



Environment

in 23 jurisdictions worldwide

2012

Contributing editor: Carlos de Miguel Perales



Published by
Getting the Deal Through
in association with:

ÆLEX Legal Practitioners and Arbitrators

Atsumi & Sakai

Avocado Rechtsanwälte

Barretto Ferreira, Kujawski e Brancher Sociedade
de Advogados (BKBG)

Bech-Bruun

Beveridge & Diamond, PC

Blum&Grob Attorneys at Law Ltd

Dianne Saxe Professional Corporation

Ganado & Associates

Gide Loyrette Nouel

Lexcorp Abogados

M V Kini & Co

Noerr OOO

Orihuela Abogados | Attorneys At Law

Perez Quiroz Santroni – Abogados Consultores

SCA Schoenherr si Asociatii

Schönherr

Schönherr Rechtsanwälte GmbH

Shepstone & Wylie

Travers Smith LLP

Uría Menéndez

Uría Menéndez – Proença de Carvalho



Environment 2012

Contributing editor

Carlos de Miguel Perales
Uría Menéndez

Business development managers

Alan Lee
George Ingledew
Robyn Hetherington
Dan White

Marketing managers

Ellie Notley
Sarah Walsh
Alice Hazard

Marketing assistants

William Bentley
Sarah Savage
Zosia Demkowicz

Marketing Manager (subscriptions)

Rachel Nurse
Subscriptions@
GettingTheDealThrough.com

Assistant editor

Adam Myers

Editorial assistant

Lydia Gerges

Senior production editor

Jonathan Cowie

Chief subeditor

Jonathan Allen

Subeditors

Davet Hyland
Caroline Rawson
Sarah Morgan

Editor-in-chief

Callum Campbell

Publisher

Richard Davey

Environment 2012

Published by
Law Business Research Ltd
87 Lancaster Road
London, W11 1QQ, UK
Tel: +44 20 7908 1188
Fax: +44 20 7229 6910
© Law Business Research Ltd 2011

No photocopying: copyright licences
do not apply.

ISSN 1752-8798

The information provided in this
publication is general and may not apply
in a specific situation. Legal advice should
always be sought before taking any legal
action based on the information provided.
This information is not intended to
create, nor does receipt of it constitute, a
lawyer-client relationship. The publishers
and authors accept no responsibility for
any acts or omissions contained herein.
Although the information provided is
accurate as of November 2011, be
advised that this is a developing area.

Printed and distributed by
Encompass Print Solutions
Tel: 0844 2480 112

Law

Business

Research

Austria <i>Christian Schmelz and Bernd Rajal</i> Schönherr Rechtsanwälte GmbH	3
Brazil <i>Ricardo Barretto Ferreira da Silva and Flávia Scabin</i> Barretto Ferreira, Kujawski e Brancher Sociedade de Advogados (BKBG)	12
Bulgaria <i>Vesela Mirkova and Elena Andonova-Rangelova</i> Schönherr	20
Canada <i>Dianne Saxe and Jackie Campbell</i> Dianne Saxe Professional Corporation	30
China <i>Stéphane Gasne and Hu Xiao</i> Gide Loyrette Nouel	37
Denmark <i>Mads Kobberø and Anne Sophie K Vilsbøll</i> Bech-Bruun	43
Dominican Republic <i>Romina Santroni and Giselle Perez Reyes</i> Perez Quiroz Santroni – Abogados Consultores	50
France <i>Laurent Deruy, Stéphane Gasne and Corentin Goupillier</i> Gide Loyrette Nouel	57
Germany <i>Christoph Anger and Thomas Gerhold</i> Avocado Rechtsanwälte	63
India <i>Els Reynaers</i> Kini M V Kini & Co	70
Japan <i>Akiko Monden, Rieko Sasaki and Sachiko Sugawara</i> Atsumi & Sakai	78
Malta <i>Jotham Scerri-Diacono and Annalise Caruana</i> Ganado & Associates	84
Mexico <i>Sergio B Bustamante and Jose Luis Rendon</i> Lexcorp Abogados	94
Nigeria <i>Soji Awogbade, Sina Sipasi and Olasumbo Abolaji</i> ÆLEX Legal Practitioners and Arbitrators	101
Peru <i>Sandra Orihuela and Michelle Beckers</i> Orihuela Abogados Attorneys At Law	106
Portugal <i>João Diogo Stoffel and João Louro e Costa</i> Uría Menéndez – Proença de Carvalho	113
Romania <i>Bogdan Ionita and Nicolae Miha</i> SCA Schoenherr si Asociatii	120
Russia <i>Tatiana Kazankova, Iliia Rachkov and Viktoria Tkatschenko</i> Noerr 000	129
South Africa <i>Ian Sampson and Melissa Groenink</i> Shepstone & Wylie	137
Spain <i>Carlos de Miguel and Jesús Sedano</i> Uría Menéndez	143
Switzerland <i>Stefan Wehrenberg</i> Blum&Grob Attorneys at Law Ltd	149
United Kingdom <i>Douglas Bryden, Owen Lomas and Carl Boeuf</i> Travers Smith LLP	156
United States <i>Donald J Patterson Jr and Holly Cannon</i> Beveridge & Diamond, PC	165

