser against claims of 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?

The public authorities can claim monetary compensation from the polluter for any damage to a public asset, provided the conditions for civil liability are met; this implies, *inter alia*, that the authorities can prove that the polluter caused the specific pollution. In addition, under the national implementation of the Environmental Liability Directive, the authorities can, under certain conditions, recover costs of measures they undertook to prevent or repair damage to protected species, natural habitats, water bodies and land from the operator. However, no case law precedents are available granting compensation to the public authorities. Further, the ongoing reform of the Civil Code has, to date, not been used to provide for rules on compensation for environmental damage to collective goods.

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.?

The environmental inspection services have broad investigation powers, such as: access to the premises; access to information (including access to electronic databases); and the right to interview site personnel and to investigate objects, including the right to take samples, as well as vehicles or ships and their cargo. They can impose measures to safeguard the evidence, e.g. by sealing the premises, installations or vehicles. They can also require the assistance of the police force or external experts and use audio-visual means.

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?

In the Walloon and Brussels Capital regions, any person discovering contamination must inform the environmental authorities and affected third parties, including in the case of off-site migration. In the Flemish region, such notification is only mandatory under the soil contamination rules in case of an incident that caused soil contamination. However, the operator has a general notification duty in case of (threatening) environmental damage under the environmental liability rules and in case of non-compliance with environmental conditions applicable to activities falling under the (previous) EU Integrated Pollution Prevention and Control Directive ("IPPC") (now replaced by the EU Industrial Emissions Directive – "IED") or, in general, of accidental emissions that could cause pollution, under the general environmental regulations (known as "Vlarem II").

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

The soil legislation in the three regions provides for a series of events triggering an obligation to investigate the land, such as when transferring land, starting or ceasing the operation of a listed risk activity, or during the operation of certain activities, when there are indications of significant soil contamination, or prior to certain applications for building, environmental or single permits.

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?

In the three regions, the transfer of land (which is described in a broad sense including, among others, the granting of rights *in rem* and corporate restructuring such as merger and demerger) triggers the obligation to hand over a soil certificate to the transferee. In addition, in the Flemish and Brussels Capital regions, the transfer of land on which risk activities have taken place, gives rise to the obligation to perform soil surveys and, if treatment is required, to provide an undertaking to treat the contamination, backed by a financial guarantee in favour of the environmental authorities, prior to the closing of the transaction.

Also, under general civil law, the seller has an obligation to provide the purchaser with sufficient information for the latter to be able to accurately assess the value of the target.

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?

Contractual indemnities relating to environmental liabilities can limit the claims of the purchaser. They are, however, only valid between parties to the contract and cannot be invoked against the environmental authorities or third parties claiming compensation. Any payment made by the indemnifier to the indemnified person will therefore not release the indemnifier from any liability, should the authorities or third parties claim compensation directly from the indemnifier.

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

According to accounting rules, a company must register provisions in its accounts for any environmental liability that entails a realistic risk of exposure in the future.

Dissolving a company merely with the aim of avoiding any environmental liability is not so easy. Prior to deciding to dissolve and liquidate the company, the latter must establish a statement of assets and liabilities, including provisions that must be made at that time for any off-balance sheet liabilities, such as environmental liabilities that are not yet covered by such provision. The auditor must issue a report on the statement of assets and liabilities,

indicating whether this statement reflects the situation of the company in a complete, faithful and accurate manner. If not all debts *vis-à-vis* third parties have yet been paid, the board should explain how these will be paid prior to the dissolution and liquidation (or sufficient funds will be consigned). The liquidator could be held liable for any liability that has not been settled or for which no consignment was made.

Also, the transfer of a plot of polluted land will be subject, in the Flemish and Brussels Capital regions, to the prior performing of soil surveys and if required, to a prior explicit undertaking by the transferor or transferee *vis-à-vis* the environmental authorities to clean up that pollution, backed up by a financial guarantee such as a first-demand bank guarantee.

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?

Under general Belgian company law, the separate legal personality of the subsidiary and the shareholders entails that the shareholders are not liable for the acts or omissions of the subsidiary. However, certain case law has accepted that in exceptional circumstances shareholders could be liable for their subsidiaries provided the shareholders behaved as the "master" of the subsidiary, i.e., when the shareholders totally disregarded the subsidiary's own legal personality (and decision-making powers). This case law has been applied only in extreme circumstances.

In addition, the Walloon Environment Code provides that after liquidation, judicial reorganisation or bankruptcy of an operator, its controlling shareholders shall be bound to pay the fines and to carry out certain measures that were imposed by the administration or the court on the operator, and that were not paid or implemented by the latter.

The shareholder may also be held directly liable under civil or criminal law for acts committed by its subsidiary, provided it can be established that the shareholder itself adopted faulty behaviour or committed an offence as a (co-)offender or accomplice of the subsidiary.

In principle, Belgian shareholders can be sued in a Belgian court for offences they themselves committed outside Belgium; this applies both in civil law matters and, under certain conditions, for criminal offences. No precedent is known where Belgian shareholders of a foreign subsidiary have been fined or ordered to pay compensation by a Belgian court for breaches of environmental law committed or pollution generated by this foreign subsidiary.

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

There is no general law that offers protection to whistle-blowers against their employers in case of reporting of environmental issues committed within the legal entity in which they are employed.

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

The Economic Law Code provides for a class action in case of harm suffered by consumers in case of breach of specific legislations. No class action can be initiated in case of breaches of environmental law. Not-for-profit organisations can initiate cease-and-desist proceedings with the court in case of (threat of) serious environmental breaches, provided they meet certain conditions in respect of their activities relating to environmental protection.

Belgian law does not know the concept of exemplary or punitive damages. A victim that has suffered damages from non-compliance with environmental laws by the operator or from soil pollution can obtain compensation of its entire (direct and indirect) loss, in kind or by equivalent (in money), in civil liability proceedings. However, in the framework of such proceedings, the court can impose/prohibit certain actions on the defendant and can impose an "*astreinte*", i.e. a lump-sum penalty payment (e.g. as a lump sum per day of default or as a lump sum per non-compliance) that the defendant must pay the victim if he does not comply with the court order.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

Individuals or public interest groups are not exempted from paying the costs of legal proceedings. As any other party, they should pay these costs, including the procedural costs indemnity, when their claim is dismissed.

9 Emissions Trading and Climate Change

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

Only one emissions trading scheme is operational in Belgium, the EU Emissions Trading System ("EU ETS"), which is a "cap and trade" system applicable to emitters of greenhouse gases from energy-intensive industries and the energy generation sector, as well as to the aviation sector. Initially, the emission allowances were granted based on national allocation plans that were subject to approval by the Commission and that covered a specific trading period. As of 2013, the EU ETS has been harmonised at EU level. Operators subject to the EU ETS will either be granted allowances for free, covering part of their emissions, and/or must obtain these allowances through auctions. The total cap of allowances available at EU level decreases each year.

Since the market was not functioning properly due to too many allowances being available, several measures were taken at EU level to decrease the surplus (e.g. backloading; the future Market Stability Reserve).

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

Apart from the monitoring and reporting obligations imposed by environmental regulations applicable to greenhouse gas installations within the EU ETS, there are no specific monitoring or reporting requirements regarding greenhouse gas emissions.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

The national climate change policy consists of actions and programmes at both the federal and the regional levels. A political

agreement has been concluded on burden-sharing, between the federal and regional levels, of the national targets for 2020 (reduction in greenhouse gases in non-EU ETS sectors, renewable energy, energy efficiency, and allocation of proceeds of auctions of allowances). The regions have drawn up regional plans relating to mitigation (e.g. greenhouse gas emissions from transport and buildings) and adaptation (e.g. in case of flooding).

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

There is limited case law available on various aspects related to asbestos. A 2017 court decision in appeal ordered a former asbestos producer to pay compensation for the illness and death of a person that had been exposed to asbestos dust brought home by her spouse as a former staff member of the asbestos production facility and by environmental exposure due to their living near the production facility. The court held that the claim was not time-barred, and that the producer failed in its duty of care by not taking sufficient safety measures to prevent the asbestos exposure, notwithstanding the knowledge the producer should have had of the link between asbestos and mesothelioma. Contractors in charge of asbestos removal have been held criminally liable because of removal works performed in breach of the safety standards, as well as ordered to pay damages to third parties in such situation. Compensation to be paid by the neighbour having performed illegal works causing asbestos-containing materials to be discharged onto the neighbouring property has also been granted. Some courts also had to decide on the question whether the presence of asbestos in a property can entail the dissolution of a sale or lease agreement.

Mesothelioma and asbestosis contracted due to exposure at work are occupational diseases. A governmental social security fund can, under certain conditions, compensate persons suffering from these diseases or their heirs. One of these conditions is that the beneficiaries waive their right to claim compensation from the person liable; i.e., in most cases, the employer.

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

The use and putting on the market of asbestos-containing applications was banned in 1998 and 2001. However, many buildings still contain asbestos-containing materials. Therefore, the presence and condition of these materials must be monitored, and a plan for managing these materials must be established. The duties in relation to asbestos on-site are, as a rule, imposed upon the employer, based upon the health and safety legislation, regardless of whether the employer owns the building. Employers must establish an asbestos inventory and, if asbestos is present, an asbestos management plan aiming at limiting, to the extent possible, the exposure of employees to the asbestos-containing materials. This plan requires regular inspections and contains prevention measures as well as measures to be taken when the asbestos is in a bad condition. The inventory and management plan must be shared with contractors carrying out works in the building. Removal works of asbestos can only be performed by accredited contractors. Prior to any works entailing a risk of exposure to asbestos, the employer must perform a risk assessment and must notify the relevant administration in charge of occupational health and safety. The employer must also keep a register of employees that are exposed to asbestos. Such employees must also be medically examined prior to and at regular intervals during such exposure. The employer must provide accurate information to these employees relating to the risks, safety and prevention measures. They must also receive adequate training.

In 2018, the Flemish regional government adopted an asbestos abatement action plan in order to accelerate the removal, by 2040, of asbestos-containing materials which are in such a condition that they (may) release asbestos fibres ("Asbestos Safe Flemish Region 2040"). To that effect, draft legislation is being prepared imposing, *inter alia*, the duty for a manager of a building containing asbestos to prevent damage to third parties, and the presence of an asbestos inventory at any sale (probably as of end 2021, early 2022) of a building likely to contain asbestos, as well as the obligation to remove asbestos-containing materials likely to pose a risk from governmental buildings by 2034 and 2040. According to the action plan, specific financial support for removal may also have to be provided.

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 your jurisdiction?

Several types of activities are subject to mandatory insurance coverage, such as the operation of nuclear installations, waste treatment installations, service stations, or maritime oil transport. In addition, operators of activities likely to cause pollution can cover such risk by a voluntary environmental insurance contract. Such environmental risk insurance will be tailor-made, depending on the specific activities and risks posed by the operator, based on detailed information and sometimes on an environmental audit. Environmental insurance can cover sudden accidental or gradual environmental damage, direct or immaterial loss, and biodiversity damage. Coverage can extend to mitigation costs, on-site and off-site clean-up costs, third-party bodily injury and third-party property damage, defence and assessment costs. Coverage can also be provided for the exceeding of a soil remediation budget in case of large clean-up projects.

In the Belgian market, environmental insurance coverage is still low compared to the risks from operations. From time to time, environmental insurance is used in an acquisition context.

11.2 What is the environmental insurance claims experience in your jurisdiction?

Published case law relating to environmental insurance claims is rare. One court decision relates to the question, among others, of whether soil contamination caused by the operation of a petrol service station was covered by the ordinary civil liability insurance (which was not a tailor-made environmental risk insurance) of the operator. The court decided that since the pollution was not caused by a sudden incident, no claim could be made against the insurer.

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 your jurisdiction.

In 2018, the new single permit has become fully operational in the Flemish region, covering the former environmental, building,

allotment and a specific nature conservation permit, as well as the permit for large retail sites. This permit is granted for an indefinite time, whereas the existing environmental permit has a limited validity period. The permit application rules are also significantly modified, including the granting of the permit for large projects by the Flemish Minister of Environment and a judicial review procedure with the (regional) Council for Permit Disputes. The rules on environmental enforcement have also been adapted to this new integrated permit, including an administrative enforcement regime through administrative fines for non-compliance with land planning rules. The Flemish parliament also adopted a bill modifying the soil legislation and introducing a new triggering factor for mandatory soil surveys, to step up the efforts to clean up all historic soil contamination by 2036. The Flemish parliament also adopted various substantial new rules on land planning.

In the Walloon region, new legislation on soil contamination has been adopted in 2018 that will enter into force on 1 January 2019, and that introduces soil information obligations in the event of a transfer of land (whereby the transfer of land is defined in a broad sense).

In the Brussels Capital region, a new land planning code was adopted in 2017 that will enter into force on 20 April 2019.

In 2018, the European Court of Justice has issued two decisions regarding the need for strategic environmental assessment for programmes or plans that might have an important impact on the adoption of land planning instruments.

In 2019, the regions will need to transpose the new EU directives on waste (among others, Directive 2018/851) as well as Directive 2018/410 on EU ETS. In the Flemish region, the adoption of the rules regarding the management and accelerated removal of asbestos is expected. As regards land planning, new planning instruments consisting of spatial policy plans have been introduced in the Flemish land planning code, and the draft Flemish spatial policy plan is being prepared.

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Brazil

Roberta Danelon Leonhardt

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1 Environmental Policy and its Enforcement

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

The purpose of the Environmental National Policy (Federal Law No. 6,938/1981) is the preservation, improvement and recovery of the environmental quality, in order to ensure socio-economic development, the interests of national security and the protection of human rights.

The Federal Constitution sets forth the duty to preserve the environment for future generations and sets out criminal and administrative sanctions, both for individual and legal entities, as well as the obligation to repair environmental damage.

The competent licensing authority enforces the environmental law and, in case of an omission, the other environmental authorities may step in.

The federal environmental agency, the Brazilian Institute for Environment and Natural Renewable Resources (IBAMA), has jurisdiction for licensing depending on the locality and the characteristics of the enterprise (i.e. nuclear power plants, hydroelectric power plan, among others). The municipal environmental agencies have jurisdiction to license enterprises and activities with a local impact, while the state environmental agencies have general jurisdiction over the environmental licensing proceedings of enterprises and activities that are not covered by federal or municipal agencies. In addition, the public prosecutors monitor compliance with the environmental legislation, as well as seek the recovery, repair and compensation of any environmental damage.

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

The licensing environmental agencies periodically perform site inspections to verify unauthorised vegetation removals, intervention in protected areas (i.e. permanent preservation areas), potentially polluting enterprises, among others, and in case any environmental damage and/or non-compliance is identified, the agency may impose administrative sanctions, such as warnings, fines and embargoes, and also ensure the recovery of the environmental damages. In addition, such authorities may communicate any suspicion of environmental crimes to the Police and Public Prosecutor's Offices.

In addition, the public prosecutors may investigate any complaints from the public regarding non-compliance.

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

According to Federal Law No. 10,650/2003, the public authorities shall grant public access to any environment-related information, especially regarding: environmental quality; environmental policies; plans and programmes; accidents, risk and emergency situations; discharge of wastewater, atmospheric emissions and generation of waste; toxic and hazardous substances; biological diversity; and genetically modified organisms (GMOs). Exceptions are made for confidential information.

2 Environmental Permits

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

Pursuant to the National Environmental Policy, the construction, installation, expansion and operation of any establishment or activity that uses environmental resources, deemed as polluting or potentially polluting, or that could possibly cause any kind of environmental damage, is subject to a prior licensing proceeding.

The environmental licence may be transferred from one titleholder to another at any time, provided the successor fulfils the licensing requirements.

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?

All administrative decisions – including the decision on the granting of an environmental licence – may be challenged by means of an Administrative Appeal. The environmental authorities may foresee different procedures for challenging the denial of an environmental licence.

A Judicial Lawsuit may also be filed seeking the annulment of an illegal administrative decision.

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

In order to support environmental licensing, entrepreneurs must prepare technical studies demonstrating the main characteristics of their intended activities and environmental impacts that may be caused by such activities, as well as the conditions of the location of the installation. The comprehensiveness of the studies varies according to the potential environmental impacts, and, depending on that, entrepreneurs may be required to conduct simplified or complex evaluations contemplating multidisciplinary aspects.

The projects capable of causing significant impact to the environment are subject to the preparation of a detailed technical study referred to as an Environmental Impact Assessment and related Report of Environmental Impact (EIA/RIMA): a time-consuming task involving a multidisciplinary team and significant expenditure.

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

The environmental authorities can suspend or cancel the permit in case of a breach of environmental rules or any of the technical conditions set forth in the licences. In addition, the licence might be cancelled in case of supervening severe environmental or health risks or if false and/or missing information was provided during the environmental licensing.

The absence of environmental licences for enterprises or activities deemed polluting or potentially polluting is subject to criminal and administrative sanctions, besides the obligation to redress any damages caused.

3 Waste

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

Pursuant to the National Solid Waste Policy (Federal Law No. 12,305/2010), the definition of waste is very broad. In a nutshell, waste is a material or substance discarded as a result of human activities in society, whose final disposal is required.

Hazardous waste is a category of waste subject to some additional controls. It is also defined as waste involving substantial risks to public health or environmental quality due to certain characteristics (such as inflammability, corrosivity, reactivity and toxicity). Some additional authorisations may be required for their transportation, storage and exportation.

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?

To the extent that the storage or disposal of its waste is duly licensed by the environmental authority. In case the company carries out any activities beyond those which are permitted, it may be subject to penalties.

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 the National Solid Waste Policy, the inadequate disposal of solid waste, as a potential source of contamination of soil and groundwater, may lead to the imposition of penalties irrespective of liability for damages. Pursuant to the National Environmental Policy, the polluter is obliged, independently of fault, to indemnify or repair the damages caused to the environment and to third parties, affected by its activity (which is the strict liability). As the waste producer can be considered an indirect polluter, it may be jointly and severally responsible for environmental recovery.

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

The National Solid Waste Policy sets forth the shared responsibility for the life-cycle of products, which includes manufacturers, importers, distributors and retailers, consumers and the operators of public services. With regard to shared responsibility, the law provides that some industrial sectors shall implement reverse logistics systems (take-back systems), actions, procedures and the means to enable the collection and recovery of solid residues, aimed at their reuse in the industrial cycle or other productive cycles, or other destinations. The reverse logistics systems may be implemented jointly or individually by companies. It is worth mentioning that the subject is currently in focus in Brazil and some states, such as São Paulo, have already conditioned the issuance of environmental licences to the adoption of reverse logistics measures.

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 three types of liability that may arise due to breach of environmental laws and/or permits, as follows:

- Civil liability: The National Environmental Policy sets forth that environmental civil liability is of an objective nature (strict liability or liability irrespective of fault), meaning that demonstration of a cause-effect relationship between the damage caused and the agent's conduct suffices to trigger the obligation to redress the environmental damage. The entities authorised by law may file claims for the recovery of the environment, usually through a public civil action. In this case, the polluter shall defend him/herself in a judicial proceeding (appeal).
- Administrative liability: According to Federal Decree No. 6,514/2008, any action or omission that infringes legal rules pertaining to the usage, enjoyment, support, protection and restoration of the environment is deemed to be an administrative violation or infraction. Perpetrators may face administrative penalties that are imposed by means of infraction notices. In this case, the violator has to present an administrative defence. Also, it is possible to file an action seeking annulment of the infraction notice.

- Criminal liability: Pursuant to Federal Law No. 9,605/1998, environmental criminal liability applies to every person, whether an individual or a legal entity, which commits certain offences considered as crimes. The criminal liability depends on the verification of fault or intent. In this case, the plaintiff shall defend him/herself in a judicial proceeding (appeal).

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

If there is a cause-effect relationship between the damage and the activities of the operator, it may be held liable for the environmental damage, even when operating within permit limits.

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?

Upon the occurrence of an environmental violation, a legal entity's officer, administrator, director, manager or agent would also be subject to criminal sanctions. However, these individuals would only be prosecuted and convicted for having caused environmental damage if and only to the extent it can be proved that the crime is attributable to their conduct or omission.

Individual transgressors are subject to the following criminal sanctions: (i) custodial sentence – imprisonment or confinement; (ii) temporary interdiction of rights; and (iii) fines. The sanctions imposed on legal entities, on the other hand, are: (a) temporary interdiction of rights; (b) fines; and (c) rendering of services to the community.

There is no insurance or indemnity that could protect a person from criminal liability. However, besides the common civil liability insurances, there are specific environmental insurance types in the market, which can assist/protect a company or person when subject to the payment of an amount regarding environmental liabilities.

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?

From an environmental liability perspective, the difference between a share sale and an asset purchase is mainly associated with the successor's liability. In the first case, the successor assumes the environmental liability arising from the operation of the company as a whole.

In the second case, the buyer only assumes the liability related to the acquired asset.

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

The question that is frequently raised due to the wide definition of "indirect polluter" is whether lenders may be considered as indirect polluters if a given financed project causes environmental damage. In Brazil, there has still been no deep analysis related to the definition of an indirect contribution for an activity that caused environmental degradation. In other words, even though there is no question about the indispensable conditions for responsibility towards the environmental civil sphere (i.e., author – direct or indirect polluter – occurrence of an environmental damage and causality relationship), there is no definition of the limits of the indirect contribution for activities that caused environmental degradation. However, the National Environmental Policy is silent in relation to private lenders and there is no precedent that could be singled out where a private lender has been held liable for any environmental damage.

5 Contaminated Land

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

The responsibility for environmental damages in the civil sphere is joint and several, including for damages caused by contamination of the ground and groundwater. Anyone who has contributed or benefited from a specific area can be held responsible for its remediation. In case of purchase of a contaminated property, the buyer will assume responsibility for repairing the environmental damages, even if it did not cause it directly. The assumption by the buyer of joint and several liability to remedy any existing contamination requires the adoption of contractual mechanisms in order to protect the interests of the new owner, which may exercise its right of recourse against the polluting parties.

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

Since liability is of a joint and several nature, the aggrieved party may choose one out of all the polluting parties (that meets all legal requirements to be sued, or simply the one with the healthiest economic situation) to redress the damages caused. The sued polluting party will have a right of recourse against the party that actually caused the environmental damage.

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?

The regulator may additionally require a remediation programme if there is a clear justification. Interested third parties, including the public prosecutors, may question the remediation process approved by the environmental agency if it is not in compliance with the applicable law.

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?

Those who acquire a contaminated area may seek compensation for prior damages caused by the former owner or possessor. However, even though this is important for strengthening the right of recourse, contractual clauses are not enforceable against third parties, mainly public authorities.

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

Public authorities and especially the Public Prosecutor's Office have the right to demand monetary compensation for aesthetic damages

to public properties, as this kind of damage is also considered as environmental damage under current legislation. However, it is important to state that for any environmental damage, the priority is to repair it, returning it to its original situation and that monetary compensation may be required only when the damage is irreversible or the population suffered from collective moral damages.

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.?

Environmental agencies have the power to conduct site inspections, require technical assessments from entrepreneurs or require the collection of samples to verify the compliance of the environmental conditions with the legal standards. Additionally, the public prosecutors may also require information from entrepreneurs, environmental agencies and interview employees under a civil inquiry.

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 legislation in force for some states requires immediate notification upon discovery of contamination, even if suspected, so the competent environmental and health bodies can monitor the confirmatory and remediation processes. In particular, the regulation enacted for the State of São Paulo has recently been modified, in order to increase protection and control over contaminated areas. In any case, disclosure of contamination and other environmental events is recommended to take place as soon as possible, in order to avoid liabilities and prevent pollution from spreading. Exceptions relating to specific activities may apply, notably in case of environmental accidents (e.g., mining, oil and gas, among others).

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

Pursuant to the Environmental National Policy, the monitoring of environmental quality and conditions is mandatory for both private and public individuals. As a consequence, licensing authorities generally require the conduction of environmental investigations aiming at evaluating the existence of pollution or suspected contamination. In case of confirmed contamination, however, the management of such liability, submission of periodic reports and conduction of monitoring campaigns may also be required.

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?

Although there is no legal provision on the mandatory disclosure of environmental liabilities among private contracting parties, the performance of due diligence in transactions is a common practice in Brazil, in order to identify potential liabilities and required mitigation measures. As a result of this procedure, the parties can contractually allocate the responsibility between themselves for any issues which have arisen, in consideration of the regulation in force and in respect of the parties' right of recourse.

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?

Brazilian civil environmental liability is based on strict, joint and several liability standards. Therefore, in case one's activity or enterprise is related to an environmental damage (irrespective of fault or intent), such person or legal entity may be held liable for repairing or compensating the damage. Joint and several liability standards, on the other hand, set forth that, in case more than one person or legal entity can be deemed liable, the whole reparation/compensation can be sought against any of them, individually. The aggrieved individual might seek the right of recourse against the party(ies) that caused the damage.

As per contractual provisions, based on Brazilian law, environmental liability allocation clauses may only govern the relation between the contracting parties. Thus public authorities are not bound by such contractual provisions. Therefore, for example, in a contract involving A and B, despite the existence of a specific clause allocating the environmental liability to B, in case A is deemed by law as a liable party (e.g. for remediating a contaminated area), public authorities may seek the whole reparation/compensation from A. The referred contractual provision would not shield A from public authorities' claims. Nonetheless, A could afterwards seek indemnification from B, since, between them, the contract provided that the liability ultimately incurred by A should be dealt with and paid by B.

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

In theory, considering that environmental issues may be deemed a liability of the corporation, it should be considered at least as a contingency in the balance sheet.

As per the dissolution of a company, we must highlight that potentially pollutant enterprises must be subject to deactivation procedures in order to legally cease their activities. Legislation has been tightening in this direction. The State of São Paulo has recent laws and regulations describing how the deactivation of a company must be carried out. Therefore, the abrupt dissolution of a company without the proper decommissioning and resolution of existent environmental liabilities may have its legality questioned by the authorities.

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?

Due to the application of the piercing of the corporate veil theory in Brazil, shareholders can be liable for breaches of environmental law.

Such theory may apply whenever the existence of the company jeopardises the recovery of environmental damages or acts as an obstacle (irrespective of fault or abuse of right) to proper compensation or remediation of the former environmental conditions.

Nonetheless, in relevant environmental cases it is usual for prosecutors to seek shareholders' joint and several liability and not the piercing of the corporate veil. In this case, please note that the liability sought is not subsidiary, but directly attributed to the shareholder. Such liability, however, should only be applied in case the shareholder is directly involved with the management of the company and involved with the practices that caused the environmental damages.

Regarding the parent company's exposure in its national courts, it would depend vastly on the specificities of the law applicable in the parent company's country.

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

Public institutions that provide a whistle-blowing mechanism for anonymous tips in Brazil must protect the identity of the whistle-blower. The specific forms of identity protection vary according to the institutional regulations. In the State of São Paulo, for example, the state environmental agency provides for confidential procedures when dealing with an anonymous contribution.

On the other hand, in cases of corporate "whistle-blowing" policies, employees that provide licit information shall not be subject to persecution from the employer due to the provided information.

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

The Public Civil Action is the most common type of action used in Brazil for pursuing environmental claims. Public Civil Actions may be filed by public prosecutors and defenders, the government (federal, state and municipal), civil associations, foundations, as well as fully or partially public companies. Popular Claims, which may be filed by any individual, may also be filed with such purpose. Such actions must exclusively be aimed at the recovery of the environment.

Regarding damages to individuals or group of individuals, as a consequence of an environmental damage, Public Civil Actions and Popular Actions are not applicable. Individual actions must be used for such purpose.

Punitive damages (penal or exemplary) are not applicable in Brazil.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

For the filing of Public Civil Actions and Popular Actions, claimants do not need to pay for the costs upfront. Besides such rule, certain parties legitimated to file such actions are exempted by law from such costs, such as public prosecutors and public defenders.

On the other hand, in individual private actions seeking indemnification as a consequence of an environmental damage, costs must be paid up front by the claimant. However, in case the poor financial condition of the claimant is proven, the benefit of free judicial assistance may be granted and the costs may be waived.

9 Emissions Trading and Climate Change

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

In line with the policies set out by the United Nations Framework Convention on Climate Change (UNFCCC), as well as according to the goals established when the Kyoto Protocol was in force, Brazil has developed its own guidelines and objectives on the reduction of gas emissions, mainly by means of the National Policy on Climate Change (Federal Law No. 12,187/2009). Pursuant to such legislation, the Brazilian government has committed to a voluntary target on the reduction of gas emissions, which has been replicated at the state and municipal levels. Even though no emission trading scheme has been formally implemented so far by the public authorities, Certified Emission Reductions (CER) can be traded by private parties in different ways, notably through the stock exchange.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

The legislation in force provides for specific guidelines on air emissions, as well as on emission standards, but no cap for greenhouse gas emissions has been established so far. During the environmental licensing process, the competent authorities may require the adoption of control measures, improvement of existing equipment and periodic monitoring of gas emissions in general. Obligations vary from case to case and failure to comply subjects the offenders to both criminal and administrative penalties, irrespective of the liability for damages.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

The provisions enacted by the National Policy on Climate Change are an important step, as Brazil made a national voluntary commitment for reducing local gas emissions, with the main objective of decreasing emission levels by 2020. There has been a lack of concrete actions to date, however; on the other hand, firm progress has been made in reducing emissions arising from deforestation. Surveillance measures are constantly been improved in an attempt to prevent forests from being converted mainly to new crop and livestock areas.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

The liabilities involving asbestos products are divided into four main areas of concern: (a) environmental restrictions; (b) labour force exposure; (c) exposure of consumers to asbestos-containing products; and (d) other people indirectly exposed to the asbestos. Most of the asbestos liabilities are resolved by monetary awards. Successful labour, consumer and civil claims result in decisions awarding compensation for damages suffered in connection with the asbestos exposure, including both (a) compensation for damages, and (b) compensation for pain and suffering in an amount that gives comfort to

the inflicted person and punishes the offender (provided that such compensation for pain and suffering does not cause unreasonable enrichment). It is important to note that recent decisions rendered by the Superior Courts have forbidden the extraction and use of white asbestos (*amianto crisotila*) in manufacturing processes in the country.

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

Under an environmental perspective, the major aspects that the owners/occupiers shall focus on are: (a) management and disposal of the residues generated by the use of asbestos; and (b) eventual land contamination.

The management and final disposal of residues containing asbestos must cause neither any damage to the environment, nor any inconvenience to public health and welfare. Therefore, disposal and control measures for the correct management of such residues must be implemented by the company.

The owner or occupier of a property which is contaminated by hazardous materials, such as asbestos, is subject to a notice of infraction to be issued by the environmental authority demanding the clean-up of the land, whether or not it is the entity which caused such contamination – a circumstance that may entail significant expenditure.

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 your jurisdiction?

For a long period, the environmental insurance market in Brazil was restricted to common civil liability insurance. Currently, however, the development of the Brazilian Environmental Law and the enforcement thereof has triggered a surge of different and specific environmental insurance types in the market, such as insurance covering risks due to: (i) installation and operation of infrastructure assets; (ii) civil works and services; (iii) transportation of environmental interest materials; and (iv) liability derived from pollution damages, amongst others.

So far, environmental risks insurance has played a small role in Brazil. This scenario, however, is currently changing in light of the hardening of law enforcement, the international reckoning of environmental insurance as a tool for the fostering of green financing and the discussions taking place in Brazil due to legislative proposals for the establishment of mandatory environmental risks insurance.

11.2 What is the environmental insurance claims experience in your jurisdiction?

Due to the incipient role that environmental insurance has played so far in Brazil, there have not been many claims relating thereto. Nevertheless, considering the strengthening of law enforcement and some relevant environmental accidents that have happened in Brazil over the last decade, the stiffening of the scrutiny of insurance companies is clearly visible.

Additionally, on 5 June 2018, the Environment Committee of the Federal Senate approved Bill No. 767/2015, which compels the contracting of environmental insurance against environmental risks to which companies are exposed. Such Bill is still pending final approval by the National Congress.

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 your jurisdiction.

At the federal and state level, new rules have been published in relation to several areas, such as mitigation of climate change, waste reverse logistics, environmental licensing and specially protected areas.

On 27 December 2017, Federal Law No. 13,576 was passed and established the National Policy of Biofuels (RenovaBio). The RenovaBio intends to expand biofuels production in Brazil in order to reduce greenhouse gas emissions and, therefore, comply with the Paris Agreement.

The Brazilian Institute for the Environment and Natural Resources published Normative Instructions Nos 11/2018 and 12/2018, which amend the Federal Technical Registry of Potentially Polluting Activities (CTF/APP) and establish new environmental control tools. Accordingly, new activities have been submitted to the CTF.

With regard to the specially protected areas, on 31 October 2018, the Palmares Cultural Foundation (FCP) published Normative Instruction No. 01, which provides that administrative proceedings must comply with the FCP regarding the licensing of projects that affect the Quilombolas communities (slavery refugee descendants).

In the State of São Paulo, the Environmental Agency of the State of São Paulo (CETESB) published Decision No. 076/2018/C, which conditions the issuance or renewal of environmental licences on the structuring and implementation of reverse logistics systems.

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Partner of the Environmental Law practice and Head of the Labour, Real Estate, Litigation and Competition Law practices, Roberta Danelon Leonhardt is a specialist in environmental law, having outstanding performance in the management of complex environmental crises due to her skills in coordinating multiple interests in negotiation processes. Ms. Leonhardt's work embraces the coordination of working teams for the provision of environmental assistance in matters related to the implementation of potential polluting projects and the analysis of environmental liabilities, support to investors and financial institutions for the identification and management of environmental risks, as well as working with environmental agencies and the Department of Public Prosecution.

Ms. Leonhardt is becoming renowned for environmental disputes due to her persuasive ability and solid environmental practice background and has experience in assisting clients in a wide range of areas such as infrastructure, logistics, food and beverage, chemicals, real estate, agribusiness, steel, mining, automotive, banking, pharmaceutical and heavy industry in general.

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Daniela Stump is a specialist in environmental litigation and consultancy, with an emphasis on the identification and management of environmental risks and liabilities in the structuring of infrastructure, sale of assets, mergers/acquisitions and concessions projects. A large part of Ms. Stump's work concerns legal assistance for the management of contaminated areas, identification and allocation of environmental responsibilities among the contracting parties, support to environmental litigation and practice before environmental agencies and the Public Prosecutor's Office, and drafting administrative defences. Ms. Stump has previous experience in providing legal assistance to clients of several business areas, such as infrastructure, logistics, food and beverage, chemicals, real estate, agribusiness, and mining.

Machado Meyer ADVOGADOS

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Chapter 8

Canada

Jonathan W. Kahn

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Anne-Catherine Boucher

1 Environmental Policy and its Enforcement

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

Jurisdiction to legislate with respect to environmental matters in Canada is found at each of the federal, provincial and municipal levels. The *Constitution Act, 1867* allocates responsibility for different subject areas to the federal government or the provinces. However, responsibility for environmental matters is not specifically assigned to either the federal government or the provinces and the courts have determined that it is a shared, joint area of responsibility.

The provinces have jurisdiction over property and civil rights and matters of a local or private nature and therefore, much of the legislation governing environmental issues is enacted at the provincial level. The federal government retains jurisdiction over fisheries, navigation, oceans, nuclear energy, as well as matters (such as transportation of dangerous goods and interprovincial undertakings such as pipelines and railways) which cross provincial or international boundaries. The federal government has also legislated in the area of toxic substances.

Environmental requirements and regulations are often also found in municipal by-laws.

Environment and Climate Change Canada and the various provincial Ministries of the Environment are responsible for the development of environmental policy and the enforcement of environmental legislation and regulations.

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

Environmental regulators at the federal and provincial levels have broad regulation-making and approval-granting powers. In cases of failure to comply with laws or approvals, or threats to the environment, the regulators have broad order-making powers. While administrative penalties are an option for regulators, breaches of environmental laws tend to be addressed by way of prosecution, and the imposition of fines or prison sentences upon conviction.

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

In certain Canadian jurisdictions, public registries have been established which contain information on a variety of matters such as proposed regulations and approvals, permitted activities, environmental assessments in progress and enforcement actions.

Any person may request information from public authorities through access to information legislation at the federal and provincial levels. However, there are exceptions built into the right of access in each statute, such as for some confidential technical or commercial information or personal information.

Canada's courts have determined that government actions or decisions that may affect Indigenous or Treaty rights impose upon the government a duty to consult and accommodate affected groups. In addition, most environmental legislation imposes broad consultation obligations on project proponents.

2 Environmental Permits

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

Environmental permits or approvals are generally required for a broad range of activities such as any discharge of contaminants into air or water, water taking, waste management activities, as well as some specific undertakings such as mines and energy facilities.

The ability to transfer a permit from one person to another will depend on the jurisdiction which issued the permit and the specific type of permit. Certain permits may be issued by simply providing notice to the regulator while other cases require the prior consent of the regulator to transfer the permits. Certain other permits are non-transferable.

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?

Most environmental statutes provide a statutory right to appeal a decision to a tribunal, board or court or to a government minister or cabinet. Decisions on whether or not to grant an environmental permit, or challenges to permit conditions, may generally be appealed by the applicant and other persons affected by the decision, in certain cases subject to obtaining leave.

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

The requirement to carry out regular environmental audits may be imposed as a condition to an environmental permit for certain polluting industries. Environmental impact assessment review processes are generally triggered at the federal and provincial levels for major installations/projects in order to obtain project approval and often involve public hearings.

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

Environmental regulators are generally granted a range of enforcement powers and discretion as to the type of enforcement powers that are most appropriate in a particular case. The violation of a permit may lead to a warning or directive to comply, administrative monetary penalties, prosecution, or a stop or control order.

3 Waste

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

Waste is defined through provincial legislation or regulations in a variety of ways based on the type of waste being regulated, but the definitions tend to be quite broad and can include any object that is discarded or that the holder intends to discard, as well as process by-products and residues.

Generally, waste regulation is divided between non-hazardous waste (municipal or domestic waste) and hazardous waste (industrial, chemical, corrosive, toxic, pathological, radioactive or PCB waste), which is more heavily regulated.

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?

Restrictions on the on-site storage of waste will depend on the type of waste being stored and the jurisdiction. Storage or generation of waste above prescribed thresholds generally requires a permit or authorisation. Disposal of waste may only occur at approved waste disposal sites.

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)?

Provided that waste is managed, shipped and disposed of in accordance with regulatory requirements, the generator does not retain liability once title to the waste is transferred to a third party for off-site treatment or disposal in Canada.

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

Most provinces have adopted extended producer responsibility regimes which require distributors of certain products (used oils, paint, tyres, electronic products, batteries, etc.) to implement recovery and reclamation programmes for products of the same type as those they distribute. It is generally possible for distributors to meet their obligations by joining an association that implements recovery and reclamation programmes for the same products. The costs related to the recovery and reclamation of a product must be internalised in the price asked for the product at the point of sale.

Blue box stewardship regimes are also in place in a number of provinces, which require distributors of paper products, containers and packaging to fund the cost of municipal curb-side recycling programmes.

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?

Liability under environmental legislation can be regulatory (quasi-criminal), administrative or civil.

In most cases, a breach of environmental legislation constitutes a regulatory offence. Such offences are quasi-criminal in nature and do not require proof of intent to commit an offence (strict liability offences). Such a breach may lead to prosecution and to fines and imprisonment upon conviction. The fines can be quite significant and minimum fines apply to certain offences.

Due diligence is the most common defence in the case of prosecution for an environmental offence. A defendant must establish that he or she took all reasonable steps to prevent the commission of the offence. What constitutes reasonable steps in a particular case will depend on the circumstances and will be determined by the court on a case-by-case basis, but generally requires at a minimum that an effective environmental management system be in place to prevent environmental harm.

In addition, environmental regulators at the federal and provincial levels generally have a number of additional administrative enforcement powers to respond to breaches of environmental law or of a permit. A breach of environmental law or of a permit may, for instance, lead to a warning, a directive to comply, stop or control orders, or administrative monetary penalties (which may be imposed without a full prosecution).

Finally, where a breach of environmental law causes damage to property, there is significant potential for civil liability under the common law, under the heads of action of private nuisance, negligence, trespass and strict liability. Some provincial legislation also creates statutory causes of action for clean-up costs in the case of spills.

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

Environmental statutes prohibit the discharge of contaminants into the environment that causes or may cause an adverse effect. A person may be prosecuted for causing environmental damage notwithstanding compliance with permit conditions. There may also be liability under a nuisance cause of action, where compliance with permit limits would not be a defence.

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?

Environmental statutes in Canada impose personal liability on directors and officers of corporations. For instance, under the *Canadian Environmental Protection Act, 1999*, when a corporation commits an offence under the Act, any officer, director or agent of the corporation who directed, authorised, assented to, acquiesced or participated in the commission of the offence may face liability.

Directors and officers may also be held liable if they knew or ought to have known that the corporation was in contravention of legislation even if they did not actively participate. In certain provinces, directors and officers have a positive duty to take all reasonable care to prevent the corporation from committing an offence.

Directors and officers may also be personally subject to clean-up or preventative orders. Such orders are a particular risk in the case of bankruptcy or insolvency.

Directors and officers are generally able to obtain insurance, though the policy must be carefully reviewed to ensure that environmental matters are covered. Certain statutes relating to business corporations prohibit the indemnification of directors and officers in the case of criminal or administrative actions unless the individual had reasonable grounds to believe that his or her conduct was lawful.

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?

In the context of a share deal, liability for acts of the corporation, including prosecution for violations of environmental laws prior to the effective date of the transaction, carry forward and remain with the corporation. Liability does not flow to the new operating entity in the case of an asset deal. The purchaser of real property, however, could be liable for historic contamination. In addition, the issue of permit transfer referred to above tends to be more of an issue in asset deals.

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

Lenders can be exposed to environment liability if they directed, acquiesced or participated in the commission of an offence. Lenders may also be exposed to environmental clean-up orders if they have *de facto* management and control of land. Certain statutory protections against regulatory orders are available for lenders, receivers and trustees in bankruptcy.

5 Contaminated Land

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

While there is some variation from province to province, potential liability for clean-up or remediation of historic contamination can generally attach to current or past owners, occupiers, those that have had management or control over a contaminated property, or those who caused or contributed to a discharge or spill into the environment. Environmental regulators generally have broad powers with respect to clean-up of contaminated land and can issue orders to characterise potentially contaminated land, carry out full remediation, monitor or reimburse the regulator for costs to carry out remediation work. The order may, in certain cases, be made against a person or company that was not responsible for the original source of contamination or was not aware of the contamination at the time of the purchase of the property. Directors and parent companies may also be exposed to liability.

Liability for historic environmental damage can also be imposed on a current or purchasing owner or operator at common law in the case of a suit brought by another landowner whose property has been contaminated by the migration of contamination.

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

Most Canadian jurisdictions have adopted a joint and several approach to liability for remediation of contaminated land, where a party considered responsible under the legislation may be held responsible for 100% of the remediation costs, irrespective of its role in causing the contamination. Such party must then turn to the civil courts to recover any amount exceeding its contribution to the contamination. A few jurisdictions have adopted statutory mechanisms for allocating liability among responsible persons.

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?

When remediation is required, land must be decontaminated below regulatory limit values for substances considered contaminants, which vary based on the use of the land and surrounding environment receptors. Risk assessments are permitted in some circumstances. While there have been cases of remediation being "re-opened", some provinces have built protections into the regulatory scheme to provide a measure of protection against that risk.

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?

Clean-up costs incurred by a party under a regulatory scheme are generally without prejudice to recovery of the remediation costs incurred from contributing parties. The allocation of liability between buyer and seller will generally be a matter of contract. However, that will not insulate the seller from civil or regulatory liability though it could, depending on the contract, give rise to a right of indemnification.

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

The Supreme Court of Canada has recognised in theory the right of the Crown to seek monetary damages for the loss of public resources caused by an environmental offender, which could include damages for aesthetic harms but has not yet been tested by the courts.

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.?

Federal and provincial environmental statutes grant broad inspection and investigation powers to enforcement officers, including search and seizure powers, entry into land or building without a warrant, collecting samples, interviewing individuals, requiring the production of documents and conducting tests and analyses. Inspectors may also issue compliance orders to stop illegal activities or require action to correct a violation.

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?

Environmental statutes generally require that the regulator immediately be notified in the case of a discharge of contaminants out of the natural course of events (i.e. a spill) that is likely to cause an adverse environmental impact.

Requirements to report the discovery of historical contamination and of risks of off-site migration vary from province to province.

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

Regulators are generally granted wide powers to order investigations, preventive measures or remediation. In practice, these powers tend to be exercised when there exists a risk to human health or safety or of off-site migration.

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?

"Buyer beware" is the prevailing concept in the context of purchase deals absent specific representations and warranties and, as such, environmental issues should be closely studied prior to the conclusion of a transaction. That said, a seller must not make any misrepresentations or fail to disclose latent defects.

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?

Contractual allocation of environmental liability is possible but will be constrained in so far as it applies only to the parties to the contract and will not insulate a party from administrative, regulatory or criminal liability.

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

Public or "reporting" issuers in Canada are subject to continuous disclosure obligations, which includes the disclosure of material environmental issues. Generally accepted accounting principles require that certain environmental issues be reflected in financial statements or related notes and estimates made about necessary contingencies.

Dissolving a company would not necessarily eliminate environmental liability. Enforcement action (including prosecution and orders) may be taken against any person who had charge, management or control of a contaminant, including parents, directors and officers.

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?

Subject to circumstances permitting a lifting of the corporate veil, shareholders will generally only be held liable for breaches of environmental law to the extent they acquiesced, directed, influenced or participated in the commission of an offence or exercised control over the contaminated site or pollutant.

An appellate-level decision in Ontario held a principal of a corporation liable along with the corporation on a joint-and-several basis for damages payable pursuant to a statutory right of compensation which could be brought against the "owner of a pollutant or person having control of the pollutant". While the corporation was clearly the owner of the pollutant, the court determined that a corporate principal, director or officer could also be considered to be a "person having control of a pollutant" based on fact-specific assessment. Future claimants could rely on this decision to pierce the corporate veil, thereby increasing the spectre of individual liability.

Subject to local laws, a foreign parent company may be sued in its national court for pollution caused by a Canadian affiliate.

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

There exists legislation in certain provinces and at the federal level protecting a person who provides information to the government about an environmental offence from employer retribution.

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

Subject to obtaining certification, environmental class actions may be brought in Canada and have in the past been certified in several provinces. Past certification decisions appear to show that the likelihood of obtaining certification is greater where plaintiffs' claims are limited to property damage as the courts have found that health-based claims are less well-suited to class actions. Punitive or exemplary damages are available but are rare and generally limited in practice.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

In Canada, the losing side is usually required to pay the winning side's costs, but costs remain at the discretion of the courts. There are no statutory exemptions from paying costs for public interest groups, but such groups have avoided paying costs by successfully arguing that a cost award against them would have a negative impact on public interest involvement.

9 Emissions Trading and Climate Change

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

Québec adopted a cap-and-trade system for greenhouse gas ("GHG") emissions in 2013 which is fully harmonised with the California regime. Industries whose annual greenhouse gas emissions are 25,000 metric tons or more are required to register for the system and cover their reported and verified emissions with emission allowances. Ontario adopted a cap-and-trade regime in January 2017 which was aligned with Québec's system, but which has since been abandoned.

There will be a trading component under the federal output-based pricing system (see question 9.3 below) to allow surplus credits allocated to facilities whose emissions fall below their annual emissions limit to be traded exclusively within the federal output-based pricing system. Nova Scotia is set to implement its own stand-alone cap-and-trade programme and Alberta has had a stand-alone system which allows the trading of emission offsets and emission performance credits for several years.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

In most provinces and at the federal level, legislation provides monitoring and reporting obligations for certain industries or where GHG emissions reach a certain threshold.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

Canada is a signatory to the Paris Agreement, negotiated at the United Nations Conference of the Parties ("COP 21") in December of 2015. As part of its commitment, Canada has a GHG emissions reduction target of 30% below 2005 levels by 2030. Most Canadian provinces and the federal government adopted the Pan-Canadian Framework on Clean Growth and Climate Change, Canada's national climate change plan to fight GHG emissions, in December 2016.

As part of the Pan-Canadian Framework, a number of provinces have adopted a tax or levy on carbon as well as additional GHG reduction measures and others have adopted, or are about to implement (as mentioned above), a cap-and-trade system.

The federal government has recently enacted legislation establishing a federal GHG emissions pricing scheme, composed of a carbon tax on fossil fuels and of an output-based pricing system for large industrial emitters. The federal regime will apply in provinces and territories that do not have a carbon pricing system that aligns with the federal benchmark as of 2019. The carbon tax on fossil fuels will be C$20 per tonne of carbon emitted in 2019, with this tax increasing by C$10 per year to C$50 per tonne in 2022.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

Workers in Canada are generally required to have their claims settled on a "no-fault" basis by a workers compensation board. Damage awards issued by these boards are modest compared to damages that might be awarded by a jury in the U.S. Plaintiffs impacted by asbestos in the workplace have tended to pursue defendants who fall outside of the workers compensation regime, primarily the manufacturers and producers of asbestos-containing products, to recover more fully for their injuries; however, the damages awarded tend to be more limited than in the U.S.

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

Exposure to asbestos on-site is regulated under federal and provincial occupational health and safety legislation. Employers or owners/occupiers generally have various obligations to limit the exposure of workers to asbestos fibres. Such measures include the requirement for asbestos management plans, meeting air quality standards with respect to the concentration of air-borne breathable asbestos fibres, taking special precautionary measures prior to undertaking any work liable to emit asbestos dust and keeping a registry of inspections, the location of materials containing asbestos and details relating to samples taken.

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 your jurisdiction?

Several carriers in Canada offer environmental insurance liability coverage. Insurance products may include insurance for legal liability for pollution (which would cover expenses such as legal costs, certain clean-up costs, damages assessed in court and economic loss), environmental impairment liability for third-party claims due to off-site migration and insurance against future pollution events on a property or undiscovered contamination. Insurance products are also available to address specific concerns, such as asbestos, storage tanks, transportation of hazardous waste and the liability of secured creditors.

11.2 What is the environmental insurance claims experience in your jurisdiction?

A wide range of environmental insurance has been available in Canada on a consistent basis for at least 20 years, particularly after general commercial liability insurance products began to exclude coverage for environmental liability.

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 your jurisdiction.

The federal government has undertaken a review of key federal environmental assessment and regulatory processes and has tabled legislation to enhance federal environmental protections and the scope of federal environmental assessment, clarify the federal environmental assessment process for major projects, increase opportunities for public participation and expand the role of Indigenous peoples in some of the processes.

Courts have, in recent years, been taking somewhat inconsistent approaches on civil claims for damages caused by contamination and as such there is some uncertainty associated with liability associated with off-site migration.

Both the federal government and several provinces have become much more aggressive in prosecuting environmental offences and the quantum of fines has increased rapidly in recent years.

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Jonathan Kahn, a partner in the Toronto office of Blake, Cassels & Graydon LLP, has for more than 30 years provided representation and advice on a broad spectrum of environmental and natural resources law issues. He represents clients on: major project development; the purchase, sale, and remediation of contaminated land; mining regulation and permitting; management of natural resources; transportation, handling and disposal of hazardous substances; environmental permitting; air, water and waste regulation; lender liability; and other environmental matters. Jonathan's wide-ranging expertise also includes representing accused corporations in major environmental prosecutions and providing environmental law advice on significant transactions, across a broad range of industries.

Jonathan was the first non-American to serve on the Executive Committee of the American Bar Association's Section of Environment, Energy and Resources Law, having also served on its governing Council and chaired several committees. He is also a past chair of the National Environment, Energy and Resources Law Section of the Canadian Bar Association, and a former chair of the Environmental Law Section of the Ontario Bar Association.

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Blake, Cassels & Graydon LLP (Blakes) provides exceptional legal services to leading businesses in Canada and around the world. Serving a diverse national and international client base, Blakes has an integrated network of nine offices worldwide providing clients with a full spectrum of capabilities in virtually every area of business law.

Our national environmental team has extensive knowledge of environmental legislation and contacts with regulatory authorities to provide timely, efficient and effective advice to assist clients in this complex field. We have been involved in the development of major projects in a variety of industries and develop sophisticated strategies to minimise our clients' exposure to environmental liabilities. We focus on emerging opportunities and challenges for our clients created by clean technologies and climate change regulations. We also advise on management, compliance, due diligence procedures, training and permit requirements for projects with potential environmental ramifications and provide representation when disputes arise.

Chile

Julio Lavín Valdés

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1 Environmental Policy and its Enforcement

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

The Environmental Framework in Chile is contained in Law 19300 and Law 20417, which amended Law 19300 to create the Ministry of the Environment, the Environmental Assessment Service and the Environmental Superintendence. These agencies are autonomous, have their own legal capacity and equity, and report to the President of the Republic through the Ministry of the Environment. Law 20600 completes the environmental regulation, which created the Environmental Courts that hear appeals against administrative decisions by the Environmental Assessment Service and the Environmental Superintendence, as well as any other matter, such as environmental damage claims.

Environmental legislation is supplemented by several regulations, such as the the Environmental Impact Assessment System that controls water pollution, hazardous waste handling, mining safety and other related matters.

There are also other special laws that regulate aspects of environmental protection, such as the Sanitary Code, the Penal Code, the General Fishing and Aquaculture Law, the Navigation Law and the Native Forest Protection Law.

Lastly, Chile has signed and enacted several international treaties, such as:

- the 1940 Convention on Nature Protection and Wild Life Preservation in the Western Hemisphere;
- the 1971 Convention on Wetlands, or Ramsar;
- the 1981 Convention for the Protection of the Marine Environment and Coastal Area of the South-East Pacific;
- the 1981 Agreement on Regional Cooperation in Combating Pollution of the South-East Pacific by Hydrocarbons or other Harmful Substances;
- the 1989 Basel Convention on the Control of Transboundary Movements of Hazardous Wastes;
- the 1992 United Nations Framework Convention on Climate Change;
- the 1997 Kyoto Protocol to the Convention on Climate Change; and
- the 2001 Stockholm Convention on Persistent Organic Pollutants.

The agencies below administer and enforce environmental law:

- The Ministry of the Environment collaborates with the President of the Republic in the design and enforcement of environmental policies, plans and programmes. This Ministry handles the protection and conservation of biodiversity and renewable natural and water resources in order to promote sustainable development, the integrity of environmental policy and environmental regulation.
- The Environmental Assessment Service administrates the Environmental Impact Assessment System ("SEIA" in Spanish) and coordinates the government agencies involved in project permitting and approvals.
- The Environmental Superintendence oversees compliance with: the environmental approvals of Environmental Studies and Statements; the measures and instruments contained in Prevention and Decontamination Plans; the environmental quality and emission standards; and management plans.
- Three Environmental Courts: There are three courts, each comprised of three judges, two of whom must be attorneys and one a scientist. These courts decide any environmental disputes within their purview according to the law.

Other government agencies have permitting and enforcement faculties, such as: the Regional Offices of the Ministry of Health; the Agriculture and Livestock Service; the National Forest Association; the National Fishing Service; the National Geology and Mining Service; the General Water Bureau; the General Administration of the Maritime Territory and Merchant Marine; and Municipalities.

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

Due to the amount of agencies within the environmental regulation system, there are different approaches. The Environmental Assessment Service applies the principle of prevention in granting environmental permits – its task is to evaluate the potential environmental impacts that a project or activity may cause prior to project implementation by means of an environmental impact study or an environmental impact statement. The Ministry of the Environment follows the same principle in its function of issuing environmental quality standards, prevention and management plans.

A second approach, used by both the Ministry of the Environment and by different government services, as applicable, is based on the "command and control" principle, and it is enforced through emission standards and the grant of sectorial environmental permits and other permits and authorisations for projects.

The third approach is corrective. The Ministry issues decontamination plans and the Environmental Superintendece exercises its authority of

oversight and penalisation of infringements of environmental permits, or prosecutes liability for environmental damage.

Finally, the fourth approach consists of economic incentives, such as the air emissions tax on the following contaminants: particulate matter; nitrogen oxide; sulphur dioxide; and carbon dioxide. A particulate matter emissions offset system has also been implemented in the Metropolitan Region.

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

The law stipulates that everyone has a right to access environmental information in possession of the government in any format.

The Ministry of the Environment administrates an online, regionally decentralised, National Environmental Information System. This system contains, for example: the text of environment-related treaties, conventions, international agreements, laws, regulations and other administrative acts; reports on the condition of the environment; and administrative authorisations of activities that may have a material environmental impact. If the information is not in this system, it will indicate which other government authority has it.

The information on environmental assessment processes and on existing environmental permits is updated on the Environmental Assessment Service's website. It also contains information on oversight actions, inquests and provisional measures for the protection of the environment and/or human health.

The above access is consistent with Law 20285 on Access to Public Information, which sets down the principle of government transparency, the right to access to the information held by government agencies, and the procedures to exercise and protect that right. However, access can be denied to any information that is considered to be confidential pursuant to the law.

2 Environmental Permits

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

Article 10 of Law 19300 lists the projects or activities that must be submitted to the Environmental Impact Assessment System by means of an environmental impact statement or study as they may cause one or more of the following impacts: risk to the health of the population; material adverse impacts on renewable natural resources; resettlement of communities or an alteration to their way of life; any impact on populations, resources and protected areas; significant alteration of the landscape or its touristic value; or any impact on monuments or sites forming part of a region's cultural heritage.

The environmental assessment of these projects concludes with the issuance of an environmental permit.

An environmental permit can be legally transferred provided the change in holder is reported to the Environmental Assessment Service.

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?

The denial of an environmental permit can be appealed before the Executive Director of the Environmental Assessment Service, if the project was evaluated by means of an Environmental Impact Statement, or before the Ministers' Committee, if the Assessment was made by means of an Environmental Impact Study. This Committee is comprised of the Ministers of: Environment; Health; Economy, Development and Tourism; Agriculture; Energy; and Mining.

Permit applicants can also bring an appeal before the Environmental Court against a refusal by the Executive Director or Ministers' Committee; and any Environmental Court decision can be appealed before the Supreme Court via a remedy of vacation of judgment based on procedure violation.

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

The law does not require environmental audits of highly polluting industries. All projects or activities that may cause an environmental impact must be submitted to the Environmental Impact Assessment System to obtain environmental permits.

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

The Environmental Superintendence has the power to oversee compliance with environmental regulations and to apply penalties for any infringement of the law or of the requirements under an environmental permit.

The penalties for violations of the law or permits range from fines of US$900 to US$9 million per violation, including the temporary or final closing of the facility and revocation of the environmental permit.

3 Waste

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

Waste is defined in the Hazardous Waste Management Regulations as a "substance, element or object that the producer disposes of, proposes to dispose of or is obligated to dispose of".

The former Regulations on the Minimum Municipal Sanitary Standards (1947) defined household waste, now known as solid household waste, as waste produced by people living in inhabitable places, such as waste from home life and cleaning products.

Industrial waste, now known as solid industrial waste, is waste from industrial or manufacturing processes, such as slag and ash from mining or organic waste, or such as the by-products from slaughter houses and sugar refineries.

The Hazardous Waste Management Regulations define *hazardous* waste as a "waste or mix of waste that is a hazard and presents a risk to public health and/or may cause adverse impacts on the environment, either directly or from actual or planned handling".

The Emission Standard for the Regulation of Pollutants in Liquid Waste Discharges into Ocean and Inland Bodies of Water defines liquid waste, wastewater or effluents as water discharged from an emitting source into a body of water.

The Emission Standard for Regulation of Pollutants in Discharges of Liquid Industrial Waste into Sewerage Systems defines liquid industrial waste as waste discharged by an industrial facility.

The law distinguishes between the treatment of each type of waste and allocates a greater responsibility to the producers of waste that cause a considerable environmental impact. By way of example, the Extended Producer Responsibility Law holds producers or importers of lubricants, electrical and electronic devices, batteries, packages, packing and tyres liable for the organisation and funding of the management of waste produced from these products.

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?

The Regulations on Basic Sanitary and Environmental Conditions in the Workplace and the Hazardous Waste Management Regulations allow industrial and hazardous waste to be accumulated, treated and disposed of on an industrial property, in a workplace or building, provided the Health Authority has issued a sanitary authorisation.

Approval of a Hazardous Management Plan is required to store hazardous waste, and it can be kept for no more than six months on an industrial facility.

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)?

Chilean law has no general rules on residual liability for waste that has been transferred for off-site disposal or treatment by third parties.

The enactment of the Extended Producer Responsibility Law in 2016 made producers or importers of waste-producing lubricants, electrical and electronic devices, batteries, packages, packaging, and tyres liable, from the moment waste is produced until it is either recovered or disposed of.

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

The Extended Producer Responsibility Law establishes a special system for waste management. The producers and importers of priority products (lubricants, electrical and electronic devices, batteries, packages, packaging, and tyres) must organise and manage the take-back and recovery of the waste from any of those products that they sell in the country.

The producer's/importer's obligations include organising and funding the collection of waste from priority products throughout the nation and the storage, carriage and treatment of that waste using one of the management systems regulated by specific executive decrees which must be dictated to that effect. The tyres regulation bill of law provides that the manufacturers or importers of tyres with a ring smaller than 57 inches must take back 50% of waste by 2021 and 90% by 2028, and recover 25% by 2021. Recovery must increase gradually.

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?

The law lists several types of breaches on environmental laws and/or permits, such as obligations, standards and measures under environmental permits, or for the execution of projects or activities without holding the relevant environmental permit.

These breaches can be penalised by sanctions that go from written admonition, to fines of US$900 to US$9 million, and/or temporary or final closing of facilities, and even the revocation of the environmental permit, for each breach, depending on whether the breach is qualified as ordinary, serious or very serious.

The law also stipulates liability for environmental damage. Anyone can file an action seeking reparation for any environmental damage.

An environmental claim must be filed before the Environmental Court in the location where the damage occurred and any judgment by that court can be brought before the Supreme Court seeking vacation of judgment.

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 even though he is operating within permit limits or standards, since environmental damage is defined as any loss, decrease, detriment or significant impairment to the environment or to one or more of its components.

Consequently, if the operator causes any of those material effects, he will be liable for the damage to the environment.

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?

There is no rule holding directors and officers of corporations liable for environmental wrongdoing. However, any company required to repair or indemnify environmental damage can seek redress from its directors and officers if it is proven they were responsible for the decision that led to the environmental damage.

Companies can carry director and officer insurance to cover 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?

In a share sale, environmental liability follows the company, and not the shareholders, as the company holds the environmental permit and also conducts the damaging activity.

Environmental liability in an asset purchase lies with the buyer unless it can be proven that the breach or damage occurred prior to the purchase, in which case redress may be sought from the seller.

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

Lenders of companies conducting activities or implementing projects that may cause environmental damage are not liable for environmental wrongdoing or remediation costs.

5 Contaminated Land

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

Assuming that the word "contamination" is used in comparative law as the equivalent to "environmental damage", Chilean law has no special regulations to pursue liability for the contamination of soil or underground water, so the general rules on environmental damage must be followed.

Unlike the international trend of enforcing the principle of objective liability for environmental damage, where whoever performs an activity must be held liable for its damage, in Chile the principle of subjective tort liability is followed where the presuppositions are an event that causes damage attributable to a certain person and that person has acted negligently or with wilful misconduct.

As for historic contamination, any action to claim environmental damage prescribes five years after the contamination has become apparent and not from when it was caused, so Chilean law offers greater protection in seeking remediation and indemnity for any damage.

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

Environmental law does not envisage more than one person being responsible for contamination. However, since Law 19300 does make reference to general rules in civil law, the rules in the Civil Code would apply, which stipulate joint and several liability when more than one person is responsible for contamination, without prejudice to the action available to the accused to take redress against the other persons responsible for the contamination, according to general rules.

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?

The law does not grant the Environmental Superintendence the authority to require additional work after an Environmental Remediation Plan has been approved. Therefore, the person responsible for the remediation must complete each of the actions, measures and objectives included in the remediation plan. If the culprit does not follow the remediation plan and the contamination is thus not remediated, the Superintendence will put an end to the remediation plan and forward the case to the State Defence Council for the filing of an environmental remediation action before the environmental courts.

If the culprit completes the remediation plan satisfactorily, all environmental remediation actions will be extinguished and the culprit will be released from any additional measures.

Under the law, third parties can take action to object to the approval of an environmental remediation plan by means of an appeal to the Environmental Court. The court's decision can be brought before the Supreme Court for vacation of judgment.

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?

The purchaser of property on which contamination is found can take action before the competent environmental court against the previous owner and also seek an indemnity if the court declares that contamination exists, unless there is a private agreement between the buyer and seller stipulating that the buyer released the seller from any environmental liability.

Under the environmental liability system, anyone who has caused damage to the environment by negligence or wilful misconduct will be obligated to remediate it, so a contaminator cannot transfer the risk of responsibility for the contaminated land to a buyer.

However, the parties can freely stipulate a release from environmental liability in their contract.

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

The government has the authority to file an environmental action and civil suit for any damage inside the nation. According to this rule, the State has the authority to seek an indemnity for aesthetic damage to public property.

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.?

The Environmental Superintendence has the authority by law to conduct inspections, take measurements and perform analyses as part of its oversight faculties of the requirements imposed by environmental regulations and the environmental permits for projects.

The Superintendence's officers will also have the power to enter properties where overseen activities are being conducted in order to take samples or make records of the site or assets inspected, or to prepare status certificates, among other measures.

The Superintendence has the power to require statements from the representatives, directors, managers, advisors and employees of the overseen entities and to testify about any punishable deed.

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?

Environmental regulations do not stipulate an obligation to report contaminated land or off-site migration to the Environmental Superintendence or potentially affected third parties, but anyone can report contamination to the Environmental Superintendence.

Although environmental regulations do not impose the obligation to inform the authority or third parties, environmental permits do impose a duty upon the permit holders to notify the environmental authority of any unforeseen impacts, including contaminating events.

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

The law does not contain any rules requiring individuals to investigate land for contamination.

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?

The regulations do not set the contractual duties of parties to disclose environmental issues in mergers and acquisitions.

Civil law on contracts applies in this regard, where good faith prevails when a contract stipulates that a seller must disclose any environmental issues.

As a general rule, buyers will request from sellers representations and warranties on pre-existing environmental issues. If those representations and warranties on environmental matters prove to be untrue, buyers will have the right to claim the payment of indemnities.

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?

Under Chilean law, releases from liability do not limit present or future environmental liability to the State or third parties.

Under the rules of private law, parties to a contract are free to stipulate this type of clause, but they will not be released from any liability for contamination in respect of third parties.

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

No overvaluing of a company's assets or undervaluing of liabilities is permitted in mergers or acquisitions by the International Financial Reporting Standards (IFRS).

Any audit revealing that an environmental liability was left off the balance sheet will immediately trigger default clauses for failure to disclose the environmental liability and causing the buyer or absorbing company to assume a risk.

Directors of a company will be held liable if that company is dissolved to elude environmental liability.

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?

Under Chilean law, a person who owns shares in a company cannot be held liable for that company's violation of environmental law or pollution, since the company, its officers and directors are the ones that will have standing to be sued in any court action.

A parent company is not liable for damage caused by a foreign subsidiary. The actual perpetrator of the damage is held liable.

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

Regulations do not contain legal protection for whistle-blowers reporting environmental violations.

Internally, companies have set up protections for workers reporting wrongdoings, including environmental violations.

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

Environmental regulations do not envisage cases of class actions for contamination and there are no penal or exemplary damages available.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

The law offers to any person the possibility of requesting the municipality to file an action for reparation of environmental damages; in this case the costs are handled by the municipality.

9 Emissions Trading and Climate Change

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

Law 19300 authorises the use of emissions trading schemes to encourage meeting goals for emissions reduction under prevention and decontamination plans. However, the regulations on the emissions trading system have not yet been issued.

At a regulatory level, valid only in the Metropolitan Region, a particulate matter emissions offset system has been established allowing emissions trading between sources to meet the required emissions limits, under prior approval of the Health Authority.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

The Tax Reform Law 20780 added a "green tax" on particulate matter (PM), nitrogen oxide (NOx), sulfur dioxide (SO2) and

carbon dioxide (CO2) air emissions by facilities with a rated capacity greater than or equal to 50 MWt. They have the obligation to monitor emissions and report their results to the Environmental Superintendence.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

The Climate Change Division of the Ministry of the Environment proposes policies and designs plans, programmes and actions in connection with climate change.

As a result, Chile now has a 2017–2022 National Climate Change Plan, which may be viewed at: http://portal.mma.gob.cl/wp-content/uploads/2017/07/plan_nacional_climatico_2017_2.pdf (Spanish version).

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

Asbestos was prohibited by Decree 656/2000 of the Ministry of Health, which prohibits the use of asbestos in certain products and authorises its import and use under very strict conditions.

One of the most representative cases regarding the use of asbestos is the lawsuit filed by Raúl Olivares against Pizarreño for the negligent handling of asbestos particulates. No palliative measures were adopted despite knowing the mortal danger of asbestos. In 2014, the Second Labour Court of Santiago ordered the company to pay an indemnity of approximately US$82,000 to Mr. Olivares, who contracted a terminal cancer called pleural mesothelioma from inhaling asbestos while he worked for Pizarreño.

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

Chilean law prohibits the production, import, distribution and sale of asbestos and any other material or product containing it, unless it is authorised under strict conditions and supervision of the Health Authority. Its storage must be done without liberating fibres of the material into the environment over the permitted amounts. In the case that a facility has asbestos in stock for the production or manufacturing of its products, it must inform the Health Authority every semester as to its stock movements and recipients. Activities such as demolitions, dismantling or modification of buildings, equipment, installations or machinery which contain asbestos fibres will require the Health Authority's approval and an asbestos management plan.

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 your jurisdiction?

There is only one local company offering environmental insurance at this time. Civil liability insurance is available on the domestic market that covers the expenses of removal and clean-up of sudden accidental contamination, but this insurance does not cover any fines imposed upon the insured or any damages to third parties caused by the contamination.

11.2 What is the environmental insurance claims experience in your jurisdiction?

Considering the subjective civil tort system, the environmental insurance industry has not developed in Chile, except for subjective tort liability insurance, so there is no or very little experience in environmental insurance claims.

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 your jurisdiction.

Chile's incorporation to the Organisation for Economic Co-operation and Development (OECD) has been a very important boost for the environment in Chile. The above is reflected in the relevance this subject has for the current Chilean public, and also in the policies to strengthen the environmental framework designed by the past few government administrations; the explosive growth of renewable energy generation; the creation of new protected zones on land and offshore and the expansion of existing ones; the waste management policies and environmental remediation; as well as the recognition and engagement of local communities and climate change policies.

New bills of law have been approved, such as the Extended Producer Responsibility Law for waste management and the reuse and recovery of waste to avoid disposal. The Tax Reform Law introduced a green tax. Congress is currently debating adding certain types of environmental crimes to the Penal Code.

The environmental framework has been strengthened by the addition of the Environmental Courts, the Environmental Assessment Service and the Environmental Superintendence. There is a more meticulous analysis, and better control, of permits. By way of example, the highest fine in the country's history was imposed last year for environmental violations to the Pascua Lama mining project, owned by Barrick Gold. The fine amounted to US$11.5 million and the closure of the facility. Now companies doing business in the country must have a greater awareness of a subject that was not even in their risk matrices a few years ago.

The measures added by the law and the improvements in the institutional framework demonstrate that the country has progressed in environmental protection and sustainable development.

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LAVÍN Abogados & Consultores is a Santiago-based boutique firm led by its founding partner Julio Lavín, one of the most recognised environmental attorneys in Chile, and comprising a highly capable and experienced team specialised in providing legal services and technical consultancy on the environmental, renewable energy, electrical, mining, maritime concessions, natural resources, corporate, tax and accounting areas.

The firm's attorneys have extensive experience in the environmental sector, both within law firms and in multinational companies in the natural resources sector, providing legal services in the diverse areas required by the industry, and helping those companies achieve their projects' timely completion while ensuring their operational continuity.

Chapter 10

Colombia

Macías Gómez & Asociados Abogados S.A.S.

Luis Fernando Macías Gómez

1 Environmental Policy and its Enforcement

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

Through Law 23 of 1973, the Colombian Government issued Law-Decree 2811 of 1974 (the "Decree"), known as the Natural Renewable Resources and Protection of the Environment Code. This Decree sets forth the legal framework in Colombia for the protection of the environment and its natural resources, imposing a series of obligations on both the State and the Colombian population. Later, the issuance of Law 9 of 1979 provided a series of rules aimed at the protection of the environment in order to improve sanitary conditions and human wellbeing.

In 1991, the Colombian National Constitution adopted a variety of principles that were to be further regulated. This Political Charter has been catalogued as the "Ecological Constitution", given that it contains 34 articles from different perspectives related to the protection of the environment. The Constitution establishes (article 79) the right for its citizens as a whole to enjoy a healthy and safe environment. The environment is also determined as a main factor for development, which is limited to economic rights. Additionally, the Constitution sets forth the obligation of the National Congress to create and regulate what in Colombia is known as Autonomous Regional Authorities.

Inspired by the international principles and directives included in the Rio Declaration of 1992, the Colombian National Congress issued Law 99 of 1993, which created the institutional framework for the protection of the environment and the management of natural resources. The National Environmental System, created therein, is a hierarchical structure of the agencies in charge of the enforcement of environmental legal dispositions and the management of natural resources within the Colombian territory. The Ministry of Environment and Sustainable Development is the agency at the apex of the hierarchy, and it is in charge of creating environmental policies at a national level. There are other environmental authorities, such as the Regional Authorities, the Sustainable Development Authorities, the Large Urban Districts and the Special Caribbean Districts, formally created by this law to manage the protection of the environment and enforce environmental law within the regions of their competent jurisdictions. These Regional Authorities also evaluate, approve, control and issue environmental licences, permits and other environmental management and control instruments within their jurisdictions. Among their functions, the Regional Authorities may also establish environmental policies at the regional level. Likewise, Law 99 of 1993 also attributes judicial functions to departmental, district and municipal authorities.

The set of rules from Law 99 of 1993 regarding the imposition of sanctions and penalties for violation of environmental laws was later amended by means of Law 1333 of 2009, which established the environmental sanctions regime. Through this regime, environmental sanctions or preventive measures might be imposed by the competent environmental authorities for activities alleged to be in violation of environmental legal dispositions. These attributions are also granted to the National Army, and the departmental, district and municipal authorities.

In September 2011, Congress issued Law 3573 of 2011, the National Authority for Environmental Licences ("ANLA" by its acronym in Spanish) which was created as an administrative and financially autonomous entity in charge of evaluating, approving and issuing environmental licences, permits and other environmental procedures, as well as enforcing environmental law within such procedures.

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

The enforcement of Colombian environmental law follows the rules of administrative procedural law. The agencies in charge of enforcing these dispositions are the ANLA, the Autonomous Regional Authorities, the Sustainable Development Authorities and the Large Urban Districts.

Additionally, Law 1333 of 2009 establishes the environmental sanctions regime by which the environmental authorities may impose preventive measures and/or sanctions on activities alleged to be in violation of the Colombian environmental regime. The investigations to impose sanctions may be initiated as a result of the management and control functions of environmental authorities or due to complaints from the community.

The legal system also provides judicial mechanisms, such as enforcement actions, class actions, actions for the protection of fundamental rights, criminal actions and civil actions.

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

The National Constitution not only grants the right to a healthy environment, but it establishes mechanisms to guarantee that its citizens are able to realise this right. Bearing this in mind, there is a

duty on the legislator to guarantee that citizens have participation mechanisms that enable them to participate in any decision-making process that may affect their right to enjoy a healthy environment. The following are some of the environmental participation mechanisms: public hearings; intervening third parties; and prior consultation of ethnic communities.

Colombian citizens hold the right to access environmental information. Furthermore, Law 99 of 1993 establishes that any person, without the need to manifest any interest whatsoever, can intervene in the administrative actions initiated to issue, modify or cancel environmental permits or licences for activities that may affect the environment, as well as in the procedures around imposing sanctions for the violation of environmental law.

2 Environmental Permits

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

The need to obtain an environmental permit is determined by the activities due to be carried out, and by the possible impact on a specific renewable resource. The National Code of Natural Renewable Resources, or Law-Decree 2811 of 1974, provides that anyone willing to use natural resources must obtain an environmental permit, according to the resource to be used. As a general rule, the assignment of environmental permits requires prior authorisation from the competent authority. The various environmental permits are set out as follows:

Environmental Permit	Resource
Water Concession Permit	Water
Flow Occupation Permit	Water
Water Discharge Permit	Water
Emissions Permit	Air
Forestry Permit	Forest
Lifting of Ban over Protected Species	Biodiversity
Research Permit	Biodiversity

On the other hand, **environmental licences** are regulated in article 2.2.2.3.1.1 and subsequent of Decree 1076 of 2015, which is defined as the authorisation granted by the State to develop an activity that, according to the regulation, might cause the deterioration of renewable natural resources and the environment. Although it is called an environmental licence, it must cover social and economic aspects as well.

An environmental licence comprises the terms and conditions to be met in relation to the management and use of natural resources through the development of the activity. It also includes the obligations with regards to the prevention, mitigation and compensation of the effects that the activity may involve. According to the current regulation, an environmental licence is only required to develop the activities listed in articles 2.2.2.3.2.2 and 2.2.2.3.2.3 of Decree 1076 of 2015.

The total or partial transference of an environmental licence is possible under Decree 1076 of 2015, but only when prior authorisation has been granted by the environmental authority. In this event, the licensee must request the transference in writing, and the environmental authority should make a statement within the subsequent 30 days.

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?

Taking into account that environmental law follows the rules of administrative procedures, environmental permits and licences are granted by the environmental authorities through decisions that are called administrative acts or "resolutions". Therefore, the rights to appeal, or to use any of the other legally established resources, are the same as those applying to the administrative procedure. Hence, any person has the right to appeal before the same authority that issued the resolution, i.e. the Autonomous Environmental Authorities, or before a superior agency when applicable. An appeal can be initiated when the conditions of the licence or permit are different from what the petitioner asks for or appear to be restrictive to environmental rights. Therefore, the appeal can be proposed by the petitioner of the licence or permit, or by anyone involved in the project, which could be any person who would like to participate in the licence or permit process.

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

In Colombia, environmental audits are not mandatory but many companies do these voluntarily.

On the other hand, the environmental regulations require analysis and characterisation of certain polluting activities, such as stationary and mobile sources of air pollutants, whether they require a permit or not, in order to establish if they are accomplishing the air quality standards. For water-related activities, characterisations are also required in order to determine if there is an environmental infringement.

Furthermore, there are specific activities, projects and installations set out in Law 99 of 1993, and regulated by Chapter 3 of Decree 1076 of 2015, which require an Environmental Impact Study (EIA by its acronym in Spanish). This study is defined as a technical document containing information on the project's location, the biotic and abiotic elements, and the impact assessment. The Environmental Impact Study is the basis for the Environmental Licence, which turns out to be a mandatory requirement in order to put into operation the activities listed in articles 2.2.2.3.2.2 and 2.2.2.3.2.3 of Decree 1076 of 2015.

On the other hand, as mentioned above, environmental audits are not mandatory, but a company that seeks the issue of an environmental licence must support their filing alongside an environmental impact assessment.

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

The enforcement of the conditions of environmental permits and licences is held under Law 1333 of 2009, which establishes the

environmental sanction regime through which the environmental authorities may impose injunctions (called "preventive measures") and/or sanctions on the companies that violate environmental law. The sanctions may be imposed according to the seriousness of the infraction, and may contemplate the possibility of temporary or definite suspension of the activities.

3 Waste

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

Title 2 of Decree 1077 of 2015 sets forth the general regime for the complete management of solid waste. This regulation equates waste and residue, and defines it as any object, material, substance or solid element resulting from domestic, industrial, commercial or service activities, rejected, abandoned or delivered by the generator, which is subject to being seized or transformed into a new asset, or to being finally disposed of.

In the same sense, this regulation establishes that the duties and control of ordinary waste are to be attributed in an individual manner to whoever is undertaking any of the activities related to waste management.

On the other hand, article 2.2.6.1.1.3 of Decree 1076 of 2015 defines hazardous waste as that with corrosive, reactive, explosive, flammable, infectious and radioactive characteristics, which may involve risk or damage to human health and the environment. Furthermore, this regulation establishes that any conventional waste in contact with hazardous waste must be treated as hazardous.

Hazardous waste handling involves additional duties or controls. These obligations are set forth in Decree 1076 of 2015 and are to be attributed jointly and severally to generators, producers and importers, who must assure the adequate disposal or treatment of the waste. The Decree also sets forth the rules for the handling, labelling and packaging of hazardous substances.

Generators of hazardous waste must maintain updates on the characterisation of hazardous waste and prepare a Complete Hazardous Waste Management Plan, as well as register with the environmental authorities as a generator of this type of waste.

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?

The storage and disposal rules regarding conventional waste are given by Decree Title 2 of Decree 1077 of 2015. The main duty relies on public utility companies in charge of collecting waste and transferring it to waste disposal venues.

In terms of hazardous waste disposal and storage, Title 6 Section 3 of Decree 1076 of 2015 establishes the obligation for the generator to store the waste for a maximum of 12 months. Nonetheless, the generator may request that the environmental authorities extend this term.

Please note that, depending on the type of hazardous waste, the timeframe for the storage of the waste may vary. For example, used oils may only be stored for up to three months.

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)?

Although non-hazardous waste retains no residual liability for its producers, hazardous waste rules impose joint and several liabilities on those involved in the management chain of this type of waste, even if it involves outsourcing for its transportation and disposal.

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

Post-consumption and return plans are mandatory for the producer and distributor of specific types of hazardous wastes. The Ministry of Environment has, in the last few years, issued regulations to adequately collect and manage several types of waste, such as: pesticides; batteries, including lead-acid batteries; medicines; tyres and pneumatics; light bulbs; and electrical and electronic waste.

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?

Several types of liabilities may arise from a breach of environmental laws or permits.

Administrative liability may arise as a result of the failure to comply with environmental regulation, as provided in Law 1333 of 2009. This regulation states that any violation of a law regarding the protection of the environment empowers the environmental authorities to impose sanctions. These sanctions may vary from economic penalties to the suspension of the licence or definite suspension of activities. It also enables the environmental authorities to impose preventive measures in order to avoid probable environmental damage occurring.

Please note that the defence mechanisms correspond to the reconsideration petitions set forth by Colombian administrative law.

On the other hand, civil liability may arise as the result of proving the occurrence of damage to the environment, in which case the person held liable could argue for negligence, *force majeure* or acts of third parties.

A set of punishable conducts regarding the environment is provided in the Criminal Code; hence criminal liability may take place in the event the criminal conduct is proven.

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

Civil liability can arise in the event of environmental damage, despite operating within permit or licence limits. An operator can also be found criminally liable if the actions that led to the damage are included in the Criminal Code. A common way to hold an operator liable for environmental damage is through the filing of class actions or actions for the protection of collective rights.

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?

When directors and officers undertake activities that lead to environmental damage, they may be subject to personal liability if negligence or wilful misconduct is proven. The personal liabilities in this case can only be imposed regarding criminal law, not in civil or administrative law, where the corporation is the one that will be held liable for the environmental wrong with its capital. In any case, if the environmental wrong was caused directly by the directors' and officers' wrongdoing, the company could sue them to recover the damages.

On the other hand, the Colombian Commerce Code establishes that the directors or officers of corporations must be held responsible when they carry out activities that were not authorised by the statutes. They will also compensate the company for the damages caused.

Please be aware that although Colombian law contemplates the possibility of directors and officers obtaining policies to insure against personal liability from environmental wrongdoings, this possibility has not been fully developed in the country.

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?

An environmental liability is transferred to the shareholder or partner in the event of acquiring shares from a company that does not have limited liability.

Therefore, when purchasing assets, since the liability is limited to the asset itself, the purchaser may claim for non-disclosed liabilities.

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

The lender, when becoming the owner, inherits environmental liabilities. Nonetheless, if the lender is held liable and forced to assume remediation costs, an action to seek contribution may be invoked under civil law.

From an administrative perspective, and regarding environmental wrongdoing, the current operator of the activity, regardless of ownership, holds the liability.

5 Contaminated Land

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

The approach to liability for contamination of soil and groundwater is conducted from the perspective of administrative, civil and criminal liabilities.

We have to take into account that in 2014, the Ministry of Environment and Sustainable Development issued the *Technical Guide for Soil Sampling*, in which it established the minimum standards that companies must follow with regard to discharges of fossil fuel into the soil.

In particular, the country has not yet developed regulations for historic contamination liabilities; therefore, these are treated under the liability regime that is applicable.

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

In this case, joint and several liabilities may be allocated under civil law. Thus, the involved parties may pursue an action to seek contribution to distribute the costs that must be paid.

Under criminal law, if more than one person commits a crime, then both individuals are held liable.

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?

A programme of environmental remediation has to be proposed by the company and approved by the environmental authority, in order to start the remediation activities.

The environmental authority may require additional works under the programme, or under the obligation of the authority to perform follow-up and control visits, if it is considered necessary.

If a third party considers that the programme is not complete or sufficient to remedy the damage, this person may ask the environmental authority to require the company to adjust the programme.

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?

The purchaser can pursue civil actions to seek contribution from the previous owner of contaminated land when it is proven that the seller knew, or should have known, about the condition of the land.

When the contamination is disclosed, the owner and the purchaser may agree upon this fact, saving the seller from liability with the purchaser, but not towards 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?

The Government is not only entitled to obtain monetary damages from whoever is proven to have caused pollution, but also to protect the environment.

The authorities can also impose sanctions and fines within the sanctionatory regime of Law 1333 of 2009, which can be applicable to damages for aesthetic harms. Other mechanisms to obtain monetary damages from the polluter are class actions or any other judicial actions that seek the repair of the damage or the fulfilment of a specific environmental rule.

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.?

Environmental authorities are empowered to conduct site inspections when evaluating whether a licence or permit is granted.

Technical experts from the authorities, who may take samples, interview employees and collect the necessary information in order to study the feasibility of the project, must conduct these inspections.

After a visit, the experts must present a technical concept, which may be further adopted in the administrative act approving or denying the permit or licence.

Environmental regulators are also able to require any documents, or the duty to obtain samples or conduct site inspections, at any time, especially when the authority deems it necessary to fulfil an investigation or to rule out a violation of environmental law. In administrative acts, authorities can require any person to file documents, or to take the samples needed.

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?

Colombian legislation establishes the obligation to report pollution found on a site, or migrating off-site, to the competent authorities. In such case, the competent authorities are the environmental authorities. This information is regularly received from community complaints.

Every citizen has the obligation to disclose this type of information. The omission to do so may result in liability for failure to report such a situation.

In the case of environmental licences and permits, the procedures include a clause that contains this specific obligation.

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

When there is circumstantial evidence of contamination, any person, owner or occupier of land has the obligation to act diligently and to investigate the land to determine if it is contaminated and, if so, the magnitude of the contamination.

In this sense, the general obligation consists of informing the authorities about the contamination and reporting the damage. This information must be taken into account by the authorities to initiate the corresponding investigation in order to impose sanctions.

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?

At any time prior to the execution of a sale and purchase agreement, it is necessary to disclose environmental situations to avoid imperfections in the purchaser's consent that could turn the contract null, and result in the reversion of the liability back to the seller.

If the environmental situation is not disclosed, the purchaser has the right to seek contribution from the seller through a redhibition, according to civil law procedures.

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?

From a civil law point of view, the parties may agree upon indemnity; however, this is limited to the parties, and administrative and criminal authorities will only bear in mind the liabilities related to the environment.

In this sense, conducting a payment under a private agreement will not discharge the parties from environment-related liabilities, since this will only be enforceable within the agreement.

Under Colombian regulations, there is a legal duty for the seller to disclose to the purchaser or buyer the possibility of contamination before a purchase agreement is made.

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

If a certain company has an obvious environmental liability, under accounting rules, its balance sheet has to reflect this special matter.

On the other hand, if a company is dissolved in order to avoid, or with the idea of avoiding, any kind of environmental liability or other obligations regarding this matter, it is usual for its shareholders and administrative staff to still be found liable for any environmental obligations that the company or enterprise may have.

There are some cases in which the company disappears and its shareholders and administrative staff cannot be found to be brought to justice. In this case, the Colombian State should remediate the environmental damages, and this is known as "orphan liabilities".

In other cases, when this happens and there is someone who bought the land where the pollution or damage was found, the environmental authorities can force the new owner (company or person) to pay for the environmental liabilities.

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?

It is possible that diligence and knowledge of a specific environmentally adverse effect is likely to cause the rupture of the corporate veil in some cases; as a specific example, shareholders who knowingly refrained from taking clear environmental actions or did not show interest in taking effective actions to seek and reach environmental remediation.

With regard to parent companies, these may also be held liable for environmental wrongdoings.

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

In administrative and civil law, there is no specific regulation intended to protect whistle-blowers, or people who inform the

authorities of environmental violations. However, in criminal law, there are provisions that prescribe that the witnesses should be protected, so it is only logical that whistle-blowers, being a sort of witness, should be protected too. Nonetheless, it should be noted that in Colombia, reports or complaints cannot be made anonymously.

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

Law 472 of 1998, which regulates actions for the protection of collective rights, establishes that this type of legal action can be filed to pursue environmental claims.

In the same way, Law 472 of 1998 regulates group or "class" actions that pursue economic restitution as well as the protection of environmental claims.

Regarding penal or exemplary damages, it is important to take into account that Colombian legislation does not allow these kinds of damages.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

Law 472 of 1998 regulates class actions and the protection of collective rights by which any individual may file a claim to avoid contingent damages from collective rights, or a group may seek the recognition of damages from any adverse effect on the environment which can be individualised.

Regarding criminal or exemplary damages, please be aware that there is no such provision under Colombian regulation.

9 Emissions Trading and Climate Change

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

Through Law 1931 of 2018, the Colombian Congress created an Emission Trading Scheme (ETS) for the country. The law does not set a specific cap, but establishes that the Ministry of Environment and Sustainable Development will regulate the number of allowances that the regulated sector must get annually to support their Greenhouse Gas (GHG) emissions. Banking is allowed but borrowing and linking are not expressly included. The scope, sectors, point of regulation and entities covered by the ETS will also be regulated by the Ministry of Environment and Sustainable Development.

Regarding the distribution of allowances, this will be done through auctions, directly, and through offsets for voluntary mitigation activities. The ETS will interact with other economic instruments and it will take into account what is paid as carbon tax.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

By means of Resolution 1447 of 2018, the Ministry of Environment and Sustainable Development regulated the Monitoring, Reporting and Verification (MRV) System of mitigation actions at the national level. Through this Resolution, all the mitigation initiative title holders who intend to opt for payments for results or similar compensations, or demonstrate compliance with national goals on climate change under the United Nations Framework Convention on Climate Change, must carry out the monitoring, reporting and verification of their GHG mitigation actions; this in accordance with the principles of the MRV System of mitigation actions at the national level and the accounting rules established in such regulation.

Additionally, under Resolution 1962 of 2017, the Ministry of Environment and Sustainable Development set a maximum standard of the coefficient indicator on greenhouse gas emissions for Denatured Fuel Anhydrous Ethanol. In order to fulfil this requirement, plants that produce Anhydrous Ethanol Fuel to mix with gasoline must calculate and report their Inventory of Greenhouse Gases, based on the methodology defined in ISO 14064-1: 2006.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

Law 1931 of 2018 sets forth the guidelines for the management of climate change in Colombia, applies both for public and private entities, and regulates the confluence of different public actors to deal with the adaptation to climate change and the mitigation of greenhouse gases. Likewise, this Law seeks to reduce vulnerability to the effects of climate change and promote the transition towards a competitive, sustainable low-carbon economy. Additionally, it raises to a legal level the National System of Climate Change, establishes instruments to manage climate change, creates the Information Systems on Climate Change and regulates economic and financial instruments.

In addition to the ratification of the Paris Agreement, Colombia has a National Policy on Climate Change and a public policy on Green Growth.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

In February 2015, a group of citizens filed a Constitutional Class Action against the Congress of the Republic and other private institutions that work with asbestos. Given that this is the first known case in our country of asbestos litigation, we are waiting to know what the court's decision will be in this case, in order to have the first precedent on this matter.

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

In Colombia, under Law 436 of 1998, different aspects were defined regarding asbestos use. Article 17 establishes that qualified personnel enforcing qualified standards or practices should only perform the demolition of structures and edification sites containing asbestos materials, and any elimination of asbestos from buildings or constructions.

On the other hand, until Law-Decree 2041 of 2014, the companies that wanted to use asbestos in their projects had to request an environmental licence from the competent authority. However, with this Decree, an environmental licence is only needed for the production of substances, materials or products subject to control by an international treaty of an environmental nature. This means there is no specific regulation of the need to have an environmental licence for the production or manipulation of asbestos.

Regulations for transporting and manipulating hazardous substances are also applicable to asbestos handling.

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 your jurisdiction?

The term "ecological insurance" was created by means of Law 491 of 1999; however, the competent authorities have not yet developed its implementation. Nonetheless, civil liability may be covered by insurance policies.

The cases in which ecological insurance may be taken are also established in this regulation, which is mainly directed towards guaranteeing the compliance of environmental regulations.

11.2 What is the environmental insurance claims experience in your jurisdiction?

There has been very little experience regarding insurance claims related to environmental risks in the country, since ecological insurance has not yet been implemented.

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 your jurisdiction.

Throughout 2018, the Colombian Government issued regulations in order to further develop the management of natural resources in Colombia. Some of the regulatory changes to highlight are as follows:

First of all, we must highlight Resolution 2254 of November 1, 2017. Although this rule was issued at the end of last year, it entered into force on January 1, 2018. The importance of this regulation, in addition to the fact that it modifies the maximum permissible levels of contaminants, is that it granted the possibility for Environmental Authorities to impose obligations on companies within their jurisdiction to perform air quality measurements.

Further, in 2018, the Ministry of Environment and Sustainable Development issued Decree 050 of 2018, which amended Decree 1076 of 2015. This Decree regulates, among other things, everything related to a permit for direct discharge to the ground; that is the requirements, procedure and finally the conditions for the granting of said permit.

Finally, and of great importance, is the issuance of Resolution 0256 of February 22, 2018 by which the Manual of Environmental Compensation of the Biotic Component was issued. In said administrative act, the requirements are established for its application, and for the approval and execution of the compensation plans that companies have under the aforementioned regulation.

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MACÍAS GÓMEZ
ABOGADOS

For over 20 years, *Macías Gómez & Asociados Abogados S.A.S.* has earned and maintained an exceptional reputation for providing practical and workable legal solutions for Colombia's most complex environmental challenges, becoming one of the country's leading environmental law firms.

The Firm's main objective is to provide the necessary legal support and strategies to allow the strengthening of corporations' environmental management and to reduce the legal risks that may exist as a result of their activities. Recently, *Macías Gómez & Asociados Abogados S.A.S.* included Climate Change Law into its Sustainability area of practice, in order to address this global issue in a specialised manner and ensure its proper management in terms of mitigation, adaptation and resilience, as well as the development of non-conventional renewable energy projects. Likewise, the firm provides legal support to those applying for environmental tax incentives.

Macías Gómez & Asociados Abogados S.A.S. has extensive experience of providing environmental legal counsel to national and foreign companies in different economic sectors. In particular, the Firm has taken the lead in providing legal advice on social issues and in scenarios for public participation as a result of a corporate environmental law approach. In addition, *Macías Gómez & Asociados Abogados S.A.S.* has been at the forefront of the interaction of environmental law with other areas of legal practice, such as private law, infrastructure, tax law, public procurement, antitrust law, among others. Furthermore, the Firm has participated in national and international arbitration tribunals, issuing expert opinions on controversies surrounding a variety of environmental issues.

Macías Gómez & Asociados Abogados S.A.S. is the exclusive representative for Colombia in the Inter-American Network of Environmental Law Specialists (RIELA), a network of independent law firms providing for the exchange of professional information about local and regional practice and the development of environmental law in the Americas.

Chapter 11

Denmark

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1 Environmental Policy and its Enforcement

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

Danish environmental legislation consists of a wide range of acts which, to a large extent, are influenced by EU legislation. The most important acts are the Environmental Protection Act, the Nature Protection Act and the Contaminated Soil Act.

The aim of the Environmental Protection Act is to contribute to safeguarding nature and the environment, thus enabling a sustainable social development in respect for human conditions of life and for the conservation of flora and fauna.

The aim of the Nature Protection Act is to protect Denmark's nature and environment so that social development can take place on a sustainable basis in respect of human living conditions and the conservation of animals and flora.

The aim of the Contaminated Soil Act is to assist in the prevention, elimination, or reduction of soil contamination and the hindrance or prevention of the detrimental impact of soil contamination of groundwater, human health and the environment.

The administration of the environmental legislation is divided between local municipalities and government agencies. The municipalities are responsible for granting permits and inspection of other enterprises and also to carry out the majority of specific public-sector duties. The municipalities are typically the point of contact for the general public and for companies wishing to access information on the environment.

The Environmental Protection Agency (EPA) prepares legislation and guidelines and grants authorisations in several areas. Further duties include the monitoring of chemicals and offshore platforms. The EPA authorises and monitors approximately 400 enterprises and local waste handling facilities.

The Nature Agency has competence in matters of nature protection.

Finally, the regions have certain competences in relation to contaminated soil.

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

The local municipalities' approach to the enforcement is primarily a traditional approach of granting environmental permits, surveillance, and monitoring and handling violations.

The EPA issues general guidelines and publishes the results from environment-related research conducted by the EPA itself or its partners.

Generally speaking, the environmental authorities' approach to enterprises and private citizens is based on an attitude of cooperation rather than on the exercise of public authority. However, if necessary, the authorities will exercise their powers.

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

The Danish Freedom of Information Act is supplemented by the Environmental Information Act. The Environmental Information Act implements EU Directive 2003/4 on Public Access to Environmental Information and the Aarhus Convention on access to information, public participation in decision-making and access to justice in environmental matters.

According to the aforementioned legislation, public authorities, including some private enterprises acting on behalf of public authorities, must provide access to environmental information, with only very few limitations.

2 Environmental Permits

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

Environmental permits are only required when an enterprise conducts activity mentioned in lists issued by the Ministry of Environment and Food pursuant to charter V of the Environmental Protection Act.

Environmental permits are not personal but granted to a certain activity regardless of ownership of the enterprise. Therefore, the permit may be transferred to a new owner, but the relevant authorities must be notified of the new ownership.

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?

In general, all decisions can be appealed to the Environmental Board of Appeal, which is the central administrative board of appeal

for all matters relating to nature and the environment. Exempted from this right of appeal are so-called "ascertaining orders", i.e. orders which only order the addressee to observe the applicable law.

It should be noted that even decisions to grant an environmental permit can be appealed by those who may be affected by the activities permitted and certain NGOs, e.g. the Danish Society for Nature Conservation.

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

As a member of the EU, Denmark has implemented EU Directive 2011/92 on the Assessment of the Effects of certain Public and Private Projects on the Environment (the EEA Directive) and EU Directive 92/43 on the conservation of natural habitats and of wild fauna and flora (the Habitat Directive). According to the Directives and the Danish Environmental Assessment Act, an impact assessment must be conducted for particularly polluting plans and projects before a permit is granted.

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

If a violation has been observed, the environmental authorities are entitled and obliged to ensure that the illegal activities cease. In order to achieve this, the authorities may issue orders and prohibitions to stop the violations. If these remedies are deemed insufficient, an environmental permit may be withdrawn. In other circumstances, the authorities may see to that the order or prohibition is carried out at the expense of the addressee.

In addition, the environmental authorities may also report the instance to the police with a request to commence criminal investigations leading to prosecution, and the imposition of fines and confiscation of profits are available.

3 Waste

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

"Waste" is defined in accordance with EU Directive 2008/98 as "any substance or object which the holder discards or intends or is required to discard".

Waste is divided into categories such as hazardous waste, household waste and commercial/industrial waste. In general, hazardous waste is subject to stricter rules regarding handling and disposal.

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?

Environmental permits can include terms regarding handling and storing of waste including the amount of waste which may be stored on-site.

Furthermore, all enterprises producing waste must ensure that their waste is sorted and prepared for reuse or recycling if the waste is useful for these purposes. Waste suited for reuse or recycling can be stored for no more than one year. The enterprise is entitled to prepare the waste for reuse or recycling or to transfer the waste to installations where such a preparation can be done.

In general, on-site waste disposal is not permitted.

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)?

If the waste is transferred to an off-site transferee/disposer holding the necessary permits for handling and disposing of the waste in question, the producer does not retain any liability. In Denmark, almost all waste disposal facilities are directly or indirectly owned by the local municipalities.

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

Producer obligations regarding take-back and recovery are limited to certain products, i.e. cars, batteries and electronic devices. The obligations may be met by financial participation in common take-back arrangements.

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?

In most instances, the environmental authorities may issue an order or a prohibition in order to remedy a breach of environmental laws or permits. The addressees of such an order or prohibition are obliged to fulfil such orders and prohibitions.

In addition to the obligation to fulfil orders and prohibitions, a violator of environmental laws and permits may also be subject to a civil liability. Such civil liability is generally based on negligence, meaning that the person or enterprise which intentionally or negligently causes injury or damage is liable to compensate the loss provided that an economic loss can be proved.

Strict liability has been introduced with regard to activities that are considered to be especially dangerous as to pollution or other environmental damages. This follows from the Environmental Liability Act. As an appendix to the Act, a list of activities where strict liability applies is provided. The list is, to a large extent, similar to the list of companies which need an environmental permit to operate.

Criminal liability is basically limited to fines and confiscation of profits. The fines for first-time offenders are usually within the range of DKK 10,000–50,000. Within specific areas, larger fines have occurred.

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

The fact that an enterprise has been operated within permit limits does not exclude liability for damages or criminal liability. However, it may of course be difficult to provide evidence of intent or negligence in such cases.

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?

Managers and board members may be liable within the scope of criminal law. However, the primary subject of criminal liability is the owner of the enterprise.

As for civil liability, the primary subject is the enterprise, regardless of whether the owner is a person or a company or other legal entity. Board members and managers are only personally liable for acts of negligence on their own.

Major insurance companies offer special environmental impairment insurance that covers board members and directors as well as the policyholder. The scope of cover is usually civil liability and liability pertaining to public law. Criminal liability is rarely covered.

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?

If the enterprise is organised as a limited company, then the company is liable, and the sale or purchase of shares issued by the company is irrelevant with regard to the matter of liability.

If, on the other hand, the assets (including the enterprise as a whole) are purchased, the liability is not automatically transferred to the new owner of the asset. Thus, the liability remains with the previous owner. The new owner may be liable for acts of negligence of its own. Furthermore, orders and prohibitions may be issued to the new owner even if the order concerns acts or omissions made by the previous owner.

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

Under Danish law moneylenders are, in general, not considered liable with regard to the wrongdoings of their debtors. This also applies to cases where the lender has violated environmental laws and permits.

5 Contaminated Land

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

According to the Contaminated Soil Act, an administrative order concerning the cleaning up of soil pollution may be issued irrespective of how the contamination happened, provided, however, that the addressee is an enterprise or contaminator and that the contamination has taken place after 1 January 2001. If a third party owns the real estate which is contaminated, the owner may be ordered to give access and tolerate the clean-up at the cost of the polluter.

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

If more than one polluter is involved, a compliance order can be given to all of them. The individual orders must relate to the contamination which the addressee has caused. If it is not possible to determine who caused specific parts of the contamination, the obligation to clean up is divided equally between the contaminators.

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?

If the environmental authority and the polluter have agreed upon the remedy, it is still necessary to issue an order, which can be challenged by third parties who are affected by the order. If the agreed remedies turn out to be insufficient, the authority may issue an additional order – provided that the conditions are met.

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?

A previous owner who has caused contamination may be liable to pay damages to a person or enterprise which has purchased the property and is ordered to clean up.

However, the addressee of the order to clean up is almost always the contaminator. A new owner of the property can only be ordered to clean up if the contaminator had been ordered to clean up before the sale, if the purchaser knew or should have known that an order had been given, and if the property was acquired from a person who had or could be ordered to clean up the property.

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

No such authority exists in Danish law. However, monetary damages may be claimed in order to "restore the environment".

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.?

The environmental legislation has a wide range of provisions which empower the environmental authorities to demand all relevant information from enterprises which cause pollution. However, access to conduct interviews with employees is extremely limited and generally viewed as a matter for the police.

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?

Polluting enterprises or private citizens are obliged to inform the relevant authorities if a major pollution or the risk thereof is observed. There is not a similar obligation with regard to informing affected third parties.

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

As referred to in section 6 above, the environmental authorities may demand that polluters take samples of soil and perform other investigations in order to evaluate the effects of pollution. A general obligation to investigate does not exist in addition to this, but authorities may ask for information regarding soil contamination when necessary, e.g. when handling an application for a building permit and the question of soil contamination is of relevance.

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?

As a civil law rule, a seller must provide the buyer with all relevant information of which the seller is aware. This includes information regarding environmental problems. Danish environmental legislation does not contain special rules on the matter; the seller's obligation to disclose information in good faith about the pollution is provided for in the general law of contracts.

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?

Such agreements are only binding between the parties and do not limit the exposure to claims of damages from third parties, including government or local authorities.

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

General accounting principles apply and require that all known liabilities are mentioned.

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?

No specific rules on the topic have been adopted in Danish environmental legislation. The general rule in Danish company law is that the owner of a limited liability company is protected from being held liable, except in the most extreme cases where the corporate veil is lifted.

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

No such laws exist, but public authorities must act on anonymous as well as non-anonymous tips.

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

The Danish rules on group actions do not exclude environmental claims. Penal or exemplary damages are not available in Danish law as only actual losses or injuries are covered.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

The general rules on costs apply. This means that the party who loses a court case usually has to pay the costs of the other party as decided by the court. Legal aid is available but no specific rules regarding environmental litigation have been adopted.

9 Emissions Trading and Climate Change

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

Pursuant to the Kyoto Protocol, the Danish Business Authority has established the Danish Emission Trading Registry. The registry manages all Danish accounts in the EU Emissions Trading System (ETS) Registry as well.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

Operators and others who are subject to the EU Directive 2003/87 must, upon request, supply the relevant authorities with such information as they may find necessary in order to perform their duties according to the Danish Emissions Allowances Act.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

The Danish government's climate policy is subject to EU targets for the reduction of greenhouse gas emissions for 2020 and 2030. The long-term objective of the government is for Denmark to be a low-emission society in 2050, independent of fossil fuels.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

Most case law on asbestos concerns employees' long-term exposure to asbestos used in production. In one case from 1989, the Danish Supreme Court introduced strict liability for the employer.

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

The use of asbestos was prohibited in Denmark approx. 30 years ago. There are no obligations to remove asbestos from existing structures, but extra precautions must be taken when working with asbestos.

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 your jurisdiction?

It is possible to buy environmental insurance that covers enterprises' liability under the Environmental Liability Act. Moreover, certain parts of the environmental liability, such as pollution, are covered by the normal professional liability insurance and may also be covered by property damage insurance if they are deemed to be sudden and unforeseen.

11.2 What is the environmental insurance claims experience in your jurisdiction?

In Denmark, only three published cases have been decided in which the Environmental Liability Act has been applied, and none of those involved insurance. Hence, experience with environmental insurance claims is very limited. In the experience of the author, there have been environmental claims under professional liability insurance, where the requirement that a leak should have been sudden and unforeseen has to a large extent been maintained.

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 your jurisdiction.

2018 proved that the Danish authorities still have problems in observing the rules of the Environmental Impact Assessment (EIA) and Habitats Directives. In a number of cases, decisions from the Environmental and Food Board of Appeal have been declared invalid due to lack of observation of these Directives.

Of interest are also some pending cases concerning the local municipalities' powers to prohibit or limit farmers' use of their land for agricultural purposes, in order to protect the groundwater. In Denmark, all drinking water is untreated groundwater, and there is a high degree of attention to protect the groundwater, which often conflicts with farmers' interest in using pesticides in their production processes.

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SIRIUS advokater

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SIRIUS advokater has grown considerably over the last years and has now more than 30 lawyers.

SIRIUS advokater is a specialised law firm which has exceptional qualifications to carry through our clients' legal challenges within the fields of specialisation of the firm. Our partners are very experienced within the fields in which they work; yet they are curious and committed to learn more about new fields of law which the firm's clients may need legal advice to fully understand and be able to operate within.

Chapter 12

England & Wales

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1 Environmental Policy and its Enforcement

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

In England, the Department for the Environment, Food and Rural Affairs (Defra) is the principal Government department responsible for developing environmental policy. The Department for Business, Energy and Industrial Strategy (BEIS) deals with climate change policy. The Department for Transport is responsible for vehicle emissions. (See further section 9.)

The Environment Agency (EA) is mainly responsible for the enforcement and administration of environmental law. For example, it is the designated regulator for: Part A (1) installations under the Environmental Permitting (EP) regime (see question 2.1); waste management (including producer responsibility initiatives) (see question 3.1); special sites designated under the contaminated land regime in Part 2A of the Environmental Protection Act 1990 (EPA) (see question 5.1); flood defence; and emissions trading (see question 9.1). Local authorities are responsible for the regulation of Part A (2) and Part B activities; the administration and enforcement of the contaminated land regime; the statutory nuisance provisions contained in Part III of the EPA; and the hazardous substances regime contained in the Planning (Hazardous Substances) Act 1990 and subsidiary regulations.

The civil and criminal courts and tribunals of England are also involved in the making and enforcement of environmental law (see question 4.1). There is also a tribunal procedure under which certain rights of appeal, usually against decisions of regulators, are heard.

Other agencies, such as Natural England, the Health and Safety Executive (HSE), the Office for Nuclear Regulation (ONR), the Marine Management Organisation and the Food Standards Agency have an important role to play in ensuring the protection of the environment.

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

The EA's Enforcement and Sanctions Policy sets out five key principles of enforcement: proportionality; consistency; transparency; accountability; and a risk-based approach, with higher-risk sites and activities being prioritised. The policy, updated on 8 May 2018, now highlights the outcome-focused approach adopted by the EA. It also emphasises the EA's regard for the "growth duty", under which enforcement action or sanctions should only be imposed when necessary, and in a proportionate way. Criminal prosecutions and civil sanctions are an important part of the EA's enforcement policy, aiming to change the behaviour of offenders, eliminate any financial gain or benefit from non-compliance, and deter future non-compliance, amongst other things.

In June 2018, the EA published an updated list of civil sanctions (including enforcement undertakings) that it has imposed as an alternative to prosecution.

The expansion of civil sanctioning powers in relation to the EP regime was made by the Environmental Permitting (England and Wales) (Amendment) (England) Regulations 2015, subsequently consolidated in the Environmental Permitting (England and Wales) Regulations 2016, which came into force on 1 January 2017 (see question 2.4). In September 2017, Defra published guidance on how prosecution powers of the regulator under the EP regime interact with local authorities' powers to prosecute statutory nuisance.

The Office for Product Safety and Standards (which superseded the former Regulatory Delivery directorate in January 2018) is responsible for the effective delivery of regulation and ensuring that local authorities deal with enforcement issues in a consistent and co-ordinated manner, with a view to easing the regulatory burden on business.

The Sentencing Council of the Magistrates' Association publishes sentencing guidelines, which encourage Magistrates to consider the means of companies and the seriousness of offences when they set financial penalties. A set of environmental sentencing guidelines has been in force since 1 July 2014, providing higher starting points for fines, promoting tougher punishment for repeat offenders and placing an increased focus on the proportionality of the fine in relation to the size of the company. Sentencing guidelines for health and safety offences, corporate manslaughter, food safety and hygiene offences came into force on 1 February 2016, which will result in similar approaches being adopted by the courts for such offences.

Environmental regulation is supplemented by other regulatory controls. In the context of energy regulation, the existence of mechanisms such as the climate change levy (essentially a tax on the use of energy from fossil fuel sources by industry and the public sector) and the Renewables Obligation (which requires all electricity suppliers licensed under the Electricity Act 1989 to produce evidence to the Office of Gas and Electricity Markets that they have supplied customers in England with specified amounts of electricity generated from "eligible renewable sources") have been instrumental in influencing more sustainable energy use and reducing greenhouse gas emissions.

The Renewables Obligation has been closed to new generation projects since 31 March 2017 (subject to grace periods) and the overall scheme is to close in 2037. The Government is replacing the Renewables Obligation with the Contracts for Difference (CfD) scheme, providing for contracts with the Low Carbon Contracts Company Ltd (LCCC), a Government-owned private company. The intention remains to incentivise the use of large low-carbon energy sources by providing greater security to qualifying generators. Under the scheme, the electricity generator is reimbursed the difference between the average market price for electricity, and the price that reflects the cost of investing in low-carbon technology. The costs of funding the CfD are recovered through a levy on suppliers, which is ultimately passed on to domestic and industrial consumers via their electricity bill. However, the Government recognised the significant burden this could place on energy-intensive industries and so in March 2017, following a public consultation, the Government announced that it would amend the Regulations to introduce exemptions from the costs of the CfD for eligible businesses.

The Government published its response to the CfD consultation in two parts: Part A was published in June 2018, with Part B published in August 2018. In July 2018, the Contracts for Difference (Miscellaneous Amendments) Regulations 2018 came into force, making the amendments outlined in Part A of the Government's response. On 30 August 2018, the Government launched a further consultation to invite views on the way that its decisions will be implemented into the CfD scheme: this consultation closed on 10 October 2018. Separately, in July 2018, the Government also published draft Feed-in Tariffs and Contracts for Difference (Amendment) (EU Exit) Regulations 2018, one of the first statutory instruments to be published under the European Union (Withdrawal) Act 2018. These draft regulations do not affect the operation of the CfD scheme.

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

An access to environmental information regime has been in place in England since 1992. This regime is now set out in the Environmental Information Regulations 2004 (EIRs), which came into force on 1 January 2005, at the same time as the Freedom of Information Act 2000 (FOIA). Environmental information is effectively excluded from the ambit of the access-to-information regime established by the FOIA, which provides that requests for such information are dealt with under the EIRs.

The EIRs implement Directive 2003/4/EC on public access to environmental information, and also aim to fulfil the UK's obligations under the Aarhus Convention (the UNECE Convention on Access to Information, Public Participation in Decision-making, and Access to Justice in Environmental Matters). As such, the EIRs have a different legislative background and focus to the FOIA and, on the whole, provide for wider disclosure than is available under the FOIA.

The EIRs require relevant public authorities (and/or third parties holding environmental information on behalf of a public authority) to do the following (among other things):

- proactively disseminate environmental information held by the public authority;
- make environmental information held by or on behalf of the public authority available to anyone (any person or any organisation from anywhere in the world) on request – in most cases within 20 working days (and only to refuse such requests in limited circumstances, for example, where non-disclosure is in the public interest); and
- organise environmental information held by the public authority so as to enable it to perform the first two duties mentioned above.

The definition of what constitutes 'environmental information' in the EIRs is wide, covering not only information on environmental elements and substances, but also information on measures and activities likely to affect them. This can include any information (in written, visual, aural, electronic or any other material form, including information relating to 'official business' which is held in the personal email accounts of employees of public authorities) on, among other things, the state of the environment and factors that impact upon it, reports on the implementation of environmental legislation, and cost-benefit and other economic analyses used in environmental decision-making.

In *Department for Business, Energy and Industrial Strategy v Information Commissioner* (C3/2016/0880), the Court of Appeal held that even information which does not directly concern the environment in itself may be subject to disclosure under the Regulations, as long as it has a sufficient link to a measure that affects the environment.

The definition of a "public authority" for the purposes of the EIRs is also very broad (broader than the definition of "public authority" under the FOIA). It includes any body or person that carries out functions of public administration, as well as any body or person under the "control" of another relevant public authority and which (among other things) exercises functions of a public nature or provides public services in relation to the environment. Guidance issued by the Government indicates that "control" in this context could include a relationship constituted by legislation, rights, licence or contract. Also, a public authority under the EIRs includes any other body or person "that carries out functions of public administration" (regardless of whether these functions relate to the environment). Accordingly, private companies or public-private partnerships with environmental functions, such as public utilities involved in the supply of public services, have been argued to be caught by the EIRs in certain circumstances.

Following the decision of the Upper Tribunal in *Smartsource Drainage & Water Reports Limited v The Information Commissioner* (GI/2458/2010), where it was held that water and sewerage companies are not public authorities under the EIRs, in *Fish Legal and Emily Shirley v The Information Commissioner and United Utilities, Yorkshire Water and Southern Water*, the Upper Tribunal made a request for a preliminary ruling to the Court of Justice of the European Union (CJEU) for further guidance. In December 2013, the CJEU ruled that commercial bodies providing public services relating to the environment can be public authorities under the EIRs. The CJEU ruled that:

- the test for whether companies perform "public administrative functions" and are therefore public authorities under the EIRs is whether they have special legal powers beyond private law powers; and
- commercial entities are capable of being bodies that are under the control of a public authority (and therefore public authorities under the EIRs), if they do not genuinely autonomously determine how they provide their services and their controlling public authority "is in a position to exert decisive influence on their action in the environmental field". However, a commercial service provider that is only a public authority because it is under the control of another public authority is not required to provide environmental information that does not relate to the provision of the relevant services.

The CJEU judgment was a preliminary ruling, only dealing with the questions referred to it by the Upper Tribunal. The main proceedings

and application of the facts to the tests set out by the CJEU to determine if utility companies are in fact public authorities were considered in the Upper Tribunal. It ultimately ruled that private water companies are public authorities for the purposes of the EIRs; basing its decision on the fact that water companies have special powers over and above those in private law. However, the decision did not go as far as laying down broad general principles on when a body was a public authority under the EIRs.

2 Environmental Permits

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

In England, environmental permits are required for a wide range of business and commercial activities, with emissions from domestic premises in the main exempt. Permits are generally granted either by the EA or the relevant local authority.

The permit regime is based on the principle of an integrated permitting process to prevent or, where that is not practicable, reduce emissions in order to achieve a high level of protection of the environment as a whole. The high level of protection is achieved by employing so-called best available techniques, i.e. the most cost-effective way, or ways, for the industry to prevent or minimise emissions. The original Integrated Pollution Prevention and Control Directive, requiring Member States to establish a pollution prevention regime, has been recast, along with six other directives, in Directive 2010/75/EU on Industrial Emissions. The Industrial Emissions Directive was implemented in England by the adoption of the Environmental Permitting (England and Wales) (Amendment) Regulations 2015 (now consolidated in the 2016 EP Regulations).

The EP Regulations (as amended) maintain the three distinct regimes established under the IPPC Directive:

- Part A(1) installations, regarded as sites where potentially more polluting activities are carried out, with emissions to air, land and water from these installations being regulated by the EA;
- Part A(2) installations, which are sites where activities regarded as having a lesser potential to pollute are conducted, but which are still considered to have impacts on all environmental media, with regulation being the responsibility of the local authority in whose area the installation is, or will be, situated; and
- Part B installations, which are sites with activities for which only emissions to air are regulated under the IPPC, such installations being the responsibility of the local authority.

An environmental permit is required for the keeping, treating or disposing of controlled waste on non-domestic premises. The EP regime also applies to discharges into controlled waters, groundwater authorisations and radioactive substances, and has been amended to implement Directive 2009/31/EC on the geological storage of carbon dioxide (CO2).

The Environmental Permitting (England and Wales) (Amendment) (No.2) Regulations came into force on 6 April 2016 and replaced the existing flood defence consents with environmental permits for flood risk activities. At the same time, the EA published standard rules for applications for standard environmental permits. There are further plans to bring water abstraction and impoundment licences within the EP regime in the early 2020s. Operators of installations subject to the EU Emissions Trading Directive are required to hold a greenhouse gas emissions permit (see question 9.1). The Environmental Permitting (England and Wales) (Amendment) Regulations 2018 came into force on 30 January 2018, implementing the Medium Combustion Plants Directive 2015 (bringing such plants into the EP regime from 20 December 2018 for new plants and on a staggered basis for existing plants), and introducing controls on nitrogen oxide emissions from certain diesel generators.

Discharges of trade effluent to public sewers are controlled by the grant of a trade effluent consent, granted by the relevant sewerage undertaker. The presence of a hazardous substance on land may also require obtaining a hazardous substances consent under the Planning (Hazardous Substances) Regulations 2015, which came into force on 1 June 2015. The system is operated by hazardous substances authorities (mostly local planning authorities).

In all the above cases, the competent authority granting the licence has the discretion to attach such conditions as it thinks necessary and appropriate to ensure that no harm to human health or the environment occurs beyond accepted limits.

Generally, the operator of the installation that is making the emission or discharge or undertaking the prescribed activity holds the permit authorising this. The definition of the term "operator" varies between the different EP regimes, but is usually the person (natural or legal) who is in control of the installation. Environmental permits can usually be transferred from one person to another, provided the requirements of the particular legislation governing the grant of the permit are met. For example, the transfer of an environmental permit granted under the EP Regulations requires the current operator and the proposed recipient of the permit to make a joint application to the regulator containing certain specified details; the regulator is required to effect the transfer unless it considers that the proposed recipient will not have control over the installation after the transfer is effected, or it will not ensure compliance with the conditions of the transferred permit.

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?

All of the above permitting regimes include provisions for appeal in certain circumstances. In general, the right of appeal is to the Secretary of State for the Environment, Food and Rural Affairs.

Appeals can be conducted by way of written representations or by holding a hearing, and interested third parties have rights to be involved in such appeals, including rights to address the inspector at any public hearing. The Secretary of State may affirm or quash the regulator's decision, quash all or any of the conditions imposed in the permit by the regulator, or direct the granting or variation of a permit where one has been refused subject to such conditions as he/she sees fit. The time limit for appeals varies depending on the nature of the permit.

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

Various measures are incorporated within the EP regime to prevent pollution during the design and operation of the installation and, subsequently, upon decommissioning, to ensure that the site is returned to a satisfactory state and poses no pollution risks.

In submitting an application for a permit to operate a Part A activity, the operator is required to submit a site report identifying the condition of the site prior to the commencement of the regulated activity. Ongoing monitoring and reporting requirements are aimed at identifying significant pollution occurring during operation of the

installation and ensuring that it is attended to immediately either by voluntary action by the operator or through the undertaking of an enforcement action by the regulator.

Where the operator plans to leave or close the site, the EP Regulations require the operator to provide evidence, i.e. a site report, to the regulator on the condition of the site and give details of any contamination discovered. The regulator will only accept the surrender of the environmental permit when the site is put in a condition where it represents no pollution risk and is in a satisfactory state.

The Environmental Impact Assessment (EIA) Directive 1985/337/EC, as amended, requires an environmental assessment to be made on the effect of certain public and private projects, e.g. construction of integrated chemical installations and other chemical plants, paper and board plants, plants manufacturing certain foodstuffs and certain infrastructure projects. Projects are defined according to whether they require an environmental statement to be provided in all cases (Schedule 1 development) or only where the development proposed is likely to have a significant effect on the environment (Schedule 2 development). The secondary legislation implementing the EIA Directive in England requires Schedule 2 projects to be subject to a formal screening process in order to determine whether they will have a significant effect before an application for planning permission is granted. The granting of planning permission is prevented where a development requires an environmental assessment until consideration of the relevant environmental information.

The EIA Directive 2014/52/EU, which was intended to create a uniform and streamlined assessment process across Member States, was implemented in England through the Town and Country Planning (Environmental Impact Assessment) Regulations 2017 and the Infrastructure Planning (Environmental Impact Assessment) Regulations 2017 in May 2017. Key parts of the Directive include the additional consideration of climate change, biodiversity, demolition impact and biodiversity in the assessment, and the mandatory introduction of penalties for non-compliance. It also aims to reduce the burden on developers by making fewer projects subject to assessment.

The Environmental Liability Directive, currently incorporated into English law through the Environmental Damage (Prevention and Remediation) Regulations 2015, establishes a framework of environmental liability requiring the prevention and, where that fails, remediation of various categories of environmental damage. It has no retrospective effect, so does not apply to damage caused by an emission, event or incident that took place before 30 April 2007. The original UK regulations implemented in 2009 conferred no retrospective effect before 1 March 2009 – an anomaly caused by the late implementation of the Directive – and may have caused some operators to undertake assessments of baseline condition in order to avoid liability for historic pollution. In the absence of a baseline condition report, there may be evidential difficulties in proving that particular damage was caused by an emission, event or incident pre-dating this date.

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

In general, legislation requiring the grant of a permit or authorisation for the carrying on of an activity or a discharge makes it a criminal offence to carry on the activity, or make the discharge, other than pursuant to a permit and in accordance with any conditions that may be attached to it. These are typically strict liability offences with no requirement to prove intention or negligence in the commission of the offence. In *St. Regis Paper Company Ltd v R* [2011] EWCA Crim Div 2527, the Court of Appeal confirmed that it is possible for criminal liability to be imposed on a company in circumstances where the actions of one of its employees infringe an environmental permit and the offence in question is one of strict liability; but that, in the case of criminal offences requiring *mens rea*, liability will only attach to the company where the employee in question can be said to be the "directing mind and will" of the company.

In addition to their powers to pursue prosecution, regulators also have the power to issue notices to vary the terms and conditions of any permit granted or, in very serious cases of non-compliance, to revoke or suspend the operation of a permit. The EA is able to accept enforcement undertakings in relation to the main EP offences.

Civil liability may also flow from a failure to hold a permit or to comply with a condition attached to it. For example, where a breach of a waste management licence occurs and a third party suffers damage as a result, that person is entitled to claim for the damage, subject to certain exceptions.

3 Waste

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

The definition of "waste" that currently applies in England is set out in the Waste Framework Directive 2008/98/EC (WFD), implemented in the UK by the Waste (England and Wales) Regulations 2011 (Waste Regulations). "Waste" is essentially any substance or object which the holder discards or intends or is required to discard. This can prove to be a difficult definition to apply in practice, and to assist in such cases, Defra published updated guidance on the legal definition of waste in May 2016. Guidance has also been published by the European Commission.

So-called "hazardous waste" is also defined in the WFD. Such waste will display one or more of the 15 hazardous properties detailed in the WFD, e.g.: it will be explosive; highly flammable; corrosive, etc. The Government published guidance on waste classification and assessment (particularly hazardous waste) in May 2015, which was updated in May 2018. Due to the potentially harmful nature of hazardous waste, additional duties and controls are imposed by the WFD, for example, in relation to how such waste is stored, transported and handled.

Additional controls also apply in the context of transboundary shipment of waste, and radioactive waste is subject to different legislative requirements than waste generally.

(See further question 3.4.)

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?

Part II of the EPA introduced the concept of the waste "duty of care", which requires producers of waste to ensure (among other things) that waste is managed so as to avoid its escape. If the intention is to undertake some treatment activity on the premises or to take in third parties' waste for storage pending consignment for end disposal, then this requires an environmental permit under the EP Regulations.

Activities involving the actual disposal of waste always require a permit under the EP Regulations and planning permission will also be required. Applications for disposal of waste under both the planning and EP systems require the disposer to demonstrate that operation of the disposal site poses no harm to human health or the environment, and that the person is qualified to operate the site and can offer appropriate financial guarantees relating to the adoption of appropriate environmental control measures both during and following closure of the site.

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)?

The waste duty of care requires the person subject to the duty: (i) to take reasonable steps to prevent any other person committing a waste management offence; (ii) to prevent the escape of waste from his control or that of any other person; (iii) to ensure that any transfer of waste is only to an authorised person or to a person for authorised transport purposes, and (when waste is transferred) that a written description of the waste is also transferred, sufficient to enable each person receiving it to avoid committing a waste offence; and (iv) to comply with the duty of care. Under the Waste Regulations, it is now a legal requirement that such transfer notes include a signed declaration that, to date, those handling the waste have applied the waste management hierarchy of options.

It has been common practice for some time for the EA to insist that operators provide a financial guarantee or bond, in order to ensure that funds are available to undertake any clean-up works required during the operation of a landfill site or following its closure, and these provisions are carried over to the EP regime.

In order to effectively pass on the burden of obligations with respect to the safe handling and disposal of waste after it leaves this site, the waste producer must ensure that the person receiving his waste (e.g. as a registered waste carrier) knowingly assumes responsibility for it under a contract.

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

As a separate category, packaging waste is subject to producer responsibility obligations for its re-use, recovery and recycling under the Producer Responsibility Obligations (Packaging Waste) Regulations 2007 (as amended). Companies with a turnover of over £2 million, handling over 50 tonnes of packaging annually, are required to recover and recycle a proportion of their packaging waste. In practice, most obligated companies discharge these requirements by joining registered compliance schemes, although those choosing to follow the individual route will usually make arrangements to take back their waste. Other categories of waste that are subject to take-back and recovery obligations include:

- Waste Electrical and Electronic Equipment (WEEE). EU Directive 2002/96/EC makes producers of WEEE responsible for financing its collection, treatment, and recovery, and obligates distributors to allow consumers to return their waste equipment free of charge through collection systems. The Directive was implemented in England by the WEEE Regulations 2006. A Recast Directive 2012/19/EU on WEEE, extending the current regime, was passed in 2012 and implemented by the WEEE Regulations 2013, which came into force on 1 January 2014. Amongst other changes, the recast directive created an obligation for large electronic retailers to provide collection points in store to allow consumers to recycle small electronic goods. A number of the changes are still due to come into force in England, on 1 January 2019.
- End of Life Vehicles (ELV). The ELV Directive (2000/53/EC) aims to prevent waste from ELVs and promote the collection, re-use and recycling of their components to protect the environment. The ELV Directive requires Member States to ensure that ELVs are only scrapped ("treated") by authorised dismantlers or shredders, who must comply with specified environmental standards. Most of the requirements of the ELV Directive were implemented in England by the passing of the ELV Regulations 2003, and the producer responsibility requirements were implemented by the ELV (Producer Responsibility) Regulations 2005. In April 2015, responsibility for the ELV regime was transferred to the National Measurement Office (now part of the Office for Product Safety and Standards).
- Batteries. The Batteries Directive (Directive 2006/66/EC) includes producer responsibility provisions regarding the setting up of battery collection and take-back systems to be paid for by producers and importers of batteries. These provisions were implemented in England by the passing of the Waste Batteries and Accumulators Regulations 2009. This is expanded by the Batteries Directive 2013/56/EU, which removes certain exceptions to the regime, and was implemented by the Batteries and Accumulators (Placing on the Market) (Amendment) Regulations 2015, which came into force on 1 July 2015.

The Commission's Work Programme 2018 confirmed that the Commission will continue to work on its Circular Economy regime, which lists four new waste Directives as "priority pending proposals". The proposed Directives will amend the WEEE Directive, the ELV Directive, the Batteries Directive, the Waste Framework Directive and the Packaging Directive. The Commission published its "European Strategy for Plastics in a Circular Economy" in January 2018.

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?

Breach of environmental law can give rise to both criminal and civil liabilities. Criminal offences arise as a result of polluting an environmental medium which is the subject of protection without holding an environmental permit in relation to the activity undertaken or the discharge or emissions made, or failing to comply with notices that the regulator has served in respect of the activity or pollution. The available defences depend upon the particular environmental legislation engaged. Civil sanctions are available as an alternative to a criminal prosecution in some cases where the EA is the enforcing authority and the breach committed is one designated for the imposition of an administrative penalty. The EA can accept enforcement undertakings, but no other civil sanctions, in relation to the main EP offences (see questions 1.2 and 2.4). As of 30 January 2018, under the Environmental Permitting (Amendment) Regulations 2018, the EA can also use enforcement undertakings to enforce compliance with flood risk activities.

Civil liability may also arise in an environmental context for breach of tort law. The tort of particular relevance to environmental protection is that of nuisance, which gives rise to remedies of damages and/or an injunction where pollution results in an unlawful interference with a third party's right of ownership or enjoyment of land. In *Network Rail Infrastructure Ltd v Williams* [2018] EWCA

Civ 1514, the Court of Appeal held that the categories of nuisance, encroachment, interference and physical injury are examples of the violation of property rights: a nuisance does not have to neatly fall into one of these categories to be actionable. Furthermore, physical damage is not a requirement for a cause of action and a nuisance can be caused by inaction or omission well as a positive action. See question 4.2 below for a discussion of nuisance and permit defences.

The rule in *Rylands v Fletcher* establishes the principle of strict liability for damage caused by a dangerous accumulation of a substance escaping from land, provided the damage is foreseeable.

The tort of negligence may also be relevant. To succeed, a claimant must show that the defendant owes a duty of care to him, that there has been a breach of that duty and that the damage of which he complains is a foreseeable consequence of the breach. Unlike nuisance, the claimant does not need to establish an interest in land in order to succeed. However, it is often difficult to establish a duty of care in cases of environmental harm. It is common for negligence to be pleaded as an alternative to nuisance.

The tort of trespass has also been pleaded in environmental cases, but to succeed, the claimant must show that the defendant's unlawful act has caused a direct physical interference with the land. Proving direct interference has proved difficult as, for example, pollution caused by the discharge of polluting materials into water and carried by the current before reaching a claimant's property has been held not to amount to a direct interference.

Officers and employees, as well as the undertaking concerned, can in certain circumstances incur personal civil liability if responsible for the event that gives rise to damage (see question 4.3).

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

An operator can be liable for environmental damage caused to a third party, notwithstanding that the polluting activity is operated within permit limits. In *Barr and others v Biffa Waste Services Ltd* [2012] EWCA Civ 312, the Court of Appeal reaffirmed that defendants who operate under a detailed regulatory scheme and environmental permit can still be liable in private nuisance, notwithstanding that they have not been negligent or breached the provisions of their permit. In *Coventry and others v Lawrence and another* [2014] UKSC 13, the Supreme Court held that the mere fact that an alleged nuisance has the benefit of a planning permission will not be enough to prevent liability for private nuisance, although it may carry some evidential weight.

Furthermore, it is possible under the EP regime for operators to be found liable for any environmental harm caused, notwithstanding compliance with a permit. Some form of failure to properly manage staff and/or manage or maintain equipment usually forms the basis of such alleged breaches. These provisions are carried over from predecessor regimes.

However, a permit defence is specifically provided for in the Environmental Liability Directive, which was adopted in the Environmental Damage Regulations 2015 (see question 2.3). The availability of the defence means that operators will not be liable to bear the costs of any remedial action that may be required provided they are not at fault or negligent, but only insofar as additional liability arises under the Directive beyond that currently provided for in national legislation (see question 5.1).

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?

Personal liability for directors and officers of companies can be imposed for breaches of environmental law if, as a result of their own acts or omissions, they can be said to have created the circumstances giving rise to the commission of the offence.

Personal liability can also be imposed for breaches of environmental law where the offence committed by a company is proven to have been attributable to the consent or connivance of any director or officer or other person acting in a similar capacity, or is attributable to any act or neglect on the part of any such person. In such cases, both the company and the director may be prosecuted.

Subject to sections 232 to 234 of the Companies Act 2006, companies can purchase insurance to protect their directors and officers from personal liability for environmental wrongdoing or provide indemnities directly to them; however, as a matter of public policy, it would not be possible to obtain insurance to indemnify a director or officer for criminal fines or penalties imposed on him/her, and the courts might not enforce an indemnity by a company for these matters. Furthermore, liability arising from pollution events is often excluded from such insurance policies, although some policies will provide cover for related defence costs or claims from shareholders (i.e. alleging a fall in value of the company as a result of the pollution-related loss).

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?

The fundamental distinction is that when one buys the shares of a company, one effectively inherits all environmental liabilities associated with the corporate entity concerned, whether relating to the business/sites that the company currently operates, or to those it has historically operated; whereas in an asset purchase, the purchaser does not automatically take on liability for any current and ongoing failure of another entity to comply with environmental law.

A key risk for the purchaser in an asset purchase is that if it is aware of a breach of environmental law and/or an environmental condition in relation to the asset acquired and has the ability to prevent the breach continuing or otherwise to remedy the environmental condition, then the purchaser might be said to be a knowing permitter, if not a causer, of an ongoing environmental problem that can result in liability. In certain circumstances, the purchaser could also become liable merely as a result of being an owner or in occupation of the relevant site.

In the case of a share sale, the seller should (in the absence of any agreement to the contrary) escape any liability that subsequently crystallises in terms of action pursued by the regulator against the company that is sold. However, the availability of a wide range of contractual and other mechanisms for transferring and otherwise allocating environmental risk means that, in many practical respects, the differences between a share and asset purchase are minimal.

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

Lenders under, for example, a mortgage deed are unlikely to incur liabilities for environmental wrongdoing, in the absence of

knowledge of the wrongdoing or any real ability to control the application of the monies lent to the borrower to prevent pollution occurring. If, however, a lender enforces its security by taking possession of a property then it may, potentially, become liable for undertaking or paying for remediation of contamination of the property. It is conceivable, for example, that a lender could incur liability as a Class A person under the provisions of Part 2A of the EPA 1990, if it can be said to have caused or knowingly permitted the presence of contamination on the property. Also, if the regulator cannot establish an appropriate Class A person, a lender in possession could be liable as a Class B person on the basis that it is then deemed to be the owner of the site.

Lenders may also face reputational risks as a consequence of lending on what are perceived to be environmentally sensitive infrastructure projects and to companies undertaking controversial activities. As a consequence, many leading UK banks have detailed environmental, social and governance policies and are signatories of voluntary agreements, such as the Equator Principles, a set of voluntary guidelines for financial institutions based on the safeguarding policies and guidelines of the World Bank and the IFC (the private-sector investment arm of the World Bank). The Equator Principles are specifically designed to promote responsible environmental and social practices in project financing, and apply to all industry sectors and to loans for projects above a specified capital cost (in the case of project finance, US$10 million or more).

5 Contaminated Land

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

The approach of the regulator to liability for historic contamination depends upon the circumstances that apply.

Where it is proposed to redevelop a contaminated site, the usual approach is for the planning permission to be subject to conditions requiring investigation and clean-up of the site to a standard where it becomes fit for its intended purpose. Often, the developer will pay for the cost of remediation, which will normally be factored into the costs of the project and be recoupable as a consequence of the sale or lease of the resulting development.

Where it is not intended to redevelop historically contaminated land in the short term, whether remedial action is required depends on the level of contamination. Part 2A of the EPA 1990 sets out a statutory regime for dealing with the most seriously contaminated land, including land contaminated by radioactivity from nuclear-licensed sites and the situation where land contamination is causing pollution of controlled waters.

Whether land is "contaminated" or is contaminating controlled waters depends on whether the damage is "significant" or there is a "significant possibility" of such harm. Statutory guidance issued by Defra in 2012 confirms the circumstances in which this is deemed to occur. Practitioners may also find the Law Society's practice note on the contaminated land regime, updated in April 2016, to be of help when applying the regime. This note replaces the Contaminated Land Warning Card, although the recommendations are broadly the same. Compliance with the note is not mandatory, but does reflect the Law Society's interpretation of best practice in this area.

Local authorities are required to consider whether any land in their areas should be classified as contaminated land (which involves considering source-pathway-target relationships and conducting a risk assessment). There is no general requirement on an owner or occupier to notify the local authority of the existence of contamination (except in circumstances where development requiring planning permission is to be undertaken). If the land satisfies the definition of contaminated land, then a statutory requirement arises on the part of the local authority as regulator (or the EA, in the case of certain "special sites") to consider whether there is a need for remediation, and exactly what form that remediation should take.

The regime is based on a "suitable for use" approach, and cost and reasonableness considerations are relevant in determining the standard and extent of remediation. Liability to undertake or, in the event that it is not done voluntarily, pay for remediation, lies with the appropriate person (the person who caused or knowingly permitted the presence of the substance that caused the contamination) or, where such a person cannot be found, the owner or occupier for the time being.

The regime is complex and includes detailed provisions on exclusion from liability and allocation of liability on various grounds between groups of polluters (see below), as well as the apportionment of the costs of remediation between such persons.

Liability for historic contamination of soil or groundwater may also give rise to the ability of a third party to bring proceedings in order to claim remedies where pollution has migrated onto its land. This is a civil liability that arises under the law of torts, the most commonly pleaded being the tort of nuisance. Remedies include the grant of a prohibitory injunction and/or damages for the harm caused. Ultimately, clean-up may be required to avoid further claims arising, or for breach of any injunction ordered by the court.

The Environmental Damage Regulations 2015 also have an impact on how new instances of the most serious cases of environmental damage are managed. They require operators not only to take preventative action to avoid environmental damage occurring in the first place, but also to own up to regulators to having caused environmental damage if it has occurred. Three categories of environmental damage are covered, namely:

- damage that has significant adverse effects on reaching or maintaining favourable conservation status of species and natural habitats protected under EC legislation or the integrity of a Site of Special Scientific Interest (SSSI) (biodiversity damage);
- damage that significantly adversely affects the ecological, chemical and/or quantitative status and/or ecological potential of waters covered by the Water Framework Directive (Directive 2000/60/EC) (water damage); and
- land contamination that creates a significant risk of human health being adversely affected.

For occupational activities listed in Schedule 2 of the Regulations, comprising a wide range of activities regulated by EC legislation which are potentially damaging to the environment, liability for all three categories of environmental damage is covered and strict liability applies. Operators of other occupational activities may be liable for biodiversity damage, but only if they are at fault or have been negligent.

Where biodiversity or water damage occurs, it must be remedied by returning the environment to its baseline condition; in the case of damage to land, the risk to human health must be removed. If the harm to biodiversity or protected waters cannot be reversed, then "complementary" remediation by improvement of a similar resource or service may be required to be undertaken to the extent the original resource cannot be fully restored. "Compensatory" remediation may also be required to compensate society for the loss of the use or enjoyment of the resource or service. Both of these are new concepts for English Law.

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

Statutory guidance under the Part 2A EPA 1990 contaminated land regime sets out the rules that apply where more than one person is deemed to be responsible for contamination. The rules differ depending upon whether the liability group comprises so-called Class A persons, that is persons who have caused or knowingly permitted the presence of the pollutants; or Class B persons, being owners and/or occupiers for the time being where no Class A persons have been found after reasonable enquiry.

The exclusion tests and subsequent apportionment tests are designed to ensure that it is fair for members of the liability group to bear responsibility for remediation. In relation to Class A groups, the regulator is required to first consider whether any of the tests for exclusion from liability apply. There are six tests in total, and judgments in relation to whether or not the tests apply are taken on a balance of probabilities, after considering the relevant information that has been obtained. The exclusion tests must be applied in the sequence in which they are set out. They must not be applied to exclude every member of the liability group. This means essentially that the person(s) responsible for bearing the cost of remediation may well therefore be the last one(s) left.

Having applied the exclusion tests, the regulator is then required to apportion liability between members of the Class A liability group, so as to reflect the relative responsibility of each of those members for creating or continuing the risk now being caused. If no information is available to make an assessment of relative responsibility, the statutory guidance advises regulators to apportion liability in equal shares.

In relation to Class B liability groups, the only exclusion test applicable is to exclude those who do not have an interest in the capital value of land. Again, the test is not to be applied if it would result in the exclusion of all the members of the liability group.

In terms of apportionment between members of a Class B liability group, the guidance indicates that where remediation refers to a particular area of land, liability should be apportioned to members who own or occupy that particular area of land. Otherwise, apportionment should be made on the basis of the capital value of the land in question.

A determination of an appeal against the service of a remediation notice illustrates how this complex regime works in practice. This involved Redland Minerals Limited (Redland) and Crest Nicholson Residential plc (Crest), who were both found to be Class A appropriate persons and liable to remediate contaminated land. Redland had formerly owned the site and Crest had developed it for housing. Chemicals from the site were found to have seeped into the underlying chalk aquifer, leading to the closure of a number of water abstraction boreholes and threatening the potable water supply. Both Redland and Crest were found to have caused the contamination to be on, in and under the site; whilst Crest had not brought the chemicals onto the site, the Secretary of State found that as a result of its action and inaction during its ownership in the way it dealt with the site, it too had caused the contamination. The Secretary of State particularly pointed to the fact that Crest had demolished hard-standings, leaving contaminated soil exposed to rainfall leaching for some two years before the new houses were built, despite it being aware of the presence of contamination on the site. This had caused contaminants that would otherwise have been removed to remain and to leach deeper and faster into the ground.

The Secretary of State apportioned liability between Redland and Crest as 85:15 for one contaminant and 45:55 for another. In the case of the second contaminant, Redland had provided a limited amount of information on its presence, but not sufficient to enable Crest to have been aware of the presence of it in the aquifer. Liability on the basis of the "sold with information" test was therefore only partly reduced. No information had been provided on contamination of the site by the first contaminant.

Civil liability for contaminated land is joint and several. Accordingly, where one of the torts of nuisance, negligence, trespass or breach of statutory duty is made out, then if breaches by different persons caused the claimant to suffer loss, injury or damage, he is entitled to sue all or any of them for the full amount of his loss. This is particularly pertinent in the case of the tort of nuisance, as subsequent owners or occupiers may be alleged to have adopted a continuing nuisance caused by a predecessor. The Civil Liability (Contribution) Act 1978 enables a tortfeasor to claim contribution from other tortfeasors responsible for the same loss or damage (see question 5.4).

Defra has adopted the following approach in the Environmental Damage Regulations where multi-party causation arises: where more than one activity contributes to an incident, the operator of any of the activities can be required to remediate, and where environmental damage is caused by the actions of a small number of identifiable operators, the regulator may notify more than one operator and serve a remediation notice on each one. In the latter case, guidance accompanying the implementing regulations indicates that operators should endeavour to agree between themselves the shares in which they should bear the costs of the measures to be carried out. If remedial action is not carried out, the authority may carry out necessary work and reclaim the costs against any or all of the operators concerned – with operators able to claim contribution from any other operator who is also responsible for the damage (see question 5.4).

In November 2016, in the case of *Price and another v Powys County Council*, the High Court confirmed that a local authority could be a "responsible person" under Part 2A of the regime, in respect of contamination caused by a predecessor; however, the local authority later successfully appealed this decision on other grounds.

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?

The nature of contaminated land is such that it is not always possible to determine at the outset of a remediation programme exactly what will be required to be done to remediate it. Consequently, and subject to procedural safeguards such as the concept of the regulator acting reasonably and the requirement for appropriate and proportionate regulation, a regulator can require additional works to be carried out even though a programme of environmental remediation has been "agreed", such as when the regulator becomes dissatisfied with the progress of the remediation works or considers that the works will not achieve the agreed remediation objectives.

In terms of third party challenges, it is conceivable that where an agreement is reached between a party and a regulator with regard to remediation works to be carried out on the party's land, a third party could challenge the agreement by way of judicial review in the Administrative Court on the basis of the agreement representing a decision by the regulator. Cases may also be heard by a dedicated fast-track court for environmental and planning judicial review cases, as detailed in the Criminal Justice and Courts Act 2015. To successfully challenge the agreement, the third party would be required to show grounds for bringing judicial review, by

demonstrating that the decision-maker reached its decision on the basis of illegality, irrationality or procedural impropriety.

Third parties may complain to the Local Government Ombudsman if they feel that a local authority's behaviour has resulted in injustice as a result of maladministration. The Ombudsman will investigate the complaint and make findings including rulings for compensation in the event that the complaint is upheld. The Parliamentary Ombudsman investigates complaints concerning such issues where the EA is involved.

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 it is a general principle of environmental law that the polluter should pay for any pollution he causes, this conflicts with the general rule in relation to property transactions of *caveat emptor*, or "let the buyer beware". Accordingly, a potential buyer or tenant must satisfy itself as to the state and condition of the property to be acquired or leased, subject, however, to the seller or landlord's obligation to disclose matters about which the other party expressly seeks information (other than where the seller makes no representation other than to insist upon the buyer relying on its own inspections). Private rights of action may arise where there has been a failure to make such disclosure or as a result of a breach of contract for misdescription, misrepresentation or fraudulent concealment. Representing that a property is free from contamination when it is, in fact, heavily contaminated may give rise to a remedy. Misrepresentation requires there to be a misrepresentation of a material fact in relation to the property, which may arise, for example, where answers to preliminary inquiries are false or misleading. It gives rise to a right of action for damages and/or rescission of the contract depending on the nature of the misrepresentation. Similar remedies apply in relation to fraudulent concealment, which involves the seller actively concealing some defect in the property.

Liability in environmental law for contamination is typically predicated on the basis of "causing" or "knowingly permitting", and subsequent owners or occupiers may be liable for contamination which pre-dates their ownership or occupation of a site, where they have both the knowledge of the presence of the substance causing pollution, and the power to prevent the substance being there or escaping from their site. As a consequence, a private right of action to recover against the original polluter may also arise where the subsequent owner or occupier has been found jointly and severally liable at common law for contamination. The Civil Liability (Contribution) Act 1978 allows any person liable in respect of any damage suffered by another to recover a contribution from any other person liable in respect of the same damage (whether jointly or otherwise). A person is liable under the provisions of the Act whether the basis of his liability is in tort, breach of contract, breach of trust or otherwise. The amount of contribution that can be ordered is such as may be found by the court to be just and equitable, with regard to the extent of the person's responsibility for the damage in question. The court's powers are, however, subject to the overriding principle that one defendant cannot be found liable to pay a greater sum than can be recovered from him by the claimant.

The statutory guidance under Part 2A EPA 1990 also provides mechanisms whereby a seller of land can effectively transfer the liability risks associated with contamination to a purchaser, for example, where a seller has provided knowledge of contamination to a purchaser and it is reasonable that the purchaser (who is a member of the same Class A liability group) should bear liability for its remediation, although it is also possible for a purchaser in such circumstances to agree with the seller that the seller will retain remediation liability.

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

The power to obtain monetary damages for aesthetic harm to public assets is limited. Under the Environmental Damage Regulations, aesthetic harm to public assets could, for example, be covered by the definition of biodiversity damage (see question 5.1), provided the other triggers specified apply, e.g. the site affected is an SSSI. Where biodiversity damage is caused, public authorities are able to claim damages for aesthetic harms, in the sense of requiring the operator to remediate the harm caused by returning the habitat to its baseline condition or, where this is not possible, to provide complementary or compensatory remediation (see question 5.1).

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.?

Regulators have wide powers to obtain information to enable them to discharge their functions. The nature of these powers depends on the circumstances. For example, under paragraph 4 of Schedule 5 of the EP Regulations 2016, applicants for an environmental permit must provide such further information as is reasonably required by the regulator in order to determine the application. Regulation 61(1) also provides that the relevant authority may, by written notice, require any person to furnish such authority with such information as it reasonably considers it needs to discharge its functions under the EP Regulations 2016, in such form and within such period as is specified in the notice; it is an offence to fail, without reasonable excuse, to comply with any requirement of such a notice.

Various general and specific powers of enforcing agencies and persons authorised by them are set out in section 108 of the Environment Act 1995, including powers to: (i) require any person whom an authorised person has reasonable cause to believe to be able to give any information relevant to any examination or investigation, to answer such questions as the authorised person thinks fit to ask and to sign a declaration of the truth of his answers; and (ii) require the production of certain records. The powers do not, however, extend to requiring the production of documents that are protected by legal privilege.

In addition to information-gathering powers contained in environmental legislation, regulatory authorities have powers, where criminal offences have been committed, to obtain information about the commission of the offences pursuant to powers under the Police and Criminal Evidence Act 1984. These include powers to search premises, conduct sampling and interview persons (including employees) in the course of investigating whether an offence has been committed.

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?

In England, there is no legal duty placed on persons generally to inform and involve the regulatory authorities upon becoming aware of an environmental problem. However, this may arise in the following circumstances:

- there may be reporting obligations in permits. For example, a permit authorising the operation of a Part A installation under the UK EP regime must include a condition requiring the operator to supply the regulator regularly with the results of the monitoring of emissions and to inform the regulator, without delay, of any incident or accident which is causing or may cause significant pollution. Monitoring and reporting obligations are also typically included in water discharge and abstraction licences;
- the operators of sites regulated under the Control of Major Accident Hazard (COMAH) Regulations 2015 are required to inform the Competent Authority (i.e. the ONR/HSE and EA, acting jointly), as soon as practicable, of the occurrence of any major accident at such a site;
- there is a general duty on the operators of a wide scope of occupational activities to report the discovery of "environmental damage" to the relevant regulator (see question 5.1); and
- a "duty to warn" may arise in certain circumstances under common law, such as where a person responsible for a dangerous incident or state of affairs is aware that it poses a danger to third parties.

Also, in circumstances where the person responsible for pollution has committed a criminal offence (e.g. by illegally causing waste to be deposited or polluting matter to enter controlled waters), the proactive disclosure of information concerning the existence of pollution or its migration may provide mitigating facts which would be taken into account when a court is assessing the penalties for the offence.

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

A person does have an affirmative obligation to investigate land for contamination in certain circumstances. For example, it is a requirement that a site condition report be submitted to the enforcing authority where the (proposed) operator of a Part A EP activity is contemplating making an environmental permit application. Site investigations may also be necessary where they are stipulated in a remediation notice served under the contaminated land provisions of Part 2A of the EPA 1990 or a works notice served under section 161A of the Water Resources Act 1991. They may also be required as a condition to a planning consent; whether any given land is contaminated to an extent that it requires remediation in order for a proposed development to proceed, being a material consideration in the planning process.