Peru

Sandra Orihuela and Michelle Beckers

Orihuela Abogados | Attorneys At Law

Legislation

1 Main environmental regulations

What are the main statutes and regulations relating to the environment?

Environmental legislation in Peru is based on rational social, ecological, economic and technological principles to promote sustainable development, and on constitutional principles that recognise the right of all Peruvians to enjoy a clean and healthy environment. The principal environmental regulations are the General Law on the Environment, the Law on the National System for Evaluation of Environmental Impact, the General Health Law, the Law for Sustainable Use of Natural Resources, the Water Resources Law and the General Law on Solid Waste.

The General Law on the Environment comprises the principal legal framework for environmental regulation in Peru, and it sets forth the basic rules and principles designed to ensure that the environment is healthy, balanced and suitable for human health and well-being, and to ensure compliance with the general duty of all persons and entities to contribute to the effective management and protection of the environment to improve the quality of life in Peru.

The Peruvian Criminal Code contains provisions to deter and punish crimes against the environment, and it provides that in order to balance the need for industrial activities with protection of the environment, no domestic or industrial activities should exceed the contamination limits established by law.

2 Integrated pollution prevention and control

Is there a system of integrated control of pollution?

No. However, the Ministry of the Environment was created in 2008 to oversee environmental matters in Peru, including designing, carrying out and supervising national environmental policy. Also, the National System for Environmental Evaluation and Investigation is a unique and centralised system that was created for the identification, prevention, management and correction of negative environmental impacts resulting from all industrial activities. Companies that carry out operations within Peru must comply with Environmental Quality Standards (EQSs) and industry set Maximum Permissible Limits (MPLs). EQSs are the set concentrations and limits for the presence of elements, chemical and biological matter and other substances in the air, water and soil that do not represent a significant risk for human health or the environment. MPLs are the maximum legal concentrations and limits of elements, chemical and biological matter and other substances in air, water and soil. When such limits are exceeded, an effluent or emission is classified as causing, or at risk of causing, harm to the environment and to human health and wellbeing. New environmental legislation calls for the Ministry of the Environment to centralise the approval of EQSs and MPLs, in lieu of having industry based standards.

3 Soil pollution

What are the main characteristics of the rules applicable to soil pollution?

There is no specific law addressing the issue of soil pollution; however, there are EQSs and MPLs with respect to levels in soil. The General Health Law prohibits the discharge of waste or pollutants into the ground without the treatment precautions required by sanitation and environmental protection regulations. There are also regulations and non-binding guidelines that apply within specific industries. For example, the Law Regulating Environmental Liabilities of Mining Activities is designed to identify responsible parties to remediate contaminated areas to mitigate the negative impacts on human health and the surrounding land and ecosystems. The Law on the Regulation of Environmental Liability in the Hydrocarbons Sector regulates the hydrocarbons subsector and establishes that any party that causes environmental harm is liable for the required environmental remediation, subject to penalty of law. There is currently a proposed Soil Environmental Quality Standards Law under consideration, but it has not been approved to date.

4 Regulation of waste

What types of waste are regulated and how?

Solid waste is regulated by the General Law on Solid Waste, and its corresponding Regulations. Solid waste is classified as substances, products or byproducts in a solid or semi-solid state that are required to be disposed of under federal regulations due to the risks to human health and the environment. They must be disposed of using a system with processes for the minimisation, segregation at the source, reuse, recollection, commercialisation, transport, treatment, transfer and final disposal of waste. These wastes are classified into eight categories: household waste, commercial waste, public facility cleaning waste, health facility waste, industrial waste, construction waste, agricultural waste and waste from special facilities or activities.