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?

The basic position in England is *caveat emptor* or "let the buyer beware" (see question 5.4). Purchasers will usually undertake environmental due diligence to reveal any environmental risks associated with the target's business or assets. Environmental representations and warranties are often required by prospective purchasers as a contractual mechanism effectively requiring disclosure of information by the seller. This is because merger and acquisition transactions are normally documented so that a purchaser cannot sue for breach of a representation or warranty to the extent that the seller has fairly disclosed information about the subject matter of the representation or warranty. Sellers should always be careful when giving replies to enquiries raised by prospective purchasers concerning environmental matters, as providing a false or misleading response could be actionable.

In hostile takeover transactions, prospective purchasers are normally reliant on whatever information they can glean about the target's environmental problems from publicly available sources. In the context of friendly takeovers, such information may well be provided by agreement of the target. Pursuant to the Seveso-III Directive, implemented by the COMAH Regulations 2015, and the Aarhus Convention, there is now an increase in the amount of public information required to be provided in relation to COMAH sites (including lower-tier COMAH sites). As such, prospective purchasers in a hostile takeover may have greater access to environmental information than was previously possible.

Recent legislation on narrative corporate reporting will also affect, to some extent, the way companies report on environmental information, as well as social and human rights matters. The Non-financial Reporting Directive 2014/95/EU was implemented in the UK in December 2016, following a consultation launched by BEIS (then the Department of Business, Innovation and Skills) in February 2016. The Directive provides for mandatory reporting on environmental and non-environmental matters by large companies throughout the EU. This overlaps with existing obligations in England under sections 414A–414D of the Companies Act 2006, but extends to "public interest entities" which may not already be covered by the English regime.

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?

Environmental indemnities provide important contractual mechanisms for allocating environmental risks in transactions. It is possible to use an environmental indemnity to limit exposure for actual or potential environment-related liabilities, as well as to effectively transfer risk for such liabilities to another person. The use of such indemnities is a common way of allocating environmental liabilities as between a seller and a purchaser. Following the implementation of the contaminated land provisions of Part 2A of the EPA 1990, the contractual allocation of environmental risks has assumed increased importance. For example, the Statutory Guidance under Part 2A specifically provides for agreements on liabilities to be entered into between persons who are responsible for the costs of a remediation action concerning contaminated land under Part 2A, and that the enforcing authority should generally make determinations on the exclusion, apportionment and attribution of liability in order to give effect to such agreements.

Typically, environmental indemnities contain detailed provisions as to the scope of the indemnities and the events that trigger claims under them. The indemnities normally contain a range of financial and other limitations to govern the relationship between the parties. For example, financial limitations may include *de minimis*, aggregate thresholds and respective caps for claims, and sometimes costs-sharing as between the parties; there are normally also other limitations limiting the purchaser's ability to claim where the claim arises as a result of post-completion actions by the purchaser. Conduct and dispute-resolution provisions are also typically included.

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 nothing to prevent a company establishing English-incorporated companies with limited liability (special purpose vehicles – SPVs) to own and occupy property that may incur *future* liabilities to third parties. It is essential, however, that such ownership is made known to third parties and that steps are taken to minimise the risk of third parties believing the company in question is acting as an agent or that another company is the owner or occupier. This is an ongoing process, as an agency can arise at any time by conduct. It may be possible to isolate the liabilities arising from site-specific environmental problems by transferring properties that have contamination issues into SPVs.

An exception arises where the liability results from acts or omissions of persons (other than the SPV established to hold the relevant properties) who caused or knowingly permitted the environmental problems. If, for example, those persons remain companies within the group, it is difficult to see how they would escape liability unless they are wound up (see below).

Another exception concerns situations where the liability in question is an *existing* one. Where this is the case, the courts would examine the facts and circumstances carefully to determine whether it was in fact the intention of a party in setting up the SPV to evade the obligation, as the courts have demonstrated a lack of sympathy for use of the corporate form as a device for evading existing liabilities.

Even where this type of SPV is created and run properly in holding contaminated properties that may give rise to environmental liabilities, it could well be that the financial amount of liabilities stated in the SPV's balance sheet would need to be consolidated with the group's accounts.

If a company is insolvent either as a result of environmental liabilities or otherwise, subject to the directors doing all they can to minimise losses to creditors, liquidation will be inevitable. The liquidation process requires the appointed liquidator to realise all available assets of the company and to distribute their value to creditors according to statutory priority. At the end of the liquidation process, the company will be dissolved. Any creditors (including environmental creditors) remaining unpaid or partly unpaid will then be highly unlikely to receive any further payment.

This may seem a rather drastic "solution" to the problem of an environmental liability arising, particularly if the company owns valuable assets and/or has an otherwise healthy business. Such a company may instead consider effecting a transfer of its business and assets to a "clean" corporate vehicle, leaving behind some or all of its liabilities (including environmental liabilities). However, the company must receive fair consideration. If it does not, the appointed liquidator may use statutory powers to challenge the transaction as being at an undervalue, provided that it occurred no more than two years before the entry into liquidation (there is no time limit if it can be shown that the transaction was effected in order to put assets beyond creditors' reach). If the challenge is successful, the court has the power to make a wide range of orders for the purpose of restoring the company to the position it would have been in had the transaction not occurred. Directors' duties and disqualification issues may also arise.

In certain circumstances, where a regulatory authority itself incurs costs, it may be entitled to serve a charging notice specifying the amount which the authority claims is recoverable from the company concerned (e.g. section 78P of the EPA 1990, concerning costs incurred by the enforcing authority in cleaning up contaminated land). Where a charging notice has been validly served (and subject to any rights of appeal against the notice), the cost becomes a charge on the premises and is registrable as such, taking priority over non-statutory creditors.

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?

As a general principle, a company's acts are not the acts of its shareholders, nor are its liabilities the liabilities of its shareholders. The liability of shareholders in a limited liability company is usually limited to paying up the unpaid amount of the nominal value of their shares; the courts strictly apply this principle. By way of exception to this general rule: (a) if a company acts as an agent for its shareholders then, on normal agency principles, its shareholders may be liable for its acts. The conduct of the parties will be looked at closely and each situation will turn on its facts; (b) a company's shareholders may have given direct contractual "comfort" to third parties (e.g. guarantees or indemnities); and (c) the courts will not allow shareholders to "hide behind" a limited company in order to facilitate fraud or use such a company as a device or "sham" to evade its own existing obligations.

If directors are (or become) accustomed to acting on the directions or instructions of the shareholders, those shareholders in certain circumstances, typically involving fraudulent or wrongful trading, could be personally liable as "shadow directors" for the liabilities of the company. Even if a company is "wholly owned" by a parent, that is not of itself sufficient to give rise to an agency relationship. However, a subsidiary could, on the facts, be the "puppet" of the parent and, as such, be found to act as its agent. In that case, the parent could be liable as principal for the express (or implied) authorised acts of its agent subsidiary.

Statute also intervenes in certain cases. The EPA 1990 and the Water Resources Act 1991 contain provisions which can make a company's shareholders liable "where the affairs of a body corporate are managed by its members" (e.g. section 157 of the EPA 1990). Under that section, a member of a company may be prosecuted as though he is a director where an offence is committed by the company and is proved to have been attributable to any neglect on the part of the member in question. This gives rise to a criminal (as opposed to a civil) liability, although it is likely that, were a prosecution to succeed, the prosecuting authority would also seek an order for recovery of its costs, which may include the clean-up costs it had incurred.

In *Chandler v Cape plc* [2012] EWCA (Civ) 525, the Court of Appeal held, essentially, that Cape owed a direct duty of care to its subsidiary's employee, who had developed an asbestos-related disease. The Court emphasised that the duty of care owed by a parent company to a subsidiary's employees does not exist automatically and only arises in particular circumstances: parent

companies have a separate legal personality and, on the facts, it was inappropriate to "pierce the corporate veil". However, the Court considered, having regard to the particular facts of the case, that Cape had assumed duties of care to its subsidiary's employees, on the basis that: (i) Cape and the subsidiary had relatively similar businesses; (ii) Cape knew (or ought to have known) that the subsidiary's system of work in relation to asbestos was unsafe; and (iii) Cape knew (or ought to have foreseen) that the subsidiary or its employees would rely on Cape applying its superior knowledge to protect the subsidiary's employees.

In a more recent case (*Lungowe and others v Vedanta Resources plc* [2017] EWCA Civ 1528), the Court of Appeal further clarified that:

- A duty may be owed by a parent company to an employee of a subsidiary, or a party directly affected by the operations of that subsidiary, in certain circumstances.
- Those circumstances may arise where the parent company (a) has taken direct responsibility for devising a material health and safety policy the adequacy of which is the subject of the claim, or (b) controls the operations which give rise to the claim.
- The first of the four indicia in *Chandler v Cape Plc* (i.e. that the businesses of the parent and subsidiary are in a relevant respect the same) requires not simply that the businesses of the parent and the subsidiary are in the relevant respect the same, but that the parent is well placed, because of its knowledge and expertise to protect the employees of the subsidiary.
- Such a duty may be owed in analogous situations, not only to employees of the subsidiary but to those affected by the operations of the subsidiary.

Under common law, English courts have jurisdiction to hear cases involving incidents occurring abroad where the defendant company is "domiciled" within England. In *Lubbe v Cape plc* ([2000] 4 All ER 268), South African claimants were entitled to bring proceedings "as of right" in the English courts – meaning that they invoked the traditional territorial jurisdiction of the English Court over a corporate defendant who is "domiciled" in England.

Previously, an English defendant against whom a claim had been brought by an overseas claimant could apply to stay the proceedings on the grounds of *forum non conveniens*.

However, in *Owusu v Jackson* ([2005] ECR I 1383), the European Court of Justice (ECJ) ruled that, under the Brussels I Regulation, a claimant was entitled to bring proceedings in England (being a Contracting Party to the Brussels Convention) provided the defendant is domiciled there, even where England had no connection with the events which resulted in the relevant loss. In *Owusu*, a British national domiciled in the UK suffered serious injuries on a property in Jamaica. The defendant property owner was also domiciled in the UK. The claimant sued in the English courts for breach of an implied term that the private beach where the accident occurred would be reasonably safe or free from hidden dangers. Some commentators view the decision as controversial, largely excluding, as it does, any consideration of *forum non conveniens* principles, which, prior to *Owusu*, had involved the courts applying a two-stage test, essentially: (1) has the English domiciled defendant shown that the courts of another jurisdiction are the more appropriate forum for the issues raised in the action; and (2) if so, can the claimant show that the interests of justice nevertheless require the action to be heard in England? The matter may, in due course, be the subject of further consideration at the ECJ level. The recast Brussels Regulation has not resolved the questions raised by *Owusu*. (Notwithstanding the decision in *Owusu*, it remains possible to argue that the proceedings brought in England against an English defendant should be stayed in certain circumstances, where the same or similar proceedings are pending in another state.)

The *Owusu* principle was recently confirmed by the Court of Appeal in *Lungowe and others v Vedanta Resources Plc*, noted above (although the decision of the Court of Appeal in *Lungowe* is currently under appeal to the Supreme Court).

Another case, in which Nigerian claimants alleged damage resulting from oil spillages at the defendant's pipelines, was heard before the Court of Appeal in February 2018. In contrast to the decision in *Lungowe*, the Court of Appeal found in *Okpabi and others v Royal Dutch Shell plc and another* ([2018] EWCA Civ 191) that the defendant parent company did not owe the claimants a duty of care. On the facts of the case, there was not sufficient proximity between the parent and its operating subsidiary to establish a direct duty of care by the parent: for example, although the parent issued group-wide policies and standards, day-to-day operational control remained within the subsidiary, and the parent company did not exercise majority control over that subsidiary.

Similarly, in February 2017, a group of Kenyan nationals were unsuccessful in bringing an action against an English parent for failing to prevent ethnic violence, as it was held that there was not sufficient proximity for the parent company to owe a duty of care on behalf of the subsidiary (*AAA and others v Unilever plc and another* [2017] EWHC 371 (QB)). This judgment has since been affirmed by the Court of Appeal ([2018] EWCA Civ 1532), albeit on slightly different grounds.

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

Sections 43A to 43L and 103A of the Employment Rights Act 1996 (as inserted by the Public Interest Disclosure Act 1998) have the effect of rendering an employee's contractual duty of confidentiality towards their employer void to the extent that those duties would prevent the employee from making a "protected disclosure". Protected disclosures are allowed where (in the reasonable belief of the person disclosing) they show one or more of a number of matters stipulated in section 43B of the Employment Rights Act 1996, which include the committing of a criminal offence, the endangering of the health and safety of any individual, or damage to the environment.

The disclosure must be made in good faith and cannot be regarded as a "protected disclosure" if the person disclosing commits a criminal offence in doing so (e.g. a disclosure which would fall under section 1 of the Official Secrets Act 1989). If an employee is dismissed on the basis of a "protected disclosure", the dismissal is automatically unfair.

Section 43F also allows an employee to make a disclosure to a "prescribed person" if they reasonably believe that a "relevant failure" has occurred or is occurring and that information they are disclosing is true or substantially true. Both defined terms refer to the Public Interest Disclosure (Prescribed Persons) (Amendment) Order 2003, and include disclosure to bodies such as the EA, the HSE, and the Food Standards Agency.

The Enterprise and Regulatory Reform Act 2013 requires that for disclosures made on or after 25 June 2013, the whistle-blower must have a reasonable belief that the disclosure is in the public interest in order for it to be considered a "protected disclosure".

Employment tribunals can send details of whistle-blowing claims directly to a regulator (also known as a prescribed person) where the claimant has given its express consent, under the Employment Tribunals (Constitution and Rules of Procedure) (Amendment) Regulations 2010.

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

US-style "class actions" are not currently available in the UK. The Court of Appeal's decision in the case of *Emerald Supplies Ltd v British Airways Plc* [2010] EWCA Civ 1284 has made it clear that the English courts are not prepared to interpret the existing court rules to allow a form of class action to be created without specific legislation that would allow such claims. For example, the Consumer Rights Act, which came into force on 1 October 2015, introduces a specific procedure pursuant to which opt-in and opt-out private actions can be brought for breaches of competition law.

Under the existing rules governing Group Litigation Orders, environmental claims can be brought by groups of claimants, but all members of the group must be identified at the start of the litigation or at a point in the pre-trial procedure laid down by the court. Although the action may be mounted by way of collective or "generic" pleadings, ultimately each member of the group must prove that their particular injury or loss was attributable to the causative agent or event of which they complain and damages are awarded on an individual basis. In order to obtain collective damages or injunctive relief a separate, simultaneous claim can be brought under Civil Procedure Rule 19.6.

Damages awards in the UK are set by professional judges, not juries, and do not generally contain any punitive element. They therefore tend to be lower than in the US.

On 26 January 2018, the European Commission published a report on the progress made by Member States on the implementation of its 2013 recommendations on collective redress, finding that the availability of such mechanisms, as well as the implementation of safeguards against their potential abuse, are still not consistent across the EU. As part of its "New Deal for Consumers", announced on 11 April 2018, the Commission proposed a new draft Directive on representative actions to strengthen consumer rights, under which redress would be available where a trader is shown to have breached identified consumer protection legislation. These laws are set out in the Annex to the current draft Directive, which contains a number of provisions relevant to the environment, such as the Classification, Labelling and Packaging Regulation ((EC) No 1272/2008), the Ecodesign Framework Directive (2009/125/EC), the Energy Performance of Buildings Directive (2010/31/EU) and the Energy Labelling Directive (2017/1369), among others. If passed, the draft Directive would need to be implemented into national law (before the end of the Brexit transition period).

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

This depends on the type of proceedings being pursued and also, to some extent, whether the individual (and the case) qualifies for public funding from the Legal Services Commission via the Community Legal Service (previously known as legal aid). In the rare cases where the latter applies to environmental litigation, some or all of the costs involved in pursuing the case will be funded from the public purse.

The general rule in English litigation is that "costs follow the event": the loser will be required to pay the winner's legal costs after taxation (if appropriate), as well as its own costs. One exception to this is in cases involving environmental judicial review proceedings engaging the Aarhus Convention (see question 1.3): English courts have the power to make an order to reflect the Aarhus principle that access to justice in environmental matters should not be prohibitively expensive. These orders are known as Costs Capping Orders (CCOs) (previously "Protective Costs Orders" or PCOs).

The old rules gave the courts considerable discretion regarding the ability to make PCOs. In its 2013 consultation on proposals for further reform of judicial review, the UK Government expressed its concern that the courts' expansive approach to PCOs had tipped the balance too far by allowing such orders to be used when a claimant is bringing judicial review for their own benefit.

Accordingly, the new rules (contained in sections 88 to 90 of the Criminal Justice and Courts Act 2015) introduced a new code for costs capping in judicial reviews and a new form of judicial review costs capping order (JRCCO).

The court may now only make a JRCCO if it is satisfied that:

- The proceedings are "public interest proceedings" (meaning there is an issue that is the subject of the proceedings which is of general public importance and the public interest requires the issue to be resolved and the proceedings are likely to provide an appropriate means of doing so).
- In the absence of the order, the applicant for judicial review would withdraw the application for judicial review or cease to participate in the proceedings.
- It would be reasonable for the applicant to do so.

When considering whether to make a JRCCO, the court must have regard to:

- The financial resources of the parties to the proceedings (including the financial resources of any person who provides, or may provide, financial support to the parties).
- The extent to which the claimant is likely to benefit if he is granted relief.
- The extent to which any person who has provided, or may provide, the claimant with financial support is likely to benefit if relief is granted to the applicant for judicial review.
- Whether legal representatives for the claimant are acting free of charge.
- Whether the claimant is an appropriate person to represent the interests of other persons or the public interest generally.

In March 2017, the Aarhus Convention Compliance Committee published its findings that the EU had violated the Aarhus Convention by failing to secure sufficient access to justice in environmental matters for members of the public. The European Commission published a communication in response in April 2017, highlighting discrepancies in standing rules across Member States as being problematic, particularly for NGOs, and launching environmental implementation review dialogues between the Commission and each Member State.

In May 2018, the European Commission adopted an Inception Impact Assessment on how the Aarhus Convention had been implemented with regard to access to justice in environmental matters. The Commission intends to carry out targeted consultations with public authorities and experts in the Member States, the outcome of which is likely to be a Commission Staff Working Document published in Q2 2019. In June 2018, Council Decision (EU) 2018/881 requested the Commission to prepare a report on improving the EU's compliance with the Aarhus Convention by submitting: (i) a study exploring how the EU can comply with the convention in a way that is compatible with the principles of the EU and its system of judicial review; and (ii) a proposal for a regulation to amend Regulation (EC) No 1367/2006 (the regulation which applies the three pillars of the Aarhus Convention to EU institutions and to other EU bodies) by 30 September 2020.

9 Emissions Trading and Climate Change

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

The EU emissions trading scheme (ETS) created by Directive 2003/87/EC applies. The EU-ETS creates a scheme for greenhouse gas (GHG) emissions allowance trading within the Community which began operation in 2005. Following political agreement on Directive 2009/29/EC, the third phase of the scheme, which runs from 2013–2020, is now in force. In March 2018, Directive (EU) 2018/410 introduced several changes for the fourth phase of the scheme, which will run from 2021–2030. Only CO2 emissions were covered under the initial operation of the EU-ETS; coverage has now been extended to include other GHG emissions. In addition to energy-intensive industries (e.g. production/processing of ferrous metals, mineral products, and pulp and paper) and large combustion installations (those with a 20 megawatt or greater thermal capacity), from 1 January 2013, CO2 emissions from petrochemicals, ammonia and aluminium production were brought into the scheme, as well as nitrous oxide (NOx) emissions from nitric, adipic and glyoxylic acid production and perfluorocarbons from the aluminium sector. The capture, transport and geological storage of greenhouse gas emissions are also covered. All installations covered by the EU-ETS scheme need a GHG emissions permit (non-tradable) to emit GHG. Operators of installations must surrender a number of allowances equal to the total emissions from that installation during the preceding calendar year. The penalty for non-compliance was set at 100 Euros/tonne CO2 in 2013, and rises annually in line with Eurozone inflation. The Greenhouse Gas Emissions Trading Scheme Regulations 2012, implementing the EU-ETS, set out rules for the issue, transfer and surrender of permits and penalties for non-compliance.

In July 2018, the Effort Sharing Regulation 2018/842 (ESR) introduced GHG emission reduction targets for each Member State for non EU-ETS sectors such as transport, buildings, agriculture, non-ETS industry and waste. These annual targets are binding and will apply for the period 2021–2030. Under the ESR, to help reach their targets, Member States may: borrow a proportion of their emissions allocation from the following year or bring forward any unused portion of their allocation from the previous year; sell a proportion of their allocation to another Member State; and, where a Member State has exceeded its allocation, offset some of its emissions against credits from certain categories of land (for instance, managed grassland and cropland).

On 12 October 2018, the Government published a technical notice on how a "no deal" Brexit may affect the regulation of GHG emissions under the EU-ETS, indicating that in those circumstances, participating in the EU-ETS would be replaced initially with a carbon tax.

Subject to certain exceptions, the EU-ETS also recognises trading in credits generated under Clean Development Mechanism (CDM) and Joint Implementation (JI) projects approved under the Kyoto Protocol.

Member States must prepare a base national allocation table (NAT), setting out the allocation of allowances. The NAT must be adjusted annually and submitted to the European Commission for approval. Allocation of allowances is now on the basis of fully harmonised rules. A Market Stability Reserve will be introduced from 2019 which will automatically adjust the annual supply of allowances up or down in accordance with the number of allowances in circulation at the time.

Since January 2012, emissions from the aviation sector have been included in the EU-ETS. However, the 2013 "Stop the Clock" Decision suspended the EU-ETS obligations on operators for flights into and out of the European Economic Area (EEA) until April 2014. The April 2014 deadline in the Decision was effectively extended until 31 December 2016 by the EU-ETS Aviation Extending Regulation 2014 (Regulation 421/2014) and – according to a provisional agreement between the Council of the European Union, the European Council and the European Parliament – now further extended until 31 December 2023. International aviation organisations and non-EU countries have expressed strong opposition to the EU-ETS scheme for the aviation sector. The delay to its operation was to facilitate discussions within the International Civil Aviation Organisation (ICAO) on a global market-based mechanism (GMBM). In October 2016, the ICAO agreed to establish such a GMBM through which airlines may offset the growth of their CO2 emissions. There will be a pilot phase from 2021–2023, followed by a voluntary first phase from 2023–2024, with compulsory participation from 2024–2026. In 2021, the number of allowances allocated to aircraft operators will be set at a level 10 per cent below the average allocation of the period 2015–2016, and will decrease annually at the same rate as the total cap for the EU-ETS. Half of the allowances for extra-EEA flights would be auctioned from 2021.

Phase IV of the EU-ETS will run from 2021–2030, and will introduce a number of key changes to the current EU-ETS, aimed at enhancing the flexibility of the system to react to changes and maintain an appropriate market balance.

The CRC Energy Efficiency Scheme (CRC) was introduced in April 2010. It is a mandatory carbon emissions reporting and pricing scheme which tackles GHG emissions from large non-energy-intensive organisations using more than 6,000 megawatt-hours (MWh) per year of electricity. Participants of the CRC need to measure and report their carbon emissions annually. From 2012, participants could buy allowances from the Government each year to cover their emissions in the previous year. Over the years, the CRC has been the subject of substantial modification in response to criticism from participants regarding its complexity and the administrative burden it places on them to ensure compliance. In the 2016 Budget, the Government announced its intentions to abolish the CRC after the 2018/19 compliance year, and accordingly the CRC Energy Efficiency Scheme (Revocation and Savings) Order 2018 entered into force on 1 October 2018. The scheme will close at the end of the 2018/19 compliance year (31 March 2019), which marks the end of Phase II of the Scheme. No businesses need to register for Phase III (which had been due by December 2018). Existing Phase II participants will continue to be required to report their emissions at the end of the 2018/19 compliance year, and allowances for 2017/2018 must be surrendered by the last working day of October 2019.

In place of the CRC, the Government intends to: (i) increase the main rates of the climate change levy from April 2019 (to recover any revenue lost from abolishing the CRC); and (ii) introduce a new streamlined energy and carbon reporting regime under the Companies Act 2006, which will extend the existing requirements for reporting CO2 emissions and energy use in company annual reports. Both of these changes will take effect from 1 April 2019.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

Since 1 October 2013, legislation requires the mandatory disclosure of annual GHG emissions from activities for which a company is

responsible, to the extent it is practical for such emissions to be assessed. The requirement applies to quoted companies, namely all UK-incorporated companies whose equity share capital is listed on the main market of the London Stock Exchange, officially listed in an EEA state or admitted to dealing on the New York Stock Exchange or NASDAQ. The information must be provided in the directors' report.

Environmental Reporting Guidelines: Including mandatory GHG emissions reporting guidance published by Defra indicates that the reporting requirement covers both UK and overseas operations (if appropriate). Companies do not need to report on supply chain emissions, nor on outputs from the company, e.g. emissions from their products when they are used by consumers. The guidance does suggest that companies should consider reporting these separately "to give a wider picture of [the organisation] to investors and shareholders".

The legislation is not prescriptive as to the methodology to be adopted to report emissions data; it simply requires the directors' reports to state the methodologies used to calculate the disclosed information. The guidance emphasises the importance of using robust and accepted methods, and recommends the use of a widely recognised independent standard such as ISO 14064, the Greenhouse Gas Protocol or the Government's own Environmental Reporting Guidance.

The sanction for non-compliance is limited to an investigation by the Conduct Committee of the Financial Reporting Council, and follow-up action (if appropriate) by way of preparation of a revised report. Whilst the Conduct Committee has the power to apply to the court for a declaration that the report does not comply with the requirements of the regulations, and for an order requiring the preparation of a revised report, this is seen very much as a weapon of last resort, with the Conduct Committee seeking to operate by agreement with companies.

As noted in response to question 9.1 above, the Government has introduced a new streamlined energy and carbon reporting regime (SECR) under the Companies Act 2006 which will apply from 1 April 2019. SECR introduces additional requirements for quoted companies to report on their total global energy use across all energy types. In addition, large unquoted companies will now be subject to the same reporting requirements as quoted companies, and must now report on: all emissions arising from activities for which the company is responsible (Scope 1 emissions); emissions resulting from the purchase of electricity, heat, steam and cooling for the company's own use (Scope 2 emissions); total global energy use; and an intensity metric. The disclosure of Scope 3 (energy indirect) emissions will remain voluntary for quoted and large unquoted companies.

Article 8(4) of the EU Energy Efficiency Directive 2012 requires all Member States to introduce a regime of regular energy audits for large enterprises to promote energy-efficiency measures. These audits must be carried out by 5 December 2015, and then every four years thereafter. In the UK this is achieved through the Energy Savings Opportunity Scheme (ESOS) which has been in force in the UK since 17 July 2014.

In November 2016, the High Court delivered its judgment in a long-running judicial review application brought by ClientEarth regarding the Government's failure to comply with the Air Quality Directive 2008/50/EC. The Court quashed the Government's proposals to introduce clean air zones because they failed to comply with the Directive or the Air Quality Standards Regulations 2010. Following the judgment, in July 2017, the Government submitted a revised Air Quality Plan for tackling NO2 that requires specified local authorities to carry out studies to identify how to meet the legal limits of NO2 in the shortest possible time (the Revised NO2 Plan). The plan included: setting up a £255 million Implementation Fund to support local authorities; establishing a Clean Air Fund for local authorities to bid for additional money; and a £100 million budget for retrofitted and new low-emission buses. In March 2018, the £220 million Clean Air Fund was launched. More than £40 million of the £255 million Implementation Fund has also been awarded to local authorities.

In February 2018, the High Court granted ClientEarth's third application for judicial review in respect of the Government's Revised NO2 Plan, holding it to be unlawful on grounds that it did not include sufficient measures to ensure compliance with the Air Quality Directive and the Air Quality Standards Regulations 2010, and did not include a compliant air quality plan for Wales. The Court granted a mandatory order requiring the Government to produce a supplement to the Revised NO2 Plan addressing these shortcomings. The Government's supplement was published on 5 October 2018.

As noted above (at question 2.1), the Medium Combustion Plants Directive 2015 was implemented in the UK through the Environmental Permitting (England and Wales) (Amendment) Regulations 2018.

The revised National Emission Ceilings Directive, which places additional restrictions on several atmospheric pollutants, came into force on 31 December 2016. The National Emission Ceilings Regulations 2018 came into force on 1 July 2018, implementing the Directive in the UK. Under the 2018 Regulations, UK emissions of NOx, sulphur dioxide, ammonia and PM2.5 must be reduced below a specified percentage of overall emissions when compared to emission levels for each pollutant in 2005.

In July 2018, Defra published an updated National Action Plan on climate change for the period 2018–2023, which includes a strategy for inviting infrastructure operators to report on the actions they are taking to adapt to climate change.

The Government also recently consulted on the performance of the Capacity Market mechanism introduced under the Energy Act 2013 and the Emissions Performance Standard. That consultation closed on 1 October 2018.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

Passed in 2008, the Climate Change Act has the twin aims of helping the UK transition towards a low-carbon economy, and demonstrating UK leadership internationally. Under the Act, the Government committed the UK to a legally-binding target of an 80 per cent reduction in GHG emissions by 2050, as against 1990 levels. It also requires a reduction in emissions of at least 34 per cent by 2020. To assist in meeting these targets, binding carbon budgets for successive five-year periods are set by the Committee on Climate Change (CCC). The CCC is an expert, independent public body tasked with assessing how the UK can best achieve its emissions reduction targets through the effort made by the part of the economy covered by cap-and-trade schemes (the traded sector), and by the rest of the economy (the non-traded sector), as well as assessing progress towards the statutory carbon budgets.

In July 2016, the Government publicly accepted the recommendations made in the CCC's fifth carbon budget report and announced that the budget for the period 2028–2032 will limit annual UK GHG emissions to an average of 57 per cent below 1990 levels.

In October 2017, the Government published the Clean Growth Strategy (CGS), a GHG reduction strategy setting out the processes

through which the Government intends to meet future statutory carbon budgets under the Climate Change Act 2008. The CGS (amended in April 2018) contains proposals including the phasing-out of new petrol and diesel cars by 2040, the upgrading of as many homes as possible to Energy Performance Certificate Band C by 2035, and phasing out the installation of high-carbon fossil fuel heating in homes and businesses off the gas grid during the 2020s. The Government published a CGS progress report in October 2018. At both the EU and national levels, the means to achieve emissions reductions include the EU-ETS (see question 9.1), as well as measures to encourage investment in renewable energy technologies and increased energy efficiency (see question 1.2).

The UK is also subject to the EU targets set in the Climate and Renewable Energy Package, which sees the EU as a whole having to achieve a minimum 20 per cent reduction in EU GHG emissions by 2020 (against 2005 levels). In October 2014, the EU set out its 2030 Climate and Energy Framework, centred on a target of a 43 per cent reduction in domestic greenhouse gas emissions (against 2005 levels). The framework also sets the target of increasing the share of renewable energy to at least 27 per cent of total energy consumption by 2030, and proposes to reform and stabilise the EU-ETS regime. In November 2016, the Commission published the "Clean Energy for All Europeans" draft legislation formalising the framework, including: a draft revised Renewable Energy Directive; a draft revised Energy Efficiency Directive; and several proposals for EU electricity market reform and regulation. In June 2018, the EU introduced the first piece of legislation under the package, adopting a directive amending the Energy Performance of Buildings Directive 2010 (Directive 2018/844/EU).

Local authorities are required to ensure that new development is sustainable, which includes achieving GHG emission reductions. The *National Planning Policy Framework* (NPPF), together with *Planning for Climate Change – A Guide for Local Authorities*, set out how planning should contribute to reducing emissions and stabilising climate change, as well as adapting for the anticipated effects. The NPPF (revised in July 2018) directly cites the 2008 Climate Change Act as a relevant consideration in decision-making, making the objective of an 80 per cent reduction in CO2 emissions by 2050 clearly relevant to the duty of planning authorities (including local authorities in that role) to shape policy which reduces CO2 emissions. The 2018 NPPF amends the list of climate change factors to include rising temperatures, implementing the Government's proposal contained in the February 2017 White Paper, *Fixing our broken housing market*.

In November 2016, the UK ratified the United Nations Framework Convention on Climate Change (UNFCCC) Paris Agreement. Principal commitments under the Agreement include a target for zero net emissions from 2050 onwards, and a maximum 1.5 degrees Celsius increase in global temperature.

In November 2017, the UK ratified the Kigali amendment to the UN Montreal Protocol that commits nations to reducing hydrofluorocarbon greenhouse gases (HFCs) by 85 per cent between 2019 and 2036. The Kigali amendment will enter into force on 1 January 2019.

In December 2017, Plan B Earth, a charity with the mission to realise the goals of the Paris Agreement, and 11 citizen claimants, filed a climate change lawsuit against the Secretary of State for Business, Energy, and Industrial Strategy. The claimants alleged that the Secretary of State violated the Climate Change Act by failing to revise the Government's 2050 carbon reduction target (which was consistent with limiting average warming to 2 degrees Celsius above pre-industrial levels) in light of new international law and scientific developments, in particular the Paris Agreement. In July 2018, the claimants were refused permission to apply for judicial review of the Secretary of State's decision.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

Whereas the first US asbestos-related disease cases were brought in as early as the 1930s, it was not until 1950 that the first asbestos-related claim was settled in the UK, and the early 1970s that a series of cases against the Central Asbestos Co. Ltd. resulted in an award of damages by the English courts. A number of factors may explain the relatively slow growth of litigation in the UK, including, for example: (1) the historical existence of compensation schemes and insurance obligations relating to occupational asbestos exposure (the first UK scheme was established in 1932, and since 1972 employers have been legally obliged to purchase employer's liability (EL) insurance to meet claims for work-related injuries or illness); (2) the difficulties for claimants in proving that their claims are not statute-barred and, where they worked for more than one employer, that they should be able to recover damages for "non-cumulative" diseases (such as mesothelioma); and (3) the unavailability in the UK of "class actions", contingency fee arrangements and punitive damages.

In recent years, civil litigation procedure in England has undergone substantial reform, aimed at ensuring more uniform access to justice for claimants and increasing the efficiency and speed of the litigation process. A Practice Note published by the Senior Master of the English High Court created a special "fast-track" claims-handling procedure for mesothelioma cases. Also, the availability of after-the-event (ATE) insurance for legal costs, and judicial erosion of the prohibition on US-style conditional fee arrangements, meant that funding was more readily available for asbestos disease claims.

In 2014, the Government confirmed it would not be introducing an out-of-court process or a dedicated pre-action protocol; it planned to bring into force provisions in the Legal Aid, Sentencing and Punishment of Offenders Act 2012 for mesothelioma, whereby claimants in successful mesothelioma cases would no longer be able to recover success fees and ATE insurance premiums from defendants. In *R (Whitston (Asbestos Victims Support Groups Forum UK)) v Secretary of State for Justice* [2014] EWHC 3044 (Admin), this decision was challenged in judicial review. Judgment was handed down in October 2014, establishing that a full impact review should have been undertaken before bringing the relevant provisions into force for mesothelioma cases. As such, the Government would not be able to remove the exception relating to ATE premiums and success fees until it had undertaken a review of the likely impacts.

The Mesothelioma Act 2014 established a payment scheme for individuals with diffuse mesothelioma and their dependants where the employer or EL insurer cannot be found. The so-called Diffuse Mesothelioma Payment Scheme, which came into force in April 2014, is funded by levies on existing liability insurers, based on their percentage of the current insurance market. In 2015, amendments led to an increase in the level of payment that eligible applicants could receive. The payment was raised from 80 per cent to 100 per cent of average civil damages for people diagnosed on or after 10 February 2015, or their eligible dependants.

The English courts have generally taken a pro-claimant approach to asbestos claims. For example, in *Fairchild v Glenhaven Funeral*

Services Ltd [2002] UKHL 22, a previous decision was overturned that had effectively barred claimants exposed to asbestos dust by more than one employer from recovering damages for mesothelioma on the grounds that the claimant could not prove which of the employers was responsible. The Compensation Act 2006 confirmed that all employers of a claimant who has developed mesothelioma are potentially "on the hook" for the full amount of his or her loss.

Furthermore, in *Bussey v 00654701 Ltd (formerly Anglia Heating Ltd)* [2018] EWCA Civ 243, the Court of Appeal overturned a High Court judgment that barred a claim because the deceased was exposed to a lower level of asbestos than that recommended in a technical data note published in 1970. The Court confirmed that there is no acceptable "minimum level of risk": it should be judged on a case-by-case basis whether developing mesothelioma was foreseeable and whether adequate precautions were taken in response to that risk. Whether there is a material increase in the risk of contracting mesothelioma is relevant to causation, not to whether a duty has been breached. The Court also held that the employer's duty is of a reasonable and prudent employer taking positive thought for the safety of his workers, given what he knew or ought to have known.

As regards insurance, in *Durham v BAI (Run Off)* [2012] UKSC 14 (the "Employers' Liability 'Trigger' Litigation"), the Supreme Court held, in relation to EL policies, that where policy wording refers to disease having been "sustained" or "contracted", the trigger for the policy responding is when the employee is wrongfully exposed to asbestos, not at the time the tumour starts to develop. As a result, liability is triggered as long as the EL policy was in place at the date of the exposure. The Court also confirmed that in construing EL policies, the concept of a disease being "caused" during the policy period must be interpreted flexibly enough to embrace the role assigned to exposure by the *Fairchild* rule. Consequently, once a number of employers have been found liable for having caused the exposure, the employers' insurers were also liable. The ruling reflects general industry practice, although it is a significant departure from the Court of Appeal's judgment in the case, which had held that the trigger for the policy responding is when the tumour starts to develop.

The English courts have taken a less claimant-friendly approach to the question of the availability of compensation for persons suffering from pleural plaques who, though they have not yet contracted the symptoms of an asbestos-related disease, are nonetheless worried that they may do so in future.

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

The Control of Asbestos Regulations 2012 (the Asbestos Regulations) implement Directive 2009/148/EC. They impose an express duty to "manage the risk" from Asbestos-Containing Materials (ACMs) and require employers and other duty holders to ensure that, as far as is reasonably practicable, no-one can come to any harm from asbestos on their premises.

If ACMs are in good condition, not likely to be damaged and not likely to be worked on or disturbed, the Asbestos Regulations provide that it is better to leave them in place and implement a system of management, and impose a duty to manage the risk of those ACMs. Appropriate steps to be taken might include: (a) noting the presence of ACMs and maintaining a register of location and condition; (b) labelling such locations with an asbestos warning sign; and (c) introducing an on-site "permit to work" system (to ensure that anyone who comes to carry out work on the premises does not start before they are presented with the relevant information on asbestos risks, and to record the use of any protective measures or equipment required).

ACMs in poor condition must be repaired under the Asbestos Regulations (e.g. by sealing or enclosing the ACMs to prevent further damage), or removed.

More generally, the Asbestos Regulations oblige duty holders to: (a) find out whether there is asbestos in or on their premises, its amount and what condition it is in (presuming that materials contain asbestos unless there is strong evidence that they do not). This will generally involve engaging a suitably trained person to conduct a survey of the premises; (b) make and maintain records of the location and condition of ACMs or presumed ACMs on the premises; (c) assess the risk from the material, seeking specialist advice, if necessary, from an asbestos surveyor, a laboratory or a licensed contractor; (d) prepare a detailed plan setting out how the risk from the material will be managed; (e) implement the plan and review it periodically; and (f) provide information on the location and condition of the material to anyone who is liable to work on or disturb it. From April 2015, additional obligations under the Asbestos Regulations came into force, requiring medical surveillance for those undertaking "non-licensable work" with asbestos, which includes sporadic, low-intensity and short-term exposure to asbestos.

The basic position in the UK is that employers have a degree of latitude in deciding on the means to control site asbestos exposures, against the background of a duty to carry out continuous risk assessment.

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 your jurisdiction?

Notwithstanding that, historically, environmental insurance has not been widely purchased in the UK, there are signs that the uptake of policies is increasing.

It is possible to obtain cover for remediation liabilities, with the relevant policies written on a claims-made, site-specific basis. Typical policy periods are 10 years for "pre-existing conditions" (i.e. environmental conditions existing before policy inception, but manifesting during the policy period) and one to five years for "new conditions" (i.e. incidents/pollution that first exist after policy inception). The scope of cover would typically include enforced regulatory clean-up costs for on-site contamination and cover for off-site third party injury and asset damage. Cover may also be available for third party claims arising from migration of known conditions, although typically excluding on-site clean-up of such conditions. Some environmental insurance is also available for gradual pollution.

A further type of insurance available is known as contractor's pollution legal liability cover, which is designed to protect contractors against pollution conditions caused by the operations covered under the policy, including work performed by sub-contractors.

Many large companies have historically covered themselves primarily through the use of captive insurers, but some companies are looking either to reinsure their captive environmental liabilities or to purchase direct environmental insurance to plug gaps in the cover provided by the captive.

The Flood Reinsurance Scheme (the insurance scheme preferred by both the Association of British Insurers and the Government) came into force on 4 April 2016 and offers affordable insurance to homeowners whose properties are deemed to be at high risk of flooding.

Environmental insurance is sometimes used as a method of allocating environmental risk as part of M&A transactions, although it is not likely to supplant traditional risk allocation tools such as warranties and indemnities. However, there is a growing awareness of the role that insurance can play as a transaction solution, both pre- and post-disposal, particularly as lenders have become more risk-averse given current market conditions. There are also a number of innovative insurance-backed environmental risk-transfer products coming onto the UK market.

11.2 What is the environmental insurance claims experience in your jurisdiction?

It is difficult to obtain environmental insurance claims figures, as insurers carefully guard such information.

However, there appears to have been very little significant claims experience to date in respect of the relatively new products described above. This is not surprising, as these products have not been written in any volume until very recently and tend to be relatively "long-tail" in nature.

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 your jurisdiction.

The European Union (Withdrawal) Act 2018 will repeal the European Communities Act 1972 at the date of "exit". Only directly-applicable EU law adopted before the end of the transition period (currently targeted as being 31 December 2020) will automatically apply in the UK. The Government has published a number of technical notices relating to environmental law and protection in the event of a "no deal" Brexit.

At least until Brexit, the UK will continue to be obliged to implement and enforce EU environmental laws. It seems likely that the UK would continue to apply the substance of much of EU environmental legislation, albeit with no direct say by the ECJ on how the UK implements and enforces it (again, subject to any agreed transitional arrangements). The Government's July 2018 White Paper committed to "maintaining high standards on the environment [and] climate change".

Unrelated to Brexit, there appears to be a developing trend for using England as a forum for bringing collective redress proceedings founded on environmental or human rights grounds (see the *Unilever*, *Vedanta* and *Okpabi* cases discussed at question 8.3; also *Arroyo v Equion Energia Ltd* [2016] EWHC 1699). This trend reflects increasing European interest in this area: the French *loi de vigilance*, adopted in March 2017, imposes a statutory duty on qualifying companies to take steps to ensure that their subsidiaries are complying with environmental law; a similar provision is also being considered in Switzerland (where the National Council approved a counter-proposal to the citizen-led Responsible Business Initiative in June 2018).

In March 2018, the UK Green Finance Taskforce formally endorsed the recommendations of the Financial Stability Board's Task Force on Climate-related Financial Disclosure (TCFD). It plans to publish guidelines on the implementation and recommendations of the TCFD by mid-2019.

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Chapter 13

Finland


Casper Herler


Henna Lusenius

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1 Environmental Policy and its Enforcement

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

Finland does not have a federal structure, therefore the environmental policy is regulated through state and municipal authorities. The state authorities have a regional representation.

The Ministry of the Environment defines environmental policies and makes strategic plans at national level, sets administrative controls as well as targets for environmental protection, and prepares environmental legislation. The Finnish Environment Institute ("SYKE") produces and compiles environmental data, develops new ways to protect the environment and supervises international waste transportation.

The AVI Agencies (the Regional State Administrative Agency) are the main environmental authorities responsible for environmental licensing. In certain smaller-scale activities specified in the Finnish Environmental Protection Act (527/2014, "FEPA"), environmental and water permits are granted by municipal environmental protection authorities.

The ELY centres (the Centre for Economic Development, Transport and the Environment) are regionally responsible for supervision of compliance with the environmental permits throughout the entire life cycle of operations. In addition, the ELY centres ensure that public interest is taken into account in environmental and water issues.

In addition, municipalities promote and supervise environmental protection locally. Chemical safety permits and mining permits are granted by the Finnish Safety and Chemicals Agency, which also acts as the supervisory authority with respect to the compliance of operators with the said permits.

In connection with the implementation of the major amendment of the FEPA, a new permitting authority called the State Permitting and Supervisory Authority ("LUOVA") will be established (for more information, see question 12.1).

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

The enforcement of Finnish environmental law is strongly based on preliminary supervision, which in practice relies on a comprehensive environmental permitting system. Recently, however, the role of subsequent supervision has increased due to a wide-ranging transition in environmental legislation to a lighter permitting process.

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

In accordance with the Finnish Act on the Openness of Government Activities (621/1999), all official documents must be available to the public unless specifically otherwise provided by law.

2 Environmental Permits

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

An environmental permit is required for all activities listed in Appendix 1 of the FEPA. Under certain preconditions, an environmental permit is also required for activities that may cause pollution of a water body or place an unreasonable burden on the surroundings, as well as for conducting wastewater. All the environmental effects of an activity are considered within the same permit procedure, regardless of in which element of environment the effects occur (soil, water, air, etc.). The scope of activities covered is broader than in the EU's Directive Concerning Integrated Pollution Prevention and Control ("IPPC") and Industrial Emissions Directive ("IED"). In accordance with a recent amendment to the FEPA, certain functions that currently require an environmental permit have been transferred under the range of a lighter notification procedure as of 1 January 2019. An environmental permit is granted for the operations in question and not tied to a specific operator, but the supervisory authority must be informed of a change of operator.

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?

The competent appeal body in environmental issues is the Administrative Court, and all parties to the permission procedure may appeal the authority's decisions. In addition, environmental non-governmental organisations have a right of appeal in most environmental decision-making processes.

There are generally no specific grounds for appeal, although the grounds for appeal are slightly more limited in zoning matters. As of January 2018, nearly all environmental issues require a leave of appeal from the Administrative Court to the Supreme Administrative Court.

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

Environmental impact assessment ("EIA") procedure must be applied to projects that may have a significant adverse impact on the environment or for which an assessment is required by an international agreement binding on Finland. Projects subject to EIA are specified in the EIA Act (252/2017). The list covers 50 project types. In addition, a discretionary EIA may be organised for other project types as well as smaller projects close to the thresholds if the project, in terms of its quality and scope, would likely cause significant environmental impact comparable to the projects listed in the EIA Act.

An EIA does not free the operator from its duty to apply for an environmental permit. However, a permit cannot be granted before the permit authority has obtained the assessment report and the coordination authority (the ELY centre or, in projects related to nuclear power plants, the Ministry of Employment and the Economy) has given its statement. Even when an EIA under the EIA Act does not apply, the environmental licensing procedure under the FEPA and the zoning procedure under the Finnish Land Use and Building Act (132/1999, "LUBA") require a limited EIA.

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

If the permit regulations or the environmental legislation are violated, the supervisory authority (ELY centre) may use administrative compulsion, which may take the form of a coercive fine suspension of the activity or notice of enforced compliance. In case of violation of the permit conditions despite a written caution by the supervisory authority, the permit authority may revoke the permit, forcing the operator to close down the activity.

In the event of soil or groundwater contamination, the supervisory authority may impose a remediation obligation on the operator. The supervisory authority may also initiate a criminal investigation where a corporate fine and confiscation of the proceeds of crime are possible. The threshold for doing so has become lower in recent years, hence companies and officers face a material risk for criminal investigation and prosecution in cases of incompliance with permits and legislation.

3 Waste

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

In accordance with the EU Waste Directive and the Finnish Waste Act (646/2011), waste is defined as any substance or object which the holder discards, intends to discard or is required to discard. According to the Waste Act, a substance or object is not waste but a by-product, if it results from a production process whose primary aim is not the production of that substance or object, and:

- further use of the substance or object is certain;
- the substance or object can be used directly as is, or without any further processing other than normal industrial practice;
- the substance or object is produced as an integral part of a production process; and
- the substance or object fulfils all relevant product requirements and requirements for the protection of the environment and human health for the specific use thereof and, when assessed overall, its use would pose no hazard or harm to human health or the environment.

There is special regulation for the handling (e.g. storage, packaging, transport and recycling) of hazardous waste.

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?

Under the Waste Act, the producer/holder of waste is responsible for organising waste management. This includes the obligation to see to the appropriate disposal of waste in landfills and waste processing facilities in accordance with the relevant legislation. The storage and disposal of waste originating from operations subject to environmental permit is, however, regulated in the permit conditions.

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)?

The waste producer/holder's responsibility for organising waste management is terminated and transferred to a new holder when the waste is delivered to a lawful consignee. However, responsibility is not transferred to a mere carrier transporting waste on behalf of another party. Waste may only be delivered to a party that:

- has been registered as a professional waste transporter or dealer; or
- has the right under an environmental permit to receive the waste in question.

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

The producer's liability applies for certain products specified in the Waste Act (e.g. certain vehicles, car tyres, electronic equipment, batteries, packages, recycled paper). Hence, the producer of the product is responsible for organising waste management, regardless of who the waste holder is.

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?

The breach of environmental laws or permits may lead to civil, criminal or administrative sanctions.

In the event of soil or groundwater contamination, either the party which has originally caused the contamination or the party currently in possession of the area (e.g. the current owner or tenant) may be required to assess the need for remediation and take the necessary actions required by the authorities. There are not many defences available, but the extent of remediation required for the contaminated site is dependent upon the purpose of use of the site.

The supervisory authority for operations subject to an environmental permit may impose a remediation obligation on the operator and may also initiate a criminal investigation where a corporate fine and confiscation of the proceeds of crime are possible.

Environmental liability in relation to third parties cannot be avoided by contractual agreement. However, as agreements regarding the division of environmental liability are binding between the parties, a party may raise a civil action against the counterparty and claim that it should stand for the costs accrued to the party due to environmental liabilities.

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 restoring contaminated soil and groundwater, paying compensation for environmental damage as well as for damage to protected species and natural habitats notwithstanding that the polluting activity has been operated within the permit limits.

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?

There is no legislation or case law explicitly allocating liability under public law or regulations concerning environmental damage to the directors of a company, unless their ownership in the company is significant enough for them to be regarded as the factual polluter or operator. In contrast, chapter 48 of the Criminal Code (39/1889) allocates liability for environmental offences to the person in whose sphere of responsibility the act of negligence belongs. The allocation rules do not exclude, e.g. external board members or officers of a parent company. The formal position of an officer in the corporation does not as such exclude liability, as the assessment is made on an overall basis with due account to the factual participation and responsibility of the person in the unlawful activity. As the Criminal Code prohibits both intentional and negligent impairment of the environment, breaches of environmental legislation may easily lead to a criminal investigation.

Criminal liability of directors and officers is best prevented by monitoring compliance and clearly allocating the environmental responsibilities within the company, as well as by providing the officers of a local subsidiary enough power to remain in factual control of the subsidiary's operation. Based on a ruling by the Supreme Court (KKO:2016:58) in 2016, directors of the board can also be held liable if they have not supervised so that substantial environmental issues are sufficiently attended to.

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?

The acquisition of company shares implies that the whole target company, its environmental liabilities included, is transferred to the acquiring company. Consequently, the acquiring company may face liability for possible contamination of soil or groundwater, or other environmental damage that the activity may have caused in the past. As liabilities for soil and groundwater contamination may extend far back in time, the risks may be substantial, especially in acquisitions of old industrial companies. Potential liabilities for previous sites of operations will also follow the acquired company.

The acquisition of assets may imply a risk of secondary liability for soil or groundwater contamination, as the acquirer may be considered liable as the holder of the contaminated property if the actual polluter cannot be found or has ceased to exist. Moreover, the acquirer may also face liability under the Act on Compensation for Environmental Damage (737/1994, ACED) if the acquirer knew or should have known about the pollution or the risk of pollution at the time of the transfer. The acquirer of a facility may also become liable for responsibilities under an environmental permit regarding the closing of operations and aftercare of, e.g., non-operational industrial landfills.

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

In certain justified situations specified in the ACED and the FEPA, liability may be extended to the shareholder of the operator of the polluting activity. This rule may also be applied to the lender financing the operations; however, only in the rare event that the lender exercises factual control over the operator (e.g. ordinary covenants should not as such render the lender liable).

5 Contaminated Land

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

In accordance with the FEPA, liability for remediation of so-called new soil contamination (contamination that occurred after 1 January 1994) lies primarily with the polluter, i.e. the party whose activities have caused the contamination. The polluter is required to restore the contaminated soil to a condition that will not cause harm or hazard to the environment or harm to health. The holder of the property where the contamination has occurred may face secondary liability – however, only if the polluter cannot be found or cannot be made to fulfil its remediation responsibility – and:

- the contamination has taken place with the consent of the holder of the property; or
- the holder was or should have been aware of the contamination when the property was acquired.

Finnish legislation does not, as a main rule, allow retroactive application of liability. However, case law developed on the basis of the old Waste Management Act (673/1978) allows the establishment of liability for historic soil contamination that originates from activities between 1 April 1979 and 31 December 1993 on the polluter or the holder (owner and/or tenant) of the contaminated property. Although there are no specific rules on which party should be responsible for remediation, recent court practice suggests that polluters would be primarily liable before holders. However, if the soil-polluting activities ceased prior to 1 April 1979, only the holder of the property can be held liable for remediation based on the Waste Management Act (Supreme Administrative Court, KHO 2006:30). Other grounds for liability may also evolve; in KHO 2013:187 the Supreme Administrative Court considered a municipality liable for landfill which was closed in the 1950s based on waste management rules in the 1927 health protection legislation. In addition to soil contamination, the FEPA contains a groundwater pollution prohibition. Liability for groundwater contamination lies with the polluter. A non-polluting holder of the contaminated groundwater area cannot be held liable for remediation. If the groundwater has been contaminated through polluted soil, it is possible to impose both soil and groundwater remediation liabilities for the polluter

(KHO 1996 A 29). Liability for groundwater contamination can be extended on the basis of the old Water Act (264/1961) to activities that have been operational as of 1 April 1962.

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

There are no clear rules for allocation of liability where more than one person is responsible for contamination.

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?

This is possible if the circumstances around the original decision have changed.

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?

The current owner may demand authorities to take action and order a liable party to assess and/or remediate a site. An *inter partes* agreement does not bind authorities or third-party claimants for the benefit of a polluter.

An acquirer may be considered liable as the holder of the contaminated property if the actual polluter cannot be found or has ceased to exist. Moreover, the acquirer may also face liability under the ACED if the acquirer knew or should have known about the pollution or the risk of pollution at the time of the transfer.

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

In accordance with the ACED, a polluter shall pay reasonable compensation for the costs incurred by authorities for preventing environmental damage or reinstating a polluted environment. In addition, the Water Act (587/2011) regulates liability for damage caused by water resources management projects to, e.g., fish stocks or fishing.

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.?

For the purpose of supervision and enforcement of the environmental legislation, the environmental authorities are entitled to gain access to places where activities are engaged in and to make inspections and tests, carry out measurements and take samples. The supervision of activities is primarily conducted through monitoring and reporting conducted by the operator, which means that investigations usually take place only if the operator does not present an adequate report or otherwise neglects its monitoring duties. The new FEPA introduces risk-based monitoring, thus the intensity of authority monitoring is determined based on dependency on risk, size and track record.

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?

Yes, the relevant environmental acts contain such duties towards the authorities.

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

The FEPA contains a list of so-called directive facilities in accordance with the IED which are, under certain preconditions, under obligation to perform a soil and groundwater baseline study to be attached to an environmental permit application. When the company dissolves activities, soil and groundwater conditions must be reinvestigated and compared to the results of the baseline study. In the case that increased contamination of soil or groundwater is detected, or if the baseline of the site is found harmful for health or environment, the operator is under obligation to remediate the site.

In addition, if there are grounds to suspect contamination of soil and/or groundwater, the operator of the polluting activity or, under certain preconditions, the holder of the area, is under obligation to establish the size of the contaminated area and the need for remediation.

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?

The FEPA contains a specific provision on the obligation to disclose environmental information in connection with transfer of land. The provision applies to asset sales, real estate sales and new lease contracts.

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?

It is possible to agree on an environmental indemnity. However, such indemnity is only effective between the parties to the agreement and is therefore not binding upon the authorities.

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

No, Finnish legislation does not allow this.

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 Finnish general corporate law does not contain any specific rule regarding piercing the corporate veil. However, in certain justified situations specified in the ACED and the FEPA, liability may be extended to the parent company or shareholder of the operator of the polluting activity. Liability is not limited to officers of the corporation. However, this rule only applies if the parent company or shareholder is deemed to exercise factual control over the operator.

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

No, there are none.

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

No, they are not.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

No, but the Finnish administrative process is low in costs for the parties, as damages are seldom imposed and high bills of costs are adjusted. However, parties to a civil process bear a much greater risk of costs (e.g. damages based on the ACED).

9 Emissions Trading and Climate Change

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

As a member of the EU, Finland has implemented the EU Emissions Trading Directive through the national Emissions Trading Act (311/2011), meaning that most sectors of heavy industry, and with certain restrictions in the aviation industry, are subject to the European Union Emissions Trading Scheme ("EU ETS"). About 600 facilities in Finland are currently subject to the EU ETS. In November 2018, the government gave a proposal for changing the Emissions Trading Act in order to implement the recent changes to the EU Emissions Trading Directive. The proposed changes concern e.g. the application procedure for free emission allowances, an obligation to deliver necessary information to the emissions trading authority, and the distribution of emission allowances.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

The IED has been implemented in Finland in connection with the major amendment of the FEPA in 2014, including the requirement to employ the best available technique for reducing greenhouse gas emissions in industrial operations. If the operations are not subject to emissions trading, the monitoring and reporting of greenhouse gases is regulated in the environmental permit.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

Finland's national climate actions are largely based on the framework set by the UN Climate Change Convention, the Kyoto Protocol, the Paris Convention and the EU. The Finnish national strategy for adapting to climate change outlines adaptation measures for 15 sectors up to the year 2050 and includes anticipatory measures as well as measures responding to the effects of climate change. In order to achieve the long-term objective, the parliamentary committee on energy and climate issues has prepared a roadmap extending to the year 2050 and serving as a strategy guide on the journey towards achieving a carbon-neutral society. The measures to be taken in order to reduce greenhouse gas emissions by 80–95% are related to renewable energy, energy efficiency and clean-tech solutions.

The Parliament accepted the Government Report on Medium-term Climate Change Plan for 2030 in March 2018. The plan outlines the necessary measures for reducing greenhouse gas emissions in sectors that are not subject to the EU ETS. The goal is to reduce greenhouse gas emissions by 39% compared to the year 2005 by the year 2030.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

Asbestos litigation cases in Finland relate mostly to neglect of asbestos safety regulations and compensation for occupational diseases caused by asbestos.

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

The use of asbestos-containing materials was partly prohibited in Finland in 1977 and totally prohibited in 1994. Asbestos is currently not considered to constitute a health risk when found in intact materials, which are in normal use. Therefore, there is no explicit legal obligation to remove asbestos-containing material on-site unless it is found hazardous for health (i.e. loose or friable). It is, however, obligatory to conduct asbestos testing on all buildings built before 1994 prior to any construction work. The handling of asbestos-containing materials (e.g. demolition work) is strictly regulated.

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 your jurisdiction?

Under the Finnish Environmental Damage Insurance Act (81/1998), all companies whose activities involve a material risk of environmental damage, or whose operations cause harm to the environment in general, shall be covered by environmental damage insurance. Voluntary insurance types, such as liability insurance and property insurance, are also available.

11.2 What is the environmental insurance claims experience in your jurisdiction?

The environmental insurance claims experience in Finland is limited, as there is only one case involving a dispute over the statutory environmental damage insurance.

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 your jurisdiction.

The third phase of the major amendment of the FEPA is currently under preparation. The amendment is planned to introduce, *inter alia*, a more focused supervision system and a lighter environmental permitting procedure by adopting a one-stop-shop model. The one-stop-shop model will combine various permits, such as the environmental permit, water permit and building permit, into one application procedure. The model allows the combination and temporal coordination of various environmental matters.

In October 2018, the Finnish government gave a proposal for a new law for phasing out from the use of coal in heat and power production by the year 2029. As a substitute for the use of coal, the government also gave a proposal for a law on promoting the use of biomass fuels.

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Chapter 14

France

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1 Environmental Policy and its Enforcement

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

Note: unless otherwise stated, references hereunder are from the French Environmental Code. Statutory provisions are referred to as 'L' articles and regulatory provisions as 'R' articles.

French environmental law is based on:

- European law, especially the Treaty on the Functioning of the European Union, relevant EU Regulations and Directives.
- The Environmental Charter (*Charte adossée à la constitution*) of 2005 (Charter) which forms part of the French Constitution. This Charter affirms key principles such as the right of citizens to public health and to live in a balanced environment, their duty to participate in the preservation of the environment, and to contribute to the compensation of damages they cause to the environment. The Charter is binding on public and administrative authorities in all the rights and obligations which it defines (Constitutional Council, 19 June 2008; Administrative Supreme Court (*Conseil d'État*), 3 October 2008). Particularly, it provides that public authorities shall abide by the precautionary principle. Since a 2010 constitutional reform, persons involved in court proceedings are entitled to seek 'a priority preliminary ruling on the issue of constitutionality' of the statutory provision applicable to the case in issue (*question prioritaire de constitutionnalité*). Consequently, the fact that a piece of legislation may violate rights and principles guaranteed by this Charter may now be raised.
- The French Environmental Code which lays down the main principles governing environmental law (Art. L.110-1) and incorporates most laws and regulations governing the protection of the environment. In line with EU requirements, applicable principles include the precautionary principle, the principle of preventive and corrective action, the 'polluter pays' principle, the right for any person to access environmental information held by public authorities, and the principle of participation according to which persons are entitled to be informed and to issue observations as regards decisions impacting the environment. New items were added further to the Biodiversity Law of 8 August 2016 including the non-regression principle. The Environmental Code is supplemented by many ministerial orders (*arrêtés ministériels*) on technical aspects.

The administration and implementation of environmental policy is essentially a competence of the State (*État*) (central government level). Local governments (municipal) enjoy only residual prerogatives in environmental matters.

At the governmental level, this competence is mainly entrusted in the (currently named) Ministry of Ecological and Inclusive Transition (note: this designation is subject to change based on the political allocation of prerogatives between ministries). The Ministry is vested with expansive powers towards the integration of sustainable development issues into the following fields: energy (including renewables); climate change (and international negotiations in relation thereto); biodiversity; pollution and risk prevention; transport, buildings, networks and urban development; seashores; and the seas.

At the site/facilities level, the enforcement of environmental laws and regulations is a State prerogative:

- The local representative of the State (*préfet*) is the key decision-maker. The *préfet* issues environmental operating permits (*autorisation environnementale*) (Art. L.181-1 *et seq.* and R.181-1 *et seq.*) for the variety of activities listed based on their propensity to impact the environment (see question 2.1 below).
- Technically, the *préfet* relies upon the services of the Regional Environment, Planning and Housing Directorate (*Directions Régionales de l'Environnement, de l'Aménagement et du Logement* or DREAL) (formerly DRIRE), acting under the authority of the Ministry of the Environment. DREAL agents oversee environmental permits applications and filings, and are in charge of the inspection of activities. *Note*: in the Ile-de-France Region (greater Paris area) the DREAL is referred to as DRIEE-IF.

From a judicial perspective, environmental law is administered by:

- Administrative courts, which review either the lawfulness of administrative decisions (decrees, ministerial orders, and individual environmental permits) (*recours pour excès de pouvoir*), or rule over indemnification actions deriving from harm caused by administrative action under an unlimited jurisdiction regime (*recours de plein contentieux*). Environmental permits are subject to review under the unlimited jurisdiction regime (Art. L.181-17 and L.514-6; Art. R.181-50 to R.181-52 and R.514-3-1). Under this regime of extended prerogatives, administrative courts may cancel, amend and even grant environmental permits.
- Civil and criminal courts each also have jurisdiction over environmental liability issues (see question 5.5 below).

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

Although applicable provisions provide for the possibility of administrative action as well as criminal prosecution, the authorities'

approach to the enforcement of environmental legislation is generally one of dialogue with operators and of pragmatism in the search for corrective action and solutions. Where an installation is found to be non-compliant, the *préfet* issues to the operator a formal notice (*mise en demeure*) requiring compliance before taking administrative sanctions (see question 2.4 below) or referring the matter to the prosecutor in view of the launching of criminal prosecution.

In practice, when an operator demonstrates good faith, public authorities tend to seek solutions to bring the installation into compliance with environmental law. About 10% of inspections result in formal notices being served upon operators. Where an installation displays risks not known at the time of permitting, the authorities may order the temporary suspension of its operation. In rare cases, where hazards cannot be eliminated, the closure or suppression of the installation may be ordered by decree (Art. L.514-7).

Inspections are organised at the regional level depending on priorities (quantitative or qualitative) set by each regional service and based on national guidelines issued by the Ministry of Ecology (Ministerial Note of 24 November 2016 governing the registered installations services multiannual control plan).

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

As a signatory of the Aarhus Convention of 1998 and pursuant to Directive 2003/4/EC, France provides extended access to environment-related information. The Charter (Art. 7) and the Environmental Code (Art. L.124-1) provide for a right of access of each person to environment-related information held, received, or drawn up by the public authorities, or on their behalf. This right is exercised under the conditions defined by the Code governing the relationship between the public and the authorities (*Code des relations entre le public et l'administration*) (Art. L.300-1 *et seq.*) (formerly the law of 17 July 1978). Public authorities may reject such requests where the consultation or communication interferes with the interests of national defence, public security or other secret information protected by the law (Art. L.124-4).

Furthermore, the principle of public participation, defined by the Charter (Art. 7), applies to all decisions taken by public authorities and having an impact on the environment (Art. L.120-1 *et seq.* as amended by a law of 30 July 2018). Also, public inquiries relating to projects or plans likely to impact the environment were reformed in 2010, 2011 and 2018 with a view to improving public participation and taking into consideration the public inquiry commissioner's recommendations. Notably, it now requires that the public have reasonable time to issue observations and proposes that they be informed of how such observations and proposals were factored into environmental decisions.

2 Environmental Permits

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

Environmental permits issued by the *préfet* are required for a wide variety of activities likely to impact the environment. These include activities in relation to the abstraction or treatment of water or affecting water resources (Art. L.181-19 and L.214-1) and registered installations (referred to as ICPE) (Art. L.181-24 and L.511-1). These also include other works and activities (civil engineering works, infrastructure, etc.) enumerated in the Environmental Code (Art. L.122-1-1 and chart appended to Art. R.122-2).

The environmental permit regime is an integrated permit system. Such permits cover all the activities/installations at a given site and regulate all discharges (to air, water, and soil), and all potential dangers or nuisances.

As far as industrial installations are concerned, this regime implements the IPPC Directive (Directive 96/61/EC) as recently recast by the Industrial Emissions Directive (Directive 2010/75/EU or IED). However, the scope of the (pre-existing) registered installations regime is broader than that of the foregoing EC/EU Directives. It covers a variety of activities and notably includes farming activities. For industrial activities, environmental permits are required for all installations categorised in a decree on the basis of their potential for environmental impact (*décret de nomenclature*) (Art. L.511-2 and R.511-9). This is a three-tier system whereby activities are either subject to authorisation, registration (*enregistrement*) or declaration, with permitting procedures organised accordingly.

In most cases, environmental permits can be transferred by way of a declaration to the *préfet* within three months of the transfer having taken place (Art. L.181-15, R.181-47, and R.512-68). The *préfet* issues an acknowledgement to the new beneficiary within one month. For sites subject to financial guarantees (Art. R.181-47 and R.516-1) (*i.e.*, waste storage facilities, quarries, hazardous installations, etc. all of which are likely to cause significant soil or water pollution), an authorisation from the *préfet* is required to effectuate a permit transfer.

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?

Environmental permits and refusals thereof, which may be tacit (Art. R.181-41 and R.181-42), may be challenged by the petitioner/operator before the locally competent administrative tribunal within two months from their notification/publication (Art. R.181-50 and R.514-3-1). Third parties (including municipalities) with standing may further challenge permits within four months from the date of their publication/public posting (Art. R.181-50 and R.514-3-1).

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

Pursuant to EU law obligations as transposed into French law, environmental impact assessments (EIAs) (*études d'impact*) (Art. L.122-1 *et seq.*; R.122-5 and R.181-13), or environmental incidence assessments (*études d'incidence*) (Art. R.181-13), and risk assessments (*études de dangers*) (Art. R.181-25) are required in the context of most applications for environmental permits (Chart appended to Art. R.122-2). The scope of EIAs has considerably and ambitiously widened in recent years (since a legislative Ordinance of 3 August 2016) to become a comprehensive document including developments regarding reduction, avoidance and compensation measures (Art. R.122-5).

For certain activities, EIAs or risk assessment updates may be required from operators and particularly at the time of significant site overhauls and permit updates (Art. R.181-45).

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

The violation of permits may carry both administrative and criminal sanctions.

The authorities may impose sanctions where an installation is operated without a permit or does not comply with legal or administrative prescriptions. Such infringements can be identified through complaints or established during environmental inspections. In such cases, a formal notice is served upon the operator (Art. L.171-8) (although inspection services may at times show leniency and issue a mere reminder before acting formally). Where the operator does not comply with the notice within the afforded time period, the *préfet* may take administrative sanctions. These include one or several of the following: (i) mandatory deposit with the Public Treasury of the sums needed to carry out the necessary works; (ii) execution of the works by the authorities at the operator's expense; (iii) suspension of operation until the conditions imposed have been complied with; and/or (iv) a fine amounting to EUR 15,000.00 (max.) and a daily penalty payment of EUR 1,500.00.

Notwithstanding the above, a criminal prosecution may also be launched. For registered installations, this entails criminal fines for petty offences (up to EUR 1,500.00) (Art. R.514-4 *et seq.*). Misdemeanours for the operation without a permit, failure to comply with a formal notice on time, or severe degradation of the environment, may carry fines ranging from EUR 75,000.00 to 300,000.00 and/or imprisonment sentences of one to five years (Art. L.173-1 to L.173-5). For convictions of legal entities, the fine amounts indicated above may be increased fivefold (Art. L.173-8; Criminal Code, Art. 131-38). On top of the above sanctions, criminal courts may also order the suspension of activities (Art. L.173-5). Under certain conditions, settlements remain possible (Art. L.173-12).

3 Waste

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

As per Directive 2008/98/EU, 'waste' is defined as 'any substance, object or, more generally, any movables which the holder discards or intends or is required to discard' (Art. L.541-1-1). Also, 'ultimate waste' is defined as 'waste which is not likely to be reused or recovered under the technical and economic conditions of the moment, notably by the extraction of the reusable part or by the reduction of its pollutant or hazardous character' (Art. L.541-2-1-II). Consequently, the possible reuse of a given material does not exclude its qualification as waste. Besides, France has transposed end-of-waste provisions whereby waste may cease to qualify as waste where it has undergone a treatment and a recovery (*valorisation*) operation and complies with specific criteria (Art. L.541-4-3 and D.541-12-4 *et seq.*).

In line with EU Directives, several categories of waste are singled out and subject to specific rules entailing additional obligations. These include, for instance, hazardous waste (Art. L.541-7-1, L.541-7-2, R.541-8, and D.541-12-1 *et seq.*) and special waste like radioactive waste, used oils, medical waste, waste electrical and electronic equipment (WEEE) (Art. L.541-10-2 and R.543-172 *et seq.*), bio-waste (Art. L.541-21-1 and R.543-225 *et seq.*), household waste resulting from dangerous chemical products (Art. L.541-10-4 and R.543-228 *et seq.*) or PCB-containing waste (Art. R.543-17 *et seq.*). As regards the cross-border shipment of waste, French law supplements EU Regulation 1013/2006 with rules specifying the prerogatives of French authorities and applicable sanctions (Art. L.541-40 *et seq.* and R.541-62 *et seq.*).

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?

On-site storage *per se* is not permissible unless the site itself qualifies as a waste storage facility and is permitted accordingly. Therefore, waste producers are under the obligation to sort and safe-store waste before pick-up, recovery and treatment/disposal by certified contractors. Environmental permits specify conditions applicable to such on-site temporary storage. Traceability is secured via mandatory waste consignment notes so authorities may, at all times, monitor disposal actors and practices.

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)?

The producer or holder of waste is liable for the management of waste until its elimination or final recovery, even where waste has been transferred to another person for off-site treatment (Art. L.541-2). It is therefore advisable that waste producers or holders ensure that their contractors are validly entitled to treat waste. Where waste is not lawfully eliminated, public authorities may force elimination at the producer's or holder's expense regardless of any contractual stipulations to the contrary (Art. L.541-3). This is notably the reason why operators of waste elimination or storage facilities are required to provide financial guarantees to protect both the authorities and waste producers from having to bear such costs in case of bankruptcy (Art. R.516-1 *et seq.*).

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

Waste management is a duty of waste producers and waste holders until the waste's elimination, or recycling even when transferred to a third party (Art. L.541-2). Above and beyond the obligation to reduce waste generation at the source, the Environmental Code prioritises waste treatment methods: producers and holders of waste must favour the reuse of waste, then its recycling, and eventually other recovery methods (Art. L.541-1 II 2°). Hence, by law, waste disposal in considered a last-resort option only.

Furthermore, in conformity with the principle of 'extended producer responsibility', producers, distributors or importers of waste-generating products must themselves manage such waste or secure its management by third parties. The choice is between either individual waste collection systems, or the use of collective treatment organisations (Art. L.541-10). Such take-back/recovery schemes apply, *inter alia*, to certain printed materials, WEEE, clothing, chemicals, packaging, furniture, used tyres (Art. L.541-10-1 *et seq.*), household waste deriving from chemical products (Art. R.543-228 *et seq.*), and end-of-life vehicles (Art. R.543-156-1).

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?

Breach of environmental laws and/or permits may carry the following liabilities:

- Regulatory liability (responsibility *vis-à-vis* the authorities): non-compliance with laws or with permit terms may carry administrative sanctions (see question 2.4 above). The authorities may occasionally act by way of reminders, although administrative action is meant to be official and to operate by way of formal notices. Non-compliance with notices may entail sanctions (permit suspension, fine, etc.) as well as criminal prosecution. Administrative sanctions may be challenged before administrative courts.
- Civil liability (tort): pursuant to the French Civil Code, a person may be held liable for damages caused to third parties (Art. 1240 *et seq.*). Claimants must show wrongful conduct, damage and a causation. Indemnities are reduced where the liable party proves contributory negligence on the part of the victim. These are bench trials only as no juries sit in civil court in France. In the absence of any violation of the law or permit, an operator may also be looked after on an 'abnormal private nuisance' basis (*trouble anormal de voisinage*) (Civil Code, Art. 544) whereby claimants must show the abnormal nature of the nuisance caused, subject to certain limitations (Construction and Housing Code, Art. L.112-16).
- Criminal liability: prosecution can be sought on general criminal grounds, such as endangering a person's health or life (Criminal Code, Art. 223-1 *et seq.* and 221-6 *et seq.*) for instance, based on specific environmental laws which provide for criminal sanctions (Art. L.173-1 *et seq.*) (see question 2.4 above). The public prosecutor as well as victims may move to institute proceedings. Victims may also join in the action and seek damages (*constitution de partie civile*). Sanctions include fines and/or imprisonment (see question 5.5 below).
- In line with Directive 2004/35/EC, an environmental liability regime for direct harm to the environment is in force since 2008 (Art. L.161-1 *et seq.* and R.161-1 *et seq.*). This regime applies only where serious and measurable environmental deterioration occurs directly or indirectly and affects: (i) land where contamination creates a significant risk of harming human health; (ii) water; (iii) species and natural habitats protected under European Birds and Habitats Directives; or (iv) ecological services. Operators are required to take necessary prevention or remedial measures. Such measures may also be imposed and enforced by public authorities. A 'state of the art' defence is available to operators where an emission or activity was not considered likely to cause environmental damage under the state of scientific and technical knowledge at the time the damage occurred (Art. L.162-23). This regime does not apply where events causing the damage occurred prior to 30 April 2007.

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

In principle, under the ICPE regime, authorisations and registrations are granted subject to the rights of third parties (Art. L.514-19). Consequently, operators remain liable for any pollution or physical or material damage caused by their activities even where activities are duly permitted and performed compliantly. Based on an abnormal private nuisance action, a third party may obtain redress against a compliant operator if it successfully demonstrates the abnormality of the nuisance suffered (see question 4.1 above).

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?

Directors and officers (D&Os), as well as legal entities, may be held liable, either criminally or civilly, for environmental wrongdoing.

D&Os' criminal liability may be sought for breach of environmental regulations providing for criminal sanctions. Such liability is insurable to the extent the offender can demonstrate the absence of intent to cause the damage. Furthermore, since 2004, companies may also be found criminally liable for all offences committed on their behalf by their representatives or bodies. In such case, fines may be increased fivefold (see question 2.4 above) while additional sanctions may also be imposed (*e.g.*, closure of the establishment or the exclusion of the company from public procurement tender procedures). Both a company and its director may therefore be found simultaneously liable for the breach of an environmental regulation. Yet, a company may alone be convicted on pollution grounds, although its director did not act with due diligence.

D&Os may also be held civilly liable, directly or indirectly, on several grounds, provided their wrongdoing damaged third parties. Liability may result directly from their criminal acts where the criminal offence also constitutes a civil tort. D&Os' civil liability towards their employer may also be sought on mismanagement, violation of statutes, laws or regulations grounds where the company's liability resulted in damages being paid to third-party victims. Such proceedings may be introduced by (i) the company, or (ii) the shareholders on behalf of the company.

Practically, acting against a company is a preferred way as claimants bear the somewhat difficult burden of proving D&Os' direct liability (*i.e.*, the existence of wrongdoing (*faute détachable*) 'in the form of an intentional and particularly serious fault, incompatible with the normal performance of corporate duties'. An *ad hoc* policy named 'Directors Civil Liability Insurance' may be taken out by companies on behalf of their D&Os. It covers all damages incurred by third parties, except damages caused directly to the environment. Furthermore, legal entities themselves may take out insurance covering damage caused to third parties via environmental harm (see question 11.1 below).

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?

In share purchases, existing and latent environmental liabilities pass on to the purchaser. From the authorities' perspective, a share purchase does not translate into a change of operator. This is reflected in case law and most academics concur. In that case, environmental liabilities therefore remain with the entity in question. Note also that share deals may have consequences (albeit limited) when involving activities subject to financial guarantees, as the authorities may require the modification of the amount of such guarantees in line with the credentials of the new shareholding (Art. L.516-1 *et seq.*).

In asset transfers, the issue rests on whether or not a change of operator declaration is filed by the transferee. Where the benefit of the permit stays with the transferor, the authorities will not be bound by the mere transfer of assets and the transferor will remain liable, unless the authorities are aware of a partial asset contribution

agreement governed by the legal regime for spin-offs (*see* Administrative Court of Appeals of Lyon, 6 July 2006, *SA Rhodia Chimie*, 02LY01929). Where the transferee effectuates the change of operator (see question 2.1 above), existing and latent liabilities pass on to him (provided the same activity is pursued). In case of change of activities, contaminations attach to the entity(ies) having conducted the activities in question.

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

As a general rule, lenders financing polluting activities are not liable. In certain limited circumstances, parent companies may be found liable and called upon to finance remediation undertakings required as the result of their bankrupt subsidiaries' activities (Art. L.512-17; Commerce Code (*Code de commerce*), Art. L.233-5-1). Under commercial law principles, lenders may nevertheless be found liable where their direct control over a polluting entity is successfully demonstrated.

Note finally that credit institutions may become increasingly accountable, as the environmental consequences of their activities and their sustainable development-oriented action must now be documented in their accounting documents (Monetary and Financial Code, Art. L.511-35; Commerce Code, Art. L.225-102-1) (see question 8.3 below).

5 Contaminated Land

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

Autonomous legislation and regulation relating to soil contamination is recent. Where soil contamination is occurring or is threatened, public authorities are entitled, after formal notice, to carry out the necessary works at the expense of the responsible party (Art. L.556-3). Persons liable for soil contamination are prioritised as follows:

- where the pollution originates from (i) one of the activities listed in Appendix III Directive 2004/35/EC, (ii) a registered installation, or (iii) a nuclear facility (INB), liability attaches to the title operator (or, in the case of registered installations, any third party officially substituted to such operator);
- where the pollution has other causes, the liable party is the waste producer or waste holder who contributed to the pollution; or
- on a subsidiary basis, in the absence of any liable person as per the above, the liable party is the owner of the land polluted by the activity or waste, if it is determined that this person was negligent or otherwise involved in the pollution.

In most cases, however, soil and groundwater pollution matters are dealt with in the framework of the registered installations regime. In a nutshell, the matter is governed by the principle whereby an operator permanently shutting down an activity must make the site environmentally safe in accordance with its future intended use (Art. L.512-6-1, L.512-7-6, and L.512-12-1) (see question 5.3 below).

This includes a two-phase approach of surface measures (*mise en sécurité*), and intrusive ones (*remise en état*), where needed. From a methodological standpoint, applicable statutory and regulatory provisions are backed by guidelines recently updated and issued by the Ministry of Ecology (National Polluted Sites and Soils Management Methodology, April 2017; Ministerial Note of 19 April 2017).

Liability for remediation attaches to the title operator irrespective of his being the landowner or not. Where the operator is the landowner, the sale of the land does not transfer remediation liabilities to the purchaser. Remediation duties neither entail the demolition of buildings nor the restoration of the site into a hypothetical original condition.

The authorities adopt a pragmatic approach whereby remediation is risk-based and factors in the intended future use of the site (as established jointly with the landowner and the mayor of the locality where the site is located). Importantly also, controlling case law indicates that failure for an operator to comply with such regulatory obligations also qualifies as a civil tort and consequently entails the possibility of damages being awarded to third parties' victims of such failure.

In the context of a site closure, the authorities may impose upon the last operator the financial consequences of the site's remediation for a period not exceeding 30 years from the date when the closure was notified or known to the authorities. The authorities may also impose land use restrictions (*servitudes d'utilité publique*) on polluted sites (Art. L.515-12 and R.515-31-1 *et seq.*). Note also that the regime has further been supplemented with an obligation for operators of certain sites to issue an interim soil condition report upon the filing of an application for a substantial modification of a facility (Art. L.512-18 and R.512-4 4°).

The above principles and provisions were recently amended to accommodate IED principles. For these sites, a baseline report must be established by the operator describing soil and groundwater conditions prior to commissioning the installation or prior to the re-examination of the site's permit (Art. L.515-30, R.515-59, and R.515-81). This report shall serve as a benchmark upon the closure of the site (Art. R.515-75).

Lastly, the environmental liability regime of Directive 2004/35/EC applies to contaminated land creating a significant risk of harm to human health and serious damage to water. This regime targets operators, which are broadly defined (Art. L.160-1), but does not apply to historic contamination, where the damaging event occurred before 30 April 2007 or where it results from an activity having ceased definitively before that date (Art. L.161-5).

Finally, where the liable person is unknown or insolvent, the site qualifies as an 'orphan' site. Remediation is then borne by the State via the ADEME (*Agence de l'Environnement et de la Maîtrise de l'Energie*), an agency of the Ministry of Ecology (Art. L.131-3, L.541-3 *in fine*, and L.556-1; Administrative Circular Letter of 26 May 2011).

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

Under the registered installations regime, site operators are ordinarily responsible for soil and groundwater contamination caused by their operations (*i.e.* where contamination is traceable to a given activity). Where a contamination is found at a site following its final closure, the last operator remains liable *vis-à-vis* the authorities regardless of a land sale. This liability extends to contamination which he caused, as well as to contamination caused by his predecessors, provided such contamination results from the activities taken over. From a regulatory perspective, the sole means of breaking this chain of liability is for a new operator to substitute the previous one, thus leaving the previous one off the hook.

In practice, public authorities are reluctant to accept the allocation of liabilities between the last/current operator and the former

operator based their respective activities. Consequently, where a new operator takes over a site along with all or part of the existing activities, the authorities will tend to consider – out of expediency – that the new operator is liable for all contaminations at the site, even though different activities have been carried out at the site over time. The rationale of this approach is that, if this is not so, the most recent prior operator may always have recourse against the previous operator(s).

However, in case of a notified change of operator at a site (Art. L.181-15, R.181-48, and R.512-68) (see question 2.1 above), the former operator is released from any liability at the site *vis-à-vis* the authorities. Hence, failure to notify the change of operator can be damaging for the former operator as he remains the only one known to the authorities, and hence, by default, the sole debtor of remediation obligations.

Again, this does not preclude contractual arrangements between operators as regards the financing of remediation efforts. It must nevertheless be remembered that such agreements do not override regulatory powers (see question 8.1 below).

Landowners, in that sole capacity, cannot be held liable for remediation under the registered installations regime. They must have acted as operators or successors to operators to be reached pursuant to this regime. Landowners may, however, be held liable for remediation under waste laws if negligent in respect of waste dumped at their site and where the waste producer or holder are unknown, or where it is demonstrated that the landowner should have known of the presence of waste on his property and of the inability of the waste producer to manage it lawfully.

Landowners may also be held liable under the new soil-specific regime (see question 5.1 above) in line with waste law principles derived from case law. Landowners of polluted sites may also be held liable to third parties under the Civil Code either if responsible for the pollution or based on their having custody of the property (Civil Code, Art. 1240 and 1242).

Finally, under the environmental liability regime of Directive 2004/35/EC, and where multiple parties are involved, prevention or remediation costs are allocated by administrative authorities among the operators in accordance with the contribution of their activity to the damage or its imminent threat (Art. L.162-18).

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?

Remediation is not agreed *per se* between operators and the authorities. Although an agreement (or rather, an approval) is sought between stakeholders regarding the future intended use (operator, landowner, mayor), the operators issue technical remediation proposals based on their assessment of the site's condition. Eventually, the remediation order laying down remediation obligations qualifies as a unilateral administrative decision, not an agreement. This administrative decision (an order of the *préfet*) can be challenged by third parties before the administrative courts.

Upon completion of remediation obligations, compliance with the remediation order is recorded by the authorities (Art. R.512-39-3-III and R.512-46-27-III). No waiver or release is issued by the authorities. If and where warranted by a patent need to protect the environment, the authorities may require additional works from the last operator within the aforementioned 30-year period (Art. R.512-39-4, R.512-46-28, and R.512-66-2) (see question 5.1 above).

Where the use of the site is subsequently modified, additional works required by such new use may not be imposed upon the last operator unless he initiated such modification. If, after the initial rehabilitation of the site, the landowner contemplates a different use of the site, additional pollution management measures must be implemented accordingly and certified by a qualified consultant (Art. L.556-1 and R.556-1 *et seq.*).

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?

The owner or operator of a site can be held liable to third parties, either as the party having caused the contamination (Civil Code, Art. 1240) (which implies fault or negligence), or as the custodian of the site (*id.*, Art. 1242) (which implies a control over the asset causing the damage). Any aggrieved third party may basically act, including recognised environmental NGOs.

There is no statutory bar to a site operator commencing civil proceedings on pollution grounds against the former operator or landowner. As indicated above, non-compliance with regulatory remediation obligations set by a previous operator carries administrative sanctions and may be criminally prosecuted. It has also been held to constitute a civil tort, even in cases where the last operator complied with the administrative requirements imposed by the *préfet* (*see* Court of Appeals of Versailles, 6 September 2012, no. 11/08231).

In a contract setting, the purchaser of contaminated land may act against the seller on a variety of Civil Code grounds: fraudulent misrepresentation (*dol*) (Art. 1137); violation of the duty to deliver a compliant good (Art. 1603 and 1604); or breach of the warranty against hidden defects (Art. 1641). The violation of the statutory information duty imposed on sellers of land having hosted registered installations subject to authorisation or registration is also often relied upon (Art. L.514-20) (see question 7.3 below). Short of transferring regulatory obligations to the purchaser, parties to such contracts may freely allocate burden-sharing issues and may provide that the purchaser will bear the financial consequences of the remediation or will file for operator status (and thus bear, from that point onwards, all of the obligations attaching to such status).

Finally, at the time of a site closure, a third party (usually a land developer) may now apply to the authorities to substitute the last operator and bear last operator's obligations (remediation in particular), thus relieving the last operator of his obligations. In order to do so, the so-called 'interested third party' must provide financial guarantees. However, the last operator remains on the hook should such 'interested third party' fail to comply with remediation obligations and should the financial guarantees be insufficient (Art. L.512-21 and R.512-76 *et seq.*).

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

The government or other public authorities may seek the refund of expenses incurred to respond to acts of pollution and claim damages for commercial, reputational (including aesthetic) and moral (not specifically aesthetic) prejudice as a result of harm caused to the environment, landscape, habitat, fauna, flora, etc.

The environmental liability regime of Directive 2004/35/EC applies to environmental damage *per se*. The operator is required to bear the remediation costs or to reimburse them where public authorities

or other persons have taken measures in lieu of the operator (Art. L.162-17 *et seq.*). Under this regime, local governments are also entitled to claim damages for harm caused to their territory as a result of the violation of environmental law (Art. L.142-4). Finally, recent case law (relating to the 'Erika' shipwreck in December 1999) has ruled on the possibility to compensate environmental harm in and of itself (*préjudice écologique*) and not, as was often the case in the past, as moral prejudice.

In this case, local governments were granted damages on the basis of environmental harm suffered, it being defined as an objective and autonomous harm to the natural environment (including the interaction between natural elements), not affecting any particular human interest, but impacting a legitimate collective interest (*see* Court of Appeals of Paris, 30 March 2010, no. RG 08/02278; *Tribunal de Grande Instance de Paris*, 16 January 2008, no. 9934895010). In the same matter, the *Cour de Cassation* confirmed that environmental harm should be indemnified and defined it as a direct or indirect damage caused to the environment and resulting from a criminal offence (*see* Cass. Crim., 25 September 2012, no. 10-82.938).

More generally, public entities (State or local) intervening to attenuate damage resulting from an incident or accident caused by a registered installation (Art. L.514-16) or waste management (Art. L.541-6), or to water resources (Art. L.211-5), are entitled to be reimbursed by responsible parties. Such public entities may also join in criminal actions, where such actions have been initiated, to seek damages in reimbursement of expenses actually incurred.

Note finally that the notion of ecological prejudice now sits in the Civil Code (Art. 1246 to 1252). On this basis, the State, local governments as well as all interested parties may seek the remediation, preferably *in rem*, for non-negligible prejudice caused to elements and functions of ecosystems and benefits drawn from the environment by humans.

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.?

Under the general framework of the environmental liability regime of Directive 2004/35/EC, and in case of imminent risk or of actual damage, competent public authorities may require the production of any necessary information or documents and may access the occupational premises and installations (Art. L.162-13, R.165-2 2°, and R.162-2).

As far as the oversight of activities is concerned, the powers of environmental regulators are significant. These are not only vested in the DREAL inspectors but also in sworn-in officers (*police*, *gendarmerie*) and officials of other more specialised administrative departments (Art. L.172-1). They are entitled to visit installations (with or without prior notice) (Art. L.171-1 *et seq.*), to collect the necessary information, and to take away documents, after a list has been drawn up and countersigned by the operator (Art. L.171-3). Should the operator refuse to grant access to the premises, visits shall have to be approved by the local *Tribunal de Grande Instance* (Art. L.171-2).

In the course of the environmental permit application for the operation of registered installations, and in addition to the required documentation (Art. R.512-6 *et seq.*), environmental regulators may, for example, require third-party expert work where justified by the dangers of the activities applied for (Art. R.512-7). Site visits may also be conducted during the public inquiry, although this remains unusual (Art. R.123-15).

As a matter of practice, unless at a criminal investigation stage, environmental regulators seldom take samples themselves. On the one hand, in the course of the operation of an activity, the obligations to provide monitoring results and explain off-specification results is standard practice. On the other, at any time during operations, the authorities may request additional information, or the updating of information initially provided (Art. R.181-45, R.512-28, and R.512-31).

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?

Under the general environmental liability regime, the operator is under the duty to immediately inform the authorities of the damage and take all appropriate measures (Art. L.162-4).

Contrary to some other European jurisdictions, note that the results of voluntary soil and/or groundwater samplings do not necessarily have to be notified to the authorities.

Now, under the ICPE regime, in the event of an accident or incident resulting from the operation of a site and likely to endanger the environment or public health, the operator must report the matter without delay (Art. R.512-69). The issue with this provision is often whether historical pollution qualifies as an incident or accident. A safe approach will be to consider that, as soon as off-site migration is evidenced or is likely, it is advisable to report the matter. In all cases, it is also advisable to immediately take all necessary measures (investigation, containment, remediation) with no need to seek prior administrative approval, and to subsequently document such measures upon demand. A similar provision also exists in the water law regime and applies to all events likely to impact water conservation (Art. L.211-5).

Although these do not specifically apply to pollution, the operators of dangerous industrial sites covered by a specific emergency plan (*plan particulier d'intervention* or PPI) (Homeland Security Code (*Code de la sécurité intérieure*); Art. L.741-6 and R.741-21 *et seq.*) have explicit reporting obligations in case of accident.

The same applies to 'Seveso 3' sites (Art. L.515-32 *et seq.*) whose operators must provide to neighbouring sites, as well as neighbours, all relevant risk-related information (Art. L.515-38, Art. R.515-88, and R.515-89).

Finally, where it is assessed that an accident involving a 'Seveso 3' site is likely to have an impact on a neighbouring country, public authorities must provide to the authorities of that neighbouring country all relevant risk-related information (Art. R.515-85).

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

The circumstances prompting such an obligation remain isolated.

This may occur prior to and after the granting of an environmental permit (see question 5.1 above). At the application stage, the impact study (see question 2.3 above) must include a chapter relating to the condition of the land (Art. R.512-8-II-1°). However, this obligation does not translate into a duty to carry out intrusive sampling and investigations. At this stage also, or subsequently in the course of operations, and if warranted under the circumstances, soil and

groundwater investigations can be ordered (Art. R.181-45, L.512-3, L.512-20, and R.512-31).

In the course of the operation of a site, operators of installations subject to financial guarantees must provide a soil status update each time activities undergo notable changes. This update is submitted to the *préfet*, the mayor, and the site owner (Art. L.512-18). This document is to be appended to any promise or deed of sale pertaining to plots hosting such installations (*id.*). Where such changes qualify as substantial, the filing required therewith must include said soil update as well (Art. R.512-4 4°).

It is however essential, at the time of a site closure, that the obligation to investigate soil (and groundwater) contamination is complied with swiftly, with the submission of a report detailing investigated soil and groundwater pollution and proposed remedial measures (Art. R.512-39-3, R.512-46-27, R.512-66-1, and R.512-66-2).

Finally, in 'soil information sectors' (*i.e.*, officially inventoried polluted zones) (Art. L.125-6, L.125-7, and R.125-23 *et seq.*), construction or subdivision projects will require a mandatory soil survey to assess the land's fitness for use (Art. L.556-2).

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?

Asset deals involving land and share deals must be distinguished.

In share deals, the issue of whether or not environmental problems should be disclosed is governed by contracts law pursuant to the Civil Code. Where silence on the part of the seller is fraudulent (*dol*) (see question 5.4 above), such practice constitutes a defence to the formation of the contract and is grounds for annulment (Civil Code, Art. 1130). The purchaser may then claim damages. However, the purchaser also has a duty to gather information. In particular, where the purchaser is a professional, he may be considered aware of the risk of pollution relating to the facility involved (*see* Court of Appeals of Douai, 19 May 2011, no. 10/04289).

In the context of an asset deal involving the sale of a plot having hosted registered installations subject to an environmental permit in the past, the seller must inform the purchaser in writing (i) of the past operation of such installations, and (ii) of the risks resulting from their operation provided these are known to the seller (Art. L.514-20) (see question 5.4 above). The duty of the seller is one of gathering information. This duty does not explicitly translate into an obligation to conduct intrusive investigations. Ignorance of the existence of registered installations in the past – which is most often documented online – is no defence (*see* Court of Appeals of Nîmes, 4 March 2008, *SA Citadis*, no. 06/00516). Finally, where pollution makes land unfit for the use specified in the contract, the purchaser may seek the rescission of the sale, a reduction of the purchase price, or its remediation by the seller within a two-year period from the discovery of the pollution (Art. L.514-20 § 3).

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?

Whether in the context of an asset deal or of a share deal, contractual environmental indemnities are lawful and enforceable between the parties. As far as administrative enforcement action is concerned, their effect may be limited.

Indeed, as regulatory remediation obligations attach to the last operator, an indemnity clause may not be raised as a defence to enforcement actions where the beneficiary of the indemnity qualifies as the last operator (see question 5.4 above). The same applies to land sales or waste transfer contracts, neither of which fully discharge the operator/waste producer of their regulatory obligations to clean up or lawfully treat/dispose of waste.

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

Under company law, a company may only be dissolved in specific circumstances and on valid grounds. Dissolving a company for purposes of dodging environmental liabilities is most likely to be considered fraudulent. Note further that the broad concept of 'autonomy of legal entities' prevents the notion of 'title operator' of a subsidiary from extending to its parent company. However, in certain narrowly framed circumstances, where a subsidiary operating a registered installation files for bankruptcy, the parent company may be called upon to bear all or part of the remediation costs (see questions 4.5 above and 8.3 below).

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?

In principle, shareholders and parent companies are not liable for breaches of law or damages caused by a company/subsidiary. However, in certain circumstances, this principle may give in.

Under the environmental liability regime of Directive 2004/35/EC, the notion of 'operator' includes not only the title operator but also that which has 'effective control' over that operator (Art. L.160-1 § 2). This may therefore extend liability to a parent company (see question 4.1 above).

Further, a parent company may be required by a court to bear all or part of the remediation costs incurred by one of its subsidiaries (as an operator) where the latter is insolvent and where it has committed a fault having contributed to the insufficiency of the assets of the subsidiary (Art. L.512-17; Commerce Code, Art. L.233-5-1).

Finally, in an isolated occurrence, administrative action was held to be admissible against a parent company where, in a complex set of contractual relationships, it was shown that the parent company had control of the subsidiary and eventually agreed to bear remediation liabilities (*see* Administrative Court of Appeals of Douai, 26 July 2001, 97DA01643).

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

Since 2013, the Labour Code (*Code du travail*) provides that any individual may, in good faith, raise with the employer any concern with respect to the potential health or environmental risk entailed by products or processes used or carried out in the workplace (Labour Code, Art. L.4133-1 *et seq.*). In case of disagreement between employee and employer, the former may report the matter to the *préfet* (*id.*, Art. L.4133-3).

Whistle-blowers are further protected from discriminatory practices or disciplinary sanctions instituted on the grounds of having revealed in good faith – to employer, or judicial, or administrative authorities alike – facts relating to health or environmental hazards identified in the course of their professional duties (Public Health Code (PHC) (*Code de la santé publique*), Art. L.1351-1 *et seq.*).

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

Class actions are a relatively new feature of French law. Environmental class actions have been instituted by the law of 18 November 2016 on the modernisation of the justice system. They are narrowly framed and limited to environmental associations only acting on behalf of victims placed in similar situations resulting from the failure of a person to abide by its statutory or contractual obligations (Art. L.142-3-1 and L.142-3-1 IV).

Such class actions apply to prejudice arising in a wide variety of areas in relation to the environment (water, air, soils, pollutions and nuisances, nuclear safety, commercial practices impacting the environment, etc.).

Environmental associations may initiate class action proceedings before civil courts (Civil Procedure Code (*Code de procedure civile*), Art. 826-2) or before administrative courts (Administrative Justice Code (*Code de justice administrative*), Art. R.77-10-1) when the damage is caused by public authorities or public service entities.

Such class actions may pursue damages for bodily or material harm, or the cessation of the violations causing the prejudices, or both. However, non-negligible harm to the environment defined in the Civil Code as ecological prejudice (Civil Code, Art. 1247) (see question 5.5 above) may not be indemnified via such a class action.

Exemplary or punitive damages are not available in France. Damages are limited to the actual measure of the victim's prejudice.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

In criminal proceedings, legal costs (*frais de justice*) are in principle paid for by the State. However, where the court considers that the move of a party for indemnification (*constitution de partie civile*) was abusive or dilatory, expert fees may be charged to that party (Criminal Procedure Code (*Code de procédure pénale*), Art. 800-1). Where the party condemned is a legal entity, it is charged with legal costs.

In civil proceedings, the losing party must in principle pay costs (*dépens*), except where the court decides to charge all or part of them to another party (Civil Procedure Code, Art. 696).

Environmental associations do not benefit from any specific exemption from liability to pay costs. However, it is common practice for them to claim the reimbursement of the legal costs incurred as rightful claimants in furtherance of their purpose, as part of the financial harm suffered.

9 Emissions Trading and Climate Change

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

The EU Emissions Trading Directive (ETS) as amended by Directive 2008/101/EC has been transposed into French law (Art. L.229-5 *et seq.* and R.229-5 *et seq.*). Further to Directive 2009/29/EU relating to the EU ETS's third period (2013–2020), the scheme was amended to broaden the scope of activities subject to the ETS regime and to introduce the principle of auctioning that part of allowances not allocated free of charge. As far as air transport is concerned, the scheme was partly suspended from 2013 to be limited to intra-EU flights only, pending an international decision on the issue of international flights to and from Europe (so-called 'stop the clock' Decision 377/2013/EU of 24 April 2013).

As regards the auctioning of allowances, the French Financial Markets and Prudential Supervisory Authorities are in charge of authorising bidders on this market (financial institutions acting on behalf of their clients) (Monetary and Financial Code (*code monétaire et financier*), Art. L.621-18-5 and L.613-70). The French *Caisse des Dépôts et Consignations* (CDC) is the national administrator of the European registry (Art. R.229-34).

BlueNext, a Nyse Euronex-Caisse des Dépôts European environmental trading exchange, was founded in December 2007. It permanently closed in December 2012. EU CO2 allowances are now traded essentially on the London marketplace. The price of a ton of carbon has risen from the May 2017 low of EUR 4.38/ton to the current EUR 24.00/ton (January 2019). A 2018 report foresaw EUR 25.00–30.00 by 2021, and EUR 55.00 by 2030 if the EU Commission legislates to align the EU's current emissions targets with the Paris Climate Agreement (*Source*: Carbon Tracker Report of 26 April 2018).

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

Obligations in this respect have expanded in recent years.

Companies with more than 500 employees, on the one hand, and the State, localities with a population in excess of 50,000 and other public entities with more than 250 employees, on the other, must establish greenhouse gas (GHG) emissions inventories which must be updated every four years for the former, and every three years for the latter (Art. L.229-25 and R.229-46 *et seq.*). These inventories must list direct and indirect emissions (*i.e.*, for the latter, those resulting from their use of electricity, heat, or vapor).

Pursuant to company law, the annual report of certain companies must also mention their GHG emissions (Commerce Code, Art. R.225-105 II A. 2°(d)).

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

The approach is multifaceted and heavily regulated. In addition to adopting legislation implementing the EU ETS scheme and the flexible mechanisms of the Kyoto Protocol, a 2004–2012 Climate Programme (*Plan Climat*) was initiated in 2004, and revised every other year, with the target of cutting GHG emissions by 4 by 2050 (*vs.* 1990 levels). This policy has considerably expanded since its commencement, with ambitious laws and regulations having been adopted.

The so-called 'Grenelle 1' framework law (2009) and 'Grenelle 2' legislation (2010) affirmed and laid down France's commitment to increase the share of renewable energies in the country's domestic consumption to 23% by 2020 and set a series of objectives in relation to energy efficiency of buildings, energy production, transportation, town and country planning, biodiversity, waste, health, and environmental governance.

An 'energy transition towards green growth' law was adopted on 17 August 2015. Its target is to cut GHG emissions by 40% by 2030 (*vs.* 1990 levels), reducing energy consumption by 50% by 2050 (*vs.* 2012 levels) with an intermediate target of 20% by 2023, achieving a renewable energy consumption level of 23% by 2020 and of 32% by 2030, while bringing nuclear production of electricity down to 50% of the total production mix by 2025 (*vs.* a current 75% approx.). This 2015 law is also aimed at reducing household waste generation by 10% in 2020 (compared to 2010 levels), reaching a 65% recycling rate in 2025 for non-dangerous, non-inert waste and reducing by 50% the landfilling of waste by 2025 (compared to 2010).

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

France used asbestos extensively between the end of the Second World War and 1997. About 2,000 new cancer cases and 1,600 deaths are registered each year. Figures started declining in 2008. A peak is expected between 2020 and 2040 with an estimated 1,140–1,600 victims per year. Yet, it is estimated that the death toll attributable to asbestos-related diseases will increase by an additional 68,000 to 100,000 victims by 2050.

In the year 2000, a dedicated asbestos victim compensation fund (*Fonds d'indemnisation des victimes de l'amiante* or FIVA) was created (Law no. 2000-1257 of 23 December 2000, Art. 53). The beneficiaries of said fund include: (i) individuals suffering from an ascertained asbestos-related occupational disease related to the use of asbestos; (ii) individuals suffering directly from the consequences of asbestos exposure in France; and (iii) eligible survivors of the above two categories. Acceptance of FIVA compensation by a victim requires that such victim forfeit direct legal action against the tortfeasor. Since 2003, 218,549 indemnification offers have been issued by the FIVA, of which 111,722 to the victims themselves and 106,827 to their beneficiaries. In 2017 alone, EUR 338.6 million was disbursed by the FIVA (*Source*: FIVA annual activity report 2017).

In parallel, asbestos litigation has developed essentially on gross negligence grounds (*faute inexcusable*) before social security jurisdictions, as well as before criminal courts. Note that in acting before any of the foregoing jurisdictions, the FIVA may introduce reimbursement actions against the employers of the victims it has otherwise compensated.

Although poisoning has not been held a valid ground for prosecution in asbestos cases, in 2008, in a landmark case before the Court of Appeals of Douai, a legal entity and the plant manager were held guilty of endangerment of one's health (Criminal Code, Art. 223-1) and sentenced to a fine of EUR 75,000.00 for the former, and of EUR 3,000.00 for the latter, and a suspended three-month prison term. Note finally that since 2010, the prejudice of anxiety faced by individuals exposed to asbestos materials is also indemnifiable.

In a March 2005 report, the Supreme body for auditing the use of public funds in France (*Cour des comptes*) observed that higher damages were awarded on gross negligence grounds than by the FIVA. It suggested that FIVA indemnification amounts be increased to drive indemnification procedures from the courts to the FIVA. It also advocated that one Appeals Court be designated to hear asbestos claims, to prevent heterogenous rulings nationwide. In February 2014, in a new report on the matter, the *Cour des comptes* observed that the above difficulties had persisted. It further stressed the unequal access to pre-retirement schemes afforded to asbestos victims which benefit employees but remain unavailable to most civil servants and independent contractors alike.

In January 2019, the French Asbestos Victims Association (AVA) voiced its intent to soon take action through private prosecution (*citation directe*) against private and public decisionmakers alike. This procedure allows plaintiffs to present evidence of their claims directly before the competent court without a prior criminal inquiry (*instruction pénale*) which tends to be the normal procedural course in France.

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

Since 1 January 1997, asbestos-containing materials (ACMs) may no longer be used in the workplace or placed on the market in France (Decree no. 96-1133 of 24 December 1996).

As far as property owners' obligations are concerned, asbestos matters are governed by health regulations (PHC, Art. L.1334-12-1 *et seq.* and R.1334-14 *et seq.*). The owners of properties for which a building permit was issued prior to 1 July 1997 are required to identify the presence of ACMs. Where the presence of ACMs is ascertained, the state and condition of such materials must be assessed with a view to further monitoring, containment or removal measures (threshold: airborne dust levels >5 fibres/litre of air) (PHC, Art. R.1334-28). All of the above measures must further be documented and updated in a technical report (*dossier technique amiante*) (*id.*, Art. R.1334-29-5).

In their capacity as owners and/or occupiers of buildings, employers also have stringent risk assessment obligations as regards the (potential) presence of ACMs in the workplace (Labour Code, Art. R.4412-94 *et seq.*). Employers are held liable to a specific performance safety obligation (*obligation de sécurité de résultat*) in occupational health and safety matters. Therefore, strict compliance with these provisions will be mandatory and an employer must make his case for such compliance. Note finally that in the workplace, the average asbestos fibre concentration shall not exceed 10 per eight-hour period (*id.*, Art. R.4412-100).

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 your jurisdiction?

Environmental insurance policies do not yet appear to play a big role in France. Historically, few insurance products have been offered on the market. Unable to adequately appraise the nature and extent of the risks involved, insurers have essentially shrunk from offering policies covering environmental damages. In 1989, and in order to answer a growing market demand, insurers pooled resources together to create *Assurpol* and offer a standard environmental damage insurance policy (from which historical contaminations were excluded).

Basically, two types of policies must be singled out on today's insurance market: civil liability for environmental harm contracts (RCAE in French), on the one hand; and environmental liability contracts, on the other. These are seldom found in the same policy and must be contracted separately unless the policy is labelled *multi-risques* (one may still want to read the fine print though).

The former cover the financial consequences of civil liability for damages caused to third parties or goods imputable to environmental harm caused by one's activities. The latter cover environmental harm in the absence of harm to a third party. These aim at covering expenses likely to result from the operator's obligation to prevent and to remediate *in rem* 'pure' ecological/environmental harm (damage to

soil, water, protected species and habitats); a direct consequence of the environmental liability regime of Directive 2004/35/EC.

As is customary, exclusions include intentional harm, violation of the law, poor maintenance of the facilities, harm resulting from R&D, etc.

11.2 What is the environmental insurance claims experience in your jurisdiction?

The market has evolved from environmental risks being uninsurable in the 1970s to a variety of environmental insurance products being offered today.

According to insurers, the main risk 'purveyors' are the oil and gas industry (underground pipelines), chemical operators and the foodstuffs industry (*e.g.*, accidental discharges into the natural milieu entailing the need to reintroduce fish larvae in surface waters). Risks are also shifting to other activities traditionally less sensitive environmentally (*e.g.*, shopping malls, due to their operation of cooling towers and the related Legionnaires' disease). Based on statistics available, 30% of industrial accidents carry environmental consequences. In terms of affected milieu, the breakdown is as follows: air (15%); groundwater (8%); soil (5%); flora and fauna (2%) (*Source*: ARIA database, 2015 inventory) (updated figures not available).

It is contemplated that the environmental liability regime of Directive 2004/35/EC and the future Civil Code amendment instituting a general civil liability for harm to the environment should boost further the offer of insurance solutions on the French market (see question 12.1 below).

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 your jurisdiction.

Multiple workstreams have been initiated by the government since the presidential election of May 2017.

In the coming months and years, developments are expected in the following fields:

- A circular economy (with a determined focus on curbing the use of single-use plastics and efforts to make easier and increase recycling).
- The 'Greening' of farming methods and gradual phasing out of certain products; the increase of bio-agriculture's market share; and the fight against food waste.
- A continued move towards the increase of renewables in France's energy mix (with the correlative closure of over 17/18 nuclear reactors to bring France's share of nuclear electricity down to 50% by 2035 or 2040 – an objective recently postponed from the 2025 deadline initially contemplated in the 2015 Energy transition law; and the boosting of off-shore wind turbines projects via a simplification of administrative procedures).
- A reshuffling of environmental taxation, with lower VAT applicable to recycled products (packaging in particular).
- A reform of the Mining Code.

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Chapter 15

Germany

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1 Environmental Policy and its Enforcement

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

The cornerstone of environmental policy in Germany is set forth in the Basic Law (*Grundgesetz* – GG) of the Federal Republic of Germany. According to Article 2 para. 2 GG, the state has to protect life and health. This individual constitutional right not only provides a protecting right against any state intervention, but is also considered to protect against any unlawful encroachments from any private third parties. The individual basic right stipulated in Art. 2 para. 2 is therefore also considered to provide for the minimum ecological existence (*ökologisches Existenzminimum*). Further environmental policy in Germany follows on from the state declaration of aim (*Staatszielbestimmung*) proclaimed in Article 20a GG. According to this provision, which was only adopted shortly after reunification in 1994, the state – in the light of its responsibility for future generations – shall protect the natural bases of life and animals through legislation and, in accordance with law and justice, by executive and judicial action. This provision also covers protection of the climate. Although individual citizens cannot base claims against the state on the state declaration of aim as this provision is addressed to the state, it is an important order for the legislator to further flesh out the details of environmental protection in its legislation. In addition, and even more importantly, state authorities and courts may use Art. 20a GG as a guiding principle when they apply discretionary provisions of law and undefined terms of law.

Although the competence to legislate on environmental matters rests mainly with the Federation, the implementation and administration of German environmental law is primarily subject to the jurisdiction of the 16 regional states (*Bundesländer*) and their authorities. The Federation, with its own administrative organs such as the Federal Environmental Agency (*Umweltbundesamt*), only assumes this role as an exception.

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

Enforcement of German environmental law is governed by a full range of instruments. It covers planning instruments such as the planning assessment procedure (*Planfeststellungsverfahren*), licensing requirements, monitoring, notification, registration and reporting duties. Further, it includes economic instruments such as environmental state aid, environmental levies, fees, taxes and extra duties (*Sonderabgaben*), as well as modern instruments; for example, market-driven certificates for greenhouse gas emissions.

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

Access to environmental information, and especially the right to inspect files, originally was limited to the participants of an administrative proceeding. Only the Aarhus Convention and EU Directive 2003/4 on access to environmental information provided a fundamental change. According to the Environmental Information Act (*Umweltinformationsgesetz* – UIG) of 2004, every natural or legal person is entitled to freely access any information on the environment held by an agency, without having to state a legal, economic or other interest. However, this right is not granted on an unlimited basis. The authority may, *inter alia*, refuse disclosure of information on the grounds of public interests or that the disclosure would reveal personal information and this would have considerable adverse effect on the interests of the person concerned or disclosure would undermine the confidentiality of commercial or industrial information.

The 16 German states (*Bundesländer*) have enacted their own laws on freedom of access to environmental information. The provisions of the laws of the German states are similar to those of the Federal Act in substantive terms or refer to the latter.

2 Environmental Permits

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

The requirement to obtain an environmental permit is regulated by sector for each type of environmental impact. For example, plants and installations that cause air emissions or noise impacts, use water bodies or concern waste disposal, require a prior permit by the competent authority. Further, environmental impact assessments, predetermined in European law, are mandatory in the course of the planning and permit procedure – including the land use planning procedure – for most of the large-scale industry installations.

Most of the environmental permits are granted for a specific installation and, therefore, are object-related (*sachbezogene Genehmigungen*). These permits are either automatically

transferred or can be transferred – in some cases with approval or notification of the competent authority – from one entity to another. In contrast, person-related permits that refer to specific individual qualifications of the applicant (*personenbezogene Genehmigungen*) cannot be transferred.

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?

The decision to deny an environmental permit or certain conditions and provisions of the permit can be challenged by filing a claim with the administrative courts. In Germany, three stages of appeal exist for administrative proceedings: the administrative courts (*Verwaltungsgerichte*); higher administrative courts (*Oberverwaltungsgerichte*) of the states (*Bundesländer*); and the Federal Administrative Court (*Bundesverwaltungsgericht*) in Leipzig. In some of the states, an objection procedure must be conducted before filing a claim.

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

German environmental law recognises two types of environmental impact assessment (*Umweltprüfungen*): the environmental impact assessment (*Umweltverträglichkeitsprüfung* – UVP); and the strategic environmental assessment (*Strategische Umweltprüfung* – SUP).

The UVP is an integral part of the permit procedure for larger industrial installations or infrastructure projects. The SUP, in contrast, is conducted in relation to the adoption of certain plans and programmes (especially municipal zoning plans or Federal planning procedures).

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

With regard to conditions or time limits of the environmental permits, non-compliance may result in a formal prohibition (*Untersagung*) or closedown (*Stilllegung*) order regarding the operation of the installation, or in a subsequent order (*nachträgliche Anordnung*). As *ultima ratio*, dismantling (*Beseitigung*) may also be ordered. Non-compliance with an additional obligation (*Auflage*) of the permit may also be enforced through administrative coercion (*Verwaltungszwang*).

Further, the violation of the environmental permit may cause a criminal or administrative offence proceeding.

3 Waste

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

According to the legal definition in Sec. 3 para. 1 sent. 1 of the Waste Management Act (*Kreislaufwirtschaftsgestz*), which is Germany's main waste disposal statute, all substances or objects which the holder discards or intends or is required to discard are specified as waste.

The state of aggregation is irrelevant for the qualification as waste. However, by virtue of having excluded elements such as "non-excavated soils and constructions", the law still applies solely to moveable property.

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?

As one of the core provisions of the Waste Management Act, the five-step hierarchy pursuant to Article 6 requires the producer or holder of waste to perform the following waste management measures: Prevention of waste; Preparation for recycling; Recycling; Other types of recovery and particularly use for energy recovery; and Disposal. Based on this hierarchy, the waste management measures are to be used that best protect human health and the environment with regard to the relevant technical, economic and social factors.

For storage and disposal on-site, a specific permit is required according to the principles of the Federal Immission Protection Act (*Bundesimmissionsschutzgesetz*).

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)?

The liability of the producer or holder of waste remains in force until the disposal is ultimately and duly completed. The disposal is completed if the qualification as waste ends or the waste has been successfully recycled. The producer or holder is entitled to request information regarding the economic and financial conditions of the transferee to exclude the risk of liability in case of a bankruptcy, etc.

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

The Waste Management Act entitles the Federal Government to issue regulations requiring the take-back and recycling of certain waste products. As a consequence of product responsibility, the producer and distributors may only place the products on the market when they comply with the respective take-back and recycling obligations. In this context, the Federal Government has issued the Packaging Ordinance (*Verpackungsverordnung*) for packaging material, the End-of-Life Vehicles Ordinance (*Altfahrzeug-Verordnung*), the Battery Act (*Batteriegesetz*) and the Electrical and Electronic Equipment Act (*Elektro- und Elektronikgerätegesetz*).

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 different environmental liability regimes applicable in Germany: there is first the risk of being held liable by private third parties for damages to persons or property under the law of torts or the Environmental Liability Act (*Umwelthaftungsgesetz*) (so-called civil liability).

In addition, following EU Directive 2004/35, Germany has introduced a liability for harm to the environment itself under public law by adopting the Environmental Damages Act (*Umschweltschadensgesetz*) in 2007. It provides for strict liability for a number of listed occupational activities and negligence liability for other occupational activities provided there is damage to species and natural habitats, water damage or land damage. So far, the 'third party' defence and the 'compliance with a compulsory order' defence are available.

Further, environmental non-compliance may trigger an administrative offence and/or a criminal prosecution.

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

German environmental law in general recognises the permit defence (*Legalisierungswirkung von Genehmigungen*) since an early judgment of the Federal Administrative Court (*Bundesverwaltungsgericht*) dated 2 December 1977 (ref. IV C 75.75). However, the permit defence only applies to aspects which were actually covered by the scope of the permit.

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?

German environmental criminal liability typically covers the management, as the management is affected by overall responsibility and comprehensive jurisdiction. Even if there is an internal delegation of competences, the overall responsibility still remains if a decision affects the enterprise as a whole. But criminal liability may also extend to mid-management levels such as department heads or environmental protection officers. Insurance is available under directors and officers (D&O) insurance policies.

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?

An asset purchase generally offers the possibility to choose only certain assets in a transaction. However, given the specifics of the contaminated land regime of German environmental law, which provides for liability of the current and former owner of a contaminated site (see question 5.1 below), the differences between a share sale and asset purchase are not significant, at least with regard to contaminations of soil and groundwater.

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

A lender liability whereby the creditor is held liable for an environmental non-compliance of a borrower is not recognised in Germany.

5 Contaminated Land

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

Under the contaminated land regime in Germany (German Federal Soil Protection Act – *Bundesbodenschutzgesetz*), authorities exercise discretion in determining and addressing the entity/person that is to be held liable for clean-up and remediation of a soil or groundwater contamination. Theoretically, the competent authority can proceed against (1) the polluter, (2) the current owner, (3) the former owner if the site was sold after 1999, or (4) the occupier (which would cover a tenant). As a practical matter, authorities tend to proceed against the current owner, as this is generally easiest unless the owner has insufficient funds. If this is an issue, the authorities may target the polluter or the tenant as occupier (if applicable). This means that the purchaser of a contaminated site would be generally liable for the clean-up of the soil and groundwater contaminations on the properties it has acquired.

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

As outlined above, multiple responsible persons are liable according to Sec. 24 para. 2 of the Federal Soil Protection Act. This provision introduces joint and several liability (*Gesamtschuld*) between the potentially responsible persons. The authority has full discretion to go after the person who, in the view of the authority, is best placed to do the clean-up fully on its own. This person is then left with a claim against the other responsible parties.

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?

Clean-up of contaminated sites is often subject to a formal remediation agreement (*Sanierungsvereinbarung*) under the Federal Soil Protection Act. The binding nature of the agreement guarantees that subsequent unilateral orders of the authorities generally would be unlawful. Even if there are different legal requirements or new scientific or technical findings, the authority would be required to ask for a contract adjustment under the rules of the administrative law provided the clean-up is still ongoing. But once the remediation has been conducted there is no legal basis for such a subsequent claim. Third parties can only challenge a remediation agreement provided it infringes their individual rights.

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?

Although the purchaser can be held liable for the clean-up of soil and groundwater contamination by the competent authorities according to public law (see question 5.1 above), it may claim for contribution against the polluter under Sec. 24 para. 2 of the Federal Soil Protection Act. This provision introduces joint and several liability (*Gesamtschuld*) between the potentially responsible persons. The major part of the clean-up costs is to be borne by the polluter who caused the contamination (*Verursacher*). Based on this regulatory framework, in case of a contamination, the purchaser would have to remediate according to public law fully on its own, and would be left with a claim against the actual polluter. However, if there are deviating contractual agreements between the potentially liable parties, the provision of Sec. 24 para. 2 of the Federal Soil Protection Act is not applicable. This means that the joint and several liability of Sec. 24 para. 2 of the Federal Soil Protection Act can be excluded or modified in a special clause of the Asset Purchase Agreement.

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

Aesthetic harms to public assets cannot be subject to monetary damages. However, damages to the natural habitats and biodiversity can be covered by liability under the Environmental Damages Act (*Umweltschadensgesetz*).

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.?

Environmental authorities in Germany are governed by the judicial principle of investigation (*Untersuchungsgrundsatz*). This means the authority is required to collect the relevant facts on its own. It determines the scope and type of discovery. Admissible evidence covers statements of all kinds such as statements from involved parties, witnesses and experts, as well as official documents, files and legal inspections. However, the legal obligations of the parties under the rules of administrative procedure are limited. They shall assist in collecting facts and evidence but there is no general duty to appear before an authority or to issue a statement.

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?

Subject to state legislation of the states (*Bundesländer*), there may be a duty to report identified pollution to the authorities. However, such reporting obligation only applies provided that an indication, concrete indication or obvious indication of a harmful soil change or contaminated site exists. According to the Federal Soil Protection Ordinance, an indication for a harmful soil change or contaminated site exists in particular if pollutants were handled on properties over an extended period of time or in significant amounts and where operation, management or other methods used in the individual case, or disturbances of proper operation, suggest significant inputs of such pollutants into the soil. A concrete or obvious indication requires that examinations reveal the excess of test values (so-called *Prüfwerte*) according to annex 2 of the Federal Soil Protection Ordinance.

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

There is no general duty to conduct environmental investigations. According to the German Federal Soil Protection Act, the authority can only order that (1) the polluter, (2) the current owner, (3) the former owner if the site was sold after 1999, or (4) the occupier (which covers a tenant) must conduct the necessary investigations to assess the dangers involved, provided there is a definite indication giving rise to sufficient suspicion of a harmful change of the soil or residual pollution.

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?

The seller, under German law contracts, is well advised to fully disclose any environmental issues to the prospective purchaser. Otherwise the seller risks allegations of fraudulent conduct and, as a consequence, limitations of liability may not be invoked. Only recently, the Federal Court of Justice held that a mere suspicion of contamination must already be considered a material defect (BGH judgment 21 July 2017 V ZR 250/15).

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?

As to the liability risks, it is standard practice for purchasers to require any remaining environmental liability risks which result from contaminations prior to closing, to be either covered by a standard environmental indemnity under the Asset Purchase Agreement, or appropriately considered when determining the purchase price (provided the costs for remediation can be calculated and are known, such costs can be discounted from the purchase price by way of a price adjustment). However, any payments made under the indemnity will relate only to the contractual obligations between two parties. Obligations under public law, as outlined above under question 5.1, remain unaffected and cannot be transferred by way of a contract.

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

Environmental liability in Germany cannot be prevented by dissolving a company. The Federal Soil Protection Act stipulates that remediation is also required by the person who, on the basis of commercial law or company law, is required to bear the responsibility for a legal entity that owns contaminated land. Such a situation is recognised in cases of undercapitalisation or qualified group dependence.

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?

As outlined above under question 8.2, in Germany there is a risk for liability of a parent company with regard to contaminated land, provided there is undercapitalisation or qualified group dependence.

German courts do not have jurisdiction in cases of pollution caused by foreign subsidiaries of German parent companies outside of Germany.

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

German environmental law does not yet provide for protection of environmental whistle-blowers.

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

There is no group or class action available for pursuing environmental claims in Germany. The recently adopted "Act introducing a civil class action" (*Gesetz zur Einführung einer zivilprozessualen Musterfeststellungsklage*) only covers consumer-related claims. In addition, U.S.-style concepts of penal or exemplary damages do not exist under German environmental law.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

German environmental law does not recognise a cost privilege of individuals or public interest groups (non-governmental organisations – NGOs). However, public interest groups were initially only awarded a right to litigate environmental matters in cases concerning nature protection law. After ratification of the Aarhus Convention and EU Directive 2011/92, a general right of litigation for environmental claims of public interest groups was introduced.

9 Emissions Trading and Climate Change

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

Germany is a key player in the EU Emissions Trading Scheme (EU ETS) since 2005. It holds the largest share of installations and emissions under the EU ETS. Operators of large energy installations and energy-intensive industrial plants, plus all aircraft operators who operate flights within the EU or continental flights to and from Europe, participate in the emissions trading system in Germany.

The carbon market has developed extremely dynamically recently. Prices of EU carbon credits increased by 200% during 2018.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

Shipping companies do not participate in emissions trading under the EU ETS. However, they are obliged to monitor their emissions as of January 2018 in accordance with EU-Regulation 2015/757 on monitoring, reporting and verification of carbon dioxide emissions of maritime transport.

Under the Carbon Offsetting and Reduction Scheme for International Aviation (CORSIA) of the International Civil Aviation Organization (ICAO), aircraft operators are required to monitor, report and verify their CO_2 emissions from flights between airports located in the EU and in other countries, as of January 2019.

Producers, importers and exporters of fluorinated greenhouse gases (f-gases) are subject to monitoring and reporting obligations under EU-Regulation No. 517/2014. The same applies to enterprises using certain quantities of f-gases.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

Climate protection has become the key driver of German environmental and energy policy. Although there is not yet a comprehensive Climate Protection Act, there are multiple pieces of legislation devoted to providing for a decrease of greenhouse gas emissions. Key elements of the strategy are the massive development of renewable energy sources and an exit from coal-based energy production, as well as a reduction of car emissions. In addition, climate protection acts at the level of the states (*Bundesländer*) focus on energy efficiency and reduction in the building sector. Finally, new laws in the area of planning and zoning are also being adopted to address the increasing issues surrounding climate change adaptation.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

In Germany, no extensive environmental-related asbestos litigation exists. Asbestos issues seem to play a more visible role in the real estate and insurance sectors.

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

Under the asbestos guidelines (*Asbest-Richtlinien*) of the states (*Bundesländer*), no general obligation for the removal of asbestos exists. However, the standard for determining a remediation obligation is the presence of a health threat. In particular, friable asbestos, which is capable of releasing asbestos fibres into the air, might cause a risk to human health. The asbestos guidelines provide criteria to assess the urgency of remediation, ranging from immediate action to interval-based risk assessments. Removal and disposal of asbestos material may require specific safety measures and may trigger relevant costs.

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 your jurisdiction?

The entry into force of the Environmental Liability Act (*Umwelthaftungsgesetz*) and Environmental Damages Act (*Umweltschadensgesetz*) made environmental insurance indispensable for operators of industrial or commercial installations in Germany. Therefore, a wide variety of different types of environmental insurance are offered on the German market.

11.2 What is the environmental insurance claims experience in your jurisdiction?

Environmental insurance claims in Germany are rarely litigated. Most cases in that area concern contaminated land.

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 your jurisdiction.

A new trend in German environmental law concerns the air quality in major cities. After the Federal Administrative Court in Leipzig ruled in February 2018 that German cities are allowed to ban certain diesel cars in city centres provided the bans are proportionate, there an increasing number of such bans have been issued at a local level. This trend is driven mainly by claims initiated by a public interest group, which illustrates that the legal privileges granted to public interest groups are quite effective when it comes to enforcing environmental law.

Further, climate litigation is a new type of environmental claim. A number of prominent cases are pending. In May 2018, 10 families

from the EU (one from Germany) and abroad filed a climate lawsuit against the European Parliament and the Council of the European Union. The complaint was filed at the European General Court and asserts that the EU's existing 2030 climate target to reduce domestic greenhouse gas emissions by at least 40% by 2030, as compared to 1990 levels, is inadequate with respect to the real need to prevent dangerous climate change, and not enough to protect their fundamental rights to life, health, occupation and property.

In addition, three German families filed a claim against the Government in October 2018 before the German Constitutional Court, arguing that the Government is violating their constitutional rights by failing to take measures to meet the national 2020 climate protection target.

In a quite unique climate change litigation of a Peruvian farmer, at issue is whether the German energy corporation RWE may be held partially responsible for protective measures against climate change in the high Andes in Peru because of the greenhouse gas emission its plants emitted in Germany. According to the claim, the city of Huaraz is threatened by a flood wave from a glacial lake that has increased in volume as a result of climate change. After the *Landgericht* (District Court) of Essen rejected the civil law suit in 2016 (judgment of 15 December 2016, file no. 2 O 285/15), the case is on appeal at the *Oberlandesgericht* (Higher District Court) of Hamm. The key issue in this case is to establish whether particular emissions are the proximate cause of particular adverse climate change impacts.

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Uwe Erling is an Associated Partner of Noerr LLP with almost 20 years of experience. He is a regulatory lawyer who deals with the full range of public law and government-related matters. He has established a practice with a deep focus on environmental law, energy law and aviation law.

He studied law at the University of Passau and at the German Federal University of Administrative Sciences – Speyer, and received a Master's of Law in Energy & Environment from Tulane Law School, USA.

Uwe's practice of environmental and energy law in general covers compliance issues, as well as providing advice and representation in permit proceedings of industrial or commercial installations. Based on his deep understanding of environmental law at a national, international and EU level, he also litigates novel and complex environmental matters across the courts. He is also regularly involved in project developments and transactions.

His special expertise in emissions trading law and climate change law covers compliance and allocation issues under the EU ETS. Clients in this area are typically plant operators covered by the EU ETS such as energy companies, refineries, chemical plants, energy suppliers, and airlines.

His aviation practice focuses on all regulatory aspects of airline business in Germany and Europe. National and international airlines are typically at the centre of his practice. However, it also includes regulatory work for leading international ground handling companies.

Uwe contributes regularly to publications and is frequently invited to give speeches. He serves in various regional, national and international committees such as the legal expert group on emissions trading of the German Federal Ministry of Environment (on behalf of CO_2ncept plus). Uwe is recognised by *Who's Who Legal*, *Best Lawyers* and *JUVE* as a leading attorney.

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Dr. Tim Uschkereit advises national and international companies on legally and politically complex matters regarding regulatory approval, environmental and public commercial law, real estate transactions and project developments. He has particular experience in the planning, approval and implementation of major projects, the legal aspects of public construction, pollution control and planning permission, as well as the implementation of environmental and regulatory requirements within companies.

He studied law at the University of Münster and at the University of Poitiers, and received a doctorate from professor Hans D. Jarass of at the Central Institute for Spatial Planning of the University of Münster.

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His aviation practice focuses on regulatory aspects of airline business in Germany. National and international airlines are typically part of his practice. It also includes long-term experience of regulatory work for leading international ground handling companies. The advice encompasses airport terms and charges, German Air Transport Tax, bilateral air service agreements, ownership and control issues, air operator certificates and licensing.

Tim contributes regularly to publications and is frequently invited to give speeches. He is recognised by *JUVE* as a leading attorney.

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Ghana

Prof. Raymond A. Atuguba

Courage Asabagna

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1 Environmental Policy and its Enforcement

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

The basis of environmental policy in Ghana is the 1992 Constitution. The Constitution, in Chapter Six, mandates the Government to take appropriate measures needed to protect and safeguard the national environment for posterity; and in cooperation with other agencies, protect the wider international environment for mankind. Flowing from the Constitution, the Environmental Protection Agency Act, 1994 (Act 490) has been passed by the legislature. This law, various other sectoral laws, together with Regulations made under these laws, seek to operationalise the broad environmental policy directives in the Constitution of Ghana.

The main body which administers environmental laws in Ghana is the Environmental Protection Agency. However, many other sectoral agencies administer various sector-specific environmental laws. These include the Petroleum Commission, the Minerals Commission, the Fisheries Commission, and local government authorities – which administer health and safety laws at the local level.

These agencies have powers to enforce aspects of environmental laws by themselves, and they do this sometimes with the assistance of other state agencies such as the police, and sometimes by working with the Attorney General's office to prosecute offenders. A few of the agencies have been given delegated prosecutorial powers by the Attorney General and may prosecute alleged violators of environmental crimes by themselves.

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

The enforcement strategies of agencies with an environmental protection mandate include: the suspension, revocation or cancellation of licences; obtaining injunctions from the courts to correct environmental wrongs; the imposition of fines; prosecution (sometimes to secure a mandatory jail term without the option of a fine); and, significantly, any other steps that the Minister for Environment may consider necessary to ensure compliance with environmental laws.

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

Although a recent development, it would appear that public authorities are required to provide environmental-related information to interested persons and even to members of the public, subject to some qualifications. Article 21(1) (f) of the 1992 Constitution of Ghana provides that all persons have the right to information, subject to such qualifications and laws as are necessary in a democratic society. In *Lolan Kow Sagoe-Moses & others v The Honourable Minister & Attorney General, Suit No. HR 0027/2015, High Court (Human Rights Division 2), Accra (unreported)*, the High Court of Ghana interpreted this provision to mean that persons are entitled to access public information that is in the custody or possession of Government upon a request, subject to other human rights and freedoms, the public interest, public order, national security, and public morality.

2 Environmental Permits

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

An environmental permit is required if, in the opinion of the Environmental Protection Agency, an activity or an undertaking by a person or an entity has or is likely to have adverse effect on the environment or public health.

The transfer of an environmental permit from one person to another is allowed; however, the transfer may only be done with the consent of the regulator. Where a transfer of a permit is approved by the regulator, the transfer is limited to the extent of the same activity for which it was originally granted and the conditions under which the permit was approved.

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?

Appeals against refusals of environmental permits or against conditions contained within a permit are made to the Minister responsible for the Environment. A panel is set up by the Minister to determine the complaint by giving the complainant a fair hearing,

after which the panel may alter the regulator's decision or give other directives it deems and considers just and reasonable having regard to the protection of the environment. Appeals and applications may also be made to the courts, which have the power to review administrative decisions and the exercise of discretionary powers for their constitutionality, legality, propriety, and reasonableness (as per Articles 23 and 296 of the 1992 Constitution of Ghana, for example).

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

Any project which has the potential of adversely affecting the air, soil or a nearby ecosystem requires an environmental impact assessment. The laws in Ghana have made specific provision for: activities that involve chemicals and chemical by-products; activities that involve the exploration of petroleum or natural gas; activities that impact fishery resources or other aquatic resources; and activities that impact forests, among others.

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

As stated in question 1.2 above, regulators can: suspend, cancel or revoke licences; and obtain injunctions against, impose fines on, and prosecute alleged violators.

3 Waste

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

In Ghana, waste is defined in Section 37 of the Hazardous and Electronic Waste Control and Management Act 2016 (Act 917) to mean substances or objects which are disposed of, intended to be disposed of, or required to be disposed of.

Persons who generate, collect, store, transport, or dispose of hazardous waste, are tasked with the duty to safely handle and dispose of their waste; additionally, they have a duty to maintain adequate insurance cover in respect of the management of the hazardous waste. Additionally, holders of equipment containing polychlorinated biphenyls that remain in use after a ban on its importation are required to undertake an inventory and provide storage facilities for the polychlorinated biphenyls during the phase-out period, which is until the year 2025, and also keep and update the inventory until the end of the phase-out period.

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?

A producer of waste is permitted or allowed to store or dispose of waste generated on the site if the storage or disposal will not have severe consequence on human health and the environment. A person involved in the management of waste is required to take steps that are necessary to prevent pollution from hazardous waste and other waste and where pollution occurs, steps must be taken to minimise the consequence of the pollution on human health and the environment.

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)?

The producer of waste does not retain any liability for waste once the waste is transferred to another party recognised by the regulator. The party to whom the waste management responsibility is transferred, retains absolute liability even if said party goes bankrupt.

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

The Hazardous and Electronic Waste Control and Management Act 2016 (Act 917) only addresses the recovery of electronic waste; providing therein that manufacturers, distributors or wholesalers of electrical or electronic equipment are required to take back used or discarded electrical or electronic equipment manufactured or sold by them, and for recycling.

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?

A breach of environmental laws or permits can result in civil or criminal liabilities. The civil liabilities include administrative sanctions such as: the suspension, revocation or cancellation of licences and permits; damages arising from suits; orders for remediation; or injunctions on the progress of projects. Aside from civil liabilities, regulators may prosecute the offending party or person, and seek the imposition of a fine, a jail term, or an order that the equipment or appliances used in the commission of the offence be forfeited to the State.

A person facing either civil or criminal liability for breach of environmental laws may argue that the activity complained of does not in any way degrade or harm the environment; or show that all reasonable steps have been taken to control or prevent the commission of the offence (as per Section 107 of the Minerals and Mining Act 2006 (Act 703)) by way of employing mechanisms to prevent the commission of the environmental offence. One may also argue that the said activity was permitted by the regulator.

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

Although an activity may be undertaken or carried out within the terms of a permit, an operator may be held liable if the activity of the operator has or is likely to have excessively adverse effects on the environment. Civil liability is especially likely if the permitted activity causes damage to the property of another person or causes private or public nuisance.

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?

The laws of Ghana impose personal liability on directors of

corporations and partners of incorporated partnerships for environmental wrongdoing committed by the corporations or partnerships.

Particular directors and partners may only be indemnified if they were legitimately unaware of the activities of one or more directors or partners who committed the wrongdoing.

Directors and partners may secure insurance cover for their liabilities.

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?

In the case of a share sale agreement, environmental liability incurred before the date of the share sale transaction is automatically absorbed by the purchaser because the purchaser generally acquires all liabilities incurred by the seller.

In the case of an asset sale, the extent of liability will depend on the assets being purchased, and where there is any historic environmental hazard attached to the assets which adversely affects the environment and human health, the purchaser is liable to take steps to remedy the situation.

In either case, the liability of the purchaser will not include the criminal liability of the seller.

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

Currently, Ghana law makes no provision for the liability of lenders for environmental wrongdoing or remediation costs. The rationale is that a lender only provides the necessary resources for a project, but has no control over the activities of the entity. The Ministry responsible for the environment is currently in consultations with stakeholders, especially those in the financial sector, on the possibility of enacting policies and laws that could make lenders so liable.

5 Contaminated Land

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

The regulator imposes several liabilities on a person who undertakes any activity in a manner that leads to the contamination of the soil or pollution of groundwater or an aquifer. The liability for contamination of groundwater is only limited to the holder of the licence, such that the owner of the land is excluded from liability.

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

Liability is a shared responsibility; the parties are held jointly and severally liable. However, the extent of liability for environmental misconduct is usually proportional to the level of involvement of a party in the said misconduct.

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?

The regulator reserves the power to review or order additional remediation works to be undertaken if, in the opinion of the regulator, the additional remediation works are necessary to deal with the contamination.

A third party, on the other hand, can exercise its right to challenge the remediation measures agreed upon if the agreed remediation measures affect or breach its rights. This may be brought administratively to the Minister for Environment or to the courts of law.

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?

It is possible to successfully maintain an action against a previous owner or occupier of contaminated land. However, liability for contaminated land may pass from the seller to the buyer if the buyer knew or should have known of the risk prior to or at the time of purchase.

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

The regulator has the power to obtain from the polluter, compensation or damages for causing aesthetic harm to public assets. In many situations, the polluter may be required to repair the damage or the regulator may undertake steps to remedy the damage caused and recover the cost from the polluter.

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.?

The regulators have the power to authorise their agents to enter any premises at a reasonable time for the purpose of ensuring that environmental legislation is complied with.

The powers of the regulators extend to the inspection of equipment used, storage or disposal facilities, or areas used for storage of waste, and the investigation of complaints of injury to human beings and animals or damage to land and pollution of water bodies resulting from the activities of a person.

The regulators also have the power to request information from persons whose activities may have adverse effects on the environment. In a situation where an environmental permit is required by an applicant, the regulators have the power to request documents such as an environmental impact statement, a scoping report, a reclamation plan and an environmental management plan from the applicant.

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?

There is a specific duty to report all such pollution found on a site to the regulator, especially for the holders of mineral and petroleum

rights, as their activity is very likely to lead to such pollution. This requirement is further extended to mere occupiers or owners of such land who do not hold a mining right, and with particular regard to radioactive materials. For the holders of mineral rights, this is to be done as part of their mandatory monthly reporting requirement. At a broader constitutional level, there is a civic responsibility on all citizens to protect and safeguard the environment for posterity, and this includes a duty to report or take action on pollution.

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

There is currently no legal obligation which requires a person to investigate land for contamination. In practice, where contamination on land is obvious and has the potential to adversely affect the environment and public health, a person is required to report the situation to the regulator in order for the necessary investigations and measures to be taken to prevent or mitigate these effects.

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?

Though there are no express provisions in Ghana's environmental laws defining the extent to which a seller is under obligation to disclose environmental problems to a prospective buyer, under the principles of commercial law, particularly the Sale of Goods Act, there is a fundamental obligation on the seller to disclose all relevant material facts known or which ought to have been known by the seller to the prospective buyer. There is also an obligation on the seller to sell goods which are free from defects, and this includes environmental defects.

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?

It is possible for parties to a commercial transaction to contract or agree to allocate environmental liability by using environmental indemnities to limit exposure for actual or potential environment-related liabilities. However, the indemnity does not restrain or prevent the regulator from holding the polluter liable for any environmental liabilities caused.

Where the indemnifier has made payment to the polluter under an indemnity in respect of a matter, the indemnifier is discharged of potential liability for that matter. However, in a situation where the indemnifier fails to make payment under an indemnity, the regulator can pursue both parties to ensure compliance.

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 known legal deterrent to the practice of sheltering environmental liabilities off the balance sheet, therefore one can argue that it is possible. However, a dissolved company will not escape environmental liability created or caused by the company. The directors of a company are personally jointly and severally liable for environmental liabilities and where a company is dissolved, the directors will be personally so liable.

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?

There is currently no provision under Ghana's environmental laws to deal with this. Under Ghanaian company law, a shareholder's liability to a company is only limited to the amount of shares remaining unpaid. As such, a shareholder cannot be held personally liable for breaches of environmental law or pollution caused by the company. However, as an adherent to the common law practice, there are provisions to take care of a situation where a shareholder uses a company as a shield to perpetuate or breach environmental laws or cause pollution, and in such instances the court will lift the veil of incorporation and hold the shareholder liable for the environmental wrongdoing.

Ghana law does not provide for a situation where environmental liabilities extend to parent companies, unless the parent company can be said to have directly engaged in activities detrimental to the environment.

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

There is a Whistle-blowers Act which offers protection and rewards to persons who make disclosures of impropriety in respect of environmental (and other) issues.

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

Under Ghana law, groups of person may bring suit, provided they can demonstrate that the actions complained of affect them directly or that the suit is brought in the public interest. It is not too difficult to prove that an action for the protection of the environment is in the public interest.

Exemplary and penal damages may be awarded for environmental wrongdoing at the discretion of a court.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

Any party to a suit may be required to pay costs at any point in the course of litigation. A successful party is further entitled to costs from a losing party. The quantum of costs is discretionary and the court may award no costs at all, minimal costs, normal costs, or exemplary costs against a losing party.

It is possible to sway the exercise of the court's discretion in one's favour and pay minimal costs by arguing that a matter was brought as a public interest claim or that the entity bringing the suit is a not-for-profit entity.

9 Emissions Trading and Climate Change

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

There are a number of emissions trading schemes in operation in Ghana. These include the Clean Development Mechanism, the EU Emissions Trading Scheme, the Greenhouse Gas Accounting Verification, and the World Bank's Forest Carbon Facility Scheme. The emissions trading market is still in the early stages of development, although there is a concerted effort to grow it due to the benefits that could accrue to the country from such trading.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

Ghana has developed a Low Carbon Development Strategy under which there is a goal to achieve a reduction of greenhouse gas emissions of up to 45% below the Business As Usual (BAU) emission levels by 2030. This Strategy has an in-built requirement for monitoring and reporting on greenhouse gas emissions.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

Ghana has adopted a National Climate Change Policy which aims to:

i. ensure adaptation to climate change to help communities and nations cope with its impact; and

ii. respond positively to various international mechanisms on enhanced mitigation actions including low carbon growth.

Thus, the strategic direction is to balance the need for economic development on the one hand, and the need to make regulations to counter the negative effects of climate change, both locally and internationally, on the other. However, specific national legislation aimed at actualising this policy, beyond the ratification of the Paris Accord on Climate Change, is yet to be passed.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

There is no record of asbestos litigation in Ghana. Although there is no specific environmental law prohibiting the use of asbestos, the regulator has in recent times and using their broad regulatory function and power, prohibited the use or importation of asbestos or items containing asbestos. All such items are seized at the port of entry by the regulator.

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

By administrative fiat, the regulator has banned the importation or use of asbestos or material that contains asbestos. Also, local authorities, which are responsible for waste removal and management, prohibit the treatment of asbestos as household waste because of its hazardous nature. Consequently, buildings or premises that have asbestos or material containing asbestos are required to take steps to remove the asbestos. However, the implementation of the directive has not been effective.

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 your jurisdiction?

There are very limited types of environmental insurance available on the market, and the subsector is not very well developed. Aside from the extractive industries (mining and petroleum) which are required to undertake mining bonds, reclamation bonds as well as performance bonds and guarantees for the purpose of decommissioning of petroleum exploratory activities, there are no other similar requirements that necessitate recourse to environmental insurance, for which most players resort to their bankers to provide such bonds and guarantees, as in other sectors. As such, the insurance industry has not developed specific products to cater for this area. Environmental risk insurance is just a minute part of the general insurance industry in Ghana.

11.2 What is the environmental insurance claims experience in your jurisdiction?

Insurance companies are not required to report on environmental insurance claims to their regulator, and so there is no data on this. Our guess is that there are few, if any, environmental insurance claims in Ghana, due to the relatively insignificant portion of the insurance market that is taken up by environmental insurance.

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 your jurisdiction.

Ghana is one of the 170 states that signed the Paris Agreement on Climate Change in 2016. That Agreement has been ratified by the legislature and imposes, at the very least, international environmental commitments on Ghana. It is significant to note that prior to signing the Paris Agreement, the Government had entered into an agreement to build a coal-fired power plant for the country. It remains to be seen if the Government will still go ahead with the said project despite having signed the Paris Agreement.

In a 2009 court action by the Centre for Interest in Public Law and the Centre for Environmental Law against the Environmental Protection Agency, the Minerals Commission and a mining company (Bonte Mines), the court held that the defendants were jointly and severally liable to the people adversely affected by the harm and damage caused to the environment and their properties as a result of the default of the defendants on their environmental obligations. Unfortunately, the court did not make any orders against the defendants, as it held that the plaintiffs were not able to establish enough basis for the court to grant the order of *mandamus* as they sought in their reliefs.

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LAW & DEVELOPMENT ASSOCIATES
Law, Human Rights, Development & Public Policy

Atuguba & Associates (A&A) is not just a law firm; it is the place where discerning individuals, firms, institutions, organisations, and communities go for the resolution of some of the most intricate law-related business and social problems. Working closely with Law and Development Associates (LADA) Consult and the LADA Institute, A&A also provides legal input for the development, re-design, monitoring and evaluation of policies, laws, and institutions.

In concrete terms, A&A provides both litigation and transactional lawyering services. Because our services are determined by the individual needs of our clients, A&A undertakes civil and criminal litigation, and also has an impeccable record for providing clients with in-depth advice for corporate and commercial transactions, public-private partnerships, commercial negotiations and arbitrations, incorporation and registration of business entities, investments and many other corporate processes.

In this vein, A&A not only represents a number of well-known banks and oil and gas companies, but also communities seeking to prevent or remediate the inimical effects of commercial and industrial endeavours. Thus, some of our first-rate lawyers have made their mark in public interest litigation and the provision of legal aid, fighting for and supporting the voiceless and underprivileged in society. In the furtherance of these goals, A&A also works alongside international agencies including UNICEF, the World Bank Group and UNHCR in delivering their projects. Collaborative practice with other firms and experts is common in A&A, the better to serve our clients.

Chapter 17

India

Els Reynaers

Tavinder Sidhu

M.V. Kini

1 Environmental Policy and its Enforcement

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

The Indian Constitution lays down the foundation for all environmental laws. Since the late 1980s and early 1990s, there has also been a clear trend of environmental policies being driven by the (activist) judiciary in India. The fundamental right to life enshrined in Article 21 of the Constitution has been expanded by judicial interpretation to include the right to a clean, healthy and pollution-free environment. The doctrine of sustainable development, "polluter pays" and the precautionary principle were all first acknowledged by the judiciary before these principles were explicitly embedded in more recent environmental legislation (such as the National Green Tribunal Act, 2010).

The Ministry of Environment and Forest & Climate Change ("MoEF&CC"), along with the Central Pollution Control Board ("CPCB") and State Pollution Control Boards ("SPCBs") of each of the 29 States in India, administers and enforces environmental laws. There are separate regulatory bodies for various environmental laws, such as: the State-level Environment Impact Assessment Authority, supervising Environmental Clearance applications and Environmental Impact Assessment reports; the Ozone Cell, supervising compliance with the Ozone-Depleting Substances Rules; Forest Officers in the context of India's Forest Act; National and State-level Coastal Zone Management Authorities, supervising the Coastal Regulation Zone Notification, etc.

We may also add here that there is only one Supreme Court in India, but each of the States has its own High Court. Importantly, various National Green Tribunals ("NGTs") were established in 2010 – dividing India geographically into several jurisdictional zones, with the central NGT in Delhi, and four other NGTs in Bhopal, Pune, Kolkata and Chennai – for the speedy disposal of cases where a substantial question relating to environment is involved, and for giving relief and compensation for damages to persons and property.

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

The interactions between these enforcement agencies and regulated entities still tend to be based on a carrot-stick approach, with few local companies, therefore, being proactive or forthcoming with their environmental compliance records. That said, in our experience voluntary disclosures are well received by all enforcement agencies, although there are no formal guidelines relating to such situations, and absent explicit rewards for such voluntary disclosures, local companies lack the confidence to approach enforcement agencies. Some of the newer environmental laws, such as the E-Waste (Management) Rules, 2016, do allow "self-declaration", e.g. relating to the Reduction in the use of Hazardous Substances ("RoHS") requirements; such approaches remain the exception rather than the rule. Some States have also adopted an "auto-renewal" of Consent Orders (i.e. environmental permits) based on self-certification if certain criteria are met, such as: when there is no increase in the overall production capacity and pollution load; if there is only a marginal increase (up to a maximum of 10%) in the capital investment, etc.

The SPCBs tend to issue "show cause" notices ("SCNs") in the event of non-compliance, giving the companies 15 to 30 days to reply and explain why criminal prosecution should not be undertaken or electricity/water supply to these companies stopped. The power of the SPCBs to cut off these basic supplies can at times be unnecessarily harsh on a company, but seems to be the only effective tool which the SPCBs have at their disposal to enforce environmental laws. Hence, all companies must ensure that they take these SCNs very seriously and duly reply. As per the respective environmental laws, all companies are also granted the right to be heard before such drastic measures such as the stoppage of basic supplies will be enforced. Moreover, if a site is found to be in grave non-compliance (such as operating without an environmental permit), the SPCBs will not hesitate to commence a proceeding before the NGT, with the request to impose a penalty, and in some cases criminal prosecution of the directors or management of a company can also be initiated.