Generators of industrial waste are responsible for its proper disposal, and must submit on an annual basis to the respective governing authority in the sector a Statement of Management of Solid Waste that details the volume generated and the mechanisms used for management of the waste, as well as a management plan that will be carried out the following year.

Hazardous wastes are those which, by their characteristics or the special management to which they are subject, represent a significant risk to health or the environment, and they are also regulated under the General Law on Solid Waste. The law governs all activities, processes and ground transportation related to hazardous materials and wastes, and provides for the steps to be taken with respect thereto in emergency situations, with the goal of minimising the risks to property, the environment and human health. Various other regulations also cover specific types of hazardous waste depending on the nature of the waste and the activities from which they result.

5 Regulation of air emissions

What are the main features of the rules governing air emissions?

EQSs and MPLs contain the guidelines and limitations on concentrations in the air and limit emissions. There is currently no legislation requiring permits or other licences for air emissions. An agency of the Ministry of Health, the Directorate General for Environmental Health, is in charge of monitoring air quality.

Peruvian environmental law provides industry-based limitations for air emissions based on the MPLs and EQSs applicable to an industry. For example, all hydrocarbon producers must monitor emissions and air quality in order to be able to demonstrate compliance with applicable environmental standards to the Office of Hydrocarbons.

6 Climate change

Are there any specific provisions relating to climate change?

Peru has a national strategy against climate control, which sets forth the criteria that the country intends to follow for preventing climate change. Peru has ratified the Kyoto Protocol and the United Nations Framework Convention on Climate Change. Peru advanced its commitments under the Kyoto Protocol prior to the creation of the Peruvian Ministry of the Environment in 2008 by having in place a Special Commission on Climate Change to identify the principal sources of and risks for climate change. The obligations of developing countries such as Peru under the Protocol are to measure the emission of gases that affect climate, which are mainly related to transportation, industrial processes, the generation of energy and deforestation. Peru participates in the Carbon Market created by the Protocol under the Clean Development Mechanism Project.

There is currently no 'cap-and-trade' system in force in Peru, nor is any such system proposed at the present time.

7 Protection of fresh water and seawater

How are fresh water and seawater, and their associated land, protected?

The Law on Water Resources governs the management of water. The law defines water as a delicate renewable natural resource that is vital to human life and of strategic importance for sustainable development, the maintenance of natural systems and cycles and the safety of the country. There is no private ownership of water bodies in Peru as these belong solely to the federal government.

A permit is required in order to make use of or discharge into any water bodies (saltwater and freshwater). For the release of treated wastewaters into water bodies, a favourable technical opinion must be obtained from the environmental and health authorities and the ESQs applicable to water must be met. The National Water Authority is the federal entity with exclusive jurisdiction over water resources and water policy and management, and from which permits are obtained. It also carries out inspections and imposes penalties with respect to violations of water laws.

8 Protection of natural spaces and landscapes

What are the main features of the rules protecting natural spaces and landscapes?

Under the Law on Natural Protected Areas, certain areas in Peru are designated as 'Natural Protected Areas' (NPAs). NPAs are national lands and marine areas that are designated as areas of natural heritage, and access to and use of NPAs are limited. The areas are grouped within certain categories for the conservation of biological diversity and other characteristics of the areas that make them valuable from a cultural, scenic, scientific or other perspective. SERNANP (the National Service on Natural Protected Areas), a branch of the Ministry of the Environment, is the government agency responsible

for establishing the administrative and technical criteria for conserving NPAs.

The specifically authorised uses of NPAs are broken down into 'direct' and 'indirect' uses, and the categorisation of each NPA is based on such permitted uses. Authorised indirect uses include tourism, recreation and non-manipulative scientific research, and the NPAs in this category are national parks, national sanctuaries and historical sanctuaries. Authorised direct use includes the extraction and use of natural resources, to which local communities have priority, as well as other activities that are compatible with the community's development plan. NPAs that fall into this category are national reserves, scenic reserves, wildlife refuges, community reserves, game reserves and protected forests.

In the event that an area designated as an NPA includes private property, the private owner will either be permitted to remain within the property and have his or her rights on the property restricted to the specific authorised uses for the property, or he or she will be required to vacate the area. The private owner will receive compensation from the government in both cases.