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

Under the Right to Information Act, 2005 ("RTI Act"), a citizen can request all government authorities to provide any particular information which they hold, at a minimal fee. There are some exemptions to this otherwise broadly drafted right to information, such as: personal information of officers; evidence yet to be presented in a court of law; and also, importantly, commercially confidential information, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information. For instance, if local residents were to file an RTI petition seeking

information about a company's off-site groundwater pollution, the larger public interest would warrant that all information available to the government authority be shared with the citizens seeking this information.

2 Environmental Permits

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

The most common Consent Orders or environmental permits to be obtained from the State Pollution Control Boards ("SPCBs") by e.g. manufacturing companies are the Consent to Establish ("CTE") under the Water (Prevention and Control of Pollution) Act, 1974 ("Water Act") in which a company submits its initial plans, shares its manufacturing capacity, pollution load, etc. for initial construction approval; which has to be followed by a Consent to Operate ("CTO") which must be obtained prior to any operations being initiated by the company. Do note that an integrated permit system is in place in most States. For instance, the CTO and its subsequent renewals under the Water Act, Air Act and Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 can typically be obtained by submitting a "Combined Consent" Application to the relevant SPCB. It is worth noting that separate pieces of legislation will trigger separate permit obligations. For instance, the recent E-Waste (Management) Rules, 2016 introduce the new concept of an "Extended Producer Responsibility – Authorisation of Producers" which would only require one centralised application with the Central Pollution Control Board ("CPCB"). Hence, depending on the type of activities undertaken by a company, multiple permits may need to be obtained.

Importantly, in August 2018, a new online environmental portal was launched by the MoEF&CC, named "PARIVESH" – which stands for Pro-Active and Responsive facilitation by Interactive, Virtuous and Environmental Single-window Hub – to facilitate online submission and tracking of various environmental clearance applications: https://parivesh.nic.in. More specifically, it will allow a single registration and single sign-in for all types of clearances (i.e. Environment, Forest, Wildlife and Coastal Regulation Zone – "CRZ"), and create a unique ID for each project for most environmental clearances.

Consent Orders issued by the SPCBs, as well as Environmental Clearances (obtained under the EIA Notification), are readily transferable, and a straightforward procedure has to be followed: the transferor would need to provide a written "No Objection" to the concerned regulatory authority; and the transferee must submit an application, along with an undertaking that it will comply with all the conditions specified in the Consent Order, along with supporting documents (explaining the underlying reason for the transfer, change of name, change of management, etc.).

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?

One can file an appeal against the decision by a State Pollution Control Board not to grant or renew a Consent Order before a State-level Appellate Authority. A subsequent appeal against a decision by the Appellate Authority would lie before the NGT (see Section 16 of the NGT Act).

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

Yes, in line with the Prior Environmental Clearance Notification, 2006, many activities require a prior Environmental Clearance ("EC"), some of which also require a detailed Environmental Impact Assessment ("EIA") study, including:

- Isolated storage and handling of hazardous chemicals (if certain quantity thresholds as identified under the Manufacture, Storage and Import of Hazardous Chemical Rules, 1989 ("MSIHC Rules") are triggered).
- Mining of minerals.
- Offshore and onshore oil and gas exploration, development and production.
- Oil and gas transportation pipelines.
- Thermal power plants.
- Nuclear power projects and processing of nuclear fuel.
- Metallurgical industries (ferrous and non-ferrous).
- Asbestos milling and asbestos-based products.
- Chlor-alkali industry.
- Chemical fertilisers.
- Pulp and paper industry.
- Sugar industry.
- Building and construction projects.
- Townships and area development projects, etc.

The process of EIA involves four stages, namely screening, scoping, public consultation and appraisal.

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

As mentioned in question 1.2 above, the State Pollution Control Boards have far-reaching powers to impose a stoppage of essential services such as electricity and water, if a company is found to be operating in violation of the conditions mentioned in the Consent Order. The SPCBs can also initiate prosecution before the courts.

3 Waste

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

The Hazardous and Other Wastes (Management and Transboundary Movement) Rules, 2016 ("HW Rules") introduced a definition of "waste" as materials that are not products or by-products, for which the generator has no further use for the purposes of production, transformation or consumption. The HW Rules further clarify that waste includes the materials that may be generated during the extraction of raw materials, the processing of raw materials into intermediate and final products, and the consumption of final products, but excludes residuals recycled or reused at the place of generation. A by-product is defined as a material that is not intended to be produced but gets produced in the production process of the intended product and is used as such. "Hazardous waste" is a more complex definition which takes into account several technical factors, and uses both a list-based approach as well as concentration limits; and the international trade dimension of hazardous wastes is

in line with the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, 1989, to which India is a party.

Other waste-specific legislation will define the waste being targeted respectively, such as: the Bio-Medical Waste Management Rules, 2016; the Solid Waste Management Rules, 2016; the Construction and Waste Management Rules, 2016; the Plastic Waste Management Rules; and the E-Waste (Management) Rules, 2016 ("E-Waste Rules").

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?

Different waste rules impose different responsibilities and requirements regarding waste storage; for instance, the E-Waste Rules – which are based on the Extended Producer Responsibility – only allow the storage of e-waste on-site up to 180 days after its generation (which can exceptionally be extended up to 365 days), and impose the further obligation on the producer to ensure that the e-waste, at end of life, finds its way to a registered recycler or an authorised treatment storage disposal facility.

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)?

Once the title has been transferred to another party, no such residual liability will be retained by the generator/producer of the respective waste(s) as this is not specified in any environmental law, nor developed via case law. Various environmental laws do specify that all the parties (be it manufacturer, producer, importer, transporter, dismantler, recycler, etc.) shall be liable for any damages caused to the environment or third party due to improper handling and management of the (respective) waste, but this is based on fault-based liability which will have to be proved in court.

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

The concept of Extended Producer Responsibility ("EPR") is embedded in several more recent pieces of environmental legislation, such as the E-Waste Rules and the Plastic Waste Management Rules. Hence, under the E-waste Rules, the producer of electrical and electronic equipment ("EEE") has a duty to channel back the e-waste and ensure the environmentally sound management of such waste. The EPR may consist of setting up a take-back system or collection centres, or having arrangements with an authorised dismantler or recycler, or through a Producer Responsibility Organisation. The producer would need to obtain a prior EPR Authorisation from the CPCB approving its proposed EPR approach and take-back targets.

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?

The Water Act, the Air Act and the Environment (Protection) Act, 1986 ("EP Act") – under which all the waste-related Rules were adopted – all contain penalty provisions. Failure to obtain the required Consent Order or environmental permit will incur penalties. For instance, under the Water Act, any person who breaches the consent application process is punishable with imprisonment for at least 18 months, which can be extended to six years, and a fine.

Importantly, the NGT Act contains penalty provisions which are considerably higher compared to previously adopted environmental laws. Most likely all existing environmental laws will be amended (at some point) to be aligned with the National Green Tribunal Act penalty provisions. More specifically, section 26(1) of the National Green Tribunal Act states that a person who fails to comply with an order or award or decision of the Tribunal is punishable with imprisonment for a term of up to three years, or with a fine of up to INR10 crore, or both (1 crore is equal to 10 million). If the failure or contravention continues, an additional fine applies up to INR25,000 for every day the failure/contravention continues, after conviction for the first failure or contravention. Moreover, if a company fails to comply with any order, award or decision of the Tribunal, the company is punishable with a fine up to INR25 crore. If the failure or contravention continues, an additional fine applies up to INR100,000 for every day the failure/contravention continues, after conviction for the first failure or contravention.

The Water Act, Air Act and Environmental Protection Act all contain specific provisions for offences committed by companies. Under these Acts, every person who is in charge when an offence is committed, and is responsible to the company for the conduct of its business, is guilty of the offence and liable to be prosecuted and punished accordingly. However, a person is not liable if he proves that the offence was committed without his knowledge, or that he exercised all due diligence to prevent the offence. Further, if the offence was committed with the consent or connivance of, or is attributable to any neglect by, a director, manager, secretary or other officer of the company, the other person is also guilty of the offence, and liable to be prosecuted.

Moreover, the Supreme Court and the State High Courts can and do impose exemplary damages for damage to the environment. For instance, in the *Sterlites Industries* case (2013), one of the largest copper smelter plants in India was found to be operating without a valid renewal of its environmental consent to operate. When assessing the company's liability to pay damages, it reviewed the company's annual report, and determined that 10% of the profit before depreciation, interest and taxes ("PBDIT") had to be paid as compensation, which amounted to INR1 billion.

About 30 years ago, the Supreme Court evolved two far-reaching environmental civil liability concepts which are now engrained in Indian case law:

- Enterprises engaged in hazardous or inherently dangerous activities are absolutely liable to compensate those affected by an accident (such as the accidental leakage of toxic gas). Such absolute liability is not subject to any of the exceptions under the tort principle of strict liability in *Rylands v Fletcher* (that is, act of God, act of third party, consent of victim and statutory authority).
- The measure of compensation must be correlated to the magnitude and capacity of the enterprise. The larger and more prosperous the enterprise, the greater the amount of compensation payable by it for harm caused by an accident, in the carrying on of hazardous or inherently dangerous activities.

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

Yes, the principle of absolute liability (discussed above under question 4.1), combined with the "polluter pays" principle, the

precautionary principle and the sustainability principle – which are well established in many environmental cases – could hold a company liable for environmental pollution or damage even if a company complies with its current environmental permit. For instance, we could think of a situation of off-site groundwater pollution caused by both historic pollution and current activities which can be traced back to the company's site and have a combined effect of negatively impacting the groundwater quality – a situation which was otherwise not covered by the environmental permit, but is negatively impacting the environment and health of neighbouring farmers or making the water unusable for irrigation purposes.

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?

As discussed under question 4.1, the Water Act, Air Act and EP Act state that every person who was in charge of, and was responsible for, the conduct of a company's business along with the company, shall be deemed to be guilty of all offences and shall be liable to be proceeded against and punished accordingly. For example, the Supreme Court has imposed personal liability to the tune of one year's salary on a managing director – but such personal liabilities for environmental damage are still rather exceptional and tend to be imposed in grave situations of non-compliance and serious environmental damage. As mentioned above, defences are provided in these laws as well, and a person will not be held liable if he proves that the offence was committed without his knowledge, or that he exercised all due diligence to prevent the offence.

The market for insurance policies for personal liability is not mature in India, whereas such insurance is available to cover companies against environmental damage claims.

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?

As is the case in many other jurisdictions, in the event of a share sale, the buyer also acquires all liabilities, including environmental liabilities, incurred by the company. Typically, in India, even in the event of an asset sale, the buyer will take over these liabilities, but the parties can contractually decide otherwise. This is because environmental laws in India do not address historical pollution and the regulatory authorities in India typically simply connect environmental liability to the occupier, i.e. the entity having current control over the site, without any further investigation in terms of previous ownership. As a result, parties will settle this point via the insertion of contractual warranties relating to environmental liabilities, which highlights the importance of a robust environmental due diligence prior to the purchase.

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

In India, lenders do not directly incur liability for environmental wrongdoing and/or remediation costs for contaminated land, unless they are directly responsible or liable for the management of the company, with a board position or substantial shareholding and involvement in the day-to-day running of the company. However, lenders increasingly undertake an environmental risk assessment of the projects of their customers and will include contractual clauses pertaining to environmental compliance in their loan documents. Lenders normally undertake prior due diligence and insist on appropriate conditions before granting a loan, requiring the management of the company to take effective measures to minimise their environmental liability.

5 Contaminated Land

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

Unlike many other jurisdictions, environmental laws in India do not explicitly address the situation of historic pollution and related remediation. As a result, even for historic pollution the current owner/occupier will be held liable. Similarly, India has no specific legislation addressing soil contamination and remediation yet, but major changes with a step-wise approach are in the pipeline. The first proposed short-term implementation strategy proposed is the draft "Contaminated Sites (Identification and Management) Rules" containing standards for soil and water pollution, carrying out mandatory site assessment and reporting and the determination of a contaminated site. Environmental consultants have already prepared reports mapping the priority (most contaminated) sites which should be covered in a first stage. Importantly, the remediation would not be merely parameter-based but take into account the expected use of the land. The longer-term implementation strategy would require amendment of the EP Act addressing the liability of parties, including for historic contamination; and the subsequent draft "Remediation of Polluted Sites Rules" would have a wider application beyond the initially identified contaminated sites.

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

Allocating environmental liability is not always an easy undertaking, particularly in industrial zones, or manufacturing or chemical clusters, with a long history of different activities having been undertaken over the years. However, the NGT in many cases has divided the cost of remediation equally amongst the responsible parties, when it is found that more than one legal person is responsible for such contamination.

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?

The environmental regulatory authority could impose additional works or remediation activities, particularly if the desired result is not being achieved within the agreed time. However, the principles of natural justice would apply, and such decisions by the regulator could be challenged by a company based on the ground that the decision is arbitrary, unreasonable, no personal hearing was granted, etc.

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?

As mentioned above, there is no specific law in India addressing contaminated land and historical pollution. Hence, the regulatory

authorities will always hold the current owner/occupier as the liable entity, whether currently observed on-site/off-site. Such private rights seeking contribution from the previous owner would, therefore, have to be contractually foreseen, otherwise the purchaser would have no such right.

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

Yes. The Supreme Court, High Courts and the NGT have all recovered environmental damages from companies for the pollution of public or historical assets, or public assets such as rivers. For instance, a company was held liable for INR1 billion for loss of ecology as well as pollution caused in the Arabian Sea near the port city of Mumbai. Also, the industries operating within a 100km radius from the Taj Mahal monument were ordered to shut down. Furthermore, in series of judgments, the NGT as well as the Supreme Court imposed costs on industries which were directly or indirectly polluting the river Ganges.

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.?

The officials of the SPCBs are empowered to inspect sites, examine and test the processes and plants, take samples for testing and conduct research, verify records and give directions to industries in order to control environmental pollution caused by companies. The CPCB and SPCBs are empowered to initiate proceedings to levy penalties on a company or criminal liability on the occupier if they are found violating the provisions of the EP Act, Air Act or Water Act.

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?

Yes, the occupier of the land is under an obligation to immediately inform the concerned authorities and affected third parties in the event of discharges of pollutants above the standards contained in the General Standards specified under the EP Act and related Rules, or in the event of an accident as regulated under, e.g., the Water Act. The issue is not as obvious in cases where the off-site migration is caused by activities which neither infringe the valid Consent Order or environmental permit nor exceed the generally applicable discharge of environmental pollutant standards, simply because such situations have not been foreseen by environmental laws in India. However, companies may still decide to inform the regulatory authorities in such situations.

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

There is no statutory obligation for investing land contamination except for the obligation to submit a pre-feasibility Environmental Impact Assessment report as part of the Environmental Clearance approval process. As mentioned, this regulatory lacuna relating to land contamination is currently being studied by the MoEF&CC and new legislation may be adopted in the future to address this legal vacuum.

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?

Material information affecting the buyer's decisions must be disclosed to him by the seller. The transferor must disclose a detailed schedule highlighting liability issues. Non-disclosure of existing environmental liability could equate to questioning of contractual validity in M&A transactions.

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 enforcement of indemnification for limiting actual or potential environmental liability is possible. However, such contractual indemnity will only be binding between the parties, and not discharge the indemnifier's liability *vis-à-vis* third parties, or in the eyes of the environmental regulatory authorities.

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

A company is under an obligation to disclose potential environmental liabilities as contingent liabilities in its financial audit. Non-disclosure of any such liability in the account shall be treated as fraud or falsification of accounts, which are punishable with imprisonment or fine or both.

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?

Under Indian law, a company is a separate legal entity deemed to be acting through its directors. Thus the shareholders of a company cannot be held liable for breach of environmental law unless there is no distinction between the shareholders and directors and the facts require lifting of the corporate veil. Lifting of the corporate veil shall take place in limited scenarios such as fraud, account falsification and misleading public disclosures; and in such situations, a foreign parent company can be held liable for its subsidiary's activities.

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

India adopted the Whistleblower Protection Act, 2014, with a prescribed mechanism to investigate alleged corruption and misuse

of power by public servants and to protect anyone who exposes alleged wrongdoing in government bodies. However, no such whistle-blower laws are applicable to private companies. However, many larger companies in India have adopted internal whistle-blower guidelines based on good corporate governance principles.

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

Yes, there are instances where class action suits have been filed by groups of affected people. The more common route in India is for individuals or non-governmental organisations ("NGOs") to file Public Interest Litigations ("PILs"). As mentioned above, exemplary damages are frequently imposed by the Supreme Court as well as NGT benches (with amounts at times being as high as INR1 billion).

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

In India, there are hardly any procedural hurdles for any citizen or NGO to file a public interest litigation, as long as the issue highlighted is in the public interest. Historically, the *locus standi* was deliberately lowered, particularly to ensure that the poor and deprived had access to courts. Since then, PILs have flourished and are omnipresent, to the point that courts have started imposing fines for abuse of the PIL process.

9 Emissions Trading and Climate Change

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

There is no specific carbon trading scheme in place in India. India ratified the UN Framework Convention on Climate Change in 1993 and the Kyoto Protocol in 2002 but, not being an Annex-I country, it did not take part in the flexibility mechanisms foreseen for developed countries (emission trading and joint implementation). On the other hand, India has been a leading host country of Clean Development Mechanism ("CDM") investments, enabling Annex-I countries to invest in emission-reducing projects in developing countries (thereby earning certified emission reductions).

Under the National Mission on Enhanced Energy Efficiency ("NMEEE"), India launched a National Action Plan on Climate Change in 2008, which focuses on the following eight areas or "missions": (1) solar; (2) enhanced energy efficiency; (3) sustainable habitat; (4) water; (5) sustaining the Himalayan ecosystem; (6) a "green" India; (7) sustainable agriculture; and (8) strategic knowledge for climate change.

As part of the NMEEE, the Perform, Achieve and Trade ("PAT") Mechanism was launched, a first-of-its-kind, market-based mechanism in India to promote energy efficiency among energy-intensive large industries by allowing trade in energy-saving certificates ("ESCerts"). The Energy Conservation Act, 2001 identified Specific Energy Consumption reduction targets for 478 "Designated Consumers" from eight industrial sectors which could take part in the PAT mechanism, *viz.*: thermal power stations; fertiliser; cement; iron and steel; chlor-alkali; aluminium; textile; and pulp and paper. The ESCerts may be traded among companies to meet their mandated compliance requirements or may be banked for the next cycle of energy savings requirements. On 31 March, 2016, comprehensive Amendment Rules were notified, essentially pertaining to the methodologies underpinning the PAT Mechanism.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

There are no mandatory GHG reporting obligations, but there are several industry-driven voluntary initiatives to encourage such GHG reporting.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

India submitted its Intended Nationally Determined Contribution ("INDC") in October, 2015, which outlines the post-2020 climate actions the country intends to take. India's INDC includes, *inter alia*, the reduction in the emissions intensity of its GDP by 33%–35% by 2030 from 2005 levels, and to create an additional carbon sink of 2.5–3 billion tons of CO2 equivalent through additional forest and tree cover by 2030. See also the answer to question 9.1 above.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

The Supreme Court imposed a ban on the manufacturing and mining of blue and brown asbestos (*Kalyaneshwari v. Union of India*) but India remains a major importer of chrysotile (white) asbestos, and a PIL filed to ban white asbestos was dismissed (*Consumer Education & Research Centre v. Union of India*). In 2009, and again in 2014, a draft Bill, the "White Asbestos (Ban on Use and Import) Bill, 2014", was tabled in Parliament, but has still not been adopted. The Supreme Court also addressed the harmful consequences of asbestos, making the employer responsible to pay damages to workers whose health has been affected due to exposure to asbestos.

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

Owners/occupiers of premises have no specific duties to discharge regarding asbestos on-site, other than the general occupational health and safety regulations applicable to all industries under, among other things, the Factories Act 1948 (and asbestosis has been notified as an occupational hazard under the Factories Act).

Asbestos-related activities fall into the red category, that is, the most polluting industries, and environmental permit/consent applications are reviewed accordingly by the SPCBs. A prior environmental clearance must be obtained and a related EIA report must be prepared for industries proposing to engage in activities relating to asbestos milling and asbestos-based products.

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 your jurisdiction?

The Public Liability Insurance Act 1991 ("PLI Act") requires an

insurance policy to be taken out by owners, users or transporters of hazardous substances, as defined under the EP Act, which exceed the minimum quantity specified in the PLI Act. The public liability policy can be extended to cover pollution risk subject to a "no objection" certificate from the SPCB. Under the PLI Act, the Any One Accident ("AOA") must represent the paid-up capital of the company, subject to a maximum of INR50 million. The AOA limit is fixed at maximum INR150 million. Under the PLI Act, the excess of any award that exceeds the AOA limit is paid by the Government through the Environment Relief Fund. The insured must contribute an amount to this fund which is equivalent to the premium paid under the PLI Act Policy. The environmental risks insurance market is growing, but is still limited compared to other jurisdictions.

11.2 What is the environmental insurance claims experience in your jurisdiction?

As mentioned, the environmental risk insurance market is still in its infancy and not much is publicly available pertaining to such insurance claims.

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 your jurisdiction.

The one major development which is expected is that a specific soil contamination law will be adopted in the near future (although this would be post the March 2019 national elections). A Report on the Development of a National Program for the Rehabilitation of Polluted Sites ("NPRPS") has recently been submitted to the MoEF&CC. As a first milestone of this exercise, a detailed mapping of the most polluted sites throughout India has already been undertaken. The Report also contains draft Rules: the Contaminated Sites (Identification and Management) Rules, which will provide standards for soil and water pollution, carrying out mandatory site assessment and reporting, and the determination of contaminated sites. The expectation (as indicated in the Report) is that the Rules could be notified approximately 24 months from now. This would be a significant development, and if the Rules are adopted along the same lines as currently proposed, it would entail that a soil analysis and possible soil remediation would need to be undertaken in the following situations: prior to a renewal of a Consent Order; when obtaining an Environmental Clearance; prior to signing an agreement for sale or lease of land; prior to applying for a permit to construct on such a site; prior to establishing new industrial projects or expanding such projects on any site; prior to the commencement of demolition of any property; and within 60 days of signing an agreement for any change in ownership of a company that owns or leases such a site. This would need to be factored in by all companies in their environmental risk analysis as part of any new project, internal environmental management system or environmental due diligence.

Several States have recently banned plastic packaging for products and imposed strict EPR obligations on generators of plastic waste, which is a trend which is expected to grow across most States in India and companies have to proactively address this shift.

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Els serves as the General Secretary of the Nuclear Law Association of India, which she helped co-found, was the President of the International Nuclear Law Association for the years 2015–2016, and is currently the Senior Vice Chair of the International Bar Association's Environment, Health and Safety Law Committee (2017–2018).

She is regularly recognised as a leading environmental lawyer in India by the *Who's Who Legal: Environment* edition, including in 2018. She received the 2019 International Advisory Experts Award under the "Environmental Law Award within India" category.

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He also represents clients before regulatory authorities to obtain environmental clearances and approvals relating to Coastal Regulation Zone ("CRZ") areas, wildlife, and use of protected areas for non-forest purposes for infrastructure projects of national importance.

He regularly advises clients on laws pertaining to water pollution, hazardous waste, e-waste and plastic waste, and in this context represents clients before the Ministry of Environment, Forests and Climate Change, the Central Pollution Control Board and the State Pollution Control Boards.

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M.V. Kini, which was established 30 years ago, currently counts about 150 lawyers. M.V. Kini is a full-service law firm and its practice areas range from corporate and commercial law, tax law, banking law, capital markets and infrastructure law, to labour law, environmental law, aviation law, government relations team, litigation and arbitration. With our head office in Mumbai and several branches throughout India, including in Delhi, Pune, Goa, Bangalore, Hyderabad, Lucknow and Calcutta, we are able to provide India-wide services to our clients.

Indonesia

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1 Environmental Policy and its Enforcement

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

Indonesia has implemented its third generation of environmental law via Law No. 32 of 2009 concerning the Management and Protection of the Environment ("**Environmental Law**"). The Environmental Law has developed to include protection aspects in order to strengthen environmental preservation efforts.

The agencies/bodies that administer and enforce the Environmental Law are the Ministry of the Environment and Forestry ("**MOEF**" – previously under the Ministry of Environment ("**MOE**"), prior to Mr. Joko Widodo's Administration), governors, and regents/mayors depending on the respective authorities and autonomy as stipulated under Law No. 23 of 2014 concerning Regional Autonomy as amended by Law No. 9 of 2015. Further, MOEF has technical implementation units that are divided into five units throughout Indonesia, those being in Sumatera, Java-Bali-Nusa Tenggara, Kalimantan, Sulawesi, and Maluku-Papua. Other institutions have also been established to deal with specific issues related to the protection of the environment; for example, the Regional Environmental Management Agency ("**BPLHD**") for regional control.

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

The main environmental legal approach is based on precautionary principles, which are applied to the permit regime instituted by the respective authorised institutions. MOEF, each province and regency/municipality have government officials that have the primary role of legal enforcement through warnings and administrative sanctions, including permit revocation if necessary.

Multi-door law enforcement has been announced as a new instrument to resolve matters related to natural resources, including the preservation of the environment, by utilising several legal instruments to encourage and uncover legal violations such as corruption, money laundering, tax crimes and other related matters. This is a development of the one roof enforcement system ("**ORES**").

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

Everyone has the right to access data or information related to environmental protection and management, which according to its nature and objectives is open to the public. However, in practice, this has got to go through several formal applications and analysis of the nature of the request. Aside from the Environmental Law and MOE Regulation No. 6 of 2011, the MOEF has an integral and coordinated environmental public information system to publish information upon requests from the public and to publish such information on, among other places, the official website of the MOEF. Public information is also regulated by Law No. 14 of 2008.

2 Environmental Permits

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

According to the Environmental Law and MOE Regulation No. 5 of 2012, an environmental licence is required in order to obtain a business licence for any business activities that require an Environmental Impact Assessment ("**AMDAL**") or Environmental Management and Monitoring Programme ("**UKL – UPL**"). The criteria for business activities that require an AMDAL include those that cause changes to the state of the land and landscape, exploit natural resources, whether renewable or non-renewable, could potentially cause environmental pollution and/or damage as well as consume and degrade natural resources in their utilisations, and/or apply technology predicted to have a significant potential to influence the environment. A UKL – UPL is required for, among others, business activities which do not require an AMDAL (for activity that has a lesser impact on the environment).

As long as the permit remains valid and there is no change in the business's activity, whether in its production and/or extraction of raw materials, according to Government Regulation ("**GR**") No. 27 of 2012, in the event of a change of ownership of a business, the environmental licence may be transferred from the initial owner to its successor by submitting an application for an amendment to the existing environmental licence to the MOEF, governor or regent/mayor, according to their respective authorities.

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?

A right of appeal against government institution decisions and decisions by an environmental regulator not to grant an environmental licence may be conducted through a state administrative court as provided by the Law on the Administrative Courts (Law No. 5 of 1986 as amended by Law No. 51 of 2009). Furthermore, MOE Regulation No. 17 of 2012 allows anyone to file a lawsuit in a state administrative court against a decision on an environmental licence.

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

The Environmental Law provides that an AMDAL is required by businesses for activities that have a significant impact on the environment. The definition of a significant impact and the types of business activities which require an AMDAL are provided in MOE Regulation No. 5 of 2012.

An Environmental Audit to evaluate compliance with government requirements and policies is only required for certain 'high-risk' business activities, as set out in Article 49 paragraph (1) Environmental Law, which states that: "[the] *Minister obligates an environmental audit to businesses and/or activities that have a high risk to the environment.*"

Moreover, Article 17 MOE Regulation No. 3/2013 further explains that environmental audits are mandatory for:

a) businesses and/or activities that have a high risk to the environment; and/or

b) businesses and/or activities that indicate non-compliance with regulations in the field of environmental protection and management.

Article 51 of the Environmental Law explains that environmental audits are conducted by environmental auditors that have a certificate of environmental competence issued by the environmental auditor's competence certification body.

Basically, MOEF has full authority to force any company to undergo an environmental audit. In addition, the procedure for conducting an environmental audit is set out in MOE Regulation No. 3 of 2013 on Environmental Audits.

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

According to the Environmental Law, the environmental regulator has the power to impose administrative sanctions in connection with the violation of permits. These include written warnings, compulsory action and the suspension, or revocation, of an environmental licence. Repairing any damage caused to the environment may also be required. Furthermore, in the event administrative sanctions have not resolved the damage caused by the violation of the permit, civil sanctions/lawsuits and/or criminal investigations and sanctions may be conducted to resolve the damage caused.

3 Waste

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

Referring to the Environmental Law, waste is defined as: (a) residue of business activities; and (b) hazardous and toxic waste ("**B3 Waste**") that is the residue of a business activity containing substances, energy and/or other components which, due to their nature, concentration and/or quantity can both directly and indirectly pollute and/or damage the environment and its sustainability.

All producers of B3 Waste or expired B3 materials are required to manage the B3 Waste and hold a licence from the respective authorities. GR No. 101 of 2014 stipulates that B3 Waste producers must implement B3 Waste management, including the reduction, storage, collection, transport, utilisation, processing, and/or disposal of B3 Waste. GR No. 101 of 2014 divides B3 Waste into two categories based on its risk: (i) B3 Waste Category 1: B3 Waste which is acute and has a direct impact on humans and certainly will have a negative impact on the environment; and (ii) B3 Waste Category 2: B3 Waste which has a delayed effect and has an indirect impact on humans and the environment and sub-chronic or chronic toxicity.

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?

There are several methods allowed for a producer to store and/or dispose of its waste on the site where it was produced pursuant to GR No. 101 of 2014. Producers must obtain a B3 Waste Management Licence to store B3 Waste. The licence is valid for five years and may be extended.

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)?

The producer of waste retains residual liability for its B3 Waste. GR No. 101 of 2014 provides that transferring B3 Waste to another party for disposal/treatment off-site does not reduce the responsibility of the producer for the management of the B3 Waste it produces; therefore, for the producer to best protect its interests in this matter, it must follow every aspect of the required permits and operations standards as intended in the law and regulations.

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

B3 Waste producers remain liable for the B3 Waste they produce even after it has been transferred and/or exported to a third party to be disposed of or managed; therefore, according to GR No. 101 of 2014, B3 Waste producers are obliged to implement B3 Waste management, including its reduction, storage, collection, transport, utilisation, processing and disposal, and hold the licences required for these activities. The aims of these activities are to eliminate or reduce the risks that may arise from B3 Waste and reduce B3 Waste dumping. If a B3 Waste producer is not able to do this, it may use another party which has the relevant licence to assist the producer in managing its waste.

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?

The 'polluter pays' principle is a part of the preventive instruments used in environmental law enforcement in Indonesia. It has become a guideline for Indonesian judges in their rulings, as stated in Head of Supreme Court Decree No. 36/KMA/SK/II/2013. Furthermore, Article 88 of the Environmental Law provides a strict liability provision which applies to any party engaged in a business activity using B3 Waste, producing and/or managing B3 Waste and/or causing a serious threat to the environment under which it is fully responsible for any damage, without the plaintiff having to prove that the party was at fault. However, the application of the strict liability provision remains controversial and debatable *versus* the use of the burden of proof in court.

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

Upon the application of the strict liability principle, even if the person found liable was not at fault or negligent, that person may be held liable for the environmental damage which occurred. But, in practice, the implementation of the strict liability principle remains debatable and controversial due to the burden of proof in trial proceedings, so in some cases this principle cannot be accepted.

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?

Yes, criminal sanctions may be imposed on the business entity and/or person who gave the order in a crime committed by, for, or on behalf of, a business entity. The person may be held liable if the crime was committed on the orders of a director or the company officer.

MOE Regulation No. 18 of 2009 requires companies whose main activity is B3 Waste management to have environmental insurance cover of at least IDR 5 billion, but it may not cover directors or other officers, only the company as a legal entity.

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?

Environmental liability remains with the company, unless it can otherwise be proven that the purchaser intervened by giving the order or leading the activity that led to environmental liability for, or on behalf of, the company. A purchaser of assets will not be held liable for any environmental damage caused by the company unless otherwise agreed by parties through their agreement.

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

Lenders may only be held liable for environmental wrongdoing or any remediation costs to the extent set forth in the loan agreements and/or the lenders' intervention in the borrower's business activities.

5 Contaminated Land

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

According to the Environmental Law, a guilty party that contaminates the soil or groundwater may be required to perform certain actions and/or pay compensation. These actions may include the recovery of the pollution and/or destruction, taking certain actions to guarantee that there will be no recurring pollution or destruction, and taking certain actions to prevent negative impacts on the environment. These activities shall be directly supervised by MOEF (remediation directory), and all the cost shall be borne by the guilty party. Further, the proposal of plans to conduct remediation has to be submitted and approved by MOEF (MOE Regulation No. 33 of 2009).

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

A court decision or consent may be reached by agreement between MOEF and responsible parties through the environmental dispute resolution mechanism as provided by the Environmental Law. Moreover, parties who are subject to strict liability may be held more accountable.

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?

If a programme of environmental remediation is agreed (approved by MOEF) with an environmental regulator, and SPPLT has been issued after the work is done, unless a new issue arises, the regulator may only supervise to see whether the agreed proposal is worked as planned and there are no further violations in the future.

If a programme of environmental remediation is agreed in a settlement agreement outside the courts, the party must register the settlement agreement with the district court to obtain a deed of settlement, which is legally enforceable.

Neither party, nor any third party, can then challenge the agreement, unless new incidents or evidence is found.

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?

Based on the Environmental Law, the polluter is responsible for managing the land contaminated by the B3 Waste it has produced. Therefore, liability cannot be transferred to the purchaser, unless the purchaser acknowledges the B3 Waste risk in the sale and purchase agreement. Therefore, anyone who suffers a loss because of contamination by a previous owner or occupier has the right to take action to seek compensation.

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

MOE Regulation No. 7 of 2014 regulates how to calculate the compensation to be paid to the government. In some cases, it has to provide proof in a court of law or for an out-of-court settlement.

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.?

To ensure compliance by all parties whose businesses or activities are covered by the environmental and management regulations and/or as part of an ongoing investigation, environmental supervision officials appointed (or a warrant) by the MOEF, governors or regents/mayors have the authority and power to monitor and inspect equipment and take samples and photographs.

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?

Based on the Environmental Law, every person is entitled to have a healthy life and a good environment; therefore, to report an alleged potential pollution and/or damage is a person's right. Further, to protect that right, the person who filed the report cannot be sanctioned either civilly or criminally.

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

The police or civil servant investigators will investigate a person or business actor for an alleged environmental crime upon receipt of a report or as a result of site visit supervision (monitoring) by the respective authorities.

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?

Companies conducting a merger and/or takeover are required to disclose any issues that have affected their activities during the current book year. These may include environmental problems. However, according to Company Law, there is no specific requirement for a seller to disclose environmental problems to a prospective purchaser.

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?

Based on the Environmental Law, anyone who caused environmental damages or pollution is obliged to pay damages and/or compensation, including potential criminal sanctions. In some activities, especially for B3 Waste management, the mandatory insurance cover may limit the liability to environmental indemnity.

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

Based on the Environmental Law, anyone who is liable for environmental damage may not be able to shelter from environmental liabilities off balance sheet or dissolve the company to escape environmental liabilities, especially in relation to strengthening the implementation of strict liability.

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?

Based on the Environmental Law and Indonesian Company Law, any shareholder cannot be held liable for breaches of environmental law. However, the shareholder may suffer if the company is closed down due to breaching environmental law. Moreover, the parent company cannot be held liable as well for breaches of environmental law committed by its subsidiaries/affiliates. However, in practice, some precedents have shown that a parent company was being sued because of their subsidiaries/affiliates' breaches of environmental law; but as long as the parent company had not been involved and/or did not intervene in their subsidiary/affiliate's activity, then the parent company was able to avoid the allegation.

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

Indonesia's regulations do not specifically regulate the protection of "whistle-blowers" who report violations, including as stipulated in Supreme Court Regulation No. 4 of 2011. However, in article 66 of Law 32/2009, it is affirmed that protection is given to anyone who fights for their right to have a good and healthy environment in order that they are not prosecuted via criminal sanctions or a civil lawsuit.

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

Yes, in the event of environmental damage that causes losses to a group or "class", communities have the right to file an individual or

class action. In the case of a class action lawsuit, the "class" group has the right to file a claim for compensation against the business actor and/or activities that caused the harm to the group (victims); this is in line with article 91 of the Environmental Law. The procedural mechanism for a class action is regulated in Supreme Court Regulation No. 1 of 2002. In addition, environmentalists are also entitled to file a lawsuit for restoration to business actors and/or activities.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

Based on Law No. 48 of 2009 on the Powers of the Judiciary, if the claimant does not have the economic resources to pay the cost, then the claimants may request exemptions from liability to pay court costs when pursuing litigation and the cost will be paid by the state. However, such remedies only apply for individuals and not public interest groups.

9 Emissions Trading and Climate Change

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

The carbon market may remain a source of funding for supporting the reduction of greenhouse gas emissions in Indonesia under the umbrella of the Paris Agreement to control climate change. The carbon market can help Indonesia achieve its target of reducing greenhouse gas emissions by 29% by 2030.

Emission trading schemes have been developed through the clean development mechanism, which already generates emission credits from no less than 47 projects, with a value of approximately 1 billion US dollars and equivalent to 32 million tons of CO2, which is developed through Presidential Regulation No. 61 of 2011. At this moment, the government of Indonesia is actively developing a mechanism to accelerate climate change mitigation actions through GR No. 46 of 2017 concerning Environmental Economic Instruments.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

Based on Presidential Regulation No. 71 of 2011 concerning the Implementation of a National Greenhouse Gas Inventory, the MOEF (previously MOE) is the authorised institution to monitor national greenhouse gas and performing inventory of greenhouse gas emission.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

There are some related regulations on climate change in Indonesia, as follows:

1. Law No. 6 of 1994 concerning Ratification of the Convention on Climate Change, which requires Indonesia to report the national greenhouse gas emission levels and efforts towards climate change mitigation in national communication.
2. The Environmental Law requires the Government, Provincial, Regency/City Government to conduct an inventory of greenhouse gas emissions (article 63).
3. Law No. 31 of 2009 concerning Meteorology, Climatology and Geophysics, Article 65 paragraph (3) letter a, requires the formulation of climate change policies and the creation of an inventory of greenhouse gas emissions.
4. Presidential Regulation No. 61 of 2011 concerning National Action Plans for reducing greenhouse gas emissions.
5. Presidential Regulation No. 71 of 2011 concerning the Implementation of a National Greenhouse Gas Inventory.

Moreover, MOEF Decree No. 33 of 2016 sets out guidelines for preparation of climate change adaptation actions and also the development of an Indonesian Sustainable Development Goal, including a National Mid-Term Development Plan for 2015–2019. The overall policy approach is to mitigate and adapt to climate change and support Indonesia's national commitments on climate change.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

We have no experience in asbestos litigation and there has been no asbestos litigation in Indonesia to date.

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

Asbestos regulation in Indonesia emphasises health issues rather than environmental issues. The only regulation relating to asbestos to date is Minister of Manpower Decree No. 3 of 1985 concerning the safe and healthy use of asbestos. Under this Decree, the management of a business entity that utilises asbestos must provide its workers with protective equipment. The other duty for business entities is to measure asbestos dust particles in the air in the work environment every three months or at another certain frequency. Moreover, asbestos as a material is regulated by GR No. 74 of 2001, and as a waste is regulated by GR No. 101 of 2014.

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 your jurisdiction?

Environmental insurance remains a stagnant market in Indonesia, even though GR No. 47 of 2017 concerning economic instruments for the environment is enacted. Moreover, environmental insurance was introduced for B3 waste management in Indonesia as stipulated in MOE 18/2009, which requires any company whose main activity is managing and/or processing B3 Waste that does not originate from its own activity to have environmental insurance cover for its B3 Waste management. Currently, the role of environmental risk in Indonesia may be considered quite limited.

11.2 What is the environmental insurance claims experience in your jurisdiction?

From our experience, some companies that are involved in B3 Waste management have been covered by insurance. However, we have neither data nor information regarding any claim for environmental insurance to date.

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 your jurisdiction.

The increasing concern for environmental issues such as climate change, environmental degradation and plastic waste has strengthened environmental law enforcement in Indonesia. The application of strict liability for environmental legal cases and the capacity-building of law enforcement-related institutions and officials in Indonesia have been effectively proven stronger nowadays; it has been for the benefit of environmental protection in Indonesia. These improvements are to be followed by companies' awareness and adherence to the sustainability of the environment. The government's legal standing has been significantly increasing and environmental standards are regularly being reviewed by MOEF to provide better environmental management and protection. Having the right and a competent environmental legal advisor or consultant may help companies in dealing with the existing and rapid development of environmental law in Indonesia.

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Daud Silalahi & Lawencon Associates Law Firm ("DSLA") was founded by Prof. Dr. M. Daud Silalahi, S.H. at Bandung in September 1999. Since then, DSLA has grown to be one of the prominent law firms specialising in environmental law. Having opened its office in Jakarta in 2008, DSLA's services reach out to clients with diverse legal issues including, but not limited to: environmental law such as energy and natural resources (such as general mining, oil and gas, forestry, plantation law, manufacturing, garments industry, alternative energy, and property tourism); labour; information and technology; research; banking and finance; and other general corporate/commercial matters. The firm's services involve both litigation and non-litigation. DSLA is committed to always innovating and offering effective legal solutions/settlements for any existing legal matter. We challenge ourselves to be trusted and respected by the community, be sustainable, on time, practical and effective. In our service, we also appreciate the importance of the development and improvement of the environment and social economy for a better quality of life.

Italy

David Röttgen

Andrea Farì

Ambientalex - Studio Legale Associato

1 Environmental Policy and its Enforcement

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

Italy's environmental policy is based, amongst others, on the principle of sustainable development, prevention, precaution and "the polluter pays". These EU principles are codified in Legislative Decree no. 152/2006 (hereinafter, the "***Code***"). They apply to public and private figures as well as lawmakers. An important role is played by the Ministry of the Environment (hereinafter, "***MoE***"). Important administrative functions are also assigned to regional and local authorities (hereinafter, "***Administrations***"). Technical surveys and assessments are carried out by technical organisations, such as the Institute for Environmental Protection and Research (hereinafter, "***ISPRA***"), which provides back-up for the MoE and coordinates the regional and provincial environment agencies.

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

In order to ensure that environmental law is applied, public figures are provided with traditional scheduling and "command and control" tools. With such tools, Administrations establish the relevant limits and then ensure that they are complied with. Administrations are also given the power, when envisaged by the law, to enter into agreements (between an Administration and the party(ies) concerned). The law also regulates economic tools that are aimed at internalising environmental costs or benefits in exchange processes.

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

With Legislative Decree no. 195/2005, implementing Directive 2003/4/EC, the legislator created a system of rules regulating environmental information and the public's right of access. On the one hand, the Administration is given an active role in divulging information on the state of the environment regardless of whether requests for access are made by individuals. On the other, it is provided that every natural or legal person who is assigned public functions connected with environmental topics must make environmental information available to anyone asking for it. Environmental information, that must be published, is also subject to civic access legislation (art. 40 of Legislative Decree no. 33/2013).

2 Environmental Permits

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

As a matter of principle, any human activity having any impact on the environment is subject to prior authorisation. Italian legislation provides for a wide variety of permit types. An operator shall apply for a permit on the basis of the type of activity planned or conducted and its output, and the environmental aspects which the system considers potentially at risk as a result of the activities in question. Some permits are issued on the basis of the applicant's subjective characteristics. Consequently, though the permit of an operator running the activity may be transferred, as a matter of principle, notification to the Administration for assessment/transferral is required.

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 operator may appeal, before the authority that is hierarchically superior to the environmental Administration, against a decision not to grant an environmental permit or a decision in respect of the conditions contained in the permit. Alternatively, an appeal may be lodged with the competent Regional Administrative Tribunal within 60 days from the issuance of the decision, or alternatively, within 120 days with the President of the Republic. The parties that are entitled to lodge an appeal are operators applying for the permit, external promoters of environmental protection and public safety schemes, as well as any Administration involved in the issuing procedure.

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

An environmental impact assessment (hereinafter, "***EIA***") is required for the plants referred to in annexes II and III of the Second Part of the Code. The projects referred to in annexes II-*bis* and IV

ibid. are subject to a preliminary check to assess whether the EIA procedure should be initiated. The EIA consists of the carrying out, presentation and evaluation of an environmental impact study. For existing and new "high threshold" installations, subject to "Seveso legislation", a "safety report" must be drawn up (Legislative Decree no. 105/2015). Environmental audits may also be requested by a permit granted according to IPPC legislation. Environmental audits, on the other hand, are carried out mainly in connection with environment certifications voluntarily obtained by the operator (e.g. UNI EN ISO 14001).

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

When permits are violated or activities are conducted without the required authorisation, the competent authority (hereinafter, "***CA***") has the power to caution the company and oblige it to remedy the violations committed. If the violations are repeated, the CA may caution and suspend activities for a fixed period. The CA may also revoke the permit and require the closing down of a plant. An installation operating without authorisation may be closed down by the CA. Furthermore, the administrative and criminal sanctions envisaged in the Code may be imposed, as well as the environmental crimes of the Italian Criminal Code (art. 452-*bis* to 452-*terdecies*), including the crimes of environmental pollution and environmental disaster, which are punishable with weighty sanctions.

3 Waste

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

Some waste definitions are identical to waste definitions provided by European legislation, and others are not, as Italian legislation also identifies additional categories of waste. Some of these categories are identical to waste categories governed by European legislation (e.g. packaging, WEEE, etc.). In addition to the aforesaid categories, the Italian legislator has also identified other waste types (e.g. some types of excavated soil and rocks). All of the above types of waste are either classified as "municipal waste" or as "non-municipal waste" (*rifiuti speciali* – some of which, under certain conditions, can be classified as municipal waste – *rifiuti assimilati*). The definition of waste is, like in other jurisdictions, heavily debated in front of the Italian courts (especially criminal courts, but also administrative courts).

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?

The original waste producer has to comply with all conditions set forth by art. 183, para. 1, lit. bb) of the Code. Storage (*deposito temporaneo*) can solely occur in the area where the waste-generating activity is carried out. Secondly, storage is subject, up to the discretion of the waste producer, either to time limits or to quantitative limits. Thirdly, storage can only be carried out for homogeneous categories of waste and in compliance with the related technical rules (e.g. for dangerous substances). Only in exceptional cases, and after a formal notification procedure, is the waste producer entitled to dispose of the non-hazardous waste it produces (*autosmaltimento*).

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)?

A waste producer/holder, unless entitled otherwise, has to consign the waste, as a matter of priority, to duly authorised third parties or to municipal waste management operators with which the waste producer/holder has entered into a specific agreement. Liability only ceases if the waste is handed over to the public collection service or to duly authorised entities, provided that the waste producer receives back the duly completed certificate (*formulario di identificazione dei rifiuti*). The responsibility of the waste producer/holder, however, lacks precise boundaries, as the topic has been the subject of criminal courts' rulings which have enlarged, sometimes far beyond the literal wording of art. 188 of the Code, such responsibility.

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

On the basis of the "polluter pays" principle, for some products, specific extended producer responsibility (hereinafter, "***EPR***") schemes have been introduced (packaging, electrical and electronic equipment, batteries, end-of-life vehicles, mineral waste oils, edible waste oils, tyres, PVC). New EPR schemes are likely to be introduced in the future. In view of the transposition of Directive (EU) 851/2018, said EPR schemes are currently subject to legislative reform. Italian EPR schemes differ very much from one other in regard to their functioning. Non-compliance with specific obligations set forth under the related EPR scheme may be subject to sanctions.

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?

Liability may be of a criminal nature in more serious situations (e.g. in connection with environmental disasters and pollution, waste, IPPC permits, remediation), of an administrative nature (e.g. in connection with the EIA) or of a remedial nature (e.g. in connection with liability for environmental damage). The measures that should be taken to avoid this type of liability are to obtain a permit and to comply diligently with the relevant conditions. According to the type of liability, the ordinary remedies may be sought before the ordinary (criminal or civil) and/or administrative judicial authorities.

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

The implementation of Directive 2004/35/EC led to the introduction of objective liability imposed on certain operators. This may lead to situations in which an operator is held liable even when its conduct complies with the permit granted. This is a controversial issue, however, as it conflicts with the provisions of art. 308, para. 5 of the Code. According to art. 308, an operator will not be held liable if it can demonstrate that it is not responsible for any negligent or wilful

conduct and that the "damage" was caused by an emission or event expressly envisaged in the permit that was granted.

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?

Directors and managers may attract personal liability for environmental wrongdoings committed in the company's interests. Environmental functions may also be delegated to a specific director or manager. In this case, the delegate will be held liable, both personally and jointly with the company. Liability relates to the activities carried out on behalf of the company and may be either civil or criminal. There also exists a system covering administrative liability for crimes by bodies (Legislative Decree no. 231/2001), which includes environmental wrongdoings amongst the predicate offences envisaged. Professional insurance against environmental wrongdoings may cover all financial aspects, including the cost of legal proceedings, with the exception of criminal sanctions that restrict personal liberty.

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?

The Italian legal system allows M&A deals to be structured in various manners. The type of structure chosen affects the degree to which environmental liability is transferred or not transferred, or even shared. In case of mergers, for example, environmental liability is also transferred. Generally speaking, in case of a share deal, the environmental liability is transferred. In case of an asset deal or a company splitting up, the transference of the environmental liability must be evaluated on a case-by-case basis. As a matter of principle, the different implications from an environmental liability perspective need to be evaluated very carefully, also taking into account the evolving case law.

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

Generally speaking, the line taken by authorities is consistent in holding lenders not liable for environmental wrongdoings committed by the lendee, provided that the lender's conduct is autonomous and cannot be legally attributed to the lendee. In fact, art. 27, para. 1 of the Italian Constitution sets forth, as far as criminal offences are concerned, the principle of personal liability. When it comes to remedial operations, however, the innocent owner is nevertheless bound by certain obligations such as, whenever he discovers that the contamination threshold concentration has been exceeded or there is risk that it will be exceeded, to notify the regional, provincial and municipal CA and take preventive measures.

5 Contaminated Land

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

The regime dealing with liability for remedial works, inspired by the "polluter pays" principle, provides that the responsibility for the remedial operations lies with the subject responsible for the contamination. The liability principle also applies to "historic contamination" (i.e. contaminations existing prior to 29 April 2006). An owner who is "innocent" is not obliged to carry out remedial works. He is nevertheless obliged to give notification and to take preventive measures. He may be obliged, up to the increase in value of the land, to reimburse the expenses incurred in carrying out the remediation works by the CA if the subject responsible for the contamination cannot be identified or does not carry out the necessary remedial works (see *infra* question 7.2).

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

Even though Italian legislation on the remediation of contaminated sites does not contain any specific rules regarding the allocation of liability in situations in which the contamination was caused by more than one contributing factor, the administrative line of authorities has confirmed that in these situations, the operators will be held liable on the basis of their share of the overall liability (i.e. to the extent to which they are responsible for contributing towards the relevant causes), thereby excluding the application of civil law principles regarding joint and several liability for compensation.

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?

The remediation procedure is divided into various stages, the outcome of which conditions the development of later stages. New evidence that arises in such stages may require the entire procedure to be revised or adjusted. Furthermore, if the use to which a remedied area is put is altered, a new obligation to remedy may arise. A completed remediation procedure does not preclude an action for environmental damage, which constitutes a self-regulating procedure even though not totally independent. A third party may challenge the legitimacy of the approval of the remediation programme before the courts when he has an interest in taking action, and the approval in question would cause specific prejudice to his person or assets.

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?

Under certain conditions, extra-contractual liability (e.g. compensation for remediation costs) of the previous owner, or the operator who caused contamination, can be invoked. In the case of an asset deal, the purchaser may bring a legal action in accordance with the provisions of civil law, enforcing the legal warranty against defects of the asset sold or any contractual warranty clauses. The Civil Supreme Court excluded dual liability (contractual as well as extra-contractual liability) in the event of mere damage to the right of ownership. Any agreement reached by the contracting parties as to liability has effects exclusively on the parties themselves and will not influence, if transferred, any obligations under public law.

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

Aesthetic harm is not a category of damage regulated by specific legislation. However, damage to the aesthetic landscaping value of an asset may fall within the definition of "environmental damage". Legislation regulating environmental damage does not provide for compensation of the monetary equivalent. There is, however, scope for other policymaking subjects (e.g. local public bodies) to take, under certain conditions, action under civil law to obtain compensation for damage caused to property belonging to the community. Art. 167 of Legislative Decree no. 42/2004 provides that, under certain conditions, the subject who carried out the works without landscaping authorisation or with inadequate authorisation is subject to paying "monetary compensation".

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.?

Environmental regulators, at both state and local level, have a wide range of powers to prevent and sanction administrative or criminal offences affecting the environment. The specific regulations are mainly contained in the Code of Criminal Procedure (inspections, searches, sequestration, etc.), in Law no. 689/1981 and in the Code. The authorities are permitted to carry out inspections aimed at verifying that the conditions set in the permits have been met, or to collect and analyse samples, benefitting from the services of various technical bodies. When carrying out the investigations, the authorities may ask for documents to be submitted, and for any subjects informed to be questioned.

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?

When an event arises that may potentially contaminate the site, the subject responsible and the "innocent" owner/operator are obliged to notify the CA immediately. Obligations to give notification also apply to Administrations that, in the performance of their duties, identify sites which are potentially contaminated. This is also the case when historical contamination is discovered, whether active or inactive. Failure to give notification to third parties may also be relevant, as far as civil liability is concerned; for example, for the purpose of establishing the compensation due for damage by contamination of the surrounding area.

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

When an event arises that may potentially contaminate the site, the polluter (but not the "innocent" owner/operator), having taken preventive measures, must also perform a preliminary investigation in the area in order to establish whether further stages in the remediation procedure are to be complied with. Subjects who are not responsible for the contamination – though not obliged to do so – are nevertheless entitled to carry out investigation (in order to prove their "innocence") and/or remediation operations on their own initiative. If the polluter cannot be identified or does not take action, or a third party does not take action of his own accord, the necessary operations are carried out by the CA.

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?

Italian environmental legislation imposes a wide range of disclosure obligations that vary according to the matrices affected by the environmental problems. Disclosure obligations may also originate from permits granted. Recent legislation regulating social and environmental disclosure also imposes disclosure obligations on the subjects indicated therein. In dealings between a buyer and seller, the failure to notify situations that do not meet environmental standards may, depending on the nature of the asset being sold, give rise to precontractual and contractual liability.

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?

Generally speaking, environmental indemnities agreed within M&A transactions cannot limit, *vis-à-vis* the competent public authorities, the environmental liabilities of the target company. Nevertheless, environmental indemnities, which are increasingly being used in Italy, do represent an effective means for reducing the buyer's financial exposure by allowing him, if properly drafted, to claim from the seller costs and damages incurred, or even to govern the procedures relating to the clearing of environmental liabilities. Depending on the type of transaction chosen under Italian law, in general terms and except for very limited cases, the payment – between the parties to an M&A transaction – of an agreed environmental indemnity, does not limit potential environment-related liabilities.

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

The balance sheet is required by law to include, in compliance with the principle of caution, any existing potential environmental liabilities (provisions for risks and charges), according to paras 47–60 of ITA GAAP no. 31/2016. A situation may arise in which shareholders of an extinguished company, that have limited liability, may avoid the obligation to remediate seeing that they are liable for the company's obligations only to the extent of the resources designated when the winding-up was completed on the basis of a *sui generis* succession phenomenon. This is true unless, on the basis of criminal law, the underlying conditions are satisfied for holding the managers, directors, receiver and any jointly responsible shareholders liable for the pollution in question, even after the company has been wound up.

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 shareholder has a limited liability in stock companies except for those cases defined by the law (e.g. the sole shareholder is responsible for the obligations assumed by the company in the event of its insolvency, but only under specific conditions as per arts 2325 and 2462 Civil Code). According to case law, anyone managing the company in the absence of investiture is considered an administrator *de facto* and can be held liable. The holding and the controlled company are two separate legal entities except for limited cases set forth by the law (art. 2497 Civil Code), or if the subsidiary has no autonomy with regard to decision-making.

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

Italy has enacted specific legislation for "whistle-blowing". The scope of such legislation is very broad and can also cover environmental matters. Public employees acting as "whistle-blowers" are protected as to their identity. Furthermore, they cannot be sanctioned, downgraded, removed, terminated or rendered subject to any sort of organisational actions having, directly or indirectly, negative effects on their working conditions. The above protection schemes do not apply in case the "whistle-blower" acted to defame or slander someone, or s/he committed crimes related to wilful/grossly negligent conduct. Protection schemes are also available for employee or personnel "whistle-blowing" offences in the private sector.

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

Legislative Decree no. 198/2009 regulates a particular type of collective action that may be brought against the Administration and concession holders for public services. This legislation seems to also apply to administrative functions and environmental services. Such "public" class actions, however, rule out the possibility of obtaining, with the same remedy, compensation of damage. This does not affect the right to seek ordinary compensatory remedies.

An action for compensation of environmental damage, understood to be in the public interest, may be taken solely by the State Administration (art. 311 of the Code). Other public or private subjects are entitled to act only in the case of damage of another kind – that affecting his or her personal legal position (health, property, business activities, etc.) – as a result of actions or facts that have caused damage to the environment.

Criminal action against conduct amounting to criminal offences may be brought by the judicial authorities. The subject incurring damage or injury as a result of the crime may bring a civil action before the criminal courts, a right that is also vested in bodies and associations representing those damaged or injured as a result of the crime in question.

Compensation of damage aims at restoring the injured party's assets, eliminating the consequences of the damage incurred. This would not cover a claim of damage with a punitive or sanctioning function though, recently, the Italian *Suprema Corte di Cassazione* stated that punitive damage is not in itself incompatible with the Italian legal system (Joint Sections, no. 16601/2017).

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

The Italian legal system does not provide for any specific exemption from liability in litigation brought to safeguard environmental interests. Applications for access to information of an environmental nature are, however, exempt from the standard court fee (art. 13, para. 6-*bis*, Legislative Decree no. 115/2002).

9 Emissions Trading and Climate Change

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

Emission quota trading is subject to the European Emissions Trading System (hereinafter, "***ETS***"), for which Directive 2003/87/EC establishes the fundamental rules. According to the "cap and trade" mechanism, emission caps are allocated to each plant or aircraft (CO2 quotas in tons). If the real emissions exceed the quotas assigned, the operator must purchase quotas to be surrendered covering its emissions. If the real emissions are lower than the set allowances, the difference can be sold once quotas have been surrendered to cover the emissions. Since 2013, power plants must purchase quotas to cover their needs. Manufacturing plants are entitled to allowances free of charge.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

Legislative Decree no. 30/2013 establishes that no plant in Italy is permitted to engage in activities subject to the ETS without a permit to emit greenhouse gas. Operators must make an application for a permit to the MoE at least 90 days prior to the date on which the plant starts to operate. The ensuing obligations consist of monitoring and subsequently surrendering, on an annual basis, a number of quotas corresponding to the CO2 emissions released in the previous calendar year. The national inventory of all emissions (not only those originating from industrial plants covered by the ETS Directive) is managed by ISPRA.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

Concrete measures to combat climate change are not limited to the implementation of Community regulations on ETS but also include the "Effort Sharing" Directive applying to non-ETS sectors (e.g. transport, agriculture etc.). Concrete measures relate to all the legislation linked to incentives for renewable energy resources and energy efficiency. An important aspect of the contribution made towards the reduction of CO2 levels also lies in the methods adopted to operate motor cars, buses or trucks for the transportation of people and goods. The main topics (renewable energy sources, energy efficiency and mobility) are regulated by EU Directives, which are implemented in Italy by the legislative system.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

The number of actions being brought before the courts by associations and families of victims of exposure to asbestos is increasing. The outcome of disputes before the courts at first instance and the Court of Appeal frequently differ. The main difficulty lies in establishing the effects of exposure to asbestos at the time the carcinogenic process experienced by the victim develops. The previous approach, proving to be advantageous to employers, has been disproved by a number of recent rulings. The latest approach, more favourable to asbestos victims and their associations, is yet to be consolidated before the Joint Sections of the Italian Supreme Court.

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

The obligations imposed on the owner or the person responsible for the operations carried out are regulated at different legislative levels. General sources include Law no. 257/1992 and the Ministerial Decree dated 6 September 1994, Legislative Decree no. 81/2008, integrated by regional laws and plans dealing with orientation and monitoring, as well as individual Municipal Regulations (e.g. Milan). The owner must notify the local health authorities (local health service – *ATS*) of the presence of asbestos. Actions to be undertaken (including timing) depend on the state of conservation which is assessed by applying a so-called Degradation Index. The owner must also appoint a person responsible for controlling and coordinating all maintenance operations that may involve asbestos-containing materials.

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 your jurisdiction?

An association of insurers and reinsurers (*Pool Inquinamento*) offers insurance products to cover damage by pollution. Various policies are envisaged, depending on the type of activity conducted. Cover from insurance companies that do not form part of the *Pool Inquinamento* is also available. These companies offer insurance products as alternatives to those generally available on the Italian market. Environmental insurance cover is in constant expansion, acknowledged by the fact that businesses obtaining ISO 14001 Certification or EMAS registration pay reduced insurance fees. State and regional laws provide that in certain cases a guarantee must be lodged for an amount calculated on the basis of pre-set criteria (e.g. activities likely to cause an environmental impact).

11.2 What is the environmental insurance claims experience in your jurisdiction?

There are currently no comprehensive data on developments in the requests for environmental insurance cover. However, according to ISPRA data reported in November 2018, incidences of environmental damage are continually increasing. Between 2017 and 2018, ISPRA and the various local environmental agencies investigated, on behalf of the MoE, 217 cases of environmental damage around the country. Given the increased number of reported cases of environmental damage, it can be assumed that the measures taken – and therefore the requests for insurance cover – are constantly increasing. Nevertheless, the degree to which environmental insurance schemes cover environmental damage, is still considered a problematic area.

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 your jurisdiction.

The development of environmental law in the Italian legal system is characterised by a marked fragmentation of regulations and the introduction of new laws, and the associated problems of interpretation and enforcement.

The implementation of European legislation, however, provides clear guidelines for future legislative initiatives. Over the last few years, Italy has complied promptly with the conditions laid down by the EU without any significant deviation – at times even setting environmental standards higher (gold-plating) than those established at a supranational level (for example, dealing with green public procurement) – and this seems likely to continue in the future.

At a legislative level, on the one hand, the objective is to simplify administrative procedures by creating a "single", or all-encompassing, permit mechanism (e.g. granting the Single Environmental Permit – the so-called *Autorizzazione Unica Ambientale* – for small and medium-sized businesses, not envisaged at a European level).

On the other hand, we are witnessing a trend towards the centralisation of functions, unlike what we have seen in the past. An example of this is the new EIA regulations.

The approach taken by the courts is, at times, an expression of a conservative stance, firmly based on outdated perceptions. A number of rulings regarding waste, though the result of objective uncertainty regarding the legislation, including European laws, have confused economic operators even more (e.g. end-of-waste, by-products).

A new criminal sanctions system introduced in 2015 is designating an increasingly important role to the regional agencies for environmental protection, in collaboration, though not always fully coordinated, with public prosecutors.

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ambientalex Studio Legale

Founded by lawyers boasting consolidated professional experience, the practice areas of Ambientalex law firm focus on the various sectors of environmental law, including energy.

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Chapter 20

Japan


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1 Environmental Policy and its Enforcement

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

The basis of Japanese national environmental policy is the Basic Environment Law of 1993 (the "BEL"). Under the BEL, the government must establish a Basic Environmental Plan, and this plan is subject to a regular six-year review (please see https://www.env.go.jp/policy/kihon_keikaku/plan/plan_5.html). In April 2018, the Fifth Basic Environment Plan was adopted by the National Cabinet. The Fifth Basic Environment Plan set six major strategic goals for future environmental policy, i.e. (i) formulation of a "green" economic system for achieving sustainable production and consumption, (ii) improvement of the value of national land as stock, (iii) sustainable community development using local resources, (iv) realisation of a healthy and prosperous life, (v) development and dissemination of technology supporting sustainability, and (vi) demonstration of Japan's leadership through international contribution and building strategic partnerships.

Various national laws provide specific regulations that, together with the general policy declared in the BEL, form the system of Japanese environmental law. These laws include: (i) laws addressing general environmental policy, including the Environment Impact Assessment Act (1997) ("EIA"); (ii) laws addressing specific environmental issues, such as (a) laws concerning global environmental issues, (b) laws preventing public nuisance and pollution, (c) laws restricting polluting substances, and (d) laws protecting or preserving natural resources; (iii) laws concerning who bears the burden of expenses necessary for the protection of the environment; (iv) laws providing judicial or administrative solutions for pollution or other environmental issues; and (v) laws concerning environmental administrative organs. In addition, there are other environment-related laws governing nuclear facilities and radiation, regulation of urban development and protection of cultural assets, which are not necessarily covered by the legal system under the BEL.

Japanese environmental policy is also realised through various local ordinances and regulations enacted by each local government. In addition to the local ordinances introduced for the purposes of enforcing national laws considering the characteristics of local areas, local governments may also enact their own local environmental ordinances (i) regulating those legal areas not covered by national laws, or (ii) expanding the scope of regulations or providing more stringent rules than national laws.

The national governmental body in charge of administering and enforcing environmental laws is the Ministry of the Environment. Local governments also have a role in administering and enforcing environmental law, as further explained in this section.

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

According to the Fifth Basic Environment Plan, the following approaches satisfy specific policy objectives of the Japanese governmental agencies/bodies:

(i) a direct regulation approach, whereby direct regulation specifies certain goals to be achieved and the government enforces the law to achieve those goals. This approach is effective for prevention of environmental pollution and land use control to protect the environment;

(ii) a regulatory framework approach, whereby the government presents a framework as a goal with mandatory actions and processes to achieve it. This approach is aimed at preventing new environmental pollution in areas when quantitative target or specific compliance matters cannot be set;

(iii) an economic approach, which seeks certain policy objectives by using economic incentives such as subsidies, tax benefits or fines. An example of this approach is feed-in-tariffs ("FIT"). This approach is effective for those to whom direct regulation or a regulatory framework may not be efficient, by changing market prices to incentivise various stakeholders to take measures that would reduce environmental burdens/costs;

(iv) a voluntary approach, whereby the government only encourages businesses to set voluntary targets to achieve policy objectives. This approach is effective in cases where businesses have widely expressed their commitment to society;

(v) an information approach, whereby the government promotes the disclosure and provision of information so that private sectors actively engaging in environment-friendly actions, products and services can be selected for investment and procurement;

(vi) a procedural approach, whereby certain environmental considerations are included in the decision-making process, such as the EIA or Pollutant Release and Transfer Register ("PRTR"); and

(vii) an action approach, whereby public bodies such as national or local governments directly implement the actions necessary to achieve policy objectives.

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

Government authorities are required to proactively make public certain environment-related information, including publishing environmental policies and plans under the BEL and notifying the public about environmental standards and pollution measurement results under certain laws (e.g. the Air Pollution Prevention Act).

The government is also required to collect information from non-governmental entities and to notify the public about such information. Such requirements include the Law Concerning Pollutant Release and Transfer Register, which was enacted based on the recommendations of the OECD, and the Greenhouse Effect Gas Measurement Enhancement Act.

The national government is also statutorily required to disclose information under the Act on Access to Information Held by Administrative Organs (similar to the Freedom of Information Act in the United States). Under this act, national governmental organisations must disclose information upon specific request from any person, unless the requested information is non-disclosable information (such as personally identifiable information, information where disclosure would have a harmful influence on the operation of the government, information having a negative impact on the competitive position of a private person (corporation), etc.). Almost all local governments have similar ordinances.

2 Environmental Permits

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

Generally, environmental permits are required when a person conducts certain designated businesses or development work having substantial environmental impact, or constructs or operates plants having certain kinds of environmental impact.

For example, the Waste Management and Cleaning Act ("WMCA") requires business owners to obtain business permits from relevant local governments before conducting business involving the collection, transportation, and/or disposal of waste. Also, the Act on Evaluation of Chemical Substances and Regulation of Manufacture, etc. (or. Chemical Substances Control Law; "CSCL") requires any person intending to conduct business that will produce certain specified hazardous chemicals to obtain a permit from the national government.

Other statutes impose requirements for persons who construct and/or operate plants having certain kinds of environmental impact. For example, the WMCA requires a permit for building and operating a waste treatment plant. Certain statutes controlling chemical substances (including the Poisonous and Deleterious Substances Control Act and the CSCL) require a permit before producing, importing, or constructing production plants of hazardous chemicals and chemicals having potential environmental impact.

Various laws also provide "notification" requirements. This is a unilateral action and does not require administrative permits, but it does function as a permit in some sense (i.e. certain parties such as parties holding a certain amount of potentially hazardous materials are obligated to notify the government and the notifying party is subject to certain regulatory obligations carrying administrative and/or criminal sanctions in the case of breach).

Local governments also impose a permit system for certain conduct. For example, the Tokyo Municipal Government requires any person planning to construct and operate any factory in Tokyo to obtain a permit.

Many environmental permits are not transferrable without further review. For example, permits relating to the operation of businesses or plants are granted based on a review of the operator having the licence, and therefore may not be transferred without another review. However, in case of a succession by operation of law, such as a merger or company split, the requirements for transfer of permission are usually less stringent. Other types of permits remain attached to property irrespective of transfer of ownership (e.g. under the Forest Act, in general, a permit to develop forested land is effective over a transferee of the subject forested land).

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?

Applicants for regulatory permits may challenge the decision of the regulator by filing (i) a complaint under the Administrative Complaint Review Act ("ACRA") within three months from the day when the applicant becomes aware of the regulator's decision (or within one year from the date of decision), or (ii) litigation within six months from the day when the complainant becomes aware of the decision (or within one year from the date of decision) (the litigation deadline will be extended for the time spent in the ACRA process when the complainant files an ACRA complaint in advance of litigation), pursuant to the Administrative Case Litigation Act (which provides special rules based on civil litigation procedural law).

ACRA provides the government's internal process for correcting erroneous or inappropriate administrative decisions. The process under ACRA had often been criticised, claiming that the reviewers in many cases were not neutral, but the process has been moving towards a pro-user approach (for example, a more independent review board system was introduced in 2016). If a claim is successful, the regulator's decision may be cancelled (and the party may reapply) or, in some cases, the regulator may be ordered to grant a permit. Parties may file litigation at the same time as challenging a decision through ACRA. However, where both processes are pending, the court may suspend the litigation process until the ACRA process is concluded.

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

The Environment Impact Assessment Act ("EIA") requires a mandatory environmental assessment process (or screening process) before beginning certain types of construction and development activities, including the construction of highways, airports, waste disposal plants and certain types of power plants, if (i) the size exceeds certain prescribed thresholds, and (ii) additional statutory requirements are satisfied. Many prefectural governments also have their own assessment requirements for certain development plans that are not covered under the EIA.

There are additional statutory audit requirements for recording and reporting obligations depending on the type of pollution (e.g. the Air Pollution Prevention Act and the Water Pollution Control Act).

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

The initial actions taken by the environmental regulator are often making inquiries with potential violators and/or providing guidance or amenable instructions to potential violators to voluntarily correct any inappropriate conduct, within the scope permitted by law. Such inquiries are not compulsory, and the regulator is prohibited from unreasonably treating a private person unfavourably due to non-compliance with such inquiries or guidance.

The regulator may monitor compliance or investigate as to whether a violation has occurred, and it has statutory authority to investigate any violation of relevant statutes (please also see section 6 herein for more information on investigatory powers).

Once a violation is identified, the regulator may issue an order to suspend permitted business or to correct operations, and if such order is not duly complied with, then criminal charges such as fines or administrative measures such as cancellation of permits may follow. Certain permits trigger criminal charges directly upon violation (e.g. a person who produces certain specified poisonous substances without a permit). The process for a criminal charge may be initiated by the police independently from the regulator, or the regulator may make a formal request to the police to commence a criminal investigation process.

3 Waste

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

(a) Definition of waste

"Waste" is defined under Article 2 of the Waste Management and Cleaning Act ("WMCA"), and generally includes any "filthy and unnecessary matter" other than radioactive waste. Under the WMCA, in general, waste is divided into two main categories: "General Waste" and "Industrial Waste".

General Waste means any waste that is not Industrial Waste. Industrial Waste encompasses certain types of waste produced from business activities, such as cinders, sludge, waste oil, waste acid, waste alkali, waste plastic, and certain kinds of imported waste.

Within the categories of General Waste and Industrial Waste, any waste that is explosive, poisonous or infectious is sub-categorised as "Specially Managed General Waste" or "Specially Managed Industrial Waste", respectively.

(b) Responsible parties for management of waste

Local governments are basically responsible for the management of General Waste (including Specially Managed General Waste).

Business operators who produce Industrial Waste ("Industrial Waste Producers") are responsible for the management of Industrial Waste and should bear the costs of managing it. However, Industrial Waste Producers may outsource their management of Industrial Waste to licensed service companies and, under certain circumstances, a local government may manage the Industrial Waste.

(c) Duties and controls over Industrial Waste

The standards of storage, collection, transportation, and disposal of Industrial Waste and the standards of outsourcing for licensed service companies are prescribed in detail under the WMCA and related regulations, and there are also regulations on outsourcing agreements for the purpose of clarifying the responsibility of Industrial Waste Producers. Those regulations include: (i) outsourcing agreements must be documented and only certain prescribed eligible persons, such as licensed service companies, can manage Industrial Waste; and (ii) re-outsourcing by licensed service companies is basically prohibited unless an Industrial Waste Producer approves it. Moreover, Industrial Waste Producers must enter into contracts separately with companies that collect and transport Industrial Waste and intermediate and/or final processing/disposal companies.

When outsourcing the transport and/or processing of Industrial Waste, Industrial Waste Producers have a duty to monitor whether the Industrial Waste is properly handled through the process chain up until its final disposal.

Industrial Waste Producers having their own processing/disposal facilities must designate a person in charge of Industrial Waste management. Also, Industrial Waste Producers who have places of business that produce a great deal of Industrial Waste must make a plan for reducing the amount and disposal of the waste, submit the plan and report the implementation status of the plan to the prefectural governor.

The standards for Specially Managed Industrial Waste are similar to the standards for Industrial Waste, but are generally more strict.

(d) Regulation of scrap material

The amended WMCA, which came into force in April 2018, requires business operators dealing with scrap material including noxious substances to (i) notify the local government about their storage and handling of these scrap materials, and (ii) comply with certain regulations in the storage and disposal of them. These scrap materials may not fall under the definition of "waste" as they can be sold as valuable items, but the handling of these materials has become subject to the WMCA regulations.

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?

Under the WMCA, the storage and processing/disposal of Industrial Waste generally depends on whether it is done by an Industrial Waste Producer itself or outsourced to a third party.

When Industrial Waste Producers themselves process/dispose of Industrial Waste or Specially Managed Industrial Waste, the storage period and the quantity are regulated (e.g. the cap on the storage quantity is, in general, the product of the quantity of the processing/disposal ability per day of the disposal plant multiplied by 14).

When Industrial Waste Producers outsource the management of Industrial Waste or Specially Managed Industrial Waste, Industrial Waste Producers must store such waste so as not to interfere with the local environment until the waste is removed.

On the other hand, there is no specifically prescribed cap on the storage quantity and length of the period for which Industrial Waste Producers can store General Waste under the WMCA.

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)?

Industrial Waste Producers may have residual liability even after transferring waste to another person under certain circumstances.

For example, Industrial Waste Producers may be subject to imprisonment and/or fines if they breach certain outsourcing standards, such as by (i) entering into improper outsourcing agreements with service companies, (ii) improperly monitoring the

handling of the Industrial Waste through the process chain up until the final processing/disposal, or (iii) outsourcing Industrial Waste management to unlicensed service companies.

Also, an Industrial Waste Producer may be ordered to remove Industrial Waste or pay the cost of removal, for example, if: (i) the Industrial Waste Producer outsources the processing/disposal of the Industrial Waste at an unusually low price to someone who then processes/disposes of it illegally; (ii) the Industrial Waste Producer becomes aware that one of its outsourcees has been illegally dumping or storing Industrial Waste, but the Industrial Waste Producer continues to outsource to such outsourcee; (iii) an outsourcee illegally dumps Industrial Waste and the Industrial Waste Producer does not properly notify authorities or otherwise remedy the situation; (iv) an outsourcee's licence is revoked; or (v) an outsourcee becomes bankrupt.

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

Please see question 3.3 above.

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?

Breaches of environmental laws and/or permits are subject to criminal charges, administrative measures, and civil liability.

In certain cases, a breach would directly trigger criminal sanctions (including imprisonment and fines) and, in other cases, criminal sanctions would be brought only after a party did not comply with administrative orders.

As for administrative measures, a regulator may make corrective orders or suspension orders or cancel permits, and may also take remedial steps or seek to recover costs from a breaching party.

Civil liability for breach of environmental laws would typically be a tort claim. If a contract requires compliance with environmental laws, a breaching party may be subject to contractual sanctions as well.

Typical defences relating to criminal, administrative and civil claims include (i) lack or limitation of the actual impact of the breach against human life/body/property, (ii) an assertion that the party has made reasonable efforts to prevent breach, and (iii) an assertion that the party has taken remedial measures promptly after discovering the breach. These defences influence the degree of the criminal offence, the necessity of taking severe administrative measures, and the amount of damages to be compensated in related civil liability cases.

One possible defence against criminal charges is that a breach was not intentional. However, such a defence is rarely successful because, in most cases, mere knowledge of the situation where a breach occurs would be sufficient as an intentional breach of the regulatory laws.

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

Yes, notwithstanding compliance with regulatory permit limits, an operator may be liable for environmental damages to the extent that such pollution has resulted from the intentional action or the negligence of the polluter. Compliance with the regulatory permit limit is one of the major considerations in assessing the existence and scope of liability but it is not a complete safe harbour. In certain cases, the regulatory body setting such a limit may also be liable for not taking a more prudent approach.

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?

Directors and officers may be personally liable under civil tort theory and the Company Code if they have directly caused environmental wrongdoings or have failed to properly prevent their personnel or other directors from doing so. Administrative sanctions may not be imposed on directors or officers unless the director or officer has personal regulatory obligations. Criminal charges may be imposed on directors or officers if the wrongdoing is extremely harmful and results in death or injury, regardless of whether the wrongdoing was done in the name of a company instead of its directors or officers.

Insurance policies are available to cover liability of the directors arising from a company's misconduct (i.e. D&O insurance) but such policies are subject to maximum payment amounts and various conditions.

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?

A purchaser of shares cannot carve out specific risk or liability of a company. However, liability of a shareholder is generally indirect in that administrative/criminal sanctions are not imposed on shareholders solely because of their shareholding, and shareholders are usually not liable for damages caused by the company (please see section 8 below).

A purchaser of assets of a company will bear the environmental liability of such assets. However, any administrative or criminal charges already imposed on the seller related to such assets will not, in principle, be transferred to the purchaser of such assets.

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

Lenders are not liable, in principle, for how a borrower uses borrowed funds. In theory, if a lender was aware that borrowed funds would be used for environmental contamination, such lender may be deemed to be a joint offender, but we are not aware of any such court case precedent related to environmental wrongdoing and/or contamination. It has been argued that banks should bear social (not legal) liability as to how loaned funds are used, and Japanese banks may hesitate to lend money to entities holding potentially serious environmental risks.

5 Contaminated Land

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

Contamination of soil or groundwater is mainly governed under the Water Pollution Prevention Act ("WPPA") and the Soil Contamination Countermeasures Act ("SCCA").

The WPPA identifies and regulates factories that produce harmful substances, imposes a limit on emission of pollution, and authorises the government to order persons responsible for the factories to remediate pollution to groundwater if water containing harmful substances affects groundwater.

The SCCA provides for inspection of land having facilities likely to have contaminated soil or where contamination has been discovered. Contaminated areas are designated according to whether there is any suspected threat of health hazards based on the results of the inspections. The land owner or occupant may be ordered to take measures to remove contamination. The transportation of contaminated soil is also regulated.

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

If the persons who caused the contamination are identified, then they are severally liable under the SCCA. Each of the polluters will be ordered to take measures to remove the contamination that they are determined to have individually caused.

However, if the persons who caused the contamination are not identified, then the land owners or occupants are liable for any contamination.

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?

There is currently no system for "agreement" with environmental regulators about a programme of environmental remediation.

However, under new legislation that will be enforced from April 1, 2019, if environmental remediation has been ordered by a regulator, the regulator may order submission of the measurement plan for contamination removal and amendment of the plan if it does not fulfil the technical standards.

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?

A land owner may have the right to seek compensation for damages caused by contamination by the previous land owner or occupier. For example, under the SCCA, if the current owner is ordered to take measures to remove contamination or to pay the costs of removal, the current owner may be able to claim such costs from the previous owner or occupier who caused contamination by way of torts or other legal grounds.

On the other hand, these liability risks may transfer from the seller to the purchaser (but not *vis-à-vis* any other third parties) if they agree that the seller sells the land "as is".

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

The Supreme Court of Japan has expressed a view that aesthetic harm (in this case, harm to a scenic view caused by a large building) may be worthy of legal protection. Accordingly, assuming that a scenic view of public assets (i.e. the property owned by the government) is actually damaged by a polluter, "theoretically" speaking, future courts may, depending on ongoing developments in case law, acknowledge the government's authority to obtain monetary damages for pollution that causes aesthetic harm, although this is fairly difficult as a matter of practice under the current case law situation.

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.?

Environmental regulators have the power to investigate as provided by specific regulatory statutes. These powers include on-site inspections and requests to provide reports and other information. In most cases, unreasonable rejection of these investigations or provision of false information is subject to criminal sanctions (including imprisonment and fines) or civil sanctions (such as cancellation of permits).

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?

In cases where any soil contamination is identified due to the statutorily required investigation under the SCCA, such investigation results shall be reported to the relevant authority. On the other hand, the SCCA also provides for a voluntary notification system when anyone discovers any soil contamination through their voluntary investigation, but there is no legal obligation requiring such notification, nor is there any penalty for non-compliance. In this way, the regulatory regime is relatively lenient towards pollution inadvertently found on a site.

Also, according to the amended SCCA which became effective in 2018, any party who modifies the landscape of a certain area may voluntarily investigate any contamination and may submit to the regulator (local government) the results of the investigation to facilitate the process of eliminating contamination, if any, to avoid a possible future investigation order. Again, this system does not impose any obligation on a private person to investigate.

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

The SCCA requires owners and occupiers of land to investigate using certain designated investigation institutes and report on soil contamination in certain cases; i.e. (i) when certain hazardous factories have ceased operations on the land, (ii) when the local governor considers that there is a possibility that the site could be hazardous to human health due to contamination, and (iii) when the local governor considers that there is a possibility that the site could be hazardous to human health when the owners give notification of a change of the shape or quality of the land of a certain size (i.e. 3,000 m^2 or more).

The amended SCCA, which came into force in 2018, requires parties having operated hazardous factories to make efforts to cooperate with the investigative body in the type of investigation stated in (i) above by providing relevant data regarding hazardous materials and other designated information regarding the factories or the sites.

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?

In a private sale, a purchaser may cancel the sale or request a decrease in price when contamination is discovered by the purchaser after the sale. There are some court precedents which required sellers to disclose known contamination or any history or manner of use that may potentially result in contamination. Also, if the seller intentionally conceals the fact of material contamination of the sold assets upon the sale, depending on the situation, the seller may be deemed to have committed a criminal offence (i.e. fraud).

Further, professional brokers of land are obligated, under the regulations applicable to them, to disclose to the purchaser (i) any items that may have a materially adverse effect on the purchaser including possible soil contamination and (ii) the fact that the subject land is designated as contaminated land under the SCCA.

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?

Indemnity and limitation of liability are commonly used in contracts, though it is also common to impose unlimited liability if damages are caused through a party's wilful misconduct or gross negligence.

In general, liability under statutory regulations, including administrative sanctions or criminal charges, cannot be eliminated or mitigated by an indemnity payment; however, the fact that the indemnifier has taken remedial measures (including the indemnity payment to the victim) may influence the degree of the criminal offence and the necessity of taking severe administrative measures. For example, if damages are compensated to the victims themselves, regulators and prosecutors may consider such arrangements a sign of possible improvement in the future, and possibly mitigate the punishment. Also, in civil cases, the amount of damages ordered by the court will be decreased by the amount voluntarily paid to the claimants.

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

In order to shelter environmental liabilities, it may be possible to transfer polluted assets to a subsidiary and, thereafter, dissolve the subsidiary. However, in most cases, it is difficult for the parent company to completely escape liability arising from polluted assets. For example, assuming that the parent company is the original polluter, it will continue to be liable as the original polluter and could be subject to tort claims. In addition, if the environmental liabilities have actually accrued before transferring polluted assets to the subsidiary, regardless of whether those liabilities are actually claimed or not, it is legally impossible to be released from those liabilities by transferring them to the subsidiary without obtaining consent from the counterparties having actual or potential claims against the parent company.

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?

In general, a parent company does not owe any "legal" obligation in connection with a subsidiary's environmental liability. However, there are exceptional cases where (i) the corporate veil may be pierced because of deceptive incorporation without substance and/or wilful intent to evade liability, or (ii) the parent company has a fully-controlled subsidiary in connection with the relevant breaches and/or pollution such that the parent company can be deemed a joint tort-feasor with the subsidiary. This applies whether or not the subsidiary is overseas.

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

The Whistle-blowers Protection Act designates certain statutes including environmental laws (e.g. CSCL, WPPA) and protects whistle-blowers who report the breach of such designated statutes from punishment or unfavourable treatment in retaliation for whistle-blowing. This Act, however, requires the whistle-blowing to be made in relation to certain specified criminal offences, and certain other requirements must be met in order for whistle-blowers to gain protection under this Act. New laws are added to those covered under this Act every year; e.g. in 2018, six new laws were added.

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

Japan does not have a general class action scheme and punitive damages are not available.

Recently, a new law was enacted to introduce a kind of class action scheme, but this law only covers monetary claims accrued in connection with consumer-related contracts, and does not include compensation for death or personal injury or claims arising from pollution.

When a lawsuit involves a large number of complainants, the complainants often unite in filing the lawsuit, but the complainants are in theory only a *de facto* unity of individual parties and actually must still each establish the damages that they have individually suffered.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

There is no system for exemption from such liability.

9 Emissions Trading and Climate Change

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

Currently, there is an emissions trading scheme at the national level called the J-Credit Scheme, whereby the government certifies the amount of greenhouse gas ("GHG") emissions reduced or removed through efforts by project participants who introduce energy-saving devices and/or manage forests as "credit". "Credit" is freely sold between project participants and users of "credit". The government does not intervene in transactions and the price of "credit" is not fixed.

Purchased "credit" can be utilised, for example, to adjust emission amounts under the GHG emissions reporting system based on the Act on Promotion of Global Warming Countermeasures ("APGWC").

The J-Credit Scheme was created in 2013 by integrating the Domestic Clean Development Mechanism and the Offset Credit (J-VER; Japan's verified emissions reduction) Scheme, and was designed to integrate the strengths of both schemes.

In Tokyo, mandatory reductions of the amount of GHG emissions from large-scale business places and an emissions trading scheme were introduced in 2008. The number of large-scale business places that must reduce the amount of GHG emissions is about 1,300, and the amount of GHG emissions to be reduced is about 20% of the total amount of GHG emissions in Tokyo. In Saitama, "targeted" reductions of the amount of GHG emissions from large-scale business places, and an emissions trading scheme to be utilised for large-scale business places to achieve such target, were introduced in 2011.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

In the APGWC, there is a requirement for the calculation and reporting of GHG emissions, whereby business operators who emit large amounts of GHG must calculate the amount of GHG emissions every fiscal year and report to the government.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

The APGWC has a reporting requirement as described in question 9.2. The reports from the business operators can be disclosed to the public. The purpose is to achieve a reduction in the emission of GHG, especially from business operators who emit a great deal of GHG, by making such business operators (and also citizens) realise the importance of efforts toward a reduction in the emission of GHG and also encouraging them to take reduction measurements themselves.

Moreover, the APGWC was revised in 2016 with the aim of promoting the achievement of certain goals based on the Paris Agreement.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

Asbestos litigation has been filed against both the government and companies that used or manufactured asbestos.

Compensation claims to the government for damages due to health hazards or death have been filed by former workers who were engaged in jobs where they directly dealt with asbestos in asbestos production plants or in the construction industries, and also by people living near the plants as well as their bereaved. They have claimed that the government did not properly exercise certain regulatory powers, such as the requirement to wear dust respirators or the requirement to install local exhaust ventilation systems.

In an action appealed by former workers and people living near asbestos production plants in the Konan area in southern Osaka Prefecture and their bereaved, the Supreme Court affirmed in 2014 the illegality of the inaction of the government to use its regulatory power to require the installation of local exhaust ventilation systems in relation to former workers and their bereaved.

Plaintiffs have also claimed compensation from employers based on a failure to maintain employee safety and from companies that produced or sold asbestos-containing building materials based on tort liability. There have been judgments that affirm such employers' liability.

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

Owners and occupiers have the duty to meet the regulatory standards for asbestos levels in the atmosphere and to prevent exposure to asbestos, including dispersal of asbestos into the environment.

In the Air Pollution Control Act ("APCA"), asbestos is specially regulated as "Specified Particulates", as distinguished from "Ordinary Particulates".

The facilities of nine types of machines over a certain scale are defined as "Facilities That Generate Specified Particulates" and the standard of production to be complied with (regulations of concentration) is prescribed in the ordinance.

Specifically, the regulatory standard is 10 fibres of asbestos per litre in the atmosphere at the site boundaries of a factory or workplace.

However, asbestos is sometimes emitted or used other than in Facilities That Generate Specified Particulates. A typical example is a building that contains asbestos-containing material. When such buildings are demolished, unless this demolition is properly managed, asbestos is dispersed widely and this may cause a health hazard. For example, at the time of the Great Hanshin-Awaji Earthquake of 1995, dispersal of asbestos became a serious problem.

Therefore, under the APCA, building materials that contain asbestos are designated as "Specified Building Material", and activities involving the demolition, alteration, or repair of buildings or factories that use them are defined as "Activities That Emit, etc. Specified Particulates". Furthermore, a person who wishes to undertake construction work associated with such activities must submit a notification to the prefectural governor and show compliance with the standards of activity. The prefectural governor has the power to make supervisory dispositions to the persons undertaking such construction work.

Moreover, the Ministry of Health, Labour and Welfare established the Ordinance on Prevention of Health Impairment due to Asbestos in 2005. It prescribes prevention measures against exposure to asbestos in activities involving the demolition of such a building. The Ministry of Health, Labour and Welfare has continued to review the regulations to enhance prevention measures against exposure to asbestos.

In 2018, the Ministry of Environment formed a committee to discuss prevention measures against dissemination of asbestos and launched a

new committee which will review measures to restrict dissemination of asbestos. The above-mentioned regulatory structure may be formed again within a few years after discussion among the committee.

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 your jurisdiction?

The types of environmental insurance available are (i) environmental contamination liability insurance, (ii) soil contamination purification costs insurance, (iii) medical waste producer liability insurance, and (iv) industrial waste producer liability insurance:

(i) insurance for environmental contamination liability protects against liability of damages arising from environmental contamination produced by the facilities owned, used or managed by policyholders;

(ii) insurance for soil contamination purification costs protects against costs where policyholders pay such costs under indemnification clauses in land sale contracts;

(iii) medical waste producer liability insurance protects against liability for health hazards caused by dumped waste and the costs for removal of waste or for purification of contaminated soil where waste from a medical institution is illegally dumped and the medical institution is ordered to take measures or pay removal costs in accordance with the Waste Management and Cleaning Act ("WMCA") and related regulations; and

(iv) industrial waste producer liability insurance protects against the liability for health hazards caused by dumped waste and the costs for removal of waste or for purification of contaminated soil where waste from producers is illegally dumped, despite efforts made by producers to prevent illegal dumping, and where they are further ordered to take measures or pay removal costs in accordance with the WMCA and related regulations.

These types of insurance are not widespread so far, and it is hard to say if they are playing a big role in Japan.

11.2 What is the environmental insurance claims experience in your jurisdiction?

The number of environmental insurance claims seems to be small. However, information about these claims is kept confidential by insurance companies and is rarely publicly available.

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 your jurisdiction.

One of the most important recent topics in environmental law in Japan is nuclear power. After the Fukushima nuclear power plant accident in March 2011 ("2011 Fukushima Accident"), all nuclear power plants in Japan temporarily stopped operations. Many injunction cases (including preliminary ones) have been filed to prevent the plants from restarting. However, the judgments of the courts have differed.

Though there has been no Supreme Court judgment on this issue since the 2011 Fukushima Accident, it seems that the difference between the results of these judgments is whether the courts gave weight to the fact that administrative agencies "reasonably" concluded that the safety of the nuclear power plants satisfied the new standards introduced after the 2011 Fukushima Accident by taking into account various "lessons" learned through the 2011 Fukushima Accident, or, even admitting that, whether the courts considered in detail the possibility (though it may be very slim) of the reoccurrence of a nuclear disaster given the possible magnitude of the damages, harm and losses which may be suffered by citizens.

Regarding the damages caused by the 2011 Fukushima Accident, there are many cases in response to a kind of "class action" initiated by a group of people who were forced to evacuate from their home town, and several district courts and high courts ordered the Japanese government and Tokyo Electric Power Co., Inc. to compensate for damages. In December 2018, the Supreme Court affirmed one of the high court decisions that admitted compensation for damages.

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Chapter 21

Mexico

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1 Environmental Policy and its Enforcement

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

Mexican environmental law is based on a separation-of-powers system, whose legal foundation is foreseen at the constitutional level and by the General Law of Ecological Balance and Environmental Protection ("LGEEPA" by its acronym in Spanish) and by the legislation of the States integrating the Federal Pact. The normative framework is complemented by International Treaties, the case law of the Inter-American Court of Human Rights, Regimes, Mexican Official Standards and Agreements issued by the Executive Power and the Federal States.

The legal foundation for environmental protection is foreseen in article 4 of the Mexican Constitution, which imposes on the Mexican State the obligation to guarantee to all persons a healthy environment for their development and well-being. The constitution also foresees the international environmental principle, establishing that damage and environmental degradation will incur responsibility for those who provoke it in terms of the applicable Law.

The Mexican environmental protection system arises from the distribution of powers. Environmental protection is considered a concurrent power that must be exercised by the Federation, States and Municipalities. Articles 5 and 8 of LGEEPA establish exclusive jurisdiction vested in each level of government.

There are offices in charge of environmental protection at each level of government. In the Federal sphere, the design of the environmental policy and its instruments lies in the Ministry of Environment and Natural Resources ("SEMARNAT" by its acronym in Spanish). An agency in charge of monitoring and sanctioning compliance with environmental legislation and acts issued by SEMARNAT has been endowed with the rank of Federal Attorney Office for Protection of Environment ("PROFEPA" by its acronym in Spanish). At the State level, this scheme is duplicated.

Within the framework of the 2014 Energy Reform, an agency under SEMARNAT's scope (the Agency for Energy and Environmental Security) has exclusive competence in oil and gas activities, and is entitled to issue and create environmental policy instruments within its jurisdiction, including inspection, surveillance and penalties.

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

At the Federal level, PROFEPA is authorised to conduct administrative acts identified as Inspection and Surveillance Visits, which are implemented through an inspection proceeding with the aim of determining the extent to which a person complies with the applicable environmental legislation.

Authorities are bound to comply with the principle of legality deriving from Article 16 of the Mexican Constitution (enshrining the due process to be followed by authorities to avoid acts of disturbance). PROFEPA is bound to serve a written order indicating that an inspection act will take place at the corresponding facility; the order must provide, in an accurate and non-generic way, the visit's purposes, areas and the environmental vectors which are the object of inspection. If an irregularity is detected, PROFEPA is entitled to initiate an Administrative Procedure that may conclude with the imposition of administrative sanctions, which can be challenged either by an appeal for review or before an Administrative Justice Court and, at the final stage, through an *Amparo* Action before Federal Courts.

Another faculty vested in PROFEPA is the ability to impose administrative penalties derived from a procedure known as Popular Complaint, by the terms of which any interested party may file an indictment requesting the intervention of said authority to protect the environment. In these cases, PROFEPA must comply with the Precautionary Principle. Additionally, this entity has been empowered to initiate actions claiming responsibility for environmental damage, or to initiate class actions.

Nowadays, PROFEPA lacks inspection faculties regarding compliance with Mexican environmental laws. The previous Federal Congress submitted for analysis an initiative to amend the Administrative Procedure of Environmental Inspection, including powers of investigation and foreseeing the hardening of the amount of economic penalties. Said modifications have not yet been approved.

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

The authorities of the three levels of government are required, by the Transparency and Access to Public Information Federal Act, to provide all the information generated, obtained or in possession of said authorities; however, it is essential to note that certain

information will remain classified or reserved, so that it cannot be disclosed to interested parties, due to it being either confidential information, intellectual property, a matter of public interest or national security. A National Online Transparency Platform has been created, through which any person can request public information.

2 Environmental Permits

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

Mexican environmental policy contains mechanisms which establish the obligation to obtain authorisations, concessions or permits. In most cases, the processing of policy is driven by the governing law, by which a private individual is entitled to perform or exercise a regulated activity.

Prior to the issuance of the authorisation, concession or permit, compliance with various requirements established by the Law, Regulation, Standard or Agreement that governs it will be required.

In most cases, the Law that governs authorisations, concessions or permits allows the transmission of the rights associated to these administrative acts, through a transfer-of-rights procedure. There are few cases in which the Law has established the impossibility of making the corresponding transfer to other persons. Transmission procedures are relatively simple, and, in specific scenarios, a mere notice to the responsible entity will be required to consider the transmission as performed; in other cases, prior to the transfer-of-rights authorisation, it is necessary to verify the technical and legal capacity of the transferees in order to credit the legal transmission of rights.

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?

In all cases, people are empowered to challenge (partially or totally) the resolution issued by environmental authorities. Firstly, an appeal for a Review must be filed before the issuing authority; the Law also foresees the faculty to challenge before a Federal Court of Administrative Justice. The *Amparo* Action is the last stage to obtain remedy.

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

Legally speaking, there is no need to determine the existence of pollution in a property by a phase I or phase II assessment; nevertheless, it is becoming common practice. As it is established by the General Law for Prevention and Integral Handling of Waste ("LGPGIR" by its acronym in Spanish), prior to the sale of a property, the owner must either notify the buyer of the existence of pollution within the public deed or obtain an authorisation from SEMARNAT to undertake the transmission of the property. Either way will determine who will be responsible for remediation.

The assumption of obtaining the authorisation from SEMARNAT stems from a land polluted with hazardous waste, while the inclusion of the aforementioned notification of the pollution (in the public deed) will result from the presence of hazardous materials. The presence of pollution in a property incurs the liability to have the site approved, for which an initial sampling and the obtainment of authorisation to remediate are necessary.

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

PROFEPA is entitled to impose control measures to contain damages which stem from an activity contrary to the permits, as well as to impose penalties provided by law, such as: an economic fine (temporary or definitive); total or partial closure; administrative arrest for up to 36 hours; confiscation of instruments, products or subprojects; and/or the suspension or revocation of authorisations. Sanctions will result from the inspection, monitoring and penalty procedures.

3 Waste

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

Waste is defined as a material or product discarded by its owner or possessor, and that is found in a solid or semi-solid state, or is a liquid or gas contained in containers or tanks, and that can be susceptible to appraisal, or is required to be subjected to treatment or final disposal in accordance with LGPGIR.

Wastes are classified into three categories: hazardous; special handling; and solid urban. The first are under the jurisdiction of the Federation, while the second and third are the responsibility of the States and Municipalities respectively. Taking into consideration both the yearly generated volume and the type of waste, the generator is bound to specific obligations, including: registry as a generator; monitoring the generation; specific considerations for identification and storage; and, in specific cases, the need to prepare and submit a Management Plan.

It should be noted that, unlike many countries, in Mexico, the criterion of shared responsibility is in contrast to the extended responsibility related to the generation and management of special handling waste and solid urban waste.

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?

As regards hazardous waste, LGPGIR establishes that it may be stored in the generation site for a period of up to six months. The regulation of this Law states that an extension of up to six months may be requested. State legislation and municipal regulations may establish specific guidelines for the storage of waste.

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)?

The hazardous waste generator is responsible from the cradle to the grave, as referred to in LGPGIR. The generator can hire companies to provide services of management and final disposal of hazardous waste, who from the moment of its delivery, will be responsible for their operations, which remain independent of that which the

generator preserves. If the hired companies are not authorised by SEMARNAT for said activities, generators will be responsible for the damages caused by their management.

According to LGPGIR, those interested in providing services of transportation, storage, reuse, recycling, treatment and final disposal of waste must offer a guarantee that covers the damages that may be caused during the provision of the authorised service, and at the end of it. By injunction of law, the responsibility of the service providers will be extended for 20 years after the closing of their operations.

In sum, although it is true that the generator is responsible from the cradle to the grave (due to the existence of an objective liability), the subjects authorised to provide management services must have insurance to support their activities, extending the same for a period up to 20 years.

Additionally, under the concept of environmental liability foreseen by the Federal Law of said matter, the persons who avail themselves of a third party authorised for the confinement or final disposal activities will not be jointly responsible for the damages generated by these, if those are the result of a chance event or *force majeure*.

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

Regarding this point, we are in the presence of solid urban and special management waste. As defined, in Mexico there is a shared and not extended responsibility scheme in these matters. There is a social co-responsibility that requires the joint, coordinated and differentiated participation of producers, distributors, consumers and users of by-products.

From a legal standpoint, generators are not obliged to recover or collect their waste; however, LGPGIR establishes that one of the objects of the relevant policy is valuation (appraisal, evaluation) whose objective is to recover the value or the calorific value of the materials that make up the waste for its reincorporation into productive processes.

Valorisation and shared responsibility principles exist through the Management Plans, whose purpose is to minimise the generation and maximise the valuation. The Mexican Official Standard NOM-161-SEMARNAT-2013 establishes the elements and procedures for the formulation of these types of instrument, in which persons that are bound to formulate it must incorporate the identification and the potential use or exploitation of the waste in other activities such as reduction of waste generation, including take-back or recovery of the waste.

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?

Responsibility can be administrative, civil, criminal and environmental. Administrative responsibility derives from the faculty that PROFEPA has to impose penalties, which can be sought through the Appeal for Review, the Contentious Administrative Judgment and the *Amparo* Action. Criminal responsibility arises from the commission of the environmental crimes stated within the Federal Penal Code; the defence occurs through an oral trial. Civil liability is regulated by LGEEPA and by the Civil Federal Code; it is a system that seeks the repair of the damage, returning the thing to the state in which it was before the effect and, in case of not being possible, the payment of damages; however, the above could be proven by demonstrating that there is an effect on the person or his patrimony, derived from an environmental damage.

With the creation of the Environmental Responsibility Federal Law, a scheme that does not seek to repair the property of the affected party, but rather to restore the environment, was established. Due to this responsibility, the damage repair will always be sought and when this is impossible, the payment of an economic sanction; this type of procedure is taken in the form of a trial before Federal civil courts.

These responsibilities are not mutually exclusive; however, in the case that they result from the Liability for Environmental Damage, the infliction of the others may attenuate or lower the amount or type of sanction.

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

We cannot speak of the existence of environmental damage, when acting within the boundaries established in the Official Standards or any other element that ascertains up to which levels an activity can be supported by the environmental system where it is located and develops. In the same vein, it is established that environmental damage will not *legally* exist, even when there are damages, modifications or deterioration, if it is verified that the permissible limits provided by environmental laws have not been exceeded.

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?

Any person who, through action or omission, directly or indirectly causes environmental damage, will be bound to repair the damage and, when not possible, to pay an environmental redress. Legal entities are responsible for the environmental damage caused by their representatives, administrators, managers, directors, employees (either by omission or when ordering or consenting to the performance of harmful conduct). By the same token, people who use a third party to carry out environmental damage will be jointly and severally liable for the damages generated. In criminal law, the types of activity associated with crimes against the environment and environmental management, are attributable to the people who order or authorise the commission of the activity constituting a criminal offence.

Emanating from various environmental laws, there is an obligation to have environmental insurance, depending on the regulated activity; obviously this can be used to respond in case of environmental damage. Criminal matters are dealt with separately, for which the best insurance is the prevention of ordering or authorising activities contrary to environmental legislation.

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?

An operation associated with a sale of shares implies the assumption of past, present and future responsibility for the activity, while the sale of assets entails an obligation on the acquirer to obtain the relevant authorisations either through a transfer of rights or permits, or through the processing of new authorisations. There may be a transmission of responsibility regarding the obligation to remediate a polluted property or even the obligation to carry out said activities,

always maintaining the right to sue in civil procedures for the recovery of remediation expenses from the person who has caused the damage.

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

In terms of LGPGIR, the owner and possessor are jointly and severally liable for the remediation of a polluted property, with the right to obtain remuneration for the expenses incurred due to the remediation work.

5 Contaminated Land

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

When there is pollution of the soil and remediation actions must be taken, an authorisation granted by SEMARNAT for a remediation plan must be obtained prior to realising any activity. As defined by Mexican law, pollution can derive from an environmental emergency or an environmental liability (historical contamination).

In the case of environmental emergencies, PROFEPA must be notified immediately and imperative measures to prevent the spread of the pollution must be implemented, to subsequently carry out the remediation procedure of the property. In the case of historical contamination, a characterisation of the contaminants should be made and a proposal must be submitted to SEMARNAT, including technology, schedules and restoration parameters, which generally must be associated with a Mexican Official Standard (currently there is only one for hydrocarbons and another for heavy metals). In the absence of a specific regulation, a risk assessment study will be needed to determine if the pollution represents a risk to the environment and human health, while establishing specific remediation levels.

Regarding water, the pertinent authority (the National Water Commission) imposes the obligation to repair or compensate for environmental damage caused by wastewaters. The procedure includes removing contaminants and restoring the water body to its baseline condition.

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

The responsibility is joint, meaning that the remediation actions may be required from any person involved. The party that has carried out the restoration activities may require the other expenses associated with the remediation. The same assumption applies to the case that the previous owners or owners of the property have been responsible for the pollution; by law, the current owner or possessor will be responsible, safeguarding the right to obtain compensation for the costs incurred through a civil lawsuit. In cases of property transfer, the parties will define who will be responsible for the remediation.

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?

Under Mexican legislation, authorisation must be obtained for the remediation proposal, which cannot be modified by the authority in terms of its scope. The party in charge of deploying the remediation can make modifications to the method or to the time within which the parameters must be reached. A third party cannot request the modification of the remediation.

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?

As mentioned before, LGPGIR empowers the person in charge of remediation to seek the recovery of expenses incurred on restoration activities. Indeed, the authorisation from SEMARNAT to conduct the remediation of polluted properties will contain the declaration of the person who will implement the remediation of the property – a situation that should be included in the sale's deed.

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

If the aesthetic damages transcend such characterisation to the point of constituting environmental pollution, PROFEPA can initiate a procedure of liability for environmental damage; nevertheless, it cannot request monetary damages, but rather the repair of the damage or the payment of economic compensation destined to an environmental fund.

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.?

Within the inspection visits, the visitor is compelled to provide all the information related to the purpose of the visit, as well as gather any type of evidence to establish the existence of a violation of environmental legislation. Within the inspection visits and through authorised personnel or through accredited Verification Units, samplings may be held to determine compliance with the pertinent limits to which it is bound.

When samplings are to be held, they should be done in accordance with the Standard Procedures and clearly establish chain-of-custody mechanisms.

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?

Yes, migration of pollution must be notified to the environmental authority within the same programme or remediation plan, and must be notified to the third party in order to carry out the samplings and remediation within its premises. If, as a result of the migration, the third party suffers a loss or impairment in their property, the latter may request civil remedies for damage to their property or their person.

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

If an environmental emergency arises, or at the time when an act of purchase or lease of the property is intended, the foregoing generates a baseline that allows a person to establish the extent of his responsibility with respect to the existing contamination in the property.

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?

The only specific case foreseen by the Law and its Regulation is that of transmission of the ownership of the property, and should always be made known to the purchaser or in the purchaser's prospectus.

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?

Currently, the insurance market in Mexico offers coverage for historical or current damages; the contract of sale in which the transfer is agreed may include a payment for environmental liability or a reduction in the transaction price due to the impairment caused by the existence of pollution on the premises, so the person receiving the compensation will be the one that faces environmental responsibility.

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

In the financial audits of the companies, the Financial Information Standards must be contemplated. Depending on the degree of impact, it will be determined if it is necessary to make a note in the financial statements, make a reservation to cover the expenses derived from the effect, or carry out the disclosure of the contingency to partners and shareholders of the company. The principle of the Financial Regulations is to disclose any type of information that could put at risk the continuity of the company.

The obligation to obtain insurance to carry out certain activities, and the Law's provisions that mandate it to remain in force for a certain period, as well as its obligations to maintain information, may limit the liquidation of the company to meet its obligations. In some cases, a PROFEPA report is required to determine the existence of environmental matters pending closure.

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?

"Piercing the corporate veil" is not an institution established by Mexican law; however, case law has determined the possibility to use said concept when it is proven that a corporation was constituted or used with the sole purpose of not complying with its legal obligations; in that case, the responsibility could reach the shareholders.

In the case of the *parent company*, there is no possibility of suing them in the national courts, since the Corporate Law establishes the creation of an autonomous entity with legal personality and its own assets.

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

Popular complaints can be filed requesting that anonymity be maintained for the person who is presenting the information that reveals the environmental violation. In this event, there is no way to determine if a whistle-blower exists.

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

Yes, currently there are three types of class actions: "diffuse"; "in strict sense"; or "individual homogeneous". By these, the respondent is sought to repair the damage, as well as compensation on an individual basis to the members that make up the group and, in some cases, a judicial claim for the forced fulfilment of a contract or its rescission, respectively.

Currently there are theories that support the imposition of exemplary sanctions in order to create dissuasive behaviour (excessive fines, closures or arrest); some decisions issued by the Supreme Court have resulted in punitive damages.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

Each party assumes the expenses or costs derived from its actions, as well as the fees of its representatives. In the case of class actions, the fees are calculated based on a maximum levy; in the case that an agreement is reached between the parties, before the issuance of the judgment, the expenses and costs should be included in the negotiations.

9 Emissions Trading and Climate Change

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

Stemming from the General Law on Climate Change, SEMARNAT has announced that the carbon market will start with a pilot phase in 2019, which will last for three years. At the conclusion of this period, there will be a transition date for an Emissions Trading System for the year 2020. The market will be operated by the Mexican Stock Exchange through a voluntary carbon market.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

Yes, the Annual Emissions Inventory requires the annual reporting of tons of CO2 equivalent.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

Mexico has been a participant in the reduction of CO2 emissions. There are 12 regulations that contemplate climate change, with an indicative commitment or aspirational goal of reducing CO2 emissions by 30% by 2020 with respect to the baseline (related to the 2000 emissions), and by up to 50% by the year 2050.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

Asbestos is managed as Hazardous Materials or Waste; in this country there has been no public health crisis associated with its use.

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

Owners/occupiers must comply with Mexican Official Standards NOM-125-SSA1-2016 and NOM-010-STPS-2014 which set out the sanitary requirements for the process and use of asbestos. Mexico has not ratified Convention 162 of the International Labour Organization on the management of asbestos.

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 your jurisdiction?

There is insurance against pre-existing and generated environmental liability as a result of carrying out industrial activities, as well as insurance for generators of hazardous waste and companies that perform highly risky activities. Similarly, there is insurance to cover the responsibility derived from the transport of waste.

In recent times, it has been taken out more frequently; however, bonds for compliance with the terms and conditions of the authorisations in terms of environmental impact are the most relevant.

11.2 What is the environmental insurance claims experience in your jurisdiction?

The advantage of buying insurance is that it has been used as an element to deal with environmental emergencies quickly; in this context, bonds to ensure compliance with environmental obligations have a greater acceptance, since these are issued in the name of the Federal Treasury, with the possibility that they may be demanded by PROFEPA.

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 your jurisdiction.

Human rights and environmental cases have brought connotations of a *supralegal* protection of life, health and an adequate environment. The environmental case law in particular stands out, with a special category of protection regarding acts that may occur and from which the responsibility of the person to have a forecasting scheme derives. There have been some cases of climate litigation. The Escazú Agreement represents a new paradigm in respect of access to justice over environmental losses.

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LAER Abogados, S.C. is created from the concern to offer an integral and non-conventional set of legal services in environmental, administrative and regulatory matters. Our main mission is to help our clients in the identification of environmental management needs, by establishing schemes that allow the regularisation of their activities or operations, and implementing measures that prevent or limit the emergence of legal liability derived from normative non-compliance; or through the strategic implementation of programmes that allow them to obtain the advantage of a sustainable scheme of feasible implementation. Our portfolio includes the design of methodologies that make feasible the determination of environmental and social risks, for the integration or improvement of an environmental management system. Our services include:

- Environmental impact.
- Water.
- Waste.
- Soil.
- Emissions to the atmosphere and climate change.
- International environmental law.
- Permits.
- Environmental audits.
- Environmental aspects of project finance (specialists in the Equator Principles and the International Finance Corporation's Performance Standards on Environmental and Social Responsibility).

Chapter 22

Netherlands

Gaastra attorneys at law

André H. Gaastra

1 Environmental Policy and its Enforcement

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

According to article 21 of the Netherlands Constitution, government care is focused on the habitability of the country and the protection and improvement of the environment. The Environmental Management Act (*Wet milieubeheer*), the Environmental Permitting (General Provisions) Act (*Wet algemene bepalingen omgevingsrecht*) and the subordinate decrees and regulations form the general regulatory framework for environmental control, permitting and enforcement.

A significant part of the specific environmental rules that apply in the Netherlands are established by the European Union and laid down in European Regulations or Directives that are implemented in Netherlands law by means of reference legislation.

Some fields of interest are dealt with by specific laws, such as the Soil Protection Act (*Wet bodembescherming*), which deals with soil pollution and remediation, the Water Act (*Waterwet*), which deals with water quality and water quantity control and permits to discharge and the Noise Abatement Act (*Wet geluidhinder*), which deals with the prevention of noise pollution. A large legislative operation is on its way, which should lead to the integration of all environmental laws into one, this being the Environmental Act (*Omgevingswet*), which is supposed to enter into force in 2021.

Since 2017, environmental law has been administered on a national level by the Minister of Infrastructure and Water Management (*ministerie van Infrastructuur en Waterstaat*) and the Minister of Economical Affairs and Climate (*ministerie van Economische Zaken en Klimaat*). Most of the permitting and environmental enforcement is the competence of the provincial and municipal executives. Given that the extent and complexity of environmental law has increased in the past few decades, most of the local governments have taken part in regional execution bodies (*Regionale Uitvoeringsdiensten*). These bodies employ the staff of the provincial or municipal executive, who prepare the decisions based on environmental law and conduct environmental inspections on the basis of a mandate.

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

In the Netherlands, the principle of the duty to enforce (*beginselplicht tot handhaving*) applies. Case law provides that, in case of a violation of environmental law, the competent authority must take (administrative) enforcement measures, apart from some exceptions, including that the situation can be legalised or that enforcement would be disproportionate, taking into account the interests of the party violating the law in relation to the general interest that is served with enforcement. This leads to a quite active approach of the enforcement agencies. The performance of industrial, waste handling and other facilities under environmental law are closely monitored. Next to this, environmental law can lead to prosecution under criminal law. In view of this, the public prosecutor's office has instituted a department with specialised prosecutors and support staff.

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

The Aarhus Convention on access to (environmental) information, public participation in decision-making and access to justice in environmental matters in the EU is implemented in the Government Information (Public Access) Act (*Wet openbaarheid van bestuur*). Public authorities must provide environmental information on request. The requestor does not need to have a specific quality or title, as anyone is entitled to file a request for environmental information. The grounds for denial are limited to quite specific public and private interests.

2 Environmental Permits

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

In the past decade, the legislator has transferred some notable permit requirements into the general notification requirements under an environmental decree. Specific permitting requirements remain for, amongst others, activities requiring a permit in the sense of the European Industrial Emissions Directive (integrated pollution prevention and control). In such cases, a permit is granted under the fulfilment of certain conditions and is required for the erection, modification and operation of a facility.

General rules apply to specific permitted and non-permitted activities, specifying, for instance, the maximum load of emissions into the ambient air, how the facility should limit and deal with their waste and other aspects of environmental control, including the prevention of noise pollution, soil pollution, external risk and energy reduction. In some cases, exemptions or tailor-made permit conditions may be granted.

Environmental permits (other than permits under the Nuclear Energy Act) are subject to *droit de suite*, meaning that these are attached to the activities for which the permit is granted rather than to the permit holder. When a facility (*inrichting*) is transferred to another operator, the environmental permit is automatically transferred on the basis of the operation of law. However, the Environmental Permitting (General Provisions) Act provides that the permit holder should notify the transfer to the competent authority at least one month before the transfer.

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?

Appeals against permitting decisions can be filed with the regional courts within six weeks. Both an appeal of the applicant against denial of the permit or against the permit conditions if granted, and appeals of interested parties against the granting of a permit are possible. These appeals will all be dealt with in the same case. However, the right to appeal is restricted to interested third parties who have first filed their opinion during the public inspection period which is part of the permitting procedure. If they would not have filed an opinion and are not able to demonstrate that this could not reasonably be held against them, then their appeal is not admissible. Appeals can also be brought by interested parties against a change of the permitting decision after the public inspection period, in case they would have grounds for an appeal against an amendment of the decision.

Other than the applicant, the person or entity filing an appeal must have a particular interest in order for his appeal to be admissible. Environmental groups' appeals are only admissible if the ground of appeal relates to a subject that is covered in their articles of association and provided that the environmental group actually is involved in activities serving the goals that are detailed in its articles of association, meaning that the environmental groups' appeal will not be admissible if the environmental group was just created for the purpose of litigation in court.

After a verdict of the court, parties may appeal to the Administrative Court of the Council of State (the highest court for administrative matters in the Netherlands).

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

Netherlands law does not contain a general requirement to conduct environmental audits. However, related conditions may be attached to environmental permits. These conditions may contain the obligation to forward a copy of the audit reports to the competent authority.

Some applications for an environmental permit are subject to the requirement of an Environmental Impact Assessment (EIA). This would be a separate part of the permitting procedure that precedes the actual permit application. EIA requirements follow from the European Directive on the Environmental Impact Assessments (2011/92/EU) for individual projects, such as an integrated industrial installation, a dam, motorway or airport or on the basis of the Directive on Strategic Environmental Assessments (2001/42/EC). The common principle of both Directives is to ensure that plans, programmes and projects likely to have significant effects on the environment are made subject to an environmental assessment, prior to their approval or authorisation. Consultation with the public is a key feature of environmental assessment procedures.

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

Environmental administrative enforcement powers are provided to the competent administrative body (the Municipal or Provincial Executive in relation to facilities or activities and the Minister of Infrastructure and Water Management with respect to non-facility-related activities such as the transboundary movement of waste). The competent authority can issue orders under the threat of a penalty (*last onder dwangsom*) or orders under the threat of administrative force (*last onder bestuursdwang*). In some cases, administrative punitive sanctions are possible. In its most extensive form, this sanction could be the withdrawal of the permit or the denial of future permits, based on the Act on the Integrity Control by Public Authorities (*Wet bevordering integriteitsbeoordelingen door het openbaar bestuur*).

Next to this, the violation of environmental law is a criminal offence, leading to the possibility of prosecution by the public prosecutor.

3 Waste

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

The Netherlands definition of waste is entirely based on and in accordance with the European Waste Framework Directive (2008/98/EC) which sets the basic concepts and definitions related to waste management. This Directive provides, amongst others, definitions of waste (any substance or object which the holder discards or intends or is required to discard), recycling and recovery.

The handling of waste on the national level is regulated by the Environmental Management Act. The national government has adopted a national policy on waste (the National Waste Plan) holding the national policy on waste prevention, waste management, recycling and best available techniques. This plan must be applied in the preparation of any government decision on waste, including permitting and enforcement.

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?

Disposal within a facility can only be allowed when permitted. The current national policy, however, is against the erection of new landfills. Temporary storage before removal is allowed. It can only be regarded as a recovery operation if the storage is limited to a period of one year. Permits to store for longer storage periods are bound by stringent requirements.

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)?

Producers may retain residual liability for their waste streams. This liability may be limited if and after they have transferred their waste to a licensed waste management company. Such liability may be based on the duty of care and other obligations with respect to waste handling under the Environmental Management Act. Producers of waste who have handed over their waste to a permitted and lawful landfill can

disculpate themselves from liability for damage that was caused by the substances present in the landfill on the basis of civil law.

If the transferee goes bankrupt, the obligation to comply with the relevant environmental and waste laws is transferred to the trustee. After termination of the insolvency period, this will in fact become the obligation of the competent authority taking control over the landfill. After all, at that moment in time, the landfill will most probably be closed. The Environmental Control Act holds aftercare obligations for the provincial authorities that apply after the closure, the purpose of which is perpetual control in order to protect the surrounding environment. These obligations are financed by waste levies that should be collected by the landfill company during the operational phase of the landfill.

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

European environmental law contains various take-back obligations such as for waste electric and electronic equipment (WEEE), batteries, car wrecks and packaging materials. These obligations are implemented in the Netherlands by specific rules and regulations under the Environmental Management Act.

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?

A breach of environmental law could lead to administrative sanctions as described above, to criminal prosecution (also as described above), or could in some cases lead to civil actions based on tort or breach of contract.

Typical defences may be related to the subject rule not being applicable to the alleged action, that the violation was not determined in the right manner (for instance, lack of proof in the sense that there are alternative causes or that measurements were not done in accordance with the applicable standards), that the violation cannot be attributed to the suspect or that there was no harm done to the environment. Civil actions are generally prone to the lack of proof on a causal connection between an alleged unlawful act or omission or breach of contract.

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

Yes. EU Directive 2004/35/CE on environmental liability with regard to the prevention and remedying of environmental damage, which applies in the Netherlands, establishes a framework of environmental liability based on the 'polluter pays' principle. This would mean that an operator could be liable for environmental damage even when the polluting activity is operated within permit limits. On the basis of Netherlands civil law, (environmental) claims may also be based on tort outside of the permit requirements.

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?

Yes. Directors and officers may attract personal liabilities for environmental wrongdoing. They may, apart from the company, be held personally liable depending on their particular involvement in the case. This is a possibility under administrative, civil and criminal law, albeit that the criteria for liability under these legislative schemes differ to some extent.

Financial damage on the basis of directors' or officers' liability can generally be insured. However, this will not avoid the competent authority, a public prosecutor or a third party incurring damages from pursuing the director or officer. Furthermore, there is no insurance against the effects of government orders or imprisonment other than financial damage.

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?

A share sale implies that the share capital in a company is transferred from one shareholder to another. This would mean that the new shareholder would acquire the company with its environmental liabilities. If the company or any person or entity for which the company can be held liable has polluted the soil, then this liability remains with the company and would be attached to the shares acquired. If only the assets of the company would be transferred, then historical liabilities would be left behind, unless this would have caused damage to the assets that were transferred. In case of soil pollution, certain measures could be taken in view of the avoidance of future liabilities *vis-à-vis* the competent authorities. The type of transaction may also have implications for the level of detail in the due diligence and the information and disclosure requirements.

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

Netherlands law does not provide a direct liability for lenders. However, there may be relevant contractual obligations or responsibilities of lenders and collaterals may be affected by environmental pollution.

5 Contaminated Land

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

The provisions of the Soil Protection Act imply responsibilities and liabilities for the party who has caused soil or groundwater pollution, the entity using polluted property and the owner or long lease holder of a polluted property. Next to this, the (extent of the) liability may depend on whether is to be qualified as a historic or non-historic case of soil pollution (i.e. caused before, in or after 1987). Apart from this, liability may be based on (general) provisions in, or attached to, lease agreements or duties of care.

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

The allocation of liability will largely depend on the merits of the case. Contract clauses may also have an effect on the distribution of liability. Joint and several liability can in general not be excluded.

The question on who should remediate on the basis of the Soil Protection Act is answered by the enforcing competent authority and not just depending on the responsible entity that can be held accountable for the soil pollution. The competent authority may turn to the owner of the polluted property as well.

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?

A remediation programme involving the excavation or treatment of polluted soil or groundwater needs to be approved by the competent authority before it can be executed. Interested parties can file objections and appeal against these decisions. The decision on the objection must be based on the latest knowledge of the facts and the developments in law. This could cause the final decision to be different than the draft decision. Later changes should be based on a change of circumstances and cannot be excluded.

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?

If a seller of polluted property does not inform his successor in ownership of material known soil or groundwater pollution, he may violate his obligation to disclose and be liable. This could lead to, amongst others, the right of the purchaser to seek a contribution from the seller. If the seller provided the buyer with all the relevant details of the known pollution, the purchaser may have no basis for a claim. It is customary to agree on an indemnity for known pollution and/or a warranty for unknown pollution in the sale and purchase agreement.

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

Both the Environmental Management Act and the chapter in the General Administrative Law Act (*Algemene wet bestuursrecht*) relating to administrative enforcement provide a basis for the competent authority to claim financial damages from the polluter, in case the competent authority had to take measures to control or remediate the situation. The competent authority has, however, no title if no actions were taken, or in case the actions taken were not needed in view of (the prevention of) harm to the environment. Purely aesthetic harms to public assets would not form a basis for such a claim.

The owner of the public assets (for instance, a municipality, province or water board) may have a claim in the sense of whether or not the environmental pollution would also cause public property to drop in value because of disfiguration. This does not, however, seem to be an obvious sole basis for a claim under Netherlands environmental or property damage law.

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.?

The operator of an industrial facility usually has some general or specific reporting requirements, depending on the nature of its activities and the conditions that are attached to the environmental permit granted for the facility. In case of an unusual incident (*ongewoon voorval*), the operator of the facility must notify the competent authority as soon as possible, providing specific information as required by law. In some cases, the permit conditions include the requirement to take samples, to have the samples analysed and to report on permit violations (e.g. where it concerns emissions into the ambient air or waste water discharge).

Inspection agencies also have the right to take samples, to conduct site inspections and to interview employees. In case of administrative enforcement, there is an obligation to cooperate. This may be different in case of criminal investigations.

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 Soil Protection Act provides that pollution found in relation to certain activities must be reported to the competent authority. The duty of care requires the operator to take immediate reasonable measures to control, mitigate or remove the pollution. The competent authority may require the operator to further investigate a case of soil or ground water pollution. This would entail an investigation into the front of the plume. That will reveal whether the pollution has migrated off-site. If such is found to be the case then this must be notified to the competent authority. Affected parties must be notified in view of any measures that need to be taken on their property. These parties must allow these actions to be taken.

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

Applications for permits to build or environmental permits for certain environmentally hazardous activities must include a recent soil investigation report. A zero soil report can be required on the basis of an environmental permit condition and these permit conditions may also require soil investigations to be carried out after termination of the permitted activities and to provide a copy of the subject report to the competent authority.

The law does not require the soil to be investigated in case of a transfer of ownership. There is no legal obligation to perform soil investigations prior to entering into a lease as well. However, such may be wise in view of the prevention of future liability depending on the type of lease agreement and the general terms that would apply.

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?

The seller has a general obligation to disclose known environmental problems to a prospective purchaser of polluted real estate. This would not be different if the sale and purchase concerns the transfer of shares in a company owning polluted property.

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?

In general, environmental liabilities may be subject to an indemnity providing a basis for a claim in case of financial damage suffered. It will not, however, limit the exposure of the new owner to government enforcement actions in case of pollution found to be present in the real estate after the transfer. The new owner of polluted industrial real estate can be forced to remediate or to take control measures regardless of the existence of an indemnity. Payment to another person under an indemnity would not discharge the indemnifier given that he may also be forced to remediate or to take control measures if he was the polluter. This may be different in case of large-scale complex ground water pollution, where the competent authority has decided to adopt a regional approach.

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

Some environmental liabilities may be sheltered off balance sheet by means of a sale and lease back transaction. Causing a company to go bankrupt in view of the limitation or avoidance of environmental liabilities may not prevent administrative, civil or criminal enforcement actions against the persons that were involved in harming the environment, including, but not limited to, officers and directors.

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?

Shareholders as such are not liable for actions of the company, unless they have undertaken actions of control. This also applies to parent companies. However, administrative case law seems to have broadened the possibility of taking administrative environmental enforcement actions against parent companies. This does not seem to be limited to national parent companies.

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

New legislation on the protection of the position of whistle-blowers was enacted in July 2016. The Act on the House for Whistleblowers (*Wet Huis voor klokkenluiders*) protects any person who is or was an employee or has or had an alike position in relation to the company. Organisations with 50 or more employees must have adopted a whistle-blowers policy according to minimum standards. The violation of environmental law and risks for the environment are specifically mentioned as reportable matters under the Act on the House for Whistleblowers.

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

The Netherlands Civil Code provides that foundations or associations with full legal capacity may initiate legal proceedings on behalf of certain classes of parties who have suffered damages.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

There is a legal reduction in liability to pay costs for individuals with lower incomes. Public interest groups do not benefit from this exemption.

However, in administrative and civil proceedings, the costs payable to the counterparty in case of a negative verdict are set at lump-sum rates that hardly represent the real legal costs involved.

9 Emissions Trading and Climate Change

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

The Netherlands, as a Member State, participates in the European Emission Trading Scheme for CO2 emissions as of 2005 (EU ETS), at first setting national targets in national allocation plans. Currently the targets are based on the European limits on emissions that apply for the year 2020. A similar system was set up for nitrogen emissions (NOx). However, that system was abandoned in 2014, given the lack of results.

The facilities that have joined the EU ETS on a mandatory basis do produce a major part of the emissions in the Netherlands, specifically those in the energy and chemical sectors.

The Netherlands market for emission allowances does not seem to work optimally but has contributed major emission reduction investments, given the relatively low market price. The EU decision on backloading and the market stability reserve may improve the market.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

The Netherlands is a party to, amongst others, the United Nations Convention on Climate Change and the Kyoto Protocol, which provide the requirement of issuing an annual national inventory report.

The emitting industries have the legal obligation to provide input for these national reports. In view of these requirements, they must monitor and report their greenhouse gas emissions.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

The overall national policy on climate change is focusing on various sources of sustainable energy, amongst which are solar power, near-shore and onshore windfarms, bio-energy and geothermal energy; as well as on closing down a number of coal-fired power plants and the realisation of carbon capture and storage.

This should lead to 14% sustainable energy in 2020 and 16% sustainable energy in 2023. The national energy agenda provides that nearly all sources of energy should be sustainable in 2050, resulting in a reduction in the emission of greenhouse gases as opposed to the 80–95% levels in 1990.

In the so-called Urgenda case, the State was convicted in a civil action based on tort to take the necessary measures in view of achieving a reduction in greenhouse gas emissions in 2020 of at least 25% lower than 1990 levels. In 2018, this verdict was sustained on appeal.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

There is a total ban on the use of asbestos-containing materials (ACM) in products, buildings and constructions, effective since 1993. Legislative action is being taken in order to implement the legal obligation to remove asbestos roofs from buildings before 2024, including a supporting subsidy scheme.

Asbestos litigation occurs in many aspects, like (i) claims from former employees who were exposed to ACM in the past and developed an asbestos-related disease (mesothelioma), (ii) administrative and criminal enforcement actions against employers alleging the violation of the Health and Safety Act (*Arbeidsomstandighedenwet*) in relation to sound asbestos inventorisations and the prevention of asbestos exposure, and (iii) civil claims of parties who were confronted with asbestos in buildings and constructions and facing extra costs.

In civil cases concerning the exposure of employees to ACM, the statute of limitations is extended to 30 years after the claimant was exposed.

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

An asbestos inventory must be drafted by a certified company prior to any works involving the possible exposure to asbestos in the Netherlands. Asbestos removal must be done by specialised certified asbestos removal companies.

The Health and Safety Act requires the prevention of exposure of employees to asbestos.

As discussed above, the obligatory removal of asbestos roofs may be enacted and lead to an obligation to remove such roofs before 2024.

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 your jurisdiction?

Environmental insurance has increasingly become customary in the Netherlands in the past couple of years, in particular in relation to mergers and acquisitions, as it may in certain cases be an adequate instrument that can be used to cap the environmental liabilities of the seller under the environmental warranties.

11.2 What is the environmental insurance claims experience in your jurisdiction?

Legal proceedings in insurance claims are dealt with by the regional courts and the courts of appeal. These may include environmental insurance claims. In some cases, the insurance company is actively involved in settlement negotiations, especially where it concerns larger claims.

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 your jurisdiction.

In the past few years, the focus of the environmental authorities has been on the safe storage of highly hazardous chemicals in above-ground cylindrical storage tanks, the handling and transboundary shipment of waste, and external safety. These continue to be areas of focus. Alongside this, we have seen an increasing interest of the environmental enforcement authorities in matters of food safety and substances rules and regulations.

Just days before the start of 2018, a new national waste policy was issued (the National Waste Control Plan 2017–2029). This policy document must be applied in permitting procedures and is aimed at facilitating the transition into a circular economy. It contains new quantitative targets for recycling and waste reduction. Furthermore, it aims to facilitate innovations in view of the circular economy by simplifying the erection of test facilities. Furthermore, it contains criteria for distinguishing between products, by-products and waste and for the disposal of waste.

The remediation and control of soil pollution with substances of very high concern such as persistent organic pollutants is a growing concern. New policies, technologies and legislative measures are needed for contaminations relating to PFOS or PFOS components.

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André H. Gaastra leads Gaastra attorneys at law, a Netherlands law firm specialised in environmental, health and safety law, real estate and regulated markets. In addition to graduating in law, he has a background in marine engineering and completed the Grotius specialisation training in general administrative law. He has over 19 years of experience as an attorney at law and six years' experience in various environmental, health and safety leadership positions with General Electric before he was admitted to the Bar. Clients view his broad experience as a definite advantage in the handling of complex environmental matters.

In the past 19 years, Mr. Gaastra has dealt with all aspects of environmental law. He has counselled corporations and branch associations on matters pertaining to permits and compliance, soil pollution, air emissions, waste water, waste handling and recycling, and occupational health and safety. His primary focus is on industry. Top-tier M&A firms team up with him for transactions that require the involvement of an environmental law specialist. From time to time he also advises government institutions.

Mr. Gaastra specialises in the tactics of environmental litigation and negotiations. He has a track record in finding solutions, in environmental civil law, administrative law and criminal cases.

Mr. Gaastra was also treasurer of the supervisory committee of the National Bar in the District of Noord Holland and is a member of the general committee of the Entrepreneurs Association, Region of Amsterdam (ORAM). He is a speaker on study days and symposiums on aspects of environmental law, and an author of articles published in the *Journal for Environment & Law*, the *Waste Products Journal* and others.

Gaastra attorneys at law

Gaastra attorneys at law is specialised in Environment, Regulatory and Real Estate. The firm has a small team of highly skilled and responsive lawyers.

André H. Gaastra is recognised as one of the leading environmental law specialists in the Netherlands by *Who's Who Legal – Environment*. He studied marine engineering prior to law school and is skilled in understanding complex matters of both a technical and legal nature. Mr. Gaastra founded the firm in 2006 after working for a number of years in the chemical industry (General Electric) and working as a lawyer at the international law firm Loyens & Loeff.

Clients who have worked with Gaastra attorneys at law more often gain the benefit of a lawyer who knows the business, the government and judicial authorities from the inside. The firm has excellent lawyers with a variety of backgrounds.

The focus of the firm is directed at providing high-quality legal services. Client feedback attests to this:

"*We are happy to have found in you a passionate lawyer and professional, with experience in our branche. Our choice for you gave us a serious advantage and your dedication and persistence have in fact led to the known end result.*"

Russia

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1 Environmental Policy and its Enforcement

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

Russia's state environmental policy is designed to ensure protection, reproduction and sustainable use of natural resources as the prerequisites for a healthy environment and environmental safety. The right of Russian citizens to a healthy environment is guaranteed by the Constitution of the Russian Federation. The principles underlying the country's environmental law are:

- presumption of environmental hazard;
- a compulsory environmental impact assessment for planned activities; and
- a research-backed combination of environmental, economic and social interests of people, society and the state to ensure sustainable development and a healthy environment.

Russia's Ministry for Natural Resources and the Environment is the main authority administering the government policy for nature management and environmental protection. It coordinates and controls the activities of its subordinate agencies:

- Federal Service for Hydrometeorology and Environmental Monitoring (*RosGidroMet*);
- Federal Supervisory Service for Nature Management (*RosPrirodNadzor*);
- Federal Water Resource Agency (*RosVodResursy*);
- Federal Forestry Agency (*RosLeskhoz*); and
- Federal Mineral Resource Agency (*Rosnedra*).

In addition, the Russian Constitution refers nature management, environmental protection and safety matters to the joint competence of the Russian Federation and the regions (constituent entities), each of them having their own authorities administering the state environmental policy.

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

The government authorities develop and approve binding environmental protection rules and standards, carry out environmental monitoring, prosecute those violating environmental laws, elaborate environmental protection and improvement measures and procure financing for them.

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

The Russian Constitution guarantees everyone's right to reliable information about the state of the environment. Authorities collect environmental information from regular reports submitted by businesses impacting on the environment, and conduct ongoing environmental monitoring.

Much environmental information is published in the media and on the Internet. Any environmental information is accessible to anyone upon request. Also, the law requires that the public be informed of any degradation in the environment to an extent endangering human health.

2 Environmental Permits

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

The main types of adverse environmental impact are:

- pollutant emissions into the atmosphere from stationary sources;
- pollutant discharges into water bodies (including underground waters); and
- waste disposal (storage and/or landfill).

Each of these impacts requires a specific permit.

Environmental permits may only be transferred from one person to another along with the relevant source of impact, i.e. while taking over/acquiring an operating facility.

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?

It is not for the environmental regulator to determine the level of adverse environmental impact requiring a permit, but for the applicant, relying on its design documentation; the conditions to be contained in an environmental permit are set by the applicant itself.

The environmental regulator may refuse a permit if the declared extent of the impact will result in an unhealthy environment. Such refusal to issue an environmental permit may be appealed by an applicant through the state courts.

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

Under Russian environmental law, preliminary environmental impact assessment must be carried out for any planned operations. In some cases, the law also requires a state environmental expert review to be performed as part of the project design documentation.

In industrial operations, environmental monitoring is also required.

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

A fee is charged for each type of adverse environmental impact. If a permit is violated, the impact fee is calculated with a scale-up factor of 5 to 25. Administrative liability might also follow in the form of a fine or suspension of operations.

If the permit violation causes harm to human health, offenders may be held criminally liable.

3 Waste

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

In Russia, waste is defined as substances or objects generated during production, work, services or consumption that are disposed of, intended to be disposed of or required to be disposed of. What distinguishes waste is that it is unwanted and needs to be got rid of.

In Russia, waste is divided into five hazard categories (category V being virtually non-hazardous). Handling of categories I–IV requires a special licence.

Each producer of waste of any hazard category must have waste generation rates (a set amount of a specific type of waste generated per unit of production) approved and obtain an Environmental Authority permit setting the waste disposal limit (maximum amount of a specific type of waste allowed for disposal, in a specified manner and for a specified period of time, at waste disposal facilities, taking into account the local environmental situation).

Waste categories I–IV also require a waste passport indicating the waste composition and certifying its classification within the relevant waste type and hazard category.

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?

The Russian legislation permits only temporary (up to 11 months') storage (accumulation) of waste on the site where it is produced and fully prohibits burial of waste anywhere other than at designated waste disposal facilities (WDFs). All such facilities are registered on the government register of WDFs. Design documentation for WDFs is subject to compulsory state environmental expert review.

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)?

Producers of waste retain no liability in respect of transferred waste. Even so, waste in hazard categories I–IV is to be transferred to a party licensed to handle waste. In this way, the government controls waste handling through licensing.

The only liability retained by waste producers in respect of waste transferred for disposal (storage and/or landfill) is to pay the environmental impact fee calculated with reference to the types and amount of the transferred waste.

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

Waste producers have no obligations regarding waste transferred to third parties.

Russia prohibits landfilling of certain types of waste containing useful components. Such wastes are to be recycled to keep useful components in the stream of commerce. Even so, recycling of waste containing useful components is not the exclusive liability of waste producers and may be performed by other transferees. Also, recycling of hazard category I–IV waste containing useful components requires a special waste handling licence.

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?

The most common types of environmental wrongdoing are pollution, emission and waste exceeding the limits. They result in an increased environmental impact fee, calculated with scale-up factors ranging from 5 to 25.

Environmental incidents not covered by permits require the offender to make compensation for the environmental damage in full. The statute of limitations in environmental damages cases is 25 years.

Also, some environmental wrongdoings constitute administrative offences triggering substantial fines; in some cases, a decision may be made to suspend operations causing damage to the environment.

The most common defence is provided by materials of industrial environmental control exercised by the operator, which might confirm that the polluting activity is operated within permitted limits.

To avoid administrative liability, absence of guilt must be proven; a party is found guilty of an administrative offence if it is established that it could have complied with the rules and regulations that, if violated, trigger administrative liability, yet failed to take every step within its control to do so.

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

If the polluting activity is operated within permit limits, the operator must pay only the environmental impact fee, calculated without scale-up factors. This fee cannot be called liability for guilty acts and should rather be seen as a set condition for the permitted environmental impact under the 'user pays' principle.

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?

Officers of corporations, including directors, may be held liable for

environmental wrongdoings constituting administrative offences. In practice, corporations appoint a special officer to be in charge of environmental matters, who would be held administratively liable in the event of violations. If no such officer is designated by the corporation's internal documents, its CEO will be the responsible officer.

It is to be noted that fines for officers are considerably lower than for corporations. Consequently, the environmental authority would impose liability on officers rather than on corporations in the event of minor environmental wrongdoings. Even so, it has the power to hold both an officer and the corporation administratively liable for one and the same wrongdoing.

Such officer's employment contract might provide for various indemnity protections in the event of their administrative 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?

Sale of shares in a corporation with environmental liabilities (the Target) does not entail a change of the responsible person, i.e. the Target remains liable.

In the event of sale of assets, the new owner assumes environmental liabilities relating to use of the purchased assets from the time of purchase only. The new owner is not liable for the previous owner's wrongdoings.

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

The Russian legislation is based on the personal liability principle. The general rule is that lenders may not be held liable for the borrower's environmental wrongdoings. Even so, in practice, if a loan is granted for narrowly specified purposes and disbursement is conditional on the borrower's compliance with environmental requirements, lenders require that borrowers confirm such compliance and suspend lending in the event of violations.

5 Contaminated Land

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

For urban land, maximum allowable concentrations of soil contaminants are established. Owners of contaminated land plots must perform land remediation, irrespective of who caused the contamination. Owners are entitled to claim compensation for land remediation costs from the contaminant (if any).

For other land categories (e.g. farm, industrial, forest, etc.), liability is established only for actual instances of contamination (e.g. accidental oil spills, other contaminants released on the soil), in which case the contaminant must also carry out land remediation.

Liability for underground water contamination may be imposed on the party whose operations resulted in such contamination.

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

In this case, joint and several liability arises whereby the regulator is entitled to demand discharge of obligations from either all responsible persons jointly or any of them separately, either in full or in part. Jointly and severally responsible persons remain liable until the obligation is discharged in full.

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?

If specified land quality indicators are not achieved following completion of an environmental remediation programme, the environmental regulator may demand that the previously approved programme be changed and works continued in order to achieve the required quality indicators.

Third parties have no legal grounds for challenging an agreed environmental remediation programme. They may, however, examine the land remediation report, take remedied land quality samples and, if the specified quality indicators are not attained, demand additional works to be performed to attain them.

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?

If a private owner acquires a land plot from a previous private owner under a sale and purchase agreement (SPA), all issues and claims are resolved on execution of the SPA. The land purchaser has the right to inspect the land plot and obtain full and exhaustive information about its state, including chemical composition of the soil and levels of both chemical and surface contamination (physical littering).

The actual state of the land plot being sold is a matter of negotiation between the seller and the purchaser. Following negotiations, the parties might agree that the land plot is to be cleaned up before it passes to the new owner, or that the price of the contaminated land plot is to be reduced.

The law does not provide an independent private right of action to seek contribution from a previous owner. Any claims against the previous land plot owner may only be brought within the terms of the SPA. If the SPA contains no specific terms regarding contamination of the land plot, the law presumes that the purchaser agrees to take ownership of the land plot 'as is'. In this case, the purchaser takes on all consequences and potential risks related to contamination of the land plot.

If a publicly owned land plot is sold into private hands, its contamination does not even affect its price; the 'take or go' principle applies.

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

Russian legislation neither contains the concept of 'aesthetic harm' nor sets any rules for recovery of damages for aesthetic harms. Russia has no rules for assessing and determining the extent of aesthetic harm, so monetary damages arising from aesthetic harms cannot be determined.

Contamination of public assets, land, forests, rivers, etc. is an administrative offence punishable by fixed fines that take no account of aesthetic harm.

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.?

The government authorities for environmental protection have the power to conduct regular (scheduled) and unscheduled (triggered by stakeholder applications) inspections of the operations of enterprises affecting the environment. During such inspections, the environmental regulators request, obtain and analyse environmental protection documents, including industrial environmental control materials of the operator and measured values of pollutant concentrations in the atmospheric air and waste waters of its various units.

In addition, the environmental regulators may themselves, by engaging independent laboratories and in the presence of the operator's officers, take water, air and soil samples on the operator's territory and determine actual pollutant concentrations.

The environmental regulators may also interview employees of the operator to obtain the fullest possible information about the state of the environment on the operator's territory and the extent of any adverse impact caused by its operation.

Following a decision to conduct an inspection, the environmental regulator sends the operator a written confirmation of the decision (Scheduled/Unscheduled Inspection Order) indicating the time of the inspection and the names of the authorised inspectors and listing the issues to be checked and documents to be provided for inspection by the operator. Following the inspection, a report is drawn up recording all identified violations (if any). Later, this inspection report may be used as a basis for a government authority's decision to hold the offender liable.

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?

Any adverse environmental impact (pollutant emissions into the atmospheric air or discharges into water bodies, waste generation and disposal) constitutes grounds for regular quarterly reporting to an environmental regulator.

Each production site must be equipped with a storm drain preventing uncontrolled off-site migration of pollutants.

At the same time, if an accident and/or unforeseen act of nature triggers an adverse environmental impact that results or might result in fatalities or harm to human health, such an incident is classified as an emergency requiring prompt notification of not only the environmental regulator but also the government authorities for civil defence, emergencies and disaster relief, as well as municipalities, which, in turn, must take actions to promptly notify the population and arrange for evacuation, if necessary.

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

The Russian Federation has never imposed an obligation on individuals to investigate land for contamination.

The statutory provisions previously in effect obliged operators owning land plots to exercise industrial land control, including over the condition of land and its contamination level. In 2015, however, this obligation was cancelled.

Today, all forms of control over the condition of land are referred exclusively to the competence of government authorities and municipalities. Also, the law provides for the right, rather than an obligation, of citizens and NGOs to exercise public control over the condition of land in Russia.

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?

Environmental information must be disclosed to the extent set forth in merger and/or takeover transaction documents. The seller and the purchaser are entitled to decide for themselves to what extent environmental information is to be disclosed. There are no specific statutory obligations for parties to merger and/or takeover transactions in the law.

In common practice, the seller discloses all information about existing environmental permits as part of legal due diligence. Even so, it is advisable also to carry out technical environmental due diligence in respect of production facilities that have a substantial adverse impact on the environment.

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?

Environmental protection matters fall under public law. Russian environmental law is based on the 'user pays' and 'polluter pays' principles. The responsibility for compensating for the damage always lies with the operator whose acts (activities) result in an adverse impact on and/or damage to the environment.

The law requires that environmental damage be compensated for in full, so the amount of compensation payable to the state treasury may not be limited by any legal tools.

Any environmental indemnity terms of M&A or asset transactions will be disregarded in the relations between an operator and government authorities. Nor will payments to another person under an indemnity be offset against compulsory environmental impact fees (EIFs) payable to the treasury and/or accepted as compensation for environmental damage.

The statutory EIF payment procedure envisages advance payments calculated on the basis of actual impact data for the previous year. If, however, such advance payments turn out to be less than the actual impact charge for a given year, the operator will be required to pay the difference at the end of that year. So advance payments do not limit liability.

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

Environmental liabilities are registered on the government authorities' records independently from the balance sheet.

If a decision is made to dissolve a company, the law stipulates mandatory notification of all its creditors via the media. Any monetary claims within environmental liabilities are to be satisfied prior to winding up. If the company does not have sufficient funds on its accounts to satisfy such claims, including those brought by the state environmental authorities, it may be put into bankruptcy proceedings. In this case, monetary claims within environmental liabilities are payable in the same priority as tax liabilities, i.e., they have priority over other monetary claims by third parties in the normal course of business.

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 Russian legislation is based on the personal liability principle. Generally, company shareholders who are not its officers may not be held liable for breaches of environmental law committed by the company itself.

Even so, if the company's corporate documents authorise a shareholder to issue instructions binding on the CEO (general director) of the company and if it is proven that the breach of environmental law committed by the company resulted from the shareholder's express instructions, such a shareholder may be treated as a company officer and held liable for the breach.

If a foreign company operates in Russia though its branch or representative office, it might be sued in Russian courts over breaches of environmental law committed by its branch or representative office.

If a Russian company commits a breach of environmental law, it is this company that will be sued, independently of its (foreign or Russian) parent.

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

No, there is no such law. Even so, the right of citizens to a healthy environment is enshrined in the Constitution of the Russian Federation. The exercise of this right in Russia is facilitated by NGOs, which carry out public environmental control and inform the regulator of any environmental violations/matters they identify.

The law also sets the rules for public environmental control, whereby individuals desiring to assist the government supervisory authorities in their environmental protection efforts act voluntarily and free of charge as public inspectors for environmental protection and liaise with public councils of the government forestry and environmental supervision agencies.

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

Russian courts recognise group actions pursuing environmental claims. Russian environmental law requires operators causing damage to the environment to compensate for such damage in full. Even so, compensation for environmental damage does not imply any direct compensation payments to claimants. Monetary compensation for environmental damage must be directed to restore the disrupted environment. This is a function of the government environmental protection authorities.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

A party initiating an action for compensation for environmental damage pays symbolic court fees. Even so, such initiators (individuals or public interest groups) do not themselves receive the funds awarded in environmental damages, if any. Consequently, they have no personal financial interest in the outcome of the litigation and act in support of collective interests and the right to a healthy environment.

9 Emissions Trading and Climate Change

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

There is no emissions trading market in Russia. Each owner of air pollution sources must have its own emission permit and pay the environmental impact fee calculated with reference to the makeup of pollutants and quantity of emissions.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

Each owner of air pollutant emission sources must submit regular reports on the composition and quantity of emissions, including greenhouse gas emissions (if any), to the government authority. The government authorities rely on these reports and regular measurements of ambient air quality characteristics and greenhouse gas concentrations at the emission source in carrying out atmospheric air monitoring and calculating greenhouse gas emission quantities for the entire territory of the Russian Federation.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

Russia has ratified the Kyoto Protocol. The government policy is aimed at reducing greenhouse gas emissions. The Russian Government has approved the Concept for Greenhouse Gas Emissions Monitoring, Reporting and Verification.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

We are not aware of any asbestos litigation having been heard by Russian courts.

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

Asbestos dust, including chrysotile asbestos, is considered a carcinogenic and fibrogenic substance. Russia has established a maximum allowable concentration of asbestos dust; if it is exceeded, owners of premises and/or asbestos dust emission sources may be held liable.

For working zone air, the maximum one-time concentration of asbestos dust may not exceed 2 mg/m^3 (6 mg/m^3 for asbestos cement dust) and the shift-average concentration – 0.5 mg/m^3 (4 mg/m^3 for asbestos cement, asbestos bakelite and asbestos rubber dust).

For community air with up to 10% chrysotile asbestos content in the dust, the maximum daily average concentration of asbestos dust may not exceed 0.06 fibres/ml.

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 your jurisdiction?

Environmental law declares environmental insurance a means for protecting the property interests of individuals and corporations against environmental exposure and provides for potential introduction of compulsory state environmental insurance.

At this stage, however, there are no statutory requirements to insure against environmental risks. Voluntary environmental insurance is possible in theory but is not common in Russia because of the complicated premium calculations and high price of such insurance.