9 Protection of flora and fauna species

What are the main features of the rules protecting flora and fauna species?

The Forest and Wildlife Law (Legislative Decree 29763) regulates the sustainable use, protection and conservation of forest resources and wildlife in Peru. The Ministry of Agriculture is the governmental entity that establishes the regulations for forest resources and wildlife and promotes sustainable use and conservation, and the National Institute of Natural Resources (INRENA) is the administrative agency that has the authority to manage those resources. INRENA prepares the official classification of species of flora and fauna based on the stage of conservation (critically endangered, endangered, threatened and almost in threat) and degree of endangerment of each species (which are divided into presumed extinct, extinct in its natural habitat, in critical danger of extinction, in threat of extinction, vulnerable species, minor risk, species without sufficient information and species not evaluated). The Forest and Wildlife Law provides for protective measures, such as limitations on hunting and bans on commercialisation. SERFOR (the National Forest and Wildlife Service) was created as an agency of the Ministry of Agriculture. Its role is planning, supervising and supporting national forest and wildlife policies.

Peru is a signatory to international conventions for the protection of flora and fauna, including the Convention on International Trade in Endangered Species of Wild Fauna and Flora, the Convention on Biological Diversity and the Cartagena Protocol.

10 Noise, odours and vibrations

What are the main features of the rules governing noise, odours and vibrations?

There is no centralised authority or comprehensive law regulating noise, odours or vibrations. The General Law on the Environment provides that local governments set the rules for and govern noise and vibration created by domestic and commercial activities, and that authorities in individual industries set the rules and control noise and vibrations in their industries.

There is no specific environmental legislation that regulates or provides for sanctions for odours. In general, municipal authorities have jurisdiction to handle complaints regarding odours in their municipalities. The only industry-specific regulation of odours is in the hydrocarbons industry, where the regulations specify that odours shall not be offensive.

11 Liability for damage to the environment

Is there a general regime on liability for environmental damage?

Liability for environmental damage is generally regulated by the General Law on the Environment, which defines environmental damage as a material infringement on the environment caused by the violation of a law and which has resulted in, or could potentially result in, negative effects on the environment. A violation of environmental laws (or permits granted to the respective party) can give rise to administrative liability, subject to administrative fines and penalties based on a monetary scale generally categorised by the seriousness of the environmental damage. Further, the polluter may be subject to civil liability (to third parties) and even criminal liability.

The civil liability scheme for environmental damage in Peru is established on the basis of objective liability resulting from a 'non-contractual', tort action. Objective liability can be based on malicious or negligent actions, or on strict liability applicable to hazardous or dangerous activities. Whereas civil liability requires existing environmental harm resulting from the violation of law, administrative and criminal penalties can be imposed solely for the violation of the law even where no harm has yet resulted.

Where a person or entity has caused or contributed to environmental damage in violation of environmental law, any third party (including the state) may file a civil lawsuit against the violating party. Peruvian environmental legislation recognises the 'polluter pays' principle, meaning the violating party is liable for the cost of prevention, monitoring, restoration and compensation for the environmental damage. In order to impose liability there must be a cause and effect relationship between the act or omission of the defendant and the harm. However, actions can be brought even in cases in which the plaintiff or claimant's economic or personal interest is not affected, so long as there is a determinable harm.

Once liability is established, the defendant pays damages to the plaintiff as compensation for the harm suffered, as well as for prevention, mitigation and clean-up. With respect to criminal liability, fines or imprisonment for violating environmental protection standards may be imposed. Stricter punishment is generally imposed for crimes resulting in 'severe' impacts to natural resources that serve as the basis of economic activity or that cause human death. Certain levels of intent or recklessness are required for criminal liability to be imposed in most cases. In two instances criminal liability is imposed for criminal negligence: environmental contamination and illegal disposal or trade of waste.

12 Environmental taxes

Is there any type of environmental tax?

In Peru there is currently no tax legislation directly applicable to environmental matters or related to activities that have environmental impacts.

Hazardous activities and substances

13 Regulation of hazardous activities

Are there specific rules governing hazardous activities?

There is no specific central authority that regulates all hazardous activities. There are regulations that govern certain hazardous activities, including the transport of hazardous wastes, management of radioactive materials, use of explosives and use and transport of chemical materials to be used for the manufacture of certain drugs. Also, certain activities that will potentially affect the environment, such as mining, energy and hydrocarbon-related activities, are classified as hazardous activities. An environmental impact study is required for any such activities, which must be submitted to and approved by the relevant governmental authority that regulates the sector, such as the Ministry of Energy and Mines or the Ministry of Transport and Construction. Additional permits and licences are

required for certain of the secondary activities related to those types of hazardous activities, which are obtained directly from the respective agencies.

14 Regulation of hazardous products and substances

What are the main features of the rules governing hazardous products and substances?

There is no comprehensive law that regulates all hazardous products and substances. However, the General Health Law requires that the necessary precautions be taken in the import, manufacture, storage, transport, sale, management and disposal of hazardous substances and products to prevent harm to human and animal health and to the environment, which precautions are further set forth in the corresponding Regulations. The Law on Land Transportation of Hazardous Materials and Waste specifically regulates the transportation of hazardous substances. It defines hazardous substances as elements, compounds, mixtures or preparations that, due to their chemical, physical, toxic or biological properties, constitute a risk to human health and safety, to the environment or to property. There are also various other laws and regulations that contain precise definitions of substances that are considered to be hazardous and that regulate their use, such as those applicable to radioactive materials, explosives, the manufacture of certain drugs and agrochemicals.

There are also certain provisions related to the management of hazardous substances in the General Law on the Environment that provide for companies to exercise measures for controlling their use of hazardous materials and substances to prevent, control and mitigate negative environmental impacts.

Industrial accidents

15 Industrial accidents

What are the regulatory requirements regarding the prevention of industrial accidents?

On 22 August 2011, the Law on Safety and Health at Work came into effect. The aim of the law is to prevent risks in the workplace, and it is applicable across all industries and sectors throughout the country. The law also provides for the creation of the National Council on Safety and Health at Work, which will, among other things, create and approve safety and health policies for the workplace.

The Law on Contingency Plans requires companies to prepare and submit, to the relevant authority in the sector in which they do business, contingency plans for each activity in which they will be engaged. The plans must be prepared based on the Institute of Civil Defence Guidelines and must be updated at the earlier of every five years or each time the company makes a major change in its activities. The plans must include, among other things, an evaluation of risks, measures for prevention of identified risks and an evacuation plan.

There are also laws that require prevention measures for work-related accidents, such as the Regulations on Safety and Health at Work established by the Ministry of Labour. These and other types of regulations provide minimum standards for mitigation of risks at the workplace and standards for occupational and industrial safety applicable to certain sectors.

Environmental aspects in transactions

16 Environmental aspects in M&A transactions

What are the main environmental aspects to consider in M&A transactions?

The main environmental aspect to be considered in M&A transactions in Peru is that a change in the ownership of a Peruvian company does not change the legal existence of such entity, meaning it remains liable for its past environmental violations. Accordingly, a successor

in interest will acquire any known or unknown liabilities of the company in a share acquisition. The entity will be liable notwithstanding any contractual agreement to the contrary. The General Law on the Environment specifically sets forth that failure to be aware of environmental violations when acquiring a company does not relieve the acquiring party from liability.

The cost of prevention, monitoring, restoration and compensation for environmental damage is the responsibility of the party causing the damage. Liability between a titleholder and any assignee, agent, subcontractor or other third party that may have contributed to the harm can be joint and several. While indemnities and other contractual obligations are enforceable between the parties, regulators will look to the entity and its directors, officers and managers for liability of environmental violations.

A legal entity cannot be criminally liable in Peru, which means that criminal liability for environmental violations can be imposed only on officers, directors, managers or legal representatives of a company. Representatives that have been appointed following the occurrence of an environmental violation can be liable for past violations of the entity.

In an acquisition of assets rather than shares, both the prior owner (or any party that carried out work on a property and caused environmental harm, or both) and the new owner of the asset would be liable for environmental violations and damage. Past owners and operators will remain responsible for violations resulting from their operations (although they may contractually assign such liabilities), but the new titleholder is liable for any remediation or rehabilitation of the damage. Where an environmental impact study is required with respect to an asset, the new owner must disclose all past environmental liabilities, as well as provide for the remediation, rehabilitation or closing plan of all liabilities as part of the study in order to continue work in such assets. Remediation or rehabilitation of past environmental liabilities is required under applicable legislation and is nowadays an essential part of all environmental impact