11.2 What is the environmental insurance claims experience in your jurisdiction?

We have not encountered any environmental insurance claims in our practice. Environmental insurance is not common in Russia because of the complicated premium calculations and high price of such insurance.

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 your jurisdiction.

From 2019, comprehensive environmental permits covering all types of adverse impact will be introduced for category I facilities – those with substantial adverse effects on the environment. They will also be required to install automated continuous emission monitoring systems (CEMS).

These new developments will provide for a continuous flow of more detailed information about environmental impact and for prompt response to 'burst releases' of air pollutants, thereby promoting a substantial improvement in the environmental situation in cities and villages where category I production sites are located.

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Vitaly was named 2017 Environmental Lawyer of the Year, 2016 Construction Lawyer of the Year and 2014–2015 Real Estate Lawyer of the Year, according to *Best Lawyers*. For many years running, *The Legal 500 EMEA*, *Chambers & Partners* and *Who's Who Legal* have listed Vitaly as a top-ranked real estate, construction and environmental law expert (Band 1). For more than 10 years, Vitaly has invariably been one of the top three advisors according to 'CRE 100 – 100 Market Makers' in the Legal Practice chapter (one of the best-known rankings held annually by *Commercial Real Estate Magazine*).

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The Russian practice of Bryan Cave Leighton Paisner (before the merger – Goltsblat BLP) was established in 2009 as a result of a merger between one of the biggest teams of Russian lawyers and the major UK law firm Berwin Leighton Paisner (BLP). The highly respected Moscow team of over 100 lawyers, qualified under Russian and English law, has over 20 years of experience in providing legal support for major Russian businesses, as well as multinationals implementing large-scale investment projects in Russia. Clients include over 1,700 companies, among them major multinational investors operating in Russia (including 130 *Forbes Global* clients), Russian and international banks and financial institutions, and Russian industry-leading companies.

Slovakia

Marián Bošanský

Ján Falath

URBAN FALATH GAŠPEREC BOŠANSKÝ

1 Environmental Policy and its Enforcement

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

The cornerstone of the Slovak environmental policy is the Constitution of the Slovak Republic (the "Constitution"), pursuant to which everyone shall be entitled to a favourable environment and is obliged to protect and enhance the environment. Slovakia has not adopted a uniform environmental code, but each specific area of the Slovak environmental policy is governed by special laws and regulations.

EU directives and regulations strongly shape our national environmental policy and are transposed into national legislation (e.g., the new Waste Act No. 79/2015 Coll., as amended, adopted in 2015, transposed ten (10) EU directives).

The Ministry of Environment of the Slovak Republic (the "Ministry") is the supreme body which administers our environmental policy and legislation. The Ministry has various administrative, regulatory and compliance competences at the national level. There are other state authorities which administer, execute and enforce the Slovak environmental policy and legislation; in particular, district offices (seventy-two (72) in total) and the Slovak Environmental Inspectorate (in Slovak: *Slovenská inšpekcia životného prostredia*). In case the environmental laws and regulations are violated, both the district offices and the Inspectorate may impose fines in order to protect the interests safeguarded by law.

The system of public authorities is effectively completed by municipalities and special agencies created in order to protect the individual environmental domains. For instance, the Fishing Guard was established under the Fishing Act No. 216/2018 Coll., as amended, to protect the performance of fishing rights in fishing grounds. Also, a special department for detection of dangerous materials and environmental crime was set up at the Criminal Police Office for the purpose of effective prevention and detection of environmental criminality.

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

Aiming to effectively protect the environment, compliance with legislation is enforced by means of administrative, civil and criminal laws.

In administrative proceedings, public authorities may take various measures such as giving warnings, imposing fines as well as ordering the shutdown of wrongful activities.

In criminal proceedings, the offender may be sentenced to imprisonment and/or a monetary fine. The most serious felonies against the environment are subject to imprisonment of up to twenty (20) years and the fines may be as high as EUR 1.6 million.

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

The Constitution provides that everyone shall be entitled to timely and complete information about the state of the environment and about the causes and consequences thereof. Despite the fact that these rights are fundamental, public authorities often act in direct conflict with them.

The general source of information about the environment is the Report on the State of the Environment, prepared by the Ministry in cooperation with other state administration authorities. The Report is published annually by the Ministry.

Apart from the Constitution, the obligation to provide the public with environment-related information derives from the Act on Collection, Storage and Broadening of Environmental Information No. 205/2004 Coll., as amended. The Act is based on EU legislation, in particular on the Regulation concerning the establishment of the European Pollutant Release and Transfer Register (the "E-PRTR Regulation").

The National Pollution Register, which was established by the above Act, is a database created on the basis of mandatory periodic reports containing data about the release of pollutants from operators whose activities are listed in Annex 1 to the E-PRTR Regulation.

In order to fully harmonise national legislation regarding environmental impact assessment with the EU legislation, Slovakia has adopted the Act on Environmental Impact Assessment No. 24/2006 Coll., as amended, which introduced a comprehensive information system for environmental and strategic impact assessment (the "EIA/SEA Information System").

The EIA/SEA Information System gathers data about all relevant procedures in assessing the impact of strategic documents and proposed activities on the environment, including their changes, and is accessible to the public and other participants in the environmental impact assessment process.

2 Environmental Permits

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

Pursuant to Slovak environmental laws and regulations, a broad range of activities require a specific environmental permit. The permit is always granted exclusively for the action regulated by a specific statute. For instance, various types of authorisation are granted under the Water Act No. 364/2004 Coll., as amended (e.g., a permit for special use of water; a permit to extract sand, gravel or mud; a permit to construct water buildings), the Waste Act, the Act on Environmental Impact Assessment, the Act on Air Protection, etc.

As a general rule, transferring the rights and obligations resulting from a granted permit is possible only if it is expressly allowed by the respective statute governing the issuance of such permit. For example, the Water Act allows the transfer of a permit for special use of water to third parties. Notwithstanding the aforementioned, the majority of authorisations are non-transferable.

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?

Pursuant to the Act on Administrative Procedure, as the general statute governing administrative proceedings in Slovakia, an applicant whose application was denied or not granted as requested, shall be entitled to file an administrative appeal (save for certain exceptions where two-instance administrative proceedings are excluded by law). In the event that the first-instance administrative decision is upheld by an appellate administrative body, the applicant shall be entitled to submit it for judicial review before the Slovak courts. A first-instance court decision may be reviewed by the Supreme Court of the Slovak Republic.

Slovak legislation, however, contains some exceptions from the above general rule (e.g., the Waste Act), when the administrative appeal is excluded and the applicant must directly file for judicial review. Moreover, certain specific laws (e.g., the Act on the Protection of Species of Wild Fauna and Wild Flora No. 15/2005 Coll., as amended) contain their own procedural rules applicable to proceedings under such laws, which take precedence over the general rules on administrative proceedings under the Act on Administrative Procedure.

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

Yes. Slovak legislation includes EU directives concerning environmental impact assessment ("EIA") and strategic environmental assessment ("SEA"). The Act on Environmental Impact Assessment governs the process of expert assessment of expected impacts of strategic documents such as zoning plans, as well as the assessment of impacts of buildings, projects and other activities on the environment prior to their approval or permission.

The EIA/SEA procedures are aimed at ensuring a high standard of environmental protection and integrating environmental aspects in preparing and approving strategic documents and contemplated activities or projects.

In addition, for example, the Act on Prevention of Major Industrial Accidents No. 128/2015 Coll., as amended, sets out rules for the prevention of serious industrial accidents on sites with the presence of dangerous substances and for limiting their consequences on human health, the environment and property. For this purpose, an undertaking which operates with dangerous substances must carry out a risk assessment and subsequently develop a prevention programme in order to control the hazards which can lead to major industrial accidents.

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

Compliance with environmental permits is safeguarded by means of both administrative and criminal law. The violation of permits can lead to the following punitive measures:

- Administrative – a monetary fine or other measures (e.g., restitution to the original state, order for temporary or permanent suspension of the activity that caused or may cause damage).
- Criminal – imprisonment of up to twenty (20) years and a monetary fine of up to EUR 1.6 million for serious felonies.

3 Waste

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

The definition of waste under the Waste Act is fully in line with the general definition of waste under the EU Waste Framework Directive No. 2008/98/EC.

Pursuant to the Waste Act, waste is a movable property or a substance that the holder discards, intends to discard or is required to discard under the Waste Act or under special laws and regulations.

However, the Waste Act does not apply to certain categories of waste such as waste from precious metals, radioactive waste, soil (*in situ*) including unexcavated contaminated soil, etc. The disposal of these kinds of waste, the specific control mechanisms and the duties relating thereto are set out in special laws and regulations.

Moreover, pursuant to the Waste Act, producers of packaging and non-packaging products, batteries and accumulators, electric devices, tyres and vehicles have a so-called extended producer responsibility ("EPR"), involving specific additional duties, e.g., to produce products in order to prevent waste or enhance the re-use, recycling or other recovery of waste.

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 Waste Act, waste storage is defined as the temporary storage of waste prior to any of the waste recovery or disposal operations at the site where the waste is to be recovered or disposed of.

Besides waste storage, the Waste Act also defines the gathering of waste, which is the preliminary storage of waste by a waste holder (waste producer) prior to further management thereof, as long as it is not waste storage.

Waste may be stored or gathered only by an authorised person. A waste holder can store or gather waste for a maximum of one (1)

year prior to its disposal or for a maximum of three (3) years prior to its recovery, unless a longer period is granted by a competent waste management authority.

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)?

No. Waste producers (waste holders) are not liable once the waste is transferred to another person, provided that this person becomes a waste holder. If the transfer of the waste does not meet the criteria under which the transferee becomes a waste holder, the transferor, as the original waste holder, remains liable for such waste. In a nutshell, the current waste holder is liable for the waste that is in his possession.

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

Waste producers, as long as they qualify as waste holders, are not required to take back the waste that they produce.

However, such waste producers (waste holders) must ensure that the waste treatment follows the waste management system hierarchy:

(i) preparing the waste for re-use within the scope of their activities and offering unused waste for preparation for re-use by a third party;

(ii) recycling the waste within the scope of their activities, if preparing it for re-use is impossible or improper, and offering unused waste for recycling by a third party;

(iii) recovering the waste within the scope of their activities, if recycling is impossible or improper, and offering unused waste for recovery by a third party; and

(iv) disposing of the waste, if recycling or recovering it is impossible or improper.

Waste producers (waste holders) are also required to hand over the waste only to a person authorised to carry out waste management.

Furthermore, with respect to certain products (e.g., electric and electronic equipment) to which the EPR applies, the respective producers are required to take back or recover the waste from their products.

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 three (3) types of liabilities that may arise due to violation of environmental laws, comprising civil, administrative, and criminal liability.

In case of civil liability, third parties who have suffered damage caused by a permit holder may claim damages under civil law. A perpetrator may challenge the alleged breach of law, the amount of damages, culpability (i.e., that the perpetrator was not even negligent), and the lack of causality between the alleged breach of law and damage suffered by third parties.

Administrative liability arises where (i) specific environmental laws and regulations, or (ii) terms and conditions of environmental permits are breached. A wrongdoer could base its defence on (i) proving that the environment was not degraded by its activity, or (ii) arguing similarly a civil defence.

Criminal liability is triggered in the event of a serious violation of environmental laws. The offender may be sentenced to imprisonment and/or a monetary fine. The most serious felonies against the environment are subject to imprisonment of up to twenty (20) years and the fines may be as high as EUR 1.6 million.

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

As a general rule, the compliance with the terms and conditions of an environmental permit should relieve the operator from liability for environmental damage, as long as the activity is within the permit limits. Nevertheless, the operator must also abide by the general prevention duty, requiring that everyone shall be obliged to act in such a manner that no damage to health, property, nature and the environment occurs. In the event that the general prevention duty is breached, the operator could be held liable, regardless of operating the polluting activity within the permit limits.

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?

Directors and officers may be held personally liable under civil or criminal law. In case of a criminal liability, an environmental offence is punishable by a monetary fine or even by imprisonment. In case of a civil liability, directors and officers are responsible for damage caused by the violation of their obligation to act with due and professional care.

There are several insurance companies which offer special insurance policies covering personal liability of directors and offices, but it is not a mass product yet.

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?

In a share sale, the buyer purchases shares or an ownership interest in a company, but not the asset itself. Therefore, the company retains its assets and liabilities. As a consequence, all liabilities, including the environmental ones, remain with the company in which the shares were purchased. On the other hand, in an asset purchase, the environmental liability remains with the seller and its shareholder.

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

According to Slovak legislation, in principle the lenders are not liable for environmental wrongdoing and/or remediation costs. The parent company may be held liable instead of its affiliate when it is proven that the mother company carries out a direct or commanding influence on the affiliate.

5 Contaminated Land

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

The Act on Environment No. 17/1992 Coll., as amended, addresses a general principle that a polluter who has caused environmental damage by harming the environment or by other unlawful behaviour shall be required to restore the natural functions of the disrupted ecosystem or its part. If it is impossible or ineffective, the polluter shall provide monetary compensation and/or another form of substitute performance, as ordered by a competent state authority.

Similarly, under the Water Act, anyone who causes damage to surface water or to groundwater or to the environment adjacent thereto shall be obliged to remedy such damage or to reimburse the costs incurred therewith. If a person responsible for causing damage is unknown or unable to remedy such damage, and if there is a risk of deterioration of the state of the water or of the environment, a competent state authority shall take appropriate measures at the expense of a person responsible for the damage, if possible.

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

The Act on Prevention and Recovery of Environmental Damage sets out that if the environmental damage has been caused by more than one (1) operator, each of them shall be liable for damage only to the extent of their involvement in causing the damage. In case of doubt about the extent of liability of each operator, a competent state authority shall decide which of them is responsible and to what extent. If the extent of liability of each operator cannot be determined clearly or without undue cost, the operators shall be liable jointly and severally.

The Act on Certain Measures Regarding Environmental Burdens No. 409/2011 Coll., as amended, applies to any person responsible for causing an environmental burden, not only to businesses. If there are more persons responsible for causing an environmental burden, each of them shall be liable to the extent that they have contributed to causing it. If it is impossible to determine their individual liability, all of them shall be liable jointly and severally.

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?

The Act on Prevention and Recovery of Environmental Damage lays down that the remediation plan may be carried out in three (3) different ways, i.e., by primary remedies, by additional remedies, and by compensatory remedies.

Primary remedies are remedial measures to restore the damaged natural resources or their functions to the original state.

Additional remedies are remedial actions to be taken if the recovery of the damaged natural resources or their functions has not been achieved by the primary remedial measures.

Compensatory remedies are remedial actions to compensate temporary losses of natural resources or their functions. Indeed, a state authority may require additional works.

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?

The responsibility for environmental damage is based on the "polluter pays" principle. Under the Act on Prevention and Recovery of Environmental Damage, the liability for environmental damage is always linked to a specific business activity or to the owner of the contaminated land. Moreover, the operator's liability for environmental damage shall be transferred to its legal successor.

As a general rule, any subsequent acquirer of land shall be entitled to compensation from a previous owner or an occupier of land who caused the contamination, in accordance with the general provisions on damages under the Civil Code. The claim can also be based on a contractual basis by specifying the indemnity terms and conditions belonging to the acquirer (against the previous owner).

Furthermore, under the Act on Certain Measures Regarding Environmental Burdens, if a person responsible for environmental damage or its legal successor is the owner of the burdened land, such person may transfer the land to another person only after an affirmative geological survey related to this land is presented. Any such transfer must be notified in writing to a competent state authority and the contracting parties must submit a sale contract concerning the transfer of the land.

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

In the event of environmental damage or an imminent threat of environmental damage, the competent state authorities may seek the recovery of costs incurred in relation to the prevention or remedy of environmental damage caused by a polluter.

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.?

The Environmental Inspectorate (in Slovak: *Slovenská inšpekcia životného prostredia*) and other competent state authorities have a wide range of powers to safeguard compliance with environmental laws. They are, in particular, entitled to enter premises and to conduct site inspections, to examine records and other documents, to carry out necessary investigations, including the collection of samples, to take photos and to make videos, and to request the submission of necessary data and explanations.

In addition, a special department for the detection of dangerous materials and environmental crime has been established at the Criminal Police Office.

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 majority of the Slovak environmental laws and regulations require that the occurrence of environmental damage or an imminent threat of such damage is reported to competent state authorities. At the same time, necessary measures to avert the damage or to mitigate the consequences thereof must be taken, unless such intervention would endanger human life or health.

Moreover, anyone who caused a serious threat or damage to the environment (e.g., as a result of an accident, fire, etc.) must inform the public without undue delay.

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

There is no such affirmative obligation in the Slovak legislation.

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?

There is no statutory requirement to disclose environmental problems by a seller to a prospective purchaser in a merger or a takeover transaction. The information must be disclosed only if agreed by the contracting parties and to the extent stipulated in the transaction documentation.

However, if a seller is aware of environmental issues which can significantly impact the functioning of a target company and fails to disclose them, a purchaser may bring claims against the seller.

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?

Parties to a contract may agree to indemnify one another in the event that one of them suffers damage as a result of a third-party environmental claim or is handed a monetary fine for breaching environmental laws and regulations. Such agreement, however, shall be binding upon the contractual parties only and the wrongdoing party cannot be relieved from its administrative or criminal liability.

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

As long as the accounts are kept in line with applicable laws and regulations, sheltering environmental liabilities off balance sheet should not be feasible. From our experience, however, environmental liabilities are sometimes withheld from the balance sheet, causing distortions in the accounts.

Dissolving a company by liquidation in order to escape environmental liabilities would be unlawful. However, it can be very difficult to prove that the liquidation was aimed at escaping environmental liabilities. Therefore, dissolution has certainly been used on several occasions to escape environmental liabilities in the past.

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?

Unless a shareholder manages or *de facto* runs a company, such shareholder cannot be held liable for breaches of environmental law caused by the company. The same principle applies to a parent company, which cannot be held liable instead of its subsidiaries or affiliates.

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

Although there are no special laws regarding whistle-blowing in environmental matters, whistle-blowers are protected under general whistle-blowing legislation against their employers for filing a complaint, a lawsuit, a motion to initiate criminal prosecution or other notification of anti-social activity.

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

Yes. A public "class" action concerning environmental issues is available through non-profit organisations or civic associations set up for the purpose of environmental protection. Penal or exemplary damages are not available.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

Individuals do not enjoy any benefits when involved in environmental litigation, whereas ecological organisations acting to protect public interest are exempted from paying a court fee to initiate such lawsuits.

9 Emissions Trading and Climate Change

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

The EU Emission Trading Scheme (the "EU ETS") has been transposed into Slovakia's legislation through the Emissions Trading Act No. 414/2012 Coll., as amended. The national emission trading scheme applies to energy-demanding heavy industries with certain limitations in the aviation industry. Based on current estimates of greenhouse gas emissions from sectors outside the emission allowance trading scheme, the Slovak Republic predicts a surplus of air emissions account ("AEA") allowances by 2020.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

In some industries, any operator that intends to emit greenhouse gases from its facility must hold a valid permit, which may be granted only if the applicant complies with the requirements for monitoring greenhouse gas emissions as well as with reporting standards in accordance with Commission Regulation (EU) No. 601/2012 on the monitoring and reporting of greenhouse gas emissions. In addition, Slovakia is bound to annually report the amount of produced greenhouse gas emissions, pursuant to the United Nations Framework Convention on Climate Change (the "UNFCCC") and the Kyoto Protocol.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

A solution that would ultimately prevent or at least minimise the risks and negative impacts of climate change is a combination of: direct measures aimed at reducing greenhouse gas emissions; and indirect measures by reducing the negative impacts of energy, agriculture and other economic activities.

In order to protect the environment, the Air Act No. 137/2010 Coll., as amended, establishes national emission reduction commitments valid for 2020 and subsequent years. Emissions from selected pollutants are expected to decrease by up to 57% from 2020 to 2029. The Air Act has also established a national programme to control air pollution with the aim of limiting the anthropogenic emissions of greenhouse gases. The Ministry shall submit the national programme to the EU Commission by 1 April 2019, following its approval by the Government of the Slovak Republic.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

Case law related to asbestos is not common in Slovakia and there are only a few minor cases, which are not of national relevance.

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

Although the production of asbestos has already been cancelled, public health is still endangered due to its widespread use. Pursuant to Annex 1 to the Ordinance of the Ministry of Environment establishing the Waste Catalog, all construction materials containing asbestos are classified as hazardous waste. In the case that asbestos is found on-site, its removal is not mandatory, but if the owner decides to do so, it must be removed by an authorised person.

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 your jurisdiction?

Certain operators (enterprises of B category pursuant to the Act on Prevention and Recovery of Environmental Damage) are required to hold a mandatory insurance policy to cover their liability for environmental damage.

Besides that, it is common for enterprises which operate their business in sectors where environmental damage is likely to occur, to take out commercial insurance policies to cover their liability for such damage.

11.2 What is the environmental insurance claims experience in your jurisdiction?

There is no particular experience concerning environmental insurance claims in the Slovak jurisdiction.

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 your jurisdiction.

Recently, various activities of non-governmental organisations seem to be an essential element in the Slovak environmental field. Last year, several non-governmental organisations such as the Centre for Sustainable Alternatives (the "CEPTA"), ClientEarth, the Cycling Coalition, and other involved citizens sued the local state authority for insufficient air protection in Bratislava. The plaintiffs argued that the programme for air quality improvement, created by the defendant, was too vague and contained no specific goals despite the national and EU legislative requirements. The suit resulted in the defendant losing the case and the state authority is now obliged to fundamentally rework the programme and, in particular, to adopt effective measures in order to contribute to the improvement of air quality in Bratislava. The court ruling should significantly affect the creation of similar air quality programmes in the future.

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URBAN FALATH GAŠPEREC BOŠANSKÝ

URBAN FALATH GAŠPEREC BOŠANSKÝ (UFGB) is a full-service law firm with solid values and a stable position in a strong competitive environment. We have a clear goal of providing our clients with not only standard legal advice but also exceptional service.

Our clients in particular appreciate that at a single point they can get highly qualified and professional advice in all areas of both their work and private life. We combine a wide range of practice areas with precision, persistence and commitment to do the job properly.

Environmental law along with waste management are key practice areas of UFGB. Our lawyers have gained substantial knowledge and experience throughout many years of practising law.

Spain

Del Pozo & De la Cuadra

Covadonga del Pozo

1 Environmental Policy and its Enforcement

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

Spanish environmental policy has its basis in article 45 of the Spanish Constitution, which sets out the right to enjoy an environment that is adequate for the development of people and the obligation to protect it. Following this constitutional dictate and the framework developed by the EU Directives, Spanish Law 26/2007 on Environmental Liability sets prevention and "polluter pays" principles as the guidelines of environmental law in Spain.

The Spanish system foresees three levels of competences for bodies in charge of the enforcement of environmental law: national; regional; and local.

The National Administration (specifically, the Ministry for Ecological Transition – of Energy and Environment) is entitled to enact basic legislation (developing laws approved at the Parliament) and to set the main coordination and supervision mechanisms. The Autonomous Regions develop basic legislation in their territorial scope and approve environmental plans; they are usually the authorities who grant environmental permits and carry out most environmental procedures. Finally, municipalities have competence in certain sectors which are of particular incidence at a local level (e.g. noise or urban waste collection).

Besides this three-level outline, there are other national and regional bodies and agencies which take part in the enforcement of environmental law within specific sectors, such as hydrographic confederations, the OECC (the Spanish Climate Change Office), SEPRONA (the Police in charge of the protection of the environment), etc.

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

Spanish authorities are strict in their role of supervision of compliance with environmental obligations. Permits usually contain technical conditions that have to be met by the operators; inspections are carried out periodically and disciplinary proceedings are quite frequent. Serious infringements may even be communicated to the Public Prosecutor for the initiation of criminal proceedings.

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

The right of access to environment-related information has been deeply developed in the Spanish jurisdiction by Law 27/2006, which transposes EU Directives 2003/4/CE and 2003/35/CE and establishes that the general public is entitled to access environmental information held by public authorities with no need to demonstrate any specific interest, as well as to be informed about their rights, to be helped during their search for information, to receive the required information within certain terms and formats (or to be informed of the reasons it is denied), and to know the list of applicable fees and prices.

2 Environmental Permits

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

The Spanish system of environmental permits is quite complex. Usually, activities that have an environmental impact will need a permit for each element of the environment that may be affected (waste, water supply, wastewater discharge, air pollution, etc.). However, since the enactment of Law 16/2002 on Integrated Pollution Prevention and Control (IPPC), which has been subsequently substituted by the consolidated text approved by Royal Legislative Decree 1/2016 of December 16th, most of these individual authorisations have been unified into a single permit for certain activities: the integrated environmental authorisation ("*autorización ambiental integrada*").

Depending on their object, environmental permits are granted to facilities and/or to the titleholder of the activity. Most of the permits can be transferred, generally requiring notification to the competent authority. In some exceptional cases, the transfer of permits requires prior administrative authorisation.

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?

Permit applicants can challenge both the decision denying them and the inclusion of detrimental conditions of mandatory observance.

The aforementioned decisions may be challenged through an administrative appeal (which will be mandatory or voluntary depending on the authority who issued the challenged resolution), and/or through a contentious-administrative appeal before the courts.

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

Particularly polluting activities will require a prior assessment of environmental impact. Specifically, Law 21/2013 on Environmental Assessment and its subsequent developing regional regulations set a list of activities and conditions under which (i) plans and programmes are subject to a strategic environmental evaluation ("*evaluación ambiental estratégica*"), and (ii) projects are subject to an environmental impact assessment ("*evaluación de impacto ambiental*").

Environmental audits are generally voluntary (except in some regions). They are usually conducted through the EU Eco-Management and Audit Scheme (EMAS) or the UNE-EN ISO (14001:2015) system.

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

Environmental regulators are public authorities entitled to carry out inspections, require information and documentation, take samples, etc. If they detect infringements of environmental regulations, they may initiate disciplinary proceedings. Penalties may include significant fines (of up to several million euros, depending on the infringement and the damage caused), temporary or permanent closure of the facility with suspension or reversal of the permit, or even disqualification of its holder from continuing to carry out the activity. The operator will also have to repair the damage caused and serious infringements may even lead to criminal proceedings.

3 Waste

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

The definition of waste within the Spanish jurisdiction is stated by Law 22/2011, of July 28th, on Waste and Contaminated Soils. The aforementioned law defines waste as "*any substance or object which the holder discards or intends to or is required to discard*", in accordance with Directive 2008/98/EC.

Duties of producers and managers of waste depend on the type of waste produced and/or managed (domestic, commercial and industrial), and especially on their hazardous or non-hazardous nature.

Obligations set by Law 22/2011 regarding hazardous waste are much stricter than those established for non-hazardous waste. Regional and local regulations must also be checked, since regions and municipalities are entitled to develop and reinforce the duties on certain aspects of the legal regime for waste, provided that their regulations do not infringe Law 22/2011.

In addition, there are specific types of waste whose production or management often have their own regulations setting particular obligations, usually denominated "special waste". Among these, we can find used industrial oils, waste electrical and electronic equipment (WEEE), batteries and accumulators, construction and demolition waste, packaging waste, sanitary waste, etc. The extended responsibility of the producer is generally applicable to devices which generate these types of waste.

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?

According to Law 22/2011, producers of waste have to keep the waste generated in their facilities stored in the right health and safety conditions.

Non-hazardous waste can be stored for up to two years in its production site if it is going to be recovered and up to one year if it is due to be disposed of, while the maximum storage term for hazardous waste is always six months. These terms might be exceptionally modified by the competent regional body for justified reasons.

Generally, producers cannot dispose of their waste themselves unless they are duly authorised to carry out this type of management activity. They have to deliver their waste to authorised managers, who will be responsible for carrying out the corresponding disposal operations. However, Law 22/2011 sets an exemption of this management authorisation for producers of non-hazardous waste who recover or dispose of it on-site.

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)?

The responsibility of waste producers ends once they transfer their waste to an authorised manager for its disposal or treatment off-site, provided that the delivery is properly documented.

However, if producers infringe their legal obligations concerning production and storage of waste prior to their transfer to an authorised manager (for example, in case a producer delivers non-hazardous waste mixed with hazardous substances), they will still be liable for those infringements. In fact, managers can reject those batches of waste which do not meet legal specifications and return them to the producers.

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

Obligations to take back and recover waste are not linked to producers of *waste*, but to the extended responsibility of producers of *products* with regard to the waste generated by their articles sold in the market. Producers of waste are only forced to accept their waste back and ensure its correct recovery or disposal when an authorised manager rejects their waste due to infringement of legal or agreed specifications of delivery.

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?

Traditionally, there have been three types of legal liabilities: civil; criminal; and administrative. Nevertheless, since the enactment of

Law 26/2007 on Environmental Liability, "administrative" liability has unfolded, resulting in a fourth category: environmental liability, whose purpose is to cover those areas of the environment that were not well covered by the regulations previously in force.

(i) *Civil liability* derives from infringements which cause damage to third parties, who will be entitled to obtain the corresponding compensation provided that there has been a damaging action or omission with harmful results for the environment and there is a causality link between these two elements. The main defences available would imply proving the lack of a cause-effect relation between conduct and damage, or that the damage has been produced by the injured party due to its own recklessness or fault.

(ii) *Criminal liability* is a consequence of the commission of environmental crimes established in the Spanish Criminal Code. It may entail high pecuniary sanctions, closure of facilities and activities, disqualification, imprisonment, etc., as well as the obligation to repair the damage caused.

Lack of participation or intentionality are two of the main allegeable defences, as well as to carry out as many measures as possible to repair the damage caused.

The last reforms of the Spanish Criminal Code also envisage the possibility of criminal liability of legal entities due to crimes committed by their legal representatives and employees on behalf of the company. In these cases, the company may be exempt from criminal liability if an adequate system to supervise corporate compliance is set and executed to prevent the crime.

(iii) *Administrative liability* derives from the commission of administrative infringements envisaged by regulations. Penalties to be imposed after the perceptive proceedings may also imply fines or restrictions on the activity.

Defence in administrative disciplinary proceedings usually involve formal grounds, irregularities during the proceedings, term expiration, or evidencing technical inaccuracies (lack of correspondence between the conduct and the legal infringement).

(iv) *Environmental liability* comprises the operators' duties to prevent, avoid and repair environmental damage (damage to habitats and wild species, water, seashores and banks of estuaries, and land). With regard to damage caused by certain categories of activities, environmental liability is strict, so it does not depend on the existence of fault or negligence of the operator.

Nevertheless, the operators will avoid assuming the costs of the prevention, avoidance and reparation measures if they evidence that the damage was caused by the conduct of a third party or by a mandatory order or instruction issued by a competent public authority. Operators will not have to bear reparation costs either if there has been no fault or negligence and damage derived from the realisation of the specific object of an administrative authorisation, or if the existing state of science did not enable foresight of the damage that would be caused. In all these cases, operators are still obliged to carry out the corresponding prevention and reparation measures.

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

Environmental liability for activities listed in Annex III of Law 26/2007 is strict: there is no exoneration of liability even when the operator has not committed fault or negligence. Fulfilment of requirements, precautions and other conditions set by the regulations or established in the corresponding permits is not an exoneration cause either, the operator being obliged to bear the reparation and prevention of environmental costs.

However, as stated in question 4.1 above, the operator will be able to recover the reparation costs when there is no fault or negligence in his behaviour and the damage derives directly from the performance of the specific object of an administrative authorisation, provided that the operator has not infringed any of the conditions of the permit or applicable regulations at the moment of generation of damage.

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?

The Spanish Criminal Code envisages that directors and officers of legal entities will attract personal criminal liability in case a criminal offence is committed by the actions of a company represented by such person.

In addition, Law 26/2007 on Environmental Liability provides that those managers of legal entities whose conduct has been decisive for the causation of environmental damage will have subsidiary liability regarding the prevention, avoidance and reparation obligations imposed on the company. The company or its shareholders may also make a claim against its directors or officers regarding civil liability due to their illegal or reckless behaviour.

Directors and officers of companies could get insurance for administrative and civil liability, but it must be noted that insurance does not usually cover damages caused intentionally.

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?

If shares of an operator are sold, such operator will keep the environmental liability derived from the damage caused by its activity before and after the transaction.

When the object of the sale is an asset, the buyer does not generally keep any liability for the previous activity (except in cases of continued infringements), and would only be liable for damages caused after the purchase (except for some special cases such as historical land contamination or hidden defects in the purchase). However, since the enactment of Law 26/2007 on Environmental Liability, those who substitute the person who caused the environmental damage in its ownership or in the exercise of its activity, have subsidiary liability. Subsidiary liability can be avoided by obtaining a certificate from the competent authority stating that the seller had no pending environmental liabilities, although this certificate is not common practice yet and may be difficult to get.

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

According to Law 26/2007, the person who *causes* environmental damage is liable and shall assume the costs of avoidance of more damages and reparation. Therefore, if the borrower of a facility causes environmental damage, in general terms there is no action that can be brought against the lender unless the latter had control or power over the activity carried out by the former.

This general rule has an exception in the case of soil contamination, where the lender (owner) has subsidiary liability in case the borrower who caused contamination cannot be identified or cannot face the decontamination costs.

5 Contaminated Land

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

The person or entity which contaminates soil is liable for such pollution and will assume the decontamination costs. Notwithstanding the foregoing, the Law on Waste and Contaminated Land envisages that the owner of the land affected or its current holder, in this order, will have subsidiary liability (except in case of public domain under concession, where the concessionaire will be liable in the second place and the owner would be liable thirdly).

With regard to groundwater contamination, Royal Decree 849/1986 also sets out that the damage has to be repaired by the polluter, but without foreseeing any "cascade system" of subsidiary liability. In opposition to soil contamination, Spain has not yet approved the parameters to legally consider groundwater decontaminated. In practice, technical experts on groundwater remediation apply other EU states' parameters (e.g. Dutch).

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

The general rule set by Law 26/2007 for environmental damage is common liability shared in proportion to their participation. However, some exceptions apply. In particular, when *soil* contamination has been caused by two or more people, they will be jointly and severally responsible in regard to the decontamination and recuperation obligations.

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?

Royal Decree 9/2005, which establishes the list of activities potentially contaminating soil and the criteria to declare land as contaminated, states that contaminated land will not be deemed decontaminated until the competent regional authority declares it so after checking the result of the recuperation activities. Thus, if any defects are found after the decontaminating activities carried out under a cooperation agreement subscribed with the authorities, additional measures could also be required until land is fully repaired.

Third parties will be entitled to challenge collaboration agreements between polluters and public authorities, provided that they justify a legitimate interest.

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?

The subject who has to assume decontamination costs of polluted land is the person who caused the contamination. Only when the polluter cannot be identified or does not have enough resources will such obligations fall on the owner of the land or on its current holder. Therefore, if a previous owner of the land caused its contamination, its current owner will be entitled to claim its costs against the former.

In this regard, a private agreement between the seller of a piece of land and its buyer exonerating the seller from any responsibility arising from a previous contamination will only be enforceable between the parties but not before the authorities, who will require the real polluter to carry out the decontamination of land unless a voluntary remediation plan is proposed directly by the owner of the land.

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

Yes. Law 42/2007 on Natural Heritage and Biodiversity considers "*the installation of publicity or the production of sensitive landscape impacts in protected natural zones*", a severe administrative infringement which can be punished with monetary fines.

Additionally, the main purpose of the reparation measures set by Law 26/2007 is the restoration of natural resources to their primary situation, which shall include its aesthetic elements.

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.?

Almost every environmental regulation in Spain provides public authorities with important powers of supervision and control over activities with environmental impact. They are able to carry out inspections of facilities, take samples, ask for information and documentation, etc. Obstruction of inspections is generally considered an administrative infringement and it must be noted that in case the authorities initiate a disciplinary proceeding, their testimonies are presumed to be true (without detriment to the possibility to prove the opposite).

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?

Most environmental regulations in Spain set the obligation to inform the competent authorities immediately in case of a pollution leak or environmental accident. The Law on Environmental Liability specifies that operators have to immediately communicate the existence of environmental damage or imminent threat that has already been caused by them or that could eventually be caused.

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

Those who carry out an activity deemed as potentially soil-polluting have the obligation to submit a preliminary report about the situation of the land where the activity is located within a maximum term of two years. This is a non-intrusive report which does not require land investigation, like the reports that also have to be submitted with the periodicity set by the competent authority and in case of extension or closure of the activity. Owners of land where a potentially contaminating activity was carried out in the past are

also obliged to submit a non-intrusive report about the situation of the land in case they apply for a permit or authorisation to develop a non-contaminating activity or to change the use of the land.

On the other hand, land investigation reports have to be filed in the following cases: i) if the competent authority requires so after the examination of the preliminary report; ii) if the holder of the activity is aware of the existence of polluting parameters above the thresholds set by Royal Decree 9/2005; and iii) in some regions, in case of closure of the activity.

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?

Good faith has to be respected in every transaction in Spain. Moreover, the seller should inform the prospective purchaser of any environmental problems that he is aware of in order to avoid subsequent claims for compensation due to hidden defects or even the nullity of the purchase due to vitiated consent of the buyer. Additionally, owners of land where a potentially contaminating activity has been carried out have to declare such circumstance in the corresponding public deed for the transfer of the land (this declaration will be registered in the Property Registry).

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?

Indemnities can be used between private parties (for example, in a purchase where the buyer accepts an indemnity introduced by the seller in exchange for a price reduction). However, such indemnities will only be enforceable between them, but environmental liability will always fall on the polluter according to Law 26/2007.

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

According to Spanish law, it is necessary for the balance sheet to contain a specific item for environmental contingencies, which has to be included in the report that is submitted jointly with the annual accounts.

Environmental liabilities of the company will be liquidated with its own resources during the dissolution process, and in case there is evidence of fraud by their managers, the "lifting of the veil" doctrine enables the corresponding administrative and criminal responsibility to be attributed to them.

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?

Unless a shareholder has directly participated in the behaviour of the company that caused the environmental damage, his responsibility only equals the value of his shares.

However, in the case that the company belongs to a group of companies, Law 26/2007 establishes that environmental liabilities could be extended to the parent company if there has been an abusive use of the affiliate or legal fraud.

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

Article 62.4 of Law 39/2015, which regulates the Ordinary Administrative Proceeding of Public Administrations and whose entry into force took place on October 2nd 2016, envisages an exemption (or proportional reduction) of fines and other non-monetary sanctions for those complainants who have taken part in an infringement along with other people but are the first to provide the public authorities with evidence that enables the initiation of a disciplinary proceeding, provided that some other requirements are met as well.

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

Law 27/2006 establishes a public action that can be exercised by non-profit organisations dedicated to the protection of the environment which meet certain requirements. Moreover, consumer associations can also defend collective interests.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

Law 1/1996, on Free Legal Aid, establishes that litigation will have no cost for those who lack resources to finance it and sets the requirements and conditions to exercise the aforementioned right. Law 27/2006 specifically states that non-profit entities which are legitimated to exercise the public action for environmental matters are entitled to obtain free public aid (given its grounds, this right has to be understood as limited to environmental litigation, excluding criminal and civil jurisdictions).

9 Emissions Trading and Climate Change

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

Through Law 1/2005, Spain has implemented the EU Emissions Trading System (ETS), the most important European measure pursuing the reduction of greenhouse gas. We are currently in the third phase (2013–2020), which is consistent with the second commitment period of the Kyoto Protocol.

As is occurring in other EU Member States, ETS is getting stricter on each new phase, with less free allowances allocated to industrial activities in order to push them to further reductions in their emissions.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

According to Law 1/2005, which also incorporates the provisions set by the Commission Regulation 601/2012 on Monitoring and

Reporting, owners of facilities have to implement and maintain a monitoring system of greenhouse gas in compliance with the conditions of their emissions authorisation, and must submit an annual report to the competent authorities before February 28th each year.

Additionally, there are different regulations in Spain which set specific requirements for greenhouse gases other than those included under the scope of Law 1/2005, and integrated environmental authorisations may also impose additional conditions in exceptional cases.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

Spain's current policy regarding climate change is to follow the path set by the EU, whose current approach entails, in addition to a prevention perspective, the adoption of a focus on the adaptation of future projects and activities to the near-future climate change impacts. The Paris Agreement may have a significant influence in this regard.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

Asbestos claims are still quite frequent within the Spanish jurisdiction, which already has quite a large body of case law on this matter. Even when compensations awarded to workers affected by asbestos are not as high as they are in other jurisdictions (the clearest example is the US), there are recent Spanish rulings which grant relevant indemnifications, such as the one issued by the Supreme Court on March 2nd 2016 granting compensation of close to half a million euros to the heirs of a shipyard worker who eventually died due to his professional exposure to asbestos. The existing case law also includes several rulings obliging different Public Administrations to compensate their affected workers.

On the other hand, the liability of producers of articles containing asbestos before their final users has barely been explored in Spain.

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

Commercialisation of asbestos and products containing asbestos is forbidden in Spain, but the use of products created before June 14th 2002 is allowed until the end of their useful life. Without detriment to the need to comply with applicable obligations with regard to prevention of labour risks, holders of activities will have to ensure that the asbestos is removed in compliance with waste provisions (specifically, collecting and transporting asbestos out of the workplace as soon as possible, duly packed and labelled, before disposing of it following the requirements set for hazardous waste).

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 your jurisdiction?

According to Law 26/2007 on Environmental Liability, operators who carry out the most potentially polluting activities need to carry out a risk analysis and constitute a financial guarantee to face the eventual environmental liability linked to their activity. There are three categories of financial guarantees available for operators: the subscription of an insurance policy; obtaining an endorsement by a financial entity; or the constitution of a technical reserve through a fund created to cover the eventual environmental damage of the activity with materialisation on financial investments backed by the public sector. Pursuant to Ministerial Order APM/1040/2017, of October 23rd, these guarantees shall be mandatory for priority level 1 & 2 activities (most pollutant activities) since October 2018 and October 2019 respectively.

Environmental insurance is already relevant in Spain and many entities have already benefited from it; nowadays it is becoming crucial, as the obligation set by Law 26/2007 is becoming gradually enforceable.

11.2 What is the environmental insurance claims experience in your jurisdiction?

Environmental insurance has usually been materialised within the general terms of civil liability insurance, where it has functioned normally. Environmental insurance litigation initiated by the policyholder or the insured party due to conflicts with the insurance company is limited in Spain.

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 your jurisdiction.

A number of new environmental regulations have been enacted during 2018 in Spain, of which we would highlight the following:

- Industrial emissions: Royal Decree 818/2018, of July 6th, on measures to reduce national emissions for certain air-polluting substances; and Order TEC/1171/2018, of October 29th, on the information, control, follow-up and assessment of large combustion facilities.
- Marine waters: Royal Decree 1365/2018, of November 2nd, approving the maritime strategies for Spain.
- Water: Royal Decree 902/2018, of July 20th, amending RD 140/2003 on health criteria for drinking water and analysis method specifications.
- Waste: Royal Decree 293/2018, of May 18th, on the reduction of plastic bag use and creation of the Producers Registry.
- Nuclear energy: Royal Decree 1400/2018, of November 23rd, regulating nuclear safety on nuclear facilities.

In addition to the new dispositions approved during 2018, a number of important developments are currently ongoing that are projected for 2019. Among others, the Government has released a first draft of its law on energy and climate change that will completely change our environmental and energy sources landscape in the medium term. Also, several amendments on the current waste legislation are under development, as a consequence of the legislative work and according to the Circular Economy package approved at EU level during 2018.

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Before becoming the founding partner of Del Pozo & De la Cuadra, Covadonga del Pozo was a partner at Cuatrecasas, with responsibility for the practices of environmental and energy law at the Madrid office, where she worked for almost 15 years. Covadonga advises on all environmental and energy law issues. She has wide experience in all the legal areas of the environment and natural resources, as well as in the regulated energy sectors: electricity (conventional and renewable); and oil & gas (as well as mining). She provides legal advice to clients in different matters, including the development and implementation of big industrial activities, M&A operations, litigation processes and in general, advising clients on regulatory compliance from a very proactive perspective (including environmental corporate compliance processes). During over two decades of professional experience, she has advised national and international corporate groups, Ibex businesses, publicly owned companies, and the major financial entities in Spain, among others.

DEL POZO & DE LA CUADRA
ABOGADOS | MEDIO AMBIENTE Y ENERGÍA

Del Pozo & De la Cuadra is an environmental, natural resources and energy law boutique that initiated its professional activities in Spain in September 2012. Behind the project of creating a highly specialised law firm to give full coverage on these interrelated legal practices to national and international clients stands its founder and legal expert, Mrs. Covadonga del Pozo, with over 20 years of experience, a former partner and head of the environmental and energy practices in the Madrid office of Cuatrecasas (the second-largest law firm in Spain).

The firm is probably unique in its class in Spain, perfectly combining the top-qualified and highly specialised advice of a very large law firm with the closeness, quick response, cost-efficiency and business understanding of a smaller structure. Del Pozo & De la Cuadra is formed of a team of very motivated and enthusiastic lawyers fully dedicated to their clients in a very proactive manner.

Chapter 26

Sweden

Wistrand Law Firm

Rudolf Laurin

1 Environmental Policy and its Enforcement

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

The main Swedish environmental legislation consists of the Swedish Environmental Code (SFS 1998:808), which entered into force on 1 January 1999. The Environmental Code brought together 15 existing central environmental laws. The aim of the Environmental Code is to promote sustainable development. The Environmental Code is further elaborated and specified in the form of ordinances, regulations issued by public authorities and decisions taken in individual cases. As far as environmental policies are concerned, the Swedish Parliament has adopted national environmental quality goals. Being a member of the European Union (EU), the EU environmental policy is in many aspects part of Swedish environmental law.

The agencies/bodies enforcing environmental law consist of the national environmental agencies, such as the Swedish Environmental Protection Agency and the Swedish Agency for Marine and Water Management as well as regional authorities, such as the Country Administrative Boards and local municipal authorities.

In Sweden, the courts handling environmental law matters consist of five Land and Environmental Courts, the Superior Land and Environmental Court and the Supreme Court. As far as permitting procedure is concerned, most permits are, depending on what kind of operation the permit concerns, issued either by the County Administrative Boards or the Land and Environmental Courts. When it comes to supervision, the County Administrative Boards and the municipal authorities are the main authorities. As far as criminal law is concerned, the district courts, the Courts of Appeal and the Supreme Court handle those issues.

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

The supervisory authorities have a central role in ensuring that environmental permits, decisions and environmental laws are met. They have the mandate to issue orders, prohibitions and, to some extent, penalties or a fine. The supervisory authorities are obliged to report infringements of the provisions of the Environmental Code or rules issued in pursuance thereof to the police or public prosecution authorities where there are grounds for suspicion that an offence has been committed. It can further be noted that all activities having an impact on the environment are not licensable but can nevertheless be supervised.

In environmental permit proceedings, various authorities act as counterparties to the applicant upholding public interests.

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

The main rule is that the public has access to official documents submitted to or drawn up by the authorities. In case of environment-related information, some parts can be subject to confidentiality; for instance, information regarding the location of sensitive species.

2 Environmental Permits

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

Environmentally hazardous activities and water operations are examples of activities that require an environmental permit. Even if an activity does not require a permit, the supervisory authority may order an operator to apply for a permit where the activity involves the risk of significant pollution or other significant detriment to human health or the environment. There is also the option for the operator of a non-licensable environmentally hazardous activity to apply for a voluntary permit.

An environmental permit is decided for an operation at a certain location and may be transferred to a new operator. A new operator needs to notify the supervisory authority about the transfer in order to become the new permit-holder.

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 applicant may appeal a decision by the County Administrative Board to the regional Land and Environmental Court if a permit is denied or if the applicant is not satisfied with the permit conditions. A judgment by the Land and Environmental Court may be appealed to the Superior Environmental Court if a leave to appeal is granted. For operations of such significance that the regional Land and Environmental Court is the first instance for issuing the permit, a

judgment, after being appealed to the Superior Environmental Court, can be appealed to the Supreme Court. Even for such an appeal, a leave to appeal is needed.

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

In order to apply for an environmental permit, an environmental impact assessment (EIA) is in some cases required. An EIA is required when an activity or operation has a significant environmental impact. If that is the case, there are more formal requirements regarding what the EIA shall address. When the activity or operation does not have a significant environmental impact, it is only necessary to make a smaller environmental impact assessment.

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

A licensing authority may withdraw a permit where a permit or its conditions have not been met and the discrepancy is not inconsiderable.

A supervisory authority may issue any injunctions and prohibitions that are necessary in individual cases to ensure compliance with the provisions of the Environmental Code and rules, judgments and other decisions issued in pursuance thereof. The measures taken must not be more intrusive than necessary.

An operator who neglects to comply with conditions of a permit may also be held liable under criminal law. In addition to personal responsibility, corporate fines, ranging between SEK 5,000 and 10,000,000, may be imposed.

3 Waste

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

The Swedish legislation concerning waste is largely based on the EU Waste Framework (2008/98/EC). The directive has been implemented in Swedish legislation through the Environmental Code and the Waste Ordinance (2011:927).

Under the Environmental Code, waste is defined as any object, matter or substance belonging to a specific waste category which the holder disposes of or intends or is required to dispose of. Appendix 4 of the Waste Ordinance contains the waste catalogue. Hazardous waste in general is subject to stricter provisions regarding collection, transport, storage, etc. Waste from packaging, glass, paper, tyres, cars, WEEE, batteries and pharmaceuticals is subject to producer responsibility.

As of 1 January 2019, a new Ordinance on Producer Responsibility for Packaging (2018:1462) and a new Ordinance on Producer Responsibility for Waste Paper (2018:1463) will enter into force. The new Ordinances sharpen the requirements of the service given by the collection systems and clarify the requirements regarding the shape of the packaging. Furthermore, the obligation to report the amount of packaging and newspaper released on the Swedish market will be transferred to the producers (instead of those who run the collection systems). In addition, amendments will be made to the Waste Ordinance, which means creating an obligation for the municipality to provide a collection system for food waste.

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?

The provision regarding storage and/or disposal of waste has been redrafted as from 1 January 2017. In general, it has been clarified that the storage of waste on the site where it has been produced only requires a permit in specific situations (storage of more than 50 tonnes of dangerous waste). The treatment or disposal of waste will normally require a permit or a notification, depending on the method, the type and the volume of waste. As a general obligation, the producer of waste is always obliged to ensure that the waste is handled in an acceptable manner for the environment and human health.

Last year, the Superior Land and Environmental Court decided on a case of principal interest regarding disposal of waste for recovery purposes. In this case, the producer applied for a permit for the handling of clean masses from soil and excavation masses. The Court declared that the importation of external clean masses entails a risk of contamination and therefore the activity could not be permitted. Storage of clean masses was considered as deposit of waste.

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)?

Normally, if transferred to a person holding the necessary permits, the producer of waste will not retain a residual liability. Such a liability would be retained in case the producer is considered as the factual operator of the treatment facility.

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

Producer responsibility has been introduced for certain categories of waste (packaging, glass, paper, tyres, cars, WEEE, batteries and pharmaceuticals). The responsibility may be actual or financial depending on the category of waste. Specific provisions are to be found in the relevant government ordinance. The extent of the producer's responsibility is currently under review.

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?

Please see question 2.4 above. In addition to what is mentioned regarding permits, please also note that even other incompliance with environmental laws may give rise to criminal liability. Some infringements can lead to environmental sanction charges ranging between SEK 1,000 and SEK 1,000,000 and some to sanctions under criminal law.

Where criminal liability requires intent or negligence, this is not a requirement for environmental sanction charges. Criminal liability requires that an individual person may be held liable or, in case of corporate fines, that a crime can be shown to have been committed. Some offences considered to be minor are not punishable under criminal law.

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

Yes. An environmental permit does not preclude liability for contamination or environmental damage.

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?

Yes; please also see questions 2.4 and 4.1. Criminal responsibility is personal. In order not to expose the CEO or the board of a company to liability for issues outside their control, liability for environmental issues is often delegated. Insurance, if any, does not preclude criminal responsibility.

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?

In case of a shares sale regarding a limited liability company, the environmental liability follows the corporate identity number.

When assets are acquired, the purchaser will take on the liabilities connected with the assets and may, under environmental law, be regarded as a new operator of the previous polluting activities performed by the selling company.

There are secondary responsibilities for properties acquired after 1 January 1999. See further question 5.1.

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

A lender of money cannot be held liable, merely due to the lending of money, for environmental wrongdoings or remediation costs linked to the borrowing company. In order to be held liable, the lender must act in such a way that the lender can be deemed to be the operator of the operation performed by the borrower.

5 Contaminated Land

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

As far as criminal law is concerned, contamination in a manner which involves risks to human health or detriment to flora and fauna that are not insignificant is considered to be a criminal offence according to the Environmental Code. In case of intent or negligence, liability can arise.

Liability for contaminated areas is regulated in chapter 2 paragraph 8 and chapter 10 of the Swedish Environmental Code. The provisions are based on the "polluter pays" principle; the liability for environmental damages therefore primarily rests on the person(s) or legal person(s) who pursues or has pursued an activity that has contributed to the contamination (the operator). In order to be held liable, the operator's actual operation needs to have continued after 30 June 1969, the effect of the operation must still be apparent when the Environmental Code entered into force (1 January 1999), and there must be a need to remediate the contaminated area. With respect to serious environmental damage, specific provisional regulations apply.

If there are no operators that can remediate the contaminated area, the owner of a property can secondarily be held responsible. This applies to properties purchased as from 1 January 1999 where the purchaser had knowledge about the contamination or ought to have discovered it.

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

If several operators have contributed to the contamination, the liability is joint and several (subject to some limitations as specified in chapter 10 of the Environmental Code). However, the payment made by the liable persons shall be shared between them as appears reasonable with regard to the extent to which each of them was responsible for the pollution and other relevant circumstances. Property owners that are secondarily responsible also have joint and several 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?

The form of what is "agreed" will be taken from a decision by the authority. It will not gain legal force in the sense that it will preclude all future claims.

A third party can challenge such a decision if this party is considered to be individually affected by the decision more than marginally.

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?

Liability for contaminated land can be handled and transferred in a purchase agreement. Civil agreements, however, only address the situation between the contracting parties and parties to an agreement cannot hinder an authority to act in a certain way or to issue orders to a specific party.

A property owner cannot act against an operator when it comes to recourse under chapter 10 of the Environmental Code. A property owner can, under these rules, only seek recourse from another property owner and an operator can only seek recourse from another operator (if not hindered thereto according to an agreement between the parties).

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

In case of serious environmental damage, the responsible polluter is primarily obliged to restore the environment and, if this is not possible, to compensate for any loss.

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.?

Authorities have the right to be given access to properties for the purpose of carrying out investigations and taking other measures in order to perform their tasks pursuant to the Environmental Code. A supervisory authority may also order an operator to submit any information and documents to the authority or carry out any investigations of the operations that are necessary for the purposes of supervision.

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 owner or user of a property is obliged to immediately notify the supervisory authority if any pollution is discovered on the property that may cause damage or detriment to human health or the environment, or if there is a risk that the operations may cause serious environmental damage. Failure to notify is a criminal offence. Third parties need not to be notified.

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

An operator or land owner is obliged to investigate if so ordered by the supervisory authority. Such an order must be based on substantial grounds. In the case of exploitation of an area which may be contaminated, there will be a need to investigate.

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?

There is no obligation to disclose environmental problems under Swedish environmental law to a purchaser. However, civil law may require disclosure.

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 agreement on environmental indemnity is commonly used in transfer agreements of different kinds. However, provisions on indemnity are only valid between the contracting parties. The indemnity does not limit or bind the authorities.

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

As a general rule, balance sheet reservations should be made in respect of liabilities that are known to arise in the future, which also includes environmental liabilities. General accounting principles apply. Recent jurisprudence suggests that dissolution of a company does not prevent the authorities from reviving the dissolvent procedure in certain cases. Bankruptcy and subsequent dissolution ends environmental liability.

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?

As a main rule, a shareholder in a limited liability company cannot be held liable for breaches of environmental law or pollution caused by the company, solely due to the fact that the person is a shareholder. In recent case law, however, a parent company was held liable for contamination caused by a subsidiary solely due to the fact that the parent company enabled the subsidiary to continue its activities through economic subsidy.

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

There is no protection for "whistle-blowers" under environmental law.

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

Group actions are available for environmental damage claims and for requests on prohibition of operations and precautionary measures. Penal or exemplary damages are not rewarded under Swedish environmental law.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

No person is liable for costs occurring during a permitting procedure under the Environmental Code, with some exceptions regarding water operations where liability to pay costs occurs on appeal. Environmental litigation regarding damages is subject to the general provisions, normally leading to the losing party compensating the winning party.

9 Emissions Trading and Climate Change

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

Sweden has implemented the EU Emission Trading Directive (2003/87/EC) through the national Emissions Trading Act

(2004:1199), the Emissions Trading Ordinance (2004:1205) and the regulations from the Environmental Protection Agency and the Swedish Energy Agency.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

There are no other obligations on the operators. Regarding the state, Sweden is a party to the United Nations Framework Convention on Climate Change and the Kyoto Protocol, and is therefore obliged to record and estimate the amount of greenhouse gas emissions produced in the country.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

One of the goals of Swedish environmental policy is to reduce the impact on the climate. The goal is set up in accordance with the United Nations Framework Convention on Climate Change. The Government has recently proposed the adoption of a comprehensive Climate Change Act. The goal is to obtain zero net emissions of greenhouse gases by the year 2045.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

This is not applicable in Sweden.

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

The use of asbestos is prohibited in Sweden. The removal of asbestos is not mandatory, but when removed, is subject to strict rules (Swedish Work Environment Authority's provisions and general recommendations concerning asbestos (AFS 2006:1)). Asbestos is, when disposed of, considered hazardous waste.

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 your jurisdiction?

General and product liability insurance provides coverage for liability to pay damages for sudden and unforeseen damages to persons' or third parties' property. Property damage insurances are also used, and may cover sudden and unforeseen leakages of oil and other liquids. Stand-alone environmental liability insurances also exist, and will cover gradually incurred environmental damage. In recent years, insurance solutions have been used during transactions to a limited extent.

11.2 What is the environmental insurance claims experience in your jurisdiction?

As described above, there is a market for environmental insurance solutions. To our knowledge, litigations regarding environmental insurance claims are not particularly common.

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 your jurisdiction.

As of 1 January 2019, new legislation will apply aiming to ensure that the requirements according to the EU Water Framework Directive (2000/60/EC) are met. Accordingly, water operations connected to production of hydroelectric power must have "modern environmental conditions". Consequently, a large number of environmental permits will need to be reviewed. This legislation also requires that a reasonability check, according to the general considerations rules, may not lead to a permit that is incompatible with the regulation regarding environmental quality standards.

Further, legislative amendments have been made to implement the EU regulation on prevention and management of the introduction and spread of invasive alien species.

Regarding contaminated land, two new judgments of principal interest have been handed down by the Superior Land and Environmental Court ("Court"). The first case is about the scope of the obligation for an owner to make investigations. The Court declared that due to the fact that the owner did not have knowledge of the activity conducted by the previous owner at the property and due to there being no visible signs of such activity or other activity, the owner was not obliged to make inquiries to the authorities or investigate the land.

In the second case, the Court clarified that an agreement takes precedence over the provisions in the Environmental Code concerning environmental damages in relations between the parties. However, this only applies provided that the environmental damage is related to the central commitments in the agreement.

Finally, the Court has decided on several cases regarding the permitted locations of wind farms in the case of existence of birds and bats in the area. The Court has declared that an overall assessment of the area must be made. Distances to the reproduction sites are not exclusively decisive; flight routes and the shape of the windfarm, etc., are also of importance.

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Rudolf Laurin (Partner) has practised environmental law since 1994 and heads Wistrand's Environment & Energy practice. He became a partner in Wistrand's energy and environmental department in 1999. Rudolf advises on the environmental aspects of projects regarding, *inter alia*, power and heat generation from biomass, peat, waste, natural gas, biogas, and wind, including off-shore wind farms. He also has in-depth knowledge of industry sectors such as waste handling, manufacturing, paper mills and rock quarries. During his 23 years of practice, he has successfully represented clients in all types of permitting procedures, including the Supreme Court.

Rudolf appears in *Expert Guides*, *Chambers*, *The Legal 500* and *Who's Who Legal*.

WISTRAND

Since its foundation in 1915, Wistrand has focused on providing quality legal advice within all areas of commercial law to private and public industry in Sweden and internationally. The firm is one of Sweden's leading, full-service business law firms with nearly 200 employees and offices in both Stockholm and Gothenburg.

Wistrand draws on the range and depth of its expertise to develop commercial, effective solutions for its clients. In order to provide tailored advice, the firm invests in understanding its clients' organisations, operating context as well as the opportunities and challenges they face.

Switzerland

Bär & Karrer Ltd.

Prof. Dr. Markus Schott

1 Environmental Policy and its Enforcement

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

According to article 73 of the Federal Constitution ("BV"), the Confederation and the Cantons shall endeavour to achieve a balanced and sustainable relationship between nature and its capacity to renew itself, and the demands placed on it by the population. Pursuant to article 74 BV, the Confederation is responsible for the legislation on the protection of the population and its natural environment against damage or nuisance and it shall ensure that such damage or nuisance is avoided. The Cantons are primarily responsible for the execution of the relevant federal regulations, but they may also enact implementing rules where federal law so provides. The Federal Constitution contains further provisions regarding protection of the water, forests as well as natural and cultural heritage (articles 76, 77 and 78 BV).

There are numerous acts and ordinances implementing the constitutional mandate regarding environmental protection. The following acts are the most important: the Environmental Protection Act ("USG"); the Ordinance on Avoidance and Disposal of Waste ("VVEA"); the Ordinance on Contaminated Sites ("AltlV"); the Chemicals Act ("ChemG"); the Act on Reduction of CO2 ("CO2 Act"); as well as the Nuclear Energy Act ("KEG"); and the Ordinance on the Environmental Impact Assessment ("UVPV").

The Swiss environmental policies and the implementation of environmental laws are based on the following main principles:

- The "precautionary principle" (*Vorsorgeprinzip*) states that early preventive measures must be taken in order to limit effects which could become harmful or a nuisance (article 1 para. 2 USG).
- The "polluter pays principle" (*Verursacherprinzip*) states that any person who causes measures to be taken due to endangering, polluting or causing damage to the environment must bear the costs related to avoidance or clean-up (article 2 USG).
- The "principle of abatement of pollution at source" (*Prinzip der Bekämpfung von Umweltbeeinträchtigungen an der Quelle*) that originates from the precautionary principle and states that environmental impact must be abated at its source.

According to article 74 para. 3 BV, the Cantons are responsible for the implementation of the relevant federal regulations, except where the law provides otherwise and determines that the Confederation is competent for implementation. This principle is replicated in article 36 USG. Accordingly, the Confederation supervises the execution of environmental law by the Cantons and coordinates their activities (article 38 para. 1 and 2 USG). In some areas, the federal government is itself responsible for the enforcement of environmental legislation, such as import and export of waste (article 41 USG). In general, the Federal Council enacts the implementing provisions (article 39 para. 1 USG).

On the federal level, the Federal Office for the Environment ("BAFU") is generally responsible for the execution of environmental law, but there are also some special agencies, which are competent in specific areas such as the Swiss Federal Nuclear Safety Inspectorate ("ENSI"). In addition, each Canton has its own authority responsible for the execution of environmental law.

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

Switzerland has a rather strict approach to enforcing environmental law. Apart from authorisations and inspections, the agencies also have the power to impose fines for various violations of environmental law (article 61 USG). Severe violations may even be punished by a custodial sentence of up to three years (article 60 USG). Other sanctions include the order to discontinue illegal activities, the re-establishment of the lawful conditions and the withdrawal of authorisations.

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

The authorities are obliged to inform the public adequately about environmental protection and levels of environmental pollution (article 10e para. 1 USG). If it is in the public interest, the authorities may also inform interested persons about the results of inspections and conformity-assessments, after having consulted the persons concerned. Furthermore, any person has the right to inspect environmental information in official documents and information relating to energy regulations that relate to the environment and to request information from the authorities about the content of these documents (article 10g para. 1 USG).

2 Environmental Permits

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

Environmental permits are common in Swiss law and are required for constructions or the operation of, e.g., landfills or nuclear energy plants, as well as for the placing on the market or handling of specific substances or special waste (e.g., article 30e USG, article 12 *ff.* KEG, article 9 *ff.* ChemG).

Usually, a permit is bound to a person/company and therefore not transferable (*personenbezogene Bewilligung*). However, in some cases, permits can be linked to an object (*sachbezogene Bewilligung*). These permits generally remain in place if the ownership of the object changes.

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?

There is a possibility to challenge the refusal or the provisions of an environmental permit, usually within a period of 30 days. The appeal has to be directed either at the competent Cantonal administrative court (in case of Cantonal authorities implementing the environmental law) or at the Federal Administrative Tribunal (if a federal authority implements the environmental law). It is possible to invoke a false establishment of the facts of the case or a violation of the applicable law. After the administrative court or tribunal has decided, its decision may be appealed before the Federal Supreme Court for violation of federal law.

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

Before taking any decision on the planning, construction or modification of installations, the competent authority must assess their impact on the environment. The requirement of an environmental impact assessment applies to installations that could cause substantial pollution to environmental areas, to the extent that it is probable that compliance with regulations on environmental protection can only be ensured through measures specific to the project or site (article 10a *ff.* USG). Any person who wishes to plan, construct or modify an installation that is subject to an environmental impact assessment must submit an environmental impact report. Based on this report and on its own investigation, the environmental protection agencies order the necessary measures.

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

Regulators can impose a fine, and there are criminal sanctions up to a custodial sentence of three years or a monetary penalty. The regulator can also confiscate objects or order the discontinuation of the illegal activities, and the re-establishment of the lawful conditions. As an *ultima ratio*, the regulators can revoke the environmental permits.

3 Waste

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

Waste is defined as "any moveable material disposed of by its holder or the disposal of which is required in the public interest" (article 7 para. 6 USG). The disposal of waste includes its recovery or deposit in a landfill, as well as the preliminary stages of collection, transport, storage and treatment (i.e. any physical, chemical or biological modification of the waste) (article 7 para. 6*bis* USG).

The owner or holder of waste has to comply with a number of legal obligations. The owner or holder is whoever has actual control over the waste. This person has the duty to dispose of the waste that he holds (article 31c para. 1 in connection with article 31b para. 1 USG) and must bear the cost of its disposal (article 32 para. 1 USG).

Waste whose environmentally compatible disposal requires special measures qualifies as special waste (article 30f USG). Additional obligations for the handling of special waste apply, such as markings as well as licence requirements for import and export.

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?

As a principle, the production of waste should be avoided wherever possible (article 30 para. 1 USG). The Federal Council may require manufacturers to avoid production waste where there is no known environmentally compatible process for its disposal (article 30a *lit.* c USG). All other waste may be stored and disposed of only in landfills (article 30e para. 1 USG) and, according to article 30c para. 2 USG, waste must not be burned other than in incineration plants (exceptions apply to the burning of natural forest, field and garden waste).

The disposal of waste on a site requires a permit for setting up and operating a landfill (article 30e para. 2 USG).

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)?

The holder of waste is entitled to instruct third parties to dispose of it (article 31c para. 1 USG). In case of such external disposal, the third party qualifies as the holder of waste. If the third party violates its obligations, it becomes liable for the recovery measures (because it qualifies as an interrupter). As the polluter has to bear the costs for recovery measures (article 2 and 59 USG), not only is the third party, as interrupter, responsible for such costs, but in some instances also the initial holder. This is the case if the wrongdoing of the appointed third party falls within the responsibility of the initial holder as well.

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

The Federal Council may require certain types of waste to be recovered if this is economically feasible and harms the environment less than other forms of disposal and the manufacture

of new products (article 30d para. 1 USG). Such recovery obligations exist, *inter alia*, for disposable packaging consisting of glass, polyethylene terephthalate ("PET") and aluminium, as well as for batteries and electrical devices.

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?

According to article 59a USG, the operator of an establishment or an installation that represents a special threat to the environment is liable for the loss or damage arising from effects that occur when this threat materialises. There is no requirement of negligence or intent. However, any person who proves that the loss or damage was caused by *force majeure* or by gross negligence on the part of the injured party or of a third party is relieved of liability (article 59a para. 3 USG).

There are also special liability provisions regarding specific activities, such as handling of pathogenic organisms (article 59a*bis* USG) or of genetically modified organisms (article 30 of the Federal Act on Non-Human Gene Technology, "GTG").

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

Yes; as the applicable liability provisions of environmental law provide for a strict liability, there is no permit defence. Consequently, the liability is not excluded if the establishment or installation has been operated or the activity has been carried out within the limits of the applicable environmental law and the conditions of the permit.

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?

According to Swiss company law, which is based on the separation principle, directors or officers are not subject to civil law liability for environmental wrongdoing of the company itself. Furthermore, the company is liable for all activities of its bodies, which are in the interest of the company.

Members of the board, as well as all persons engaged in the business management, are liable both to the company and to the individual shareholders (and to the company's creditors in case of its bankruptcy) for any losses or damage arising from any intentional or negligent breach of their duties. Therefore, if an officer breaches his obligations regarding environmental affairs, he may become personally liable. It is common to have directors' and officers' liability insurance ("D&O insurance") covering all damage claims against insured persons. Normally, intent and internal damage claims are excluded from the D&O insurance, as well as personal injury and damage to property.

There is also a criminal law liability of directors and officers, which may not be covered by insurance.

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?

If an investor acquires all shares of a company (share deal), the target still remains liable for the recovery of pollution and corresponding costs due to the "polluter pays" principle. The environmental liability is not affected by the change of ownership.

If a purchaser acquires the assets (asset deal), the purchaser will be liable as the new owner of the land or installation for any forthcoming environmental damage. The liability for previous pollution remains with the seller due to the "polluter pays" principle.

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

In Switzerland, there is no concept of lender liability. According to the separation principle, the lender cannot be held liable for environmental wrongdoing and/or remediation costs that the company caused. As long as the lender does not cause pollution, liability is excluded.

5 Contaminated Land

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

Each Canton is obliged to have a register of polluted sites, which is accessible to the public (article 32c para. 2 USG and article 5 Contaminated Sites Ordinance, "AltlV"). Polluted sites are defined as sites whose pollution originates from waste, and which are restricted areas. They comprise waste disposal sites, industrial sites and accident sites (article 2 para. 1 AltlV). Sites in need of remediation are polluted sites that cause harmful effects or nuisance or where there is a real danger that such effects may arise (article 2 para. 2 AltlV). Contaminated sites are polluted sites in need of remediation (article 2 para. 3 AltlV).

Based on a preliminary investigation, the authorities assess whether the polluted site is in need of monitoring or remediation with regard to groundwater protection, protection of surface waters or prevention of air pollution or pollution of the soil. All other investigated sites are defined as in need of neither monitoring, nor remediation (articles 7 and 8 AltlV).

For polluted sites in need of monitoring, the authorities require a monitoring plan to be drawn up and suitable measures to be taken to detect a real danger of harmful effects or nuisances before these become evident (article 13 para. 1 AltlV). The monitoring measures shall be applied until there is no longer any need for monitoring.

For sites that are in need of remediation (contaminated sites), the authorities require that a detailed investigation be carried out within a reasonable period and that the site be monitored until completion of remediation (article 13 para. 2 AltlV).

The authorities require that for contaminated sites, a remediation project is prepared within a time frame appropriate to the urgency of remediation (article 17 AltlV). Persons required to carry out remediation measures must notify the authorities of the remediation measures carried out and demonstrate that the remediation objectives have been achieved (article 19 AltlV).

The investigation, monitoring and remediation measures shall be carried out by the holder of the polluted site or, if the pollution of the site was caused by the action of third parties, the authorities may require these, with the approval of the holder, to prepare the remediation project and perform the remediation measures (article 20 AltlV).

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

If the authorities have reason to believe that the pollution of the site was caused by the action of third parties, they may require them to carry out the preliminary investigation, the monitoring measures or the detailed investigation, as well as the remediation measures (article 20 para. 2 and 3 AltlV). Fundamentally, the person responsible for the pollution bears the costs of the measures required to investigate, monitor and remediate polluted sites (article 32d para. 1 USG). If two or more persons are responsible, they bear the costs according to their shares of responsibility (article 32d para. 2 USG). Any of the responsible persons may request a ruling on the allocation of costs from the authority (article 32d para. 4 USG).

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?

The authorities assess the remediation project and on the basis of this assessment they issue a ruling defining the final objectives of the remediation, the remediation measures, as well as the assessment of results and the time frame to be adhered to and further charges and conditions for the protection of the environment (article 18 AltlV). If the authorities conclude in the evaluation of results that the remediation measures carried out were not successful, they can require additional works (article 19 AltlV).

Challenges by third parties are possible if they took part in the previous proceedings, are particularly affected by the ruling and have a legitimate interest in its cancellation or alteration.

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?

In accordance with the "polluter pays" principle, if two or more persons are responsible for the pollution, they bear the costs according to their share of responsibility (article 32d para. 2 USG). A private person can demand a ruling regarding costs (article 32d para. 4 USG) and can appeal it if he does not agree with the cost allocation. Usually, the site owner has to bear only 10–30% of the costs, while the rest is allocated to the person who caused the pollution.

For the sale or division of immovable property on which a site is located that is listed in the register of polluted sites, an authorisation by the competent authority is required (article 32d*bis* USG). Such authorisation is granted, *inter alia*, if security is provided for the costs of the expected measures.

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

In case of damage caused by the handling of genetically modified organisms or pathogenic organisms, the responsible person must also reimburse the costs of necessary and appropriate measures that are taken to repair destroyed or damaged environmental components, or to replace them with components of equal value. If the destroyed or damaged environmental components are not the object of a right *in rem* or if the eligible person does not take the measures that the situation calls for, the damages are awarded to the responsible community (article 31 Federal Act on Non-Human Gene Technology and article 59a*bis* para. 9 USG).

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.?

Everyone is obliged to provide the authorities with the information required to enforce environmental law and to conduct or tolerate the conduct of enquiries (article 46 para. 1 USG). According to article 61 USG, non-compliance with these obligations can be sanctioned with a fine of up to CHF 20,000.

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?

Operators of installations (i.e. buildings, traffic routes and other fixed facilities, as well as modifications of the terrain and appliances, machines, vehicles, ships and aircraft) that could seriously damage people or their natural environment must immediately report any extraordinary event to the competent agency (article 10 USG).

Based on the Ordinance on Protection against Major Accidents ("StFV"), operators of certain establishments (e.g. where certain thresholds for substances, preparations or special waste are exceeded, or where certain activities involving genetically modified or pathogenic microorganisms are carried out) have to notify the Cantonal notification body of any extraordinary event which has significant impact.

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

Each Canton is obliged to have a register of polluted sites, which is accessible to the public. Based on a preliminary investigation, the authorities assess whether the polluted site is in need of monitoring or remediation with regard to groundwater protection, protection of surface water or prevention of air pollution or pollution of the soil.

All other investigated sites are defined as in need of neither monitoring nor remediation (article 7 and 8 AltlV). The investigation of land for contamination is triggered by the authorities, but according to article 20 AltlV, the holder of the site has to carry out the investigation, monitoring and remediation measures. If the land is qualified as a polluted site and if measures must be taken, the polluter has to pay for the investigation. If the authority determines the land not to be a polluted site, the competent community will bear the costs for the necessary investigation (article 32d para. 5 USG).

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?

There is no obligation, based on environmental law, to disclose environmental problems to a potential purchaser. However, if the seller fails to inform the purchaser about any existing or suspected environmental problems, the purchaser may be able to claim for compensation based on the law of sales contracts. It is also standard practice to include representation and warranty clauses covering such problems in share or asset purchase agreements.

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?

It is possible for private parties to agree on an environmental indemnity. However, liability under environmental law cannot be modified or excluded by way of such agreement.

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

A company may transfer environmental liabilities linked to an asset to a subsidiary or other company by transferring the respective asset. However, it remains liable as a historic polluter. Dissolution of the company is no solution to escaping environmental liabilities, as either these are shifted to the legal successor, or the respective claims have to be fulfilled before dissolution can be completed.

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?

According to Swiss company law, which is based on the separation principle, shareholders are not subject to civil law liability for environmental wrongdoing of the company itself. Under certain circumstances, a so-called "piercing of the corporate veil" (*Durchgriffshaftung*) is possible if the calling on the separation principle is an abuse of rights.

If a shareholder is engaged in the business's management, he may be liable both to the company and to the other shareholders (and to the company's creditors in case of its bankruptcy) for any losses or damage arising from any intentional or negligent breach of his duties.

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

So far, there is no law which protects "whistle-blowers". The federal government is currently preparing a draft provision of the Swiss Code of Obligation, which should regulate whistle-blowing in the context of employment law.

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

So far, there are no class actions or penal or exemplary damages available. However, there are some special rights of appeal and liability provisions worth mentioning in this context.

Environmental organisations are entitled to appeal decisions regarding specific projects (so-called associations' right of appeal, "*Ideelle Verbandsbeschwerde*"). For example, national environmental organisations can appeal projects which need to undergo the environmental impact assessment or the placing on the market of pathogenic organisms (articles 55 and 55f USG). Other associations' rights of appeal relate to decisions based on the Federal Act on the Protection of Nature and Cultural Heritage ("NHG"), and to authorisations for putting into circulation genetically modified organisms intended for lawful use in the environment based on the Federal Act on Non-Human Gene Technology ("GTG").

Also, the Federal Office for the Environment ("BAFU") has a right of appeal under federal and Cantonal laws against rulings by the Cantonal authorities regarding environmental matters, and the municipalities have a right of appeal if they are affected by a ruling and have a legitimate interest in having them reversed or amended (articles 56 and 57 USG).

In case of damage caused by the handling of genetically modified organisms or pathogenic organisms, the responsible person must also reimburse the costs of necessary and appropriate measures that are taken to repair destroyed or damaged environmental components, or to replace them with components of equal value. If the destroyed or damaged environmental components are not the object of a right *in rem* or if the eligible person does not take the measures that the situation calls for, the damages are awarded to the responsible community (article 31 GTG and article 59a*bis* para. 9 USG).

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

Swiss law does not provide exemption from costs such as court fees and liability for such fees for individuals or public interest groups with regard to litigation proceedings. The general principle for judicial proceedings is that the losing party must bear the costs relating to the action and the ones incurred by opposing parties. This rule also applies with regard to associations' right of appeal.

9 Emissions Trading and Climate Change

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

The Swiss emissions trading scheme ("ETS") is designed according to the "cap-and-trade" principle. The quantity of emission allowances

available is limited. The total quantity of emission allowances is determined in advance, representing the maximum quantity available ("cap"). This cap was 5.63 million tonnes of CO2 for 2013 and has been reduced each year by 1.74% of the initial 2010 quantity. The emission allowances needed for greenhouse gas-efficient operation are allocated free of charge annually to ETS companies and are tradable ("trade"). Companies that exercise specific activities (as defined in annex 6 of the CO2 Ordinance) are obliged to participate in the Swiss emissions trading scheme. If a company's total emissions in the previous three years are below 25,000 tonnes of CO2 in each year, the company can apply for an exemption from the ETS obligation ("opt-out"). Companies with an installed capacity of between 10 and 20 MW that are engaged in a specific activity (as defined in annex 7 of the CO2 Ordinance) may voluntarily participate in the ETS ("opt-in").

The ETS is organised to be compatible with the European emission trade system ("EU-ETS") so that the two systems can be connected. Linking the Swiss and EU CO2 emissions markets would be beneficial for both environmental policy and the economy. The technical negotiations were concluded and the agreement was signed in November 2017. The treaty is subject to ratification by both sides and should enter into force no later than 2020.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

There is the so-called CO2 levy on thermal fuels. The CO2 levy is a key instrument to achieve CO2 emission targets. This steering levy on combustible fossil fuels, such as heating oil and natural gas, has been levied since 2008. In making fossil fuels more expensive, it creates an incentive to use them more economically and choose more carbon-neutral or low carbon energy sources. Energy-intensive companies can be exempted from the CO2 levy if they commit to reducing emissions in return. Large energy-intensive companies participate in the emissions trading scheme and are also exempt from the CO2 levy.

The CO2 levy is imposed on all thermal fossil fuels (e.g., heating oil, natural gas, but not motor fuels). The levy is imposed when the thermal fuels are used to produce heat, to generate light, in thermal installations for the production of electricity or for the operation of heat-power cogeneration plants. No levy is imposed on wood and biomass because these energy sources are CO2-neutral. In 2018, the levy amounts to CHF 96.00 per tonne of CO2. The Federal Council can increase the rate of the levy if the interim target for thermal fuels has not been reached. The CO2 levy is indicated on invoices for purchases of thermal fuels.

Around two thirds of the revenue from the CO2 levy is redistributed to the public and the business community through health insurers and the compensation offices. The annual revenue is about CHF 1 billion.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

In addition to its participation in worldwide climate programmes (e.g. the Paris Agreement), Switzerland pursues an active policy on reducing greenhouse gases and contributes to the international goal of limiting global warming to two degrees. The CO2 Act is focused on reducing Switzerland's domestic emissions. Measures to reduce greenhouse gas are the CO2 levy, emissions trading, building standards as well as compensation for CO2 emissions and the technology fund. With the technology fund, the Confederation promotes innovations that reduce greenhouse gas or the consumption of resources, increase the use of renewable energies, and increase energy efficiency. Due to the Paris Agreement and the linkage of the Swiss ETS with the EU ETS, the CO2 Act is currently under revision in order to implement the new international obligations. The revised CO2 Act is currently under discussion in the Federal Parliament.

In 2011, the Swiss government decided to withdraw from the use of nuclear energy on a step-by-step basis as a reaction to the incident in Fukushima and to strengthen the amount of renewable energy. The existing five nuclear power plants are to be decommissioned when they reach the end of their safe service life, and they will not be replaced by new ones. In this respect, the Federal Council has developed a long-term energy policy ("Energy Strategy 2050") based on the new energy perspectives. Essentially, the Federal Council's new strategy focuses on the consistent exploitation of the existing energy efficiency potential, and on the balanced use of the potentials of hydropower and new renewable energy sources. The respective statute was adopted by the Federal Parliament in September 2016. In May 2017, the new Energy Act was approved in a referendum by the Swiss people, and it entered into force on 1 January 2018.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

Switzerland does not have an asbestos litigation industry that is in any way comparable to the extent of asbestos litigation taking place in the US. However, there have been a number of proceedings concerning the limitation period of asbestos claims. In 2010, the Federal Supreme Court decided that the limitation period does not start from the occurrence of the loss (e.g. disease) but from the reference date of the infringement (e.g. violation of the employment contract by exposure of the workers to asbestos). According to this case law of the Federal Supreme Court, health damages which occur 10 or more years after working in an asbestos environment cannot be brought before court because the claim becomes time-barred 10 years after the (last) breach of the employment contract. However, the European Court of Human Rights ("ECHR") decided in March 2014 that the limitation period of only 10 years violates article 6 section 1 of the European Convention on Human Rights because claims for late damages may become time-barred before they even come into existence. The Federal Supreme Court accepted the decision of the ECHR and adapted its practice. The Federal Parliament has recently passed a revision of the applicable statutes of limitation. Accordingly, the limitation period for claims arising out of asbestos damages shall be extended to 20 years. The Federal Council has yet to decide when the revised provisions will enter into force.

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

So far, owners of premises are not obliged to remove materials containing asbestos from buildings unless the health of people is threatened due to released fibres. If this is the case, the owner is obliged to renovate, otherwise the owner becomes liable due to the liability of property owners (article 58 of the Swiss Code of Obligations). Also, if a building is renovated or demolished, the workers have to be protected adequately, which may be costly.

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 your jurisdiction?

Environmental insurance policies are very common in Switzerland, particularly for companies in the building industry or handling chemicals. These policies protect against, for example, contamination of the soil or water or other environmental damage that a third-party claims against the company.

11.2 What is the environmental insurance claims experience in your jurisdiction?

To our knowledge, there are no known court cases regarding environmental insurance claims in Switzerland.

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 your jurisdiction.

On 12 December 2015, Switzerland and 194 other countries passed an agreement concerning the international climate policy at the climate summit COP21 in Paris. This agreement aims to limit the global temperature rise to fewer than two degrees. In October 2017, following the approval by the Federal Parliament, Switzerland has ratified the Paris Agreement.

In December 2017, the Federal Council presented its report on the revision of the CO2 Act and its report on the Swiss-EU agreement regarding the linkage of both ETS to the Federal Parliament. The revision of the CO2 Act and the Swiss-EU agreement will be discussed together in the Federal Parliament in 2018.

On 1 August 2016, a partial revision of the USG entered into force. If a substantial amount of biogenic fuels that do not meet certain conditions is placed on the Swiss market, the Federal Council is now allowed to designate such biogenic fuels that may only be placed on the Swiss market if they meet certain ecological or social requirements which are defined by the Federal Council.

On 16 June 2017, the Federal Parliament adopted a revision of the GTG. In essence, the revised GTG extends the moratorium to grow genetically modified organisms ("GMO") for agricultural purposes for another four years. However, the Federal Parliament did not adopt the Federal Council's proposal for a legal framework regarding the coexistence of GMO and non-GMO as well as the creation of growing areas for GMO in which the concentrated growing of GMO would be possible.

On 21 May 2017, the Swiss people approved the revised Energy Act in a popular referendum. The revised Energy Act marks the first step of the implementation of the "Energy Strategy 2050" and entered into force on 1 January 2018.

On 5 September 2018, the Federal Council released its report regarding Switzerland's financial contributions to international environmental funds in order to support the protection of the global environment. The majority of the total funds amounting to CHF 147m are dedicated to the Global Environment Fund ("GEF"), a central instrument for financing and implementing the conventions and protocols in the environmental field.

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Chapter 28

Uganda

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1 Environmental Policy and its Enforcement

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

The basis for the environmental policy in Uganda is to ensure that all people living in the country enjoy the fundamental right to an environment adequate for their health and well-being while conserving the environment and natural resources of Uganda equitably and for the benefit of both present and future generations, taking into account the rate of population growth and the productivity of the available resources respecting the principle of optimum sustainable yield in the use of natural resources. The Environmental Law is enforced by the National Environment Management Authority ("NEMA") under the National Environment Act, CAP 153 of the Laws of Uganda.

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

NEMA usually enforces environmental law by filing an action in court for an Order against any person whose activities or omissions have or are likely to have a significant impact on the environment, to prevent, stop or discontinue any act or omission deleterious to the environment, or requiring that any ongoing activity be subjected to environmental monitoring.

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

NEMA has a function to promote public awareness through formal, non-formal and informal education about environmental issues, undertake research and disseminate information about the environment once every two (2) years for both public and private users. NEMA can delegate any of these functions to a Lead Agency, a Technical Committee, the Executive Director of NEMA or any other Public Officer. A Lead Agency mentioned herein means any Government Ministry, Department, Parastatal Agency, Local Government or Public Officer in which or in whom any law vests functions of control or management of any segments of the environment. NEMA is also assisted by the District Environment Committee and the Local Environment Committee, which are required to promote the dissemination of information about the environment through education and outreach programmes and to also prepare a District State of the Environment Report every year.

2 Environmental Permits

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

The question of transferability of an environmental permit is dependent on the conditions of the permit itself. In practice, most permits are transferable upon seeking written approval from NEMA and payment of transfer fees of UGX 300,000 (=USD 80). The owner of the permit must be compliant with the conditions of the permit before a transfer can be permitted.

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?

NEMA has a duty to inform an aggrieved person of his/her right to appeal to the High Court against any decision.

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

In Uganda, it is a legal requirement for a Project Developer to undertake an Environmental Impact Assessment where the Lead Agency in consultation with NEMA is of the view that the project may have an impact on the environment, is likely to have a significant impact on the environment or will have a significant impact on the environment. Where the project requires an environmental impact study, after completing the study, the developer is required by law to make an environmental impact statement. In executing the project, the developer is required to take all practicable measures to ensure that the requirements of the environmental impact statement are complied with. Owners of premises/operators of projects for which an environmental impact statement has been made, are required to keep records and also make annual reports to NEMA describing how far the project conforms in operation with the statements made in the environmental impact statement. In case of undesirable effects not contemplated in the environmental impact statement, the law requires the owner of the premises/operator of a project to take all

reasonable measures to mitigate any undesirable effects not contemplated in the environmental impact statement. An owner of premises is required to carry out annual environmental audits and submit the audit reports to NEMA.

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

The Executive Director of NEMA has powers to enter any land to inspect or cause to be inspected any activity to determine whether that activity is harmful to the environment, and may take into account the evidence obtained from the inspection in any decision on whether or not to serve an Environmental Restoration Order. NEMA also has powers to seek and take into account any technical, professional and scientific advice which it considers to be desirable for a satisfactory decision to be made on an Environmental Restoration Order. NEMA has no duty to hear the person being investigated. However, once an Environmental Restoration Order has been issued, the affected person has a right, within twenty-one (21) days, by giving reasons in writing, to request NEMA to reconsider. NEMA may, after reconsideration of the case, confirm, vary, suspend or withdraw the Environmental Restoration Order. It is mandatory for NEMA to give the person who has requested a reconsideration of an Environmental Restoration Order the opportunity to be heard orally before a decision is made. If the person served with an Environmental Restoration Order fails, refuses or neglects to take action, NEMA is entitled to take all necessary action in respect of the activity to which that Order relates, and otherwise to enforce that Order as may seem fit and recover the expenses necessarily incurred by it in the exercise of that power as a civil debt from the culprit in any court of competent jurisdiction.

In addition, any person who: (a) fails or refuses to comply with an Environmental Restoration Order made under the law; or (b) fails to comply with an environmental easement issued under the law, commits an offence and is liable on conviction to imprisonment for a term not exceeding twelve (12) months or to a fine of not less than UGX 120,000 (=USD 32) and not more than UGX 12,000,000 (=USD 3,214) or to both.

Generally, any person who contravenes any provision of the law for which no other penalty is specifically provided is liable on conviction to imprisonment for a term of not less than three (3) months or to a fine of not less than UGX 30,000 (=USD 8) and not more than UGX 3,000,000 (=USD 803) or to both. In addition, the Court has powers to order that the substance, equipment and appliance used in the commission of the offence be forfeited to the State and be disposed of as Court directs and the cost of disposal to be borne by the accused. The other additional Orders which the Court is empowered to make are cancellation of the licence or permit, or other authorisations made under the law. The Court may, in addition, require the offender to do community work which promotes the protection or improvement of the environment, in addition to the Environmental Restoration Order.

3 Waste

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

Waste is defined to include any matter prescribed to be waste and any matter, whether liquid, solid, gaseous, or radioactive, which is discharged, emitted or deposited in the environment in such volume, composition or manner as to cause an alteration of the environment. No person is allowed to discharge any hazardous substance, chemical, oil or mixture containing oil in any waters or any other segment of the environment except in accordance with guidelines prescribed by NEMA in consultation with the Lead Agency. Any person who discharges any hazardous waste, substance, chemical, oil or a mixture containing oil into any waters or other segment of the environment without a licence issued by NEMA or contrary to any Regulations made in Uganda or to any conditions specified in the licence given to him or her commits an offence. Any person who: (a) fails to manage any hazardous waste in accordance with the law; (b) imports any hazardous waste contrary to the law; (c) imports waste which has not been determined as hazardous waste without a permit contrary to the law; (d) fails to manage any chemical in accordance with the law; (e) fails to manage any radioactive substance in accordance with the law; (f) disposes of any chemical or hazardous waste contrary to the law; (g) knowingly mislabels any waste, chemicals or radioactive substance; (h) withholds information about the management of wastes, chemicals or radioactive substances; or (i) aids or abets the illegal traffic in wastes, chemicals or radioactive substances, commits an offence and is liable on conviction to imprisonment for a term of not less than thirty-six (36) months or a fine of not less than UGX 360,000 (=USD 96) and not more than UGX 36,000,000 (=USD 9,662) or to both.

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?

A person has the duty to manage any waste generated by his/her activities or the activities of those persons working under his/her direction in such a manner that he/she does not cause ill health to the person or damage to the environment. A person whose activities generate waste is required to employ measures for the minimisation of waste through treatment, reclamation and recycling. Any person who contravenes such a duty commits an offence.

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)?

A producer of waste is under a duty to treat any waste in a treatment facility and in a manner approved by the Lead Agency in consultation in NEMA before it is discharged or disposed of in any state into the environment. However, once the producer of waste transfers it to another person who is licensed to dispose of or treat the waste, their liability ceases unless the entity to which it is handed to is not licensed to operate a waste treatment or disposal site or plant.

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

Once a producer of waste has handed it over to a licensed operator of a waste treatment or disposal site or plant, he/she has no obligation to take back or recover the said waste. The obligation of take-back and recovery of waste is only applicable where it is handed to an unlicensed operator.

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?

Upon conviction, the person discharging a hazardous substance, chemical, oil or a mixture containing oil into the environment may – in addition to any other sentence imposed by the Court – pay the cost of the removal, including any costs which may be incurred by any Government Agency or organ in the restoration of the environment damaged or destroyed as a result of the discharge; and the costs of the third parties in the form of reparation, restoration, restitution or compensation as may, from time to time, be determined by NEMA.

The owner or operator of a production or storage facility, motor vehicle or vessel from which a discharge occurs contrary to the law, is required to mitigate the impact of the discharge by: giving immediate notice of the discharge to NEMA and other Government officers; immediately beginning the clean-up operations using the best available clean-up methods; and complying with such directions as NEMA may, from time to time, prescribe.

If the said prescribed mitigation measures are not taken, NEMA may seize the production facility, motor vehicle, vessel, etc. If, after a reasonable time in all circumstances, the necessary measures are not taken, NEMA may, upon a Court Order, dispose of the production or storage facility, motor vehicle or vessel to meet the costs of taking the necessary measures and other remedial and restoration measures.

The Court, in convicting a person of an offence under the Regulations, takes into account the measures taken by that person to comply with the Law. It is therefore a defence for one to say that he/she has complied with the law.

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

Yes, the operator can still be liable for any environmental damage notwithstanding that the polluting activity is operated within the permit limits. The law forbids any person to carry out any activity which is likely to pollute the air, water or land in excess of any standards or guidelines prescribed under the law except in accordance with the pollution licence.

In the event that the polluting activity exceeds the permit limits or standards prescribed by law, the operator can be held liable. The operator will be liable on the basis of the "polluter pays" principle, i.e. the person contributing the greater amount of pollution bears the largest burden in paying for cleaning the environment.

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?

The personal liability of directors and officers of corporations depends on the penalty prescribed under the relevant law. Most of the environmental penalties prescribed under the law are against "a person", which definition includes a company. The liability therefore would accrue to the company and not personally to its directors and/or officers.

A generator of waste (which has been characterised as hazardous) is required upon written instructions from the Executive Director of NEMA, to subscribe to an insurance Policy to cover risks caused by that waste.

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?

Most of the offences under the Environmental Law are of a strict liability to an individual and penal in nature. Where an individual sells his/her shares, the liability remains with the individual and the buyer of the shares takes the shares without the liability. However, if the liability is on the company, the buyer of the shares takes on the liability.

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

The Environmental Law is silent about the relationship between lending institutions and their clients where liabilities are incurred in so far as the environment is concerned.

5 Contaminated Land

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

The approach generally is for improvement and/or restoration first. NEMA may issue an Improvement Notice or an Environmental Restoration Order for the following purposes: (a) requiring the person to restore the environment as near as it may be to the state in which it was before the taking of the action which is the subject of the Order; (b) preventing the person from taking any action which would or is reasonably likely to do harm to the environment; or (c) awarding compensation to be paid by that person to other persons whose environment or livelihood has been harmed by the action which is the subject of the Order.

The said Improvement Notice or Environmental Restoration Order may also require the person on whom it is served to: (a) take such action as will prevent the commencement, continuation or cause of pollution; (b) restore land, including the replacement of soil, the replanting of trees and other flora and the restoration, as far as may be, of outstanding geological, archaeological or historical features of the land or the area contiguous to the land specified in the Order; (c) take such action as will prevent the commencement, continuation or cause of an environmental hazard; (d) cease to take any action which is causing or may cause or may contribute to causing pollution or an environmental hazard; (e) remove or alleviate any injury to land or the environment or to the amenities of the area; (f) prevent damage to the land or the environment, aquifers beneath the land and flora and fauna in, on, under or about the land specified in the Order or land or the environment contiguous to land specified in the Order; (g) remove any waste or refuse deposited on land specified in the Order; (h) deposit waste in a place specified in the Order; or (i) pay such compensation as is specified in the Order.

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

In allocating liability, NEMA uses the "polluter pays" principle, i.e. the person contributing the greater amount of pollution is required to bear the largest burden in paying for cleaning the environment.

Licence Fees are used to promote behaviour that conserves the environment by charging smaller fees for activities that reduce pollution.

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?

If NEMA establishes that the programme of environmental remediation agreed upon does not cover all the risks anticipated/involved, it can impose more obligations.

A third party can challenge the said agreement since under the Environmental Law, any person can bring an action in Court seeking an Environmental Restoration Order against any person who has harmed, is harming or is reasonably likely to harm the environment. It is not necessary for a third party to show that he/she had a right of, or interest in, the property, in the environment or land alleged to have been harmed or in the environment or land contiguous to such environment or land.

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?

According to the environmental laws of Uganda, any person can bring an action in Court seeking an Environmental Restoration Order against any person who has harmed the environment, and it is not necessary for him to show that he/she had a right of, or interest in, the property, in the environment or land alleged to have been harmed or in the environment or land contiguous to such environment or land.

This therefore means that the private right exists since most environmental offences are penal in nature, are strict liability offences and therefore not easily transferable.

However, in case the liability is on a limited liability company, the liability can easily be transferred with the sale of the shares in the company to another, or with a change of ownership to another.

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

According to the environmental laws of Uganda, NEMA is required to identify and create a register for activities and industrial plants which have or are most likely to have a significant adverse effect on the environment when operated in a manner that is not in conformity with good environmental practice.

This requires the operators of such industries or activities to deposit a refundable deposit bond in the National Environment Fund to act as security for good environmental practice.

NEMA may, after giving the Operator an opportunity to be heard, confiscate the deposit bond if it is satisfied that the Operator is responsible for environmental practice that is in breach of the provisions of the Environmental Law and cancel a pollution licence issued under the Environmental Law, if it is satisfied that the Operator has become a habitual offender.

The Law allows NEMA to prosecute the polluter and if found guilty, the polluter is liable to imprisonment for a term not exceeding eighteen (18) months or to a fine of not less than UGX 180,000 (=USD 48) and not more than UGX 18,000,000 (=USD 4,822). If the Operator is not satisfied, he/she can appeal to the Court against the decision taken by NEMA.

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.?

Every person who carries on any activity which has or is likely to have a significant impact on the environment is required to keep records of: (a) the amount of waste and by-products generated by the activity; (b) the extent of his/her activities, indicating the economic value of the activity on the area covered, expressed in the monetary value of the product per year; (c) the observable effects of the activity on the environment; and (d) how far, in the opinion of that person, the provisions of the law have been complied with.

It is a legal requirement that records which are kept, are by law to be availed to the Environmental Inspector, District Environmental Committee, the Board or the Policy Committee upon request. In addition, the records are supposed to be transmitted to NEMA annually, which is required to keep them and use them as a basis for the preparation of the state of the environment report.

Environmental Inspectors have powers under the Environmental Law, without a warrant but after suitably identifying himself/herself, to: (a) enter any land, premises or vehicle to determine whether the provisions of the Law are being complied with; (b) require the production of, inspect, examine and copy licences, registers, records, and other documents relating to the environment and the management of natural resources; (c) take samples of any article or substance and submit them for tests and analysis; (d) make examinations and inquiries to discover whether the Act is complied with; (e) carry out periodic inspections of all establishments which manufacture, produce as by-products, import, export, store, sell, distribute or use any substances that are likely to have a significant impact on the environment; seize any plant, equipment, substance or any other thing which he/she believes has been used in the commission of an offence against the Environmental Law; (f) close any manufacturing plant or other activity which pollutes or is likely to pollute the environment, for a period of not more than three (3) weeks; (g) issue an improvement notice requiring the operator of any manufacturing plant or other activity to cease any activities deleterious to the environment; and (h) cause a Police Officer to arrest any person whom he/she believes has committed an offence under the Environmental Law.

In addition to the above, an Environmental Inspector has powers to, at any time, install any equipment on any land, premises or vehicle for the purpose of monitoring compliance with the Environmental Law.

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?

A person licensed to carry out any activity is required to submit biannual reports on the conduct of the licensed activity to NEMA.

Where special reporting procedures are made the condition of a licence granted under the law, those procedures take precedence over the submission of the biannual reports. Therefore, disclosure is a must under the law.

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

When the environment is being polluted or is likely to be polluted or the provisions of the law are being violated, any person is free and has a right to take action against the offender at any time.

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?

Both the Environmental Law and the Companies Act of Uganda are silent on whether a seller to a prospective purchaser in the context of merger and/or takeover transactions is obliged to disclose environmental problems in the company.

However, as a precautionary measure, a purchaser normally conducts due diligence with NEMA prior to a merger or takeover transaction, to ascertain compliance with environmental laws or to disclose any environmental issues of the seller.

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?

Under the environmental laws of Uganda, a generator of waste which has been characterised as hazardous is under an obligation to subscribe to an insurance policy covering the risks likely to arise out of the activity for which the licence is required.

It is therefore possible to use the environmental indemnity to limit exposure for actual or potential environment-related liabilities. A payment made by the indemnifier in respect of remediation discharges the indemnifier's potential liability for the matter.

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

The National Environment Act prescribes a penalty for any person who fraudulently alters any record as required by the law. A person would therefore be liable where he/she alters any record not limited to an environmental audit, environmental impact study or assessment to imprisonment of not less than twelve (12) months or a fine of not less than UGX 180,000 (=USD 48) and not more than UGX 18,000,000 (=USD 4,822).

A company can be dissolved/wound up for other reasons except to escape environmental liabilities. If a company is dissolved/wound up, NEMA can claim for the unpaid fines and monetary penalties as an unsecured creditor.

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?

A shareholder of a limited liability company is not liable for breaches of environmental law and/or pollution caused by the company. However, if the company is fined, a shareholder's liability would be limited to the shares owned by him/her, or guaranteed by him/her in case of a company limited by guarantee.

Under the environmental laws of Uganda, the environmental offences committed are of a penal nature and of strict liability. In case the company in question has incurred an environmental liability, it would be sued individually to recover the debt. In case of winding up, on failure to pay, the parent company would only be liable to the extent of the shares it has or it has guaranteed to pay in the subsidiary company. There is no provision in our environmental laws which can enable NEMA to sue the parent company in another jurisdiction.

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

There are no specific provisions in the environmental laws of Uganda to protect "whistle-blowers" who report environmental violations/matters. The whistle-blowers would be protected under the Whistleblowers Protection Act.

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

Group or class actions are available under Article 50 of the Constitution of the Republic of Uganda, which permits any person whose rights are being infringed to seek redress, which may include compensation from the High Court of Uganda.

Furthermore, any person can bring a suit in Court seeking an Environmental Restoration Order against any person who has harmed, is harming or is reasonably likely to harm the environment. It is not necessary for the person bringing the suit to show that he/she has a right of, or interest in, the property, in the environment or land alleged to have been harmed or in the environment or land contiguous to such environment or land.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

The liability to pay costs is a matter for the Court's discretion. In practice, the courts in matters of public interest litigation usually do not order the litigant to pay the costs of the suit following the conclusion of environmental litigation. This is on the basis that the litigation was pursued in the best interests of the public. Individuals or public interest groups, however, are required to pay the relevant government fees before filing any court document. In case of frivolous suits, courts may easily award costs against the litigant.

9 Emissions Trading and Climate Change

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

Currently, the Environmental Law, which came into effect on 19 May 1995, does not take into consideration the issue of emissions trading schemes. However, there is a need to address them due to international best practices which are emerging to meet the escalation of climate change concerns such as drought, floods, storms, heatwaves and landslides, which have had serious effects on agricultural production, food security, incomes, health and livelihoods; as well as technological advancements with the attendant challenges of managing e-waste; and unsound use of chemicals, among others.

In order to provide for the emerging environmental issues, including climate change, the Government of Uganda has come up with the National Environmental Bill, No. 17 of 2017 which is currently before the Parliament of Uganda. Its aims are: to address the management of hazardous chemicals and biodiversity offsets; to provide for strategic environmental assessments; to address environmental concerns arising out of petroleum activities; to provide for the management of plastics and plastic products; to establish an Environmental Protection Force; to provide for the establishment of an Environmental Tribunal; and to provide for enhanced penalties for offences under the Environmental Law.

We strongly believe that with the expected new law, the emissions trading markets will begin to develop.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

According to our environmental laws, NEMA is under an obligation to make Regulations, issue guidelines, and institute programmes concerning: (a) the elimination of substances that deplete the ozone layer; (b) management practices and activities likely to lead to the degradation of the ozone layer and the stratosphere; and (c) the reduction and minimisation of risks to human health created by the degradation of the ozone layer and stratosphere. Greenhouse gas emissions are ozone-depleting substances which, under the Environmental Law, are regarded as controlled substances. Therefore, an end-user who sells or otherwise supplies or uses a controlled substance or product for a purpose other than the purpose declared in the end-user declaration, or sells or otherwise supplies a controlled substance or product to any person, commits an offence. It is therefore a requirement that end-users of ozone-depleting substances must declare them.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

The overall policy approach to climate change in Uganda is to ensure that every Ugandan has a duty to create, maintain and enhance the environment, including the duty to prevent pollution, since every Ugandan has a right to a clean and healthy environment in accordance with the Constitution and the principles of sustainable development.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

In Uganda, asbestos is listed as one of the carcinogenic wastes which may lead to development of cancer in human beings or animals; wastes containing asbestos in the form of dust or fibres are also considered hazardous.

According to the Environmental Law, any person who generates waste through his/her/its activities is under a duty to manage it by employing measures for the minimisation of waste through treatment, reclamation and recycling, failure of which amounts to an offence punishable with imprisonment, a fine or both. However, despite the existence of these regulations, apart from awareness programmes, there is currently no asbestos litigation.

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

The duties of owners/occupiers of premises in relation to asbestos on site are: to minimise the waste through treatment, reclamation and recycling; and not to discharge or dispose of waste in any state into the environment, unless the waste is treated in a treatment facility and in a manner approved by NEMA.

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 your jurisdiction?

In Uganda, it is an environmental legal requirement that any person who applies for a licence for: (a) transportation or storage of waste; (b) operation of a waste treatment plant or waste disposal site; (c) transboundary movement of waste; or any waste characterised as hazardous, must satisfy NEMA that he/she has subscribed to an insurance policy covering the risks likely to arise out of the activity for which the licence is required. Therefore, insurance policies on pollution licences play a major role for those intending to set up industries which are likely to pollute the environment.

11.2 What is the environmental insurance claims experience in your jurisdiction?

Although the environmental law is well developed in Uganda and a lot of environmental awareness has been created through educational programmes, due to low development levels the environmental insurance sector has not yet fully developed, and therefore we have not experienced environmental claims as yet.

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 your jurisdiction.

It is now a new trend in our environmental regulations to require each employer – including educational institutions, hotels or recreational

facilities and hospitals whose activities are likely to have a significant impact on the environment – to prepare a disaster preparedness plan taking into account the kind of risks it faces. The law also lays down a duty for any person who negligently carries out any activity that leads to a disaster to compensate any person affected by the disaster. The law also creates environmental easements which can be registered to further principles of environment management on the benefited environment, through the imposition of one or more obligations in respect of the use of the burdened land (such as prevention/restriction of any agricultural activity or creation and maintenance of works), being land in the vicinity of the benefited environment.

Courts have discretionary powers to grant environmental easements in perpetuity or for a term of years. A person in whose name an environmental easement has been registered, has a right to bring an action to enforce an environmental easement. However, the environmental easement holder is under obligation to give compensation commensurate with the lost interest of the use of land to the legal interest owner of the land that is the subject of the environmental easement. If the easement is of national importance, NEMA may recommend that the Government compensates by compulsorily acquiring the land under the Constitution of Uganda. If the owner of the land is not satisfied with the compensation, he/she can appeal to the High Court.

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Edwin is also a rising lawyer in the corporate and commercial department of the firm, focusing on the carrying out of due diligence, mergers and acquisitions, and advising on corporate restructuring.

Katende, Ssempebwa & Co. Advocates was founded in 1969 and has since expanded to become Uganda's largest and leading legal practice, now boasting over 60 permanent legal and support staff. The firm has affiliated offices in all the leading capitals in the world.

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Uruguay

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1 Environmental Policy and its Enforcement

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

Environmental policy in Uruguay is based on Section 47 of the Uruguayan Constitution, Law Number 17,283 (Environmental General Law), its regulatory Decree Number 152/013, Law Number 16,466 and its regulatory Decree Number 349/005.

Such provisions declare the protection of the environment against any kind of depredation, destruction or pollution of national interest, which includes the prevention of any negative environmental impact, and, as the case may be, the restoration of damaged environments.

Law Number 16,112 establishes that the Ministry of Housing, Territorial Planning and Environment (hereinafter, "**MVOTMA**") is the main agency that administers and enforces environmental law. Specifically, the main agency is the National Environmental Agency ("*Dirección Nacional de Medio Ambiente*") (hereinafter, "**DINAMA**").

Pursuant to Section 8 of Law Number 17,283, municipal authorities are also able to administer and enforce environmental law in certain delegated aspects.

On the other hand, the Ministry of Public Health (hereinafter, "**MSP**") (through the "*División Salud Ambiental y Ocupacional*") and the National Naval Prefecture (through the "*Dirección de Protección de Medio Ambiente*") have sectorial competencies regarding their commitments.

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

In general terms, such agencies impose fines in order to enforce environmental law. The fines depend on the kind of infringement, but in general vary from 10 R.U. (Readjustable Units – "*Unidades Reajustables*") to 10,000 R.U. (currently: 1 R.U. = Uruguayan $ 1,088.52 = US$ 35 approximately). Moreover, they are also entitled to impose warnings, confiscations and suspensions. According to Section 6 of Law Number 16,112, MVOTMA will be in charge of controlling whether public or private activities comply with environmental protection standards. Specifically, Section 15 of Law Number 17,283 allows MVOTMA to:

A) Sanction with warnings when the offender lacks any prior convictions regarding the commission of minor infringements.

B) Accumulatively proceed to publicly publish the resolution which sanctioned the offender, when the infringement is not considered a minor offence.

C) Cumulatively with other penalties, confiscate objects or products used in the illicit activity.

D) Arrange for the suspension (for up to 180 days) or for the expiration of the permits, authorisations, or concessions of the offender, when the committed infractions are considered to be serious or repeated offences.

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

Public authorities are obliged to provide environment-related information to interested persons who require such information, with the limitation of information that is considered a trade or industrial secret (Section 15 of Law Number 16,466).

2 Environmental Permits

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

Pursuant to Law Number 16,466 and Decree Number 349/005, several environmental permits are required prior to starting certain activities, constructions and works expressly listed in such regulations.

Those interested in carrying out any of the activities, constructions and works are subject to the request of a Prior Environmental Authorisation (hereinafter, "**AAP**" – "*Autorización Ambiental Previa*") and shall communicate the project to the MVOTMA by submitting certain information depending on the category of the same.

Decree Number 349/005 also establishes that parties interested in performing certain activities, constructions or works included in Section 20 of said Decree shall communicate the location and a description of the area of execution and influence to the DINAMA and, as the case may be, include an assessment of the location or section of the site where the project is to be performed, including an analysis of any alternatives.

Some projects that require an AAP must also obtain an Operating Environmental Authorisation (hereinafter, "**AAO**") in order to start operating. The AAO shall be requested by the interested party and, once there has been full verification of the conditions established in the AAP, the project is filed before the MVOTMA and the Environmental Impact Assessment criteria are met, the MVOTMA grants the AAO.

Those activities that were built, authorised or put into operation without being required to obtain the AAP (because the activity was prior to the entry into force of the Decree or, when the activity started, it did not meet the requirement established in the Decree for obtaining the AAP), would require a Special Environmental Authorisation (hereinafter, "**AAE**"), included in Section 25 of Decree Number 349/005, if they expand the facilities or increase the productive capacity.

Environmental permits can be transferred from one person to another, provided the transferee assumes the same obligations that the transferor had assumed before.

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?

In Uruguay, decisions by an environmental regulator rejecting an environmental permit, or in respect to conditions contained in an environmental permit, may be challenged through an administrative recourse before the authority rejecting the permit and then an appeal before the Executive Power.

The term to file said administrative actions is 10 calendar days from the publication of the administrative resolution in the Official Gazette or its notification to the affected person, as the case may be. Only those individuals or legal entities that have a direct, personal and legitimate interest may file said administrative actions and, in addition to proving such interest, they have to express the grounds and arguments for the administrative action. However, such grounds and arguments do not need to be filed together with the administrative action, and may be filed later, before the term for the Administration to resolve expires (in the meantime, the Administration may nevertheless decide the case even without having received such grounds).

Once the administrative action has been filed, the Administration has a term of 200 days as from the filing to issue a resolution to decide upon the challenge. If the term expires without any resolution from the Administration, the action shall be deemed rejected.

In the case that the administrative action is expressly or tacitly rejected, the Company shall have the right to file an annulment action before the jurisdictional court called "*Tribunal de lo Contencioso Administrativo*" (hereinafter, "**TCA**") (it is the rough equivalent to a Supreme Court in administrative cases).

Such action does not suspend the application of the resolution, save for the cases in which the Company requests the immediate suspension of the effects of the resolution and the Administration favourably resolves (highly unlikely).

The term to file an annulment action before the TCA is 60 days from the notification of the rejection of the administrative action or as from the expiration of the 200-day term for the resolution of the administrative action (that is, after the administrative action has been tacitly rejected).

The TCA may confirm or annul the resolution, as applicable, but it may not modify its content.

Also, in case the environmental regulator rejects the environmental permit and the Company is not willing to file an annulment action before TCA, it could file a lawsuit before our judicial authorities to claim for the damages that the rejection of the permit causes the Company (the term to file the lawsuit is four years).

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

Under Uruguayan law, there is no obligation to conduct environmental audits for particularly polluting industries. However, Law Number 16,466 and Decree Number 349/005 establish that it is necessary to perform an Environmental Impact Assessment for certain activities, constructions and works expressly listed in such Law (Section 6).

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

In the case of violations of environmental protection regulations, the environmental regulator may impose warnings, the confiscation and/or destruction of vehicles, instruments and devices directly linked to the commission of the offence or the transit of objects or products, or even a suspension of the offender's authorisations, permits, etc., for up to 180 days, cumulatively with a fine of 10 to 10,000 R.U.

Furthermore, Section 453 of Law Number 16,170 establishes that apart from the possibility of imposing fines in order to enforce environmental legislation, the environmental regulator (MVOTMA) can request the assistance of the Police and the National Naval Prefecture.

3 Waste

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

Under Uruguayan law, there is no general definition of waste. However, Decree Number 182/013, Resolution Number 1708/2013 and Resolution Number 266/014, which regulate industrial wastes, define "waste" as "*any substance or material which is disposed of or removed, is intended to be disposed of or removed, or is required to be disposed of or removed*".

There are certain categories of waste which involve additional duties or controls such as: (i) industrial solid wastes (Decree Number 152/013); (ii) hospital wastes (Decree Number 586/09); (iii) batteries (Decree Number 373/003); and (iv) agricultural, horticultural and forestry wastes (Decree Number 152/013).

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?

In general terms, an approved Management Plan which regulates all aspects related to waste is necessary prior to storing and/or disposing of such waste.

With regard to the Waste Management Plans of solid industrial waste, the same must include generation, internal management, storage, transport, recycling, recovery, treatment and final disposal of all the solid waste generated by the activity of the Company.

The location, kind of waste and other conditions related to the disposal of such waste shall be approved by the environmental regulator.

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)?

Uruguayan law does not establish direct liability for producers regarding waste when they have transferred it to another person for disposal/treatment off-site.

However, under the general tort rules, producers can be found liable if a direct link between such deed and the harm caused by the same is proven.

Please note that currently there is a Bill on National Waste Management being discussed in Parliament (hereinafter, the "**Waste Management Bill**") which stipulates in general terms that the producer is responsible for the management of waste at all the different stages.

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

Fundamentally, waste producers shall submit a Management Plan that regulates all aspects related to such waste to the MVOTMA.

If it is not possible to reintroduce the waste in the production process, the producer shall take back and/or recover the same under the Management Plan.

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?

Three different types of liabilities arise where there is a breach of environmental law and/or permits: civil; administrative; and criminal liability.

Regarding civil liability: Uruguayan law provides that whoever causes depredation, destruction or contamination of the environment in violation of law shall be held liable for the payment of all damages caused. The law also obliges the liable party to conduct and perform all works to reduce or mitigate the damage caused.

In general, doctrine and jurisprudence recognise that the claimant must give evidence of the following issues: that there has been a harmful act; that such an act has caused real harm (not potential or eventual damage); that there is a direct link between such a deed and the harm caused by the same; and that the party has caused such an act by acting fraudulently or by acting with severe negligence. This means that such liability is not objective or based on the mere risk but the claimant must prove that the defendant acted with the full intention of causing the damage or with severe negligence.

Regarding administrative liability: Laws Number 16,112, 16,170, 16,466, 16,688 and 17,283 and Decree Number 100/991 provide administrative sanctions in the case of a violation of environmental protection regulations, which vary from a warning to a confiscation and/or the destruction of vehicles, instruments and devices directly linked to the commission of the offence or the transit of objects or products, or even a suspension of the offender's authorisations, permits, etc., for up to 180 days, cumulatively with a fine of 10 to 10,000 R.U. according to Law Number 16,226 (Section 67).

Regarding criminal liability: As stated in Environmental Law Number 17,220 (dated November 17, 1999), a person introducing hazardous wastes (as defined in Annex I and II of the Basel Convention on Movements of Hazardous Wastes and Their Disposal, as of March 22, 1989) into a zone subject to Uruguayan jurisdiction may be punished with up to 12 years in prison. Also, on February 1, 2017, a bill was presented before Parliament (hereinafter, the "**2017 Bill**") which seeks to incorporate a specific Section in the Uruguayan Penal Code regulating "Crimes Against the Environment". The crimes which are punishable under this project of law are those regarding pollution, crimes against biodiversity, and crimes against environmental management.

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

Under Uruguayan law, there is no obligation regarding liability when pollution is caused when operating within permit limits. However, in general terms, Section 3 of Law Number 17,283 and Law Number 16,466 establish that all persons have an obligation not to cause environmental impacts.

Furthermore, Section 4 of Law Number 16,466 establishes that the polluter is liable for all of the damages caused, without exception.

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?

Under Uruguayan law, there is not yet any particular regulation that establishes direct liability for directors and officers of corporations for environmental wrongdoing. However, the Uruguayan Corporate Law establishes the liability of directors and administrators before the Company, its shareholders and third parties for all damages (it is not exclusive to environmental damages) they may cause if acting against the law or by-laws.

In that sense, directors and officers of corporations could be liable for environmental wrongdoing. However, there is no express provision which establishes the possibility of getting insurance or relying on other indemnity protection in respect of such liabilities.

Furthermore, the 2017 Bill adds a chapter referring to environmental crime to the Uruguayan Penal Code. The 2017 Bill regulates the liability for corporations that commit environmental crimes, and establishes that in that case, the liability will lie with the people that have effective control over a corporation, provided they have contributed to and determined the commission of the said environmental crime. Although this has not been approved yet, it gives a hint of the tendencies of Uruguayan regulation.

Moreover, as previously explained, as a general rule all persons who cause environmental damage are liable for such damage.

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?

In principle, under Uruguayan law, shareholders are not liable for the obligations of the Company, save in the case that the corporate veil is pierced, which is unlikely in Uruguay, since the standard to raise the veil is quite high. In such sense, in order to pierce the corporate veil of a Company, article 189 of Law Number 16,060 (hereinafter, the "**Uruguayan Company Law**") establishes some prerequisites that must be met: (i) fraudulent avoidance of the law; (ii) fraud in detriment of the rights of shareholders, partners or third parties; or (iii) breach of Public Order.

The Uruguayan Company Law demands that the use of the Company for the purposes previously listed must be proven beyond any reasonable doubt. The disregard mechanism should be applied restrictively and as an exception. The legal threshold for piercing the corporate veil in Uruguay is quite high. Both scholars and courts have understood that the Uruguayan Company Law consecrates a special requirement in the evidentiary field.

Therefore, the transfer of shares between shareholders has no consequences regarding the liability of the Company, who is the liable entity.

In the case of an asset purchase (the transference of an ongoing business concern), provided a special procedure is followed, the liability of the purchaser will be limited to the obligations resulting from the balance sheet and those not included in the balance sheet but denounced by creditors within a specific term.

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

Under Uruguayan law and jurisprudence, there is no specific provision or precedent that establishes a liability to lenders for environmental wrongdoing and/or remediation costs.

However, as it is understood under Uruguayan law, as a general rule all persons who cause environmental damage are liable for such damage.

5 Contaminated Land

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

Liability for the contamination of soil or groundwater is regulated mainly by Decree Number 253/79. Such Decree establishes the possibility of imposing fines in case of contamination and establishes certain limitations for spilling waste on soil and groundwater.

In addition, the 2017 Bill, which regulates environmental crime, establishes a penalty of prison for up to eight years in case of contamination of groundwater, as well as damage to the environment caused by toxic substances.

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

Section 11 of Law Number 16,466 establishes a joint and several liability when more than one person is responsible for contamination; including not only the owner of a project, constructions and works, but also the professionals and technicians who have participated in such project.

Also, as mentioned above, the 2017 Bill adds environmental crimes to the Uruguayan Penal Code, and the Uruguayan Penal Code establishes the possibility of criminal liability of a "group", in cases where the crimes were committed by more than one person.

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?

Although there is no specific regulation in this regard, as a general rule the environmental regulator has the power to request all works that may be necessary to remediate the damage caused to the environment.

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?

Under Uruguayan legislation, there is no regulation that expressly regulates 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, the contamination. However, under Uruguayan tort rules, the polluter is liable for all damages caused without exception. Nonetheless, under the freedom of contract doctrine, it can be agreed between the parties which of them shall bear the environmental liability (save for the clarification made under question 5.2 regarding the 2017 Bill).

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

Yes. Aesthetic harms are included under the definition provided by Law Number 17,283.

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.?

Environmental regulators have different powers, such as the possibility of imposing warnings and fines, in order to require production of documents, take samples, conduct site inspections, interview employees, etc.

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?

Under Uruguayan legislation, there is no directive that regulates such situation specifically.

However, following the general rules, such situation must be disclosed to an environmental regulator. Specifically, under Section 34 of Decree Number 152/013, the omission of environmental information or the submission of false or incorrect information to the Administration is considered a serious infraction of environmental regulation.

Furthermore, according to the 2017 Bill, it is a crime to hinder environmental control or to provide false information to the corresponding authorities, which may incur a penalty of prison for up to two years.

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

Under Uruguayan legislation, there is no law that imposes the obligation to investigate land for contamination. However, as all

persons are obliged to take care of the environment, it could be construed that such obligation exists.

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?

Under Uruguayan legislation, there is no law that regulates such a situation in particular. Nonetheless, general principles of law determine the obligation of the parties in an agreement to act with good faith, avoid fraud and disclose any possible hidden faults of the object of the negotiation. Thus, according to such principles, not disclosing environmental problems may be construed as bad faith and may entail legal consequences regarding liability.

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?

Under Uruguayan regulations, there is no provision that regulates such situation yet. Therefore, under the freedom of contract principle, an environmental indemnity should be upheld by Uruguayan courts, as well as payments thereof.

However, in the event that the 2017 Bill is approved, the described behaviour would be considered a crime. Additionally, there is no way for a person in Uruguayan legislation to avoid or limit criminal liability, provided such person was responsible for the crime and accountable according to the general rules.

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

It is not possible to shelter environmental liabilities off balance sheet. The shareholders could decide to dissolve the Company, but in such a case, the Company's assets and liabilities will be allocated with the shareholders.

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?

Under Uruguayan law, the principle is that shareholders are not liable for the obligations of the Company, and there are no court precedents stating the contrary. Nevertheless, as we mentioned, Uruguayan law establishes the possibility of piercing the corporate veil in certain situations (see question 4.4). In such scenario, shareholders could be held liable for the Company's actions. However, as mentioned above, in Uruguay the standard to pierce the veil is quite high.

Moreover, a parent Company can be sued in name of a foreign subsidiary if the foreign Company has no capital to pay its environmental liabilities.

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

No. In Uruguay, there is no law which protects "whistle-blowers" who report environmental violations/matters. Nevertheless, in the event that the 2017 Bill is approved, those who denounce crimes against the environment in circumstances of danger or risk will be protected as set out in Decree Number 209/000.

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

Yes. Under Uruguayan law (Section 42 of the Procedural General Code), in the case of matters related to environmental protection, cultural and historical values, and any other matters belonging to an indefinite number of persons, any interested party shall be entitled to promote the relevant process in order to protect such values. Furthermore, Law Number 16,112 establishes the same possibility for the MVOTMA.

Moreover, in some types of claims on which a direct, personal and legitimate interest is required to file the claim (such as annulment actions against administrative acts or unconstitutional actions before the Supreme Court of Justice), it is now admitted by jurisprudence that if the claim relates to environmental protection, cultural and historical values, any interested party can promote them. However, said flexibility regarding special legitimation requirements has not been unanimously accepted for protective actions "*Acciones de Amparo*" – which are commonly used for environmental protection.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

No. Uruguayan law does not establish any exemptions from liability to pay costs when pursuing environmental litigation.

9 Emissions Trading and Climate Change

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

The emissions trading market is related in general to renewable energy projects that want to be settled in Uruguay. In this sense, Uruguay has implemented a major change in the energy matrix because of a significant number of projects that have been promoted related to the production of energy from renewable sources; mainly wind, solar and biomass. The development of wind projects was, essentially, the beginning of the production of energy from renewable sources in Uruguay.

Besides, 2018 saw the launch of the project "Towards a sustainable and efficient urban mobility system in Uruguay", whose purpose is to adapt institutional capacity and the regulatory framework in order to promote the reduction of carbon emissions in the mobility system. This project is executed by the Ministry of Industry, Energy and Mining (MIEM) and the Ministry of Housing, Land Management and Environment (MVOTMA). It is supported in its implementation by the United Nations Development Programme (hereinafter, "**UNDP**") and in collaboration with the Uruguayan Agency for International Cooperation (AUCI). Its funding comes from the Global Environment Facility (GEF).

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

According to Law Number 19,147, the National Environmental Observatory ("*Observatorio Ambiental Nacional*") shall register and update the information regarding the conditions of the environment, carrying out a quantification of polluting emissions, hazardous substances, waste in the environment and greenhouse gas emissions.

Further, Law Number 18,195, which has the purpose of promoting and regulating the production, marketing and use of agrofuels, establishes that it also aims to reduce greenhouse gas emissions under the terms of the Kyoto Protocol to the Framework Convention of the United Nations on Climate Change, approved by Law Number 17,279, contributing to the sustainable development of the country.

Obligations on companies to monitor their greenhouse gas emissions arise from the processing of an Environmental Authorisation. In other words, it is common for the MVOTMA, in order to authorise the operation of certain activities, to establish some requirements to monitor and report greenhouse gas emissions.

In addition, please note that the Project for the Production of Electricity from Biomass in Uruguay (PROBIO) which is a joint initiative of the National Government and the UNDP, has the aim of reducing greenhouse gas emissions from the generation of electricity from fossil fuels in Uruguay, through the promotion and development of decentralised energy generation from industrial waste biomass and by-products.

Finally, by Law Number 19,640, Uruguay approved the Decision 1/CMP.8 Amendment to the Kyoto Protocol in accordance with article 3, paragraph 9 (Doha amendment) which, among other things, encourages developing countries, such as Uruguay, to contribute to the overall effort of reduction of emissions through the mitigation measures established therein.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

The Kyoto Protocol was approved by the Uruguayan Parliament in November 2000, with the same being incorporated into Uruguayan regulations by means of Law Number 17,279. In 2013, Law Number 19,158 founded the Uruguayan Institute of Meteorology and Hydrology which, among other commitments, advises the Executive Branch in terms of climate change.

Further, in 2016, Decree Number 172/016 created the National Environmental System (hereinafter, "**NES**") with the purpose of strengthening, articulating and coordinating public policies on the matter, which is composed of various State agencies. Said Decree also creates the National Environmental Cabinet (hereinafter, "**NEC**"), which will have as a function, among others, to propose to the Executive Power an integrated and equitable environmental policy of the State for sustainable and territorially balanced national development. Also, said Decree regulates the National Secretariat of Environment, Water and Climate Change, whose purpose is to supervise compliance with the agreements of the NEC, as well as to provide it with technical and operational support. One of its main tasks is to coordinate – alongside the institutions and organisations which are members of the NES – the execution of public policies related to environment, water and climate change agreed in the NEC, nationally and internationally.

In August 2018, Law Number 19,644 approved the Montreal Protocol on substances that deplete the ozone layer.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

Decree Number 154/002 prohibits the manufacture, commercialisation and introduction to its territory of any product that contains asbestos.

The above-mentioned Decree establishes that in order to introduce asbestos into Uruguay, it is necessary to request an authorisation from the MSP prior to the opinion of the "Honorary Committee of Unhealthy Jobs" ("*Comisión Honoraria de Trabajos Insalubres*"). By way of example, Judgment No. 319/2011 of the Civil Court of Appeals of the 7th Circuit relates to a Customs Offence due to the import of materials containing asbestos, thereby breaching the mentioned Decree.

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

The competent authorities may require the substitution of asbestos on-site.

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 your jurisdiction?

The market for environmental insurance is not quite developed yet, and there is only one compulsory environmental insurance for the companies that provide port services; namely, Section 9 of Decree Number 413/92 stipulates that companies that provide port services shall have policies to cover civil liability which include protection against environmental liabilities.

Although insurance companies do offer specific environmental policies, they are not yet commonly used, since environmental liability is usually covered within general insurance which covers civil liability in general.

11.2 What is the environmental insurance claims experience in your jurisdiction?

There are no precedents in environmental insurance claims in Uruguay.

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 your jurisdiction.

Aside from the 2017 Bill, currently, one of the most important developments regarding the preservation of the environment in Uruguay is the draft of the Waste Management Bill. The Waste Management Bill has been drawn up by the Technical Advisory Commission for the Protection of the Environment, with the active contribution of the private sector.

The purpose of the Waste Management Bill is to protect the environment, promoting a model of sustainable development, through the prevention and reduction of adverse effects of the generation and management of waste and the recognition of waste as a reusable and recyclable resource, capable of generating value and employment. The Bill provides for the elaboration of a National Waste Management Plan that will establish the guidelines of waste management that shall apply in all the national territory. Along with this, the provinces shall also draw up their own Waste Management Plans that will apply within their jurisdiction, taking into account the guidelines provided by the National Waste Management Plan.

One of the main features of the Bill is the establishment of the extended responsibility of the manufacturer and importer in the management of special waste – except in those cases where the Specific Internal Tax is applicable to the products from which it is generated. In such cases, the Executive Power may impose a tax (IMESI) on the products from which the waste is generated, or increase the current tax rate.

Another significant development in Uruguay is Law Number 19,655, which was approved in 2018. The law states that it is of general interest to pursue the prevention and reduction of the environmental impact derived from the use of plastic bags, through actions to discourage their use and promote their reuse, recycling and other forms of valorisation. The law prohibits the manufacture, import, distribution, sale and delivery, in any capacity, of plastic bags that are not compostable or biodegradable. Plastic bags authorised by the present law may only be distributed, sold or delivered for any purpose on the national territory, when the manufacturer or importer has obtained the corresponding compliance certificate established by the regulation. Furthermore, the law states that the Executive Power may impose the obligation to collect and set a minimum price and method of billing for authorised plastic bags.

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She has attended several national and international seminars and conferences on environmental law and sustainable development, and has written papers in national and international forums on her specialties: matters related to quality and environmental protection; waste management; effluents treatment; persistent pollutants; and in areas related to oil pollution.

Anabela is very experienced in environmental and regulatory matters – she has taken part in procedures for adaptation of major domestic and foreign companies, participated in the mechanisms and legal systems in force in Uruguay in environmental areas, and been involved in occupational health and safety.

She has been recognised by prestigious international journals, such as *Legal*, *Latin Lawyer*, and *Who's Who Legal – Environment*, for her outstanding performance in the area of environmental law.

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Chapter 30

USA

Snell & Wilmer L.L.P.

Denise A. Dragoo

1 Environmental Policy and its Enforcement

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

Environmental law and policy in the United States derives from traditional common law notions of trespass and nuisance. Modern U.S. environmental law, however, is primarily based on statutory and regulatory enactments.

In areas where the federal government has chosen to act, federal environmental law pre-empts similar state and local enactments. Thus, federal law serves as a national baseline for environmental requirements. Consequently, U.S. environmental law is driven by the major federal statutes, and their implementing regulations, including the Clean Air Act, the Clean Water Act, the Comprehensive Environmental Response Compensation and Liability Act (CERCLA) and the Resource Conservation and Recovery Act (RCRA). Additionally, most states, and some Tribes, have been delegated the authority to implement aspects of federal law, and their statutory and regulatory requirements may exceed the requirements of federal law.

These federal regulatory agencies are also tasked with enforcement of U.S. environmental laws. Because of state delegation, however, the bulk of environmental enforcement has also been delegated to the states.

The major federal statutes tend to be fairly general and limited. As such, the U.S. Congress has authorised the U.S. Environmental Protection Agency (the USEPA), the U.S. Army Corps of Engineers and the Department of the Interior, to develop implementing regulations that provide specific legal requirements.

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

Civil penalties and criminal fines are authorised by statute to enforce state and federal environmental laws and permits. Injunctive relief can also be sought in federal or state court. Administrative penalties are generally enforced by an agency following inspection, discovery of a violation and issuance of a notice of violation and/or a corrective action order. The alleged violator may contest the fact of violation or amount of the penalty before the administrative agency and appeal a final decision for judicial review. Larger civil penalties or criminal penalties may be prosecuted in court against an alleged violator. Wilful and knowing violations may be prosecuted as a crime (generally a misdemeanour), resulting in fines and possibly imprisonment. Actions to recover natural resource damages can be brought in the appropriate state or federal court with jurisdiction over the alleged violation.

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

Most environmental data filed with state and federal government is publicly available. Information filed with federal agencies can be requested by the public pursuant to the Freedom of Information Act. State governments generally have similar laws allowing public access. Confidentiality is the exception, not the rule, but trade secrets and commercially sensitive information that is clearly marked confidential may be exempt from public disclosure.

2 Environmental Permits

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

Environmental permits are authorised under local, state and federal law to assure site-specific compliance with environmental performance standards. In some cases, the permits are standardised for an industry and can be issued as a general or nationwide permit. In most cases, environmental permits are transferrable upon notice to the issuing agency, subject to the transferee's assumption of responsibility. The transferee may need to demonstrate the financial and technical ability to meet permit conditions. A transferee's poor environmental compliance history may block the permit transfer.

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?

State and federal agencies generally have an administrative appeal process set by statute or rule. Permit denial or disputed permit conditions are initially considered by an administrative law judge or appeals board. After this administrative process is exhausted, the final agency decision can then be appealed for judicial review. The scope of review depends on the enabling statute and is either a review on the administrative record or a trial *de novo*. Under the federal Administrative Procedure Act (APA), the court may set aside

agency action found to be arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.

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

Environmental assessments have different meanings in different contexts. The term "environmental site assessment" arises in the context of CERCLA liability. Prospective purchasers of property may be protected from liability under CERCLA for certain environmental conditions by conducting "all appropriate inquiries" (AAI). To meet AAI, an environmental site assessment process must be followed which meets specified industry standards issued by the American Society for Testing and Materials (ASTM). As a separate matter, under the National Environmental Policy Act (NEPA), if the project involves major federal action or approvals, an environmental assessment or environmental impact statement must be prepared to inform the agency decision. Finally, there are benefits to environmental self-evaluation and audits which may allow the polluting industry to voluntarily identify and remediate compliance problems. Some states, including Utah, have enacted legislation and rules of evidence which protect environmental audit reports from disclosure in state administrative and judicial proceedings. If violations are properly reported and remediated as a result of self-audit, these statutes and rules may result in the waiver of civil penalties for non-compliance. Without these protections, voluntary self-audits may provide a basis for liability.

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

See question 1.2, above.

3 Waste

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

The duties and controls required for the disposal of waste in the United States depends on the waste's classification(s). Generally, waste is classified as either non-hazardous solid waste or hazardous waste. Waste can also be classified as radioactive waste, for which separate rules apply. Finally, certain wastes (for instance, certain recycling) are exempt from classification as either solid or hazardous waste. Unfortunately, there is often uncertainty, and disagreement with regulators, as to the appropriate waste classification. Because the duties and controls vary substantially, depending on the classification, this uncertainty is often hotly contested.

Hazardous wastes are tracked and regulated from their generation to their disposal, to ensure that they are handled safely. Under the USEPA's regulations implementing RCRA, hazardous wastes exhibit at least one of four characteristics – ignitability, corrosivity, reactivity and/or toxicity. The RCRA regulations contain extensive requirements for hazardous wastes. For instance, the regulations specify how hazardous wastes are identified, how they can be recycled and how they can be transported. The regulations governing the treatment, storage and disposal of hazardous wastes are particularly extensive. Both the federal regulatory agencies and the delegated states have substantial authority under RCRA to enforce compliance with the applicable regulations.

The RCRA regulations also govern non-hazardous solid waste. These rules primarily focus on the requirements for recycling and reusing, composting, incinerating, or landfilling wastes. These rules are primarily implemented and enforced by delegated states.

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?

Generally, a facility that treats, stores or disposes of solid wastes, including the waste generator, must obtain a permit. There are, however, exceptions. For instance, a large quantity generator can store waste on-site for less than 90 days without a permit, and a small quantity generator can do so for less than 180 days without a permit. There are also exceptions that may apply for transporters, for farmers, and for parties remediating contaminated sites.

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)?

Yes. This is a substantial issue under U.S. environmental law. In particular, under CERCLA, a party that disposes or treats, or arranges for the disposal, treatment or transportation, of a hazardous substance is strictly liable, jointly and severally, without regard to fault, for releases into the environment of the hazardous substance. In 2009, however, the U.S. Supreme Court limited CERCLA "arranger" liability to those parties who intended for disposal of hazardous substances to occur. Considering that remediation of CERCLA sites can cost hundreds of millions of dollars, and that the responsible parties are strictly liable for those costs, the scope of this relatively new exception to arranger liability is now heavily litigated throughout the United States.

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

Generally, waste producers do not have any obligation regarding the take-back and recovery of their waste. Some states, however, require that certain electronic waste, pharmaceuticals, batteries and/or bottles and cans must be collected and recycled by their manufacturers and distributors. Additionally, many businesses and municipalities have voluntary programmes designed to take back and recycle these wastes.

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?

A breach of environmental laws can give rise to administrative, civil and/or criminal penalties, damages, injunctions and (rarely) incarceration. The extent of liability typically will depend on the amount of damage caused, the duration of the damage, the cooperation of the party causing damage, and their prior compliance history. Criminal liabilities generally are reserved for cases where the damage is particularly egregious and/or the conduct was intentional.

There are limited statutory defences for breaching environmental laws. Primarily, they relate to equipment malfunctions and emergency

responses. In order to qualify for a defence, an operator usually must provide notice of the breach to the proper regulatory authority within a matter of days, and must correct the situation as quickly as possible. Violations may also be time-barred by statutes of limitation.

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

Yes. Many environmental statutes provide that compliance does not pre-empt other local, state or federal requirements. However, operation within permit limits demonstrates compliance with the specific performance standards addressed by the permit.

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?

Yes, corporate officers and directors can be personally liable for wilful and knowing violations, intentional acts including failure to report or to disclose known violations, and for fraudulent, grossly negligent or illegal acts that result in contamination. Personal liability may be established where it is shown that the officer and director actively participated in or exercised control over the operations. Fraudulent, criminal or grossly negligent acts are generally excluded from indemnification clauses and insurance policies.

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?

In a share sale, the buyer "steps into the shoes" of the company purchased and assumes the environmental liability of the seller. By contrast, in an asset sale, environmental liability relates to the assets acquired. Through due diligence, the buyer may determine whether or not to acquire certain assets and associated liability. In addition, the asset purchase agreement may be structured to limit or cap liability.

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

Lender liability largely depends on the amount of control exercised by the lender over the contaminated property. Lenders who hold a mortgage primarily to protect their security interest in the property are provided a limited "safe harbour" from CERCLA liability, if they do not directly participate in management of the property. If the lender exercises decision-making authority as to the use, management or environmental compliance of the property, the lender may become liable for environmental remediation costs.

5 Contaminated Land

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

As discussed in question 3.3, CERCLA imposes strict liability on a range of parties for the disposal of hazardous substances. This strict liability also applies to the past and present owners and operators of facilities where hazardous substances are disposed. The clear public policy in the United States is to find a responsible party, or parties, to pay for remediation of contamination.

Also, some states have additional statutes affecting the transferability of potentially contaminated land. For instance, New Jersey's Industrial Site Remediation Act permits the state to rescind any transfer of industrial property if the buyer and seller have not first investigated and remediated any site contamination to the extent required by the state.

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

There is no definitive CERCLA law on how allocation should be done. Consequently, allocation of responsibility between potentially responsible parties is always a substantial issue in CERCLA matters.

As a general matter, usually the parties or a neutral third party will determine the allocation scheme for a given CERCLA site. Issues that are usually considered for each party include: volume of waste disposed; type of waste; toxicity or other hazardous nature of waste; culpability as to the transportation, treatment, storage and/or disposal of the waste; degree of cooperation with government authorities to remediate the waste; and degree of care taken to ensure proper disposal of the waste. As noted in question 3.3, whether a party intended to arrange for disposal of the waste has become a primary issue in recent years.

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?

Yes, both the government and third parties usually have opportunities to either reopen the required work (for instance, if additional unknown contamination is found), or to challenge the agreement (if, in the case of a third party, their own rights may be impacted by the agreement). These opportunities, however, are often time limited, particularly with regard to third-party challenges of the initial agreement.

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?

Yes, CERCLA, RCRA and state statutes all provide private rights of action against previous owners and operators of contaminated land.

Additionally, it is possible to transfer the risk to a purchaser. This is discussed below in question 8.1.

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

Yes, the federal government, the Tribes, and the states can, and frequently do, seek to recover natural resource damages.

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.?

Environmental regulators have inherent police power to enforce environmental statutes. This means that they may require the production of documents, take samples, conduct site inspections and interview employees. Moreover, they may, and sometimes do, arrest site personnel for impeding their investigations.

Nevertheless, their police powers are limited by the United States Constitution, and by federal and state statutes and regulations. Consequently, it is usually the case that environmental regulators will work with the targets of their investigations (particularly, if the targets are themselves cooperative) to obtain information. In this regard, it is prudent for regulated entities to maintain cooperative relationships with their regulators.

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?

On or off-site pollution may need to be disclosed to environmental regulators. The legal requirements vary tremendously, however, depending on the jurisdiction of the site, the environmental law(s) at issue, and the characteristics of the pollution. This issue is best resolved by a legal practitioner within the jurisdiction. Because, however, some jurisdictions have extremely short mandatory reporting timelines (for instance, as short as 15 minutes in New Jersey), it is prudent to know these requirements in advance for any potential releases at a site.

As a general matter, pollution does not legally need to be disclosed to third parties; although, as a practical matter, failure to warn third parties can expose the property owner to new or greater liabilities if the third parties are harmed.

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

Obviously, a release of contaminants will often trigger an obligation to investigate and remediate that release. Otherwise, it is generally the case that there is no obligation to investigate land for contamination unless either: (i) the ownership or operation of the land is being transferred; or (ii) the financial strength of the owner has changed, thereby calling into question the financial ability of the owner to conduct any necessary future remediation. Because CERCLA makes current owners and operators of contaminated land strictly liable for hazardous substances, prudent purchasers as a matter of course engage in "all appropriate inquiry" prior to purchase. Finally, property used as collateral must usually be investigated.

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?

The extent of mandatory disclosure is sometimes driven by state law, but it is usually a matter of the contractual terms between the buyer and seller.

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?

Parties frequently include contractual indemnities for environmental liabilities. The efficacy and enforceability of such provisions depends on the terms of the provisions, the extent of any relevant disclosures, representations and warranties, and the underlying environmental laws involved.

Payment under an indemnity does not alter claims that the government may have against the indemnitor. Moreover, even if responsible parties allocate responsibility among themselves, each responsible party remains strictly liable, without regard to fault, under CERCLA for the discharge of hazardous substances.

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

Yes, it is possible to "escape" environmental liabilities. This is an issue, however, that is impacted not only by environmental laws, but also by corporate, bankruptcy and securities law. Accordingly, any such endeavour should only be undertaken, if at all, after careful review by an appropriate team of legal counsel.

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?

Shareholders are usually protected from corporate environmental liabilities. Parent corporations also are usually protected from subsidiary environmental liabilities. There are, however, a variety of ways that these protections might be breached. For instance, courts may "pierce the corporate veil" of a parent corporation, if the corporate form is not maintained by a subsidiary, and courts may hold a shareholder liable if a company is merely an alter ego.

While the United States federal courts may entertain lawsuits involving foreign subsidiaries or foreign companies, a recent decision from the United States Supreme Court has limited the extent to which federal courts will exercise their general jurisdiction to hear such cases.

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

Yes. Federal environmental laws protect "whistle-blowers" who report environmental violations from retaliation. Special protection is provided under the federal CAA, CWA, RCRA and CERCLA. In addition, the federal False Claims Act offers environmental whistle-blowers a financial incentive to report environmental violations in connection with federal contracts.

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

The Federal Rules of Civil Procedure provide for class action suits for a variety of legal claims, including environmental claims. As a practical matter, however, courts have determined that class action lawsuits are not well-suited for the enforcement of environmental laws. Consequently, such actions are fairly rare.

Penal damages generally are not allowed. Punitive or exemplary damages are available, and regulators will pursue punitive damage when they believe a party's conduct warrants punishment.

8.6 Do individuals or public interest groups benefit from any exemption from liability to pay costs when pursuing environmental litigation?

No. As a general rule, litigants must bear their own costs of litigation. There are, however, exceptions. First, many federal environmental statutes allow for citizens' suits, in which private individuals seek to enforce environmental laws. If citizens prevail in those suits, they are generally able to recover their costs of litigation. Second, there are countervailing provisions that seek to prevent the filing of frivolous litigation. Under those circumstances, individuals may be forced to bear the costs incurred by others to defend against their suits.

9 Emissions Trading and Climate Change

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

The United States has fragmented emissions trading schemes for greenhouse gases, primarily in the northeast and California. It remains an open question whether such markets will develop fully in the United States. Indeed, the new Administration seems openly hostile to any such trading, or to acknowledging that climate change is occurring.

The United States does have established trading of SO2, which has reduced nationwide SO2 emissions. Additionally, new source air permitting often requires credits of banked, traditional air pollutants, thereby reducing those emissions.

9.2 Aside from the emissions trading schemes mentioned in question 9.1 above, is there any other requirement to monitor and report greenhouse gas emissions?

Yes, the USEPA requires monitoring and reporting of greenhouse gas emissions. The USEPA enacted regulations that would have required such reporting from a wide variety of major sources of greenhouse gases, but the Supreme Court issued a decision limiting such reporting to sources that are already regulated under Title V of the Clean Air Act (so-called "anyway sources"). On March 28, 2017, President Trump issued an executive order (EO) calling for the repeal of the Clean Power Plan (CPP) rule finalised in the previous administration to regulate greenhouse gas (GHG) emissions from coal-fired power plants. The Supreme Court had stayed implementation of the CPP in February 2016. In response to the EO, the USEPA proposed the repeal of the CPP in October 2017 and the CPP was finally repealed on December 1, 2018. A new replacement rule entitled "Affordable Clean Energy" rule (ACE) was proposed in August 2018 and, following comment, is scheduled to take effect in March 2019. This rule sets emission guidelines to be used by states to develop plans to address GHG emissions from existing electric utility generating units. The rule provides more flexibility to state regulators.

9.3 What is the overall policy approach to climate change regulation in your jurisdiction?

There is no overall policy approach to climate change regulation in the United States. The Supreme Court has held that the USEPA has the authority and the obligation to regulate greenhouse gases pursuant to the Clean Air Act. However, the Supreme Court has mostly struck down the regulations that the USEPA has sought to implement. Meanwhile, there seems to be virtually universal agreement, including within the USEPA, that the Clean Air Act – last amended in 1990 – is not well suited for the regulation of greenhouse gases. Whether a future Congress would amend the Clean Air Act, or pass a climate change bill, remains doubtful.

10 Asbestos

10.1 What is the experience of asbestos litigation in your jurisdiction?

The United States continues to experience substantial asbestos litigation. The plaintiffs' bar has depleted, or bankrupted, many of the original asbestos manufacturer defendants. As a result, plaintiffs have sought an ever-wider array of corporate defendants who may have used asbestos in their goods or services, or who may have had asbestos installed in their premises.

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

The requirements related to on-site asbestos are determined based on a range of federal, state and local health and safety statutes and codes. Asbestos removal from school buildings is subject to the federal Asbestos Hazard Emergency Response requiring the certification of contractors and workers. Many states have established asbestos work practices and certification programmes for contractors and other persons engaging in the removal and disposal of friable asbestos-containing material.

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 your jurisdiction?

The environmental insurance market in the United States is currently fairly soft and growing. Until recently, however, environmental insurance was difficult to obtain. Many of the companies that offered such insurance in the 1990s experienced losses far in excess of their expectations. Currently, to obtain environmental insurance, a contaminated site must be well characterised.

11.2 What is the environmental insurance claims experience in your jurisdiction?

Comprehensive general liability insurance policies, particularly those

issued prior to 1974, continue to provide extensive coverage for environmental liabilities. The extent of available coverage, however, varies dramatically from state to state, as the various states' courts have often rendered distinctly different interpretations of identical policy terms. Consequently, the state in which a claim is filed (or adjudicated) can determine whether environmental insurance coverage is available, and the amount of coverage available.

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 your jurisdiction.

President Donald Trump took office on January 20, 2017 and since that time both Congress and the Executive Branch have undertaken a comprehensive review of the environmental regulations and policies of the previous administration. The Congressional Review Act (CRA) has been used to repeal several rules finalised at the end of the previous administration. Under the CRA, agencies must notify Congress when rules are issued. Congress then has 60 days from the date of notice or publication to issue a joint resolution of disapproval by a simple majority. The Bureau of Land Management's new 2.0 landscape-scale planning rules and the Federal Office of Surface Mining stream protection rules are among the regulations repealed under the CRA. The Trump administration has curtailed aggressive expansion of the USEPA authority in rulemakings under both the Clean Water Act and the Clean Air Act. See question 9.1 regarding repeal and replacement of the Clean Power Plan. On December 11, 2018, the USEPA and the Corps of Engineers proposed a new, narrower definition of the Clean Water Act (CWA) term "waters of the United States" (WOTUS). Rules adopted by the previous administration in June 2015 broadly define the scope of jurisdiction of the USEPA and the Corps of Engineers over WOTUS.

The 2015 rules have been challenged in litigation across the nation. As a result, the 2015 rules are currently effective in 22 states, the District of Columbia and the U.S. territories. The previous regulations, issued in the 1980s, are in effect in the other 28 states, including Arizona, Colorado, Nevada and Utah. Upon final adoption, the new WOTUS rule would be effective in all states. The new proposed definition limits jurisdiction to six categories of water, including traditional navigable waters, their tributaries (specifically excluding ephemeral streams), adjacent wetlands (must have a direct hydrologic connection to jurisdictional waters), ditches constructed in tributary waters and lakes, ponds and impoundments of otherwise jurisdictional waters. Eleven exclusions are specified including waste treatment systems, storm water controls and artificial lakes and ponds. The rule is subject to 60 days' comment. The new administration has significantly changed its approach to controlling GHG emissions. The USEPA's Clean Power Plan (CPP), finalised in August 2015, extended climate change mandates to existing coal-fired power plants. Carbon emissions from these sources were to be reduced by 32 per cent from 2005 levels by 2030.

These climate change mandates expanded the USEPA's authority under the Clean Air Act. As noted in question 9.1 above, the new administration repealed the CPP as of December 1, 2018. A new replacement rule entitled the "Affordable Clean Energy" rule (ACE) was proposed in August 2018 and is scheduled to take effect in March 2019. This rule sets emission guidelines to be used by states to develop plans to address GHG emissions from existing electric utility generating units. The USEPA requires the states to impose limits based on allowable pounds of CO2/MWh, but does not specify the method of establishing those standards. The ACE rule provides State regulators with more flexibility than the now-repealed CPP.

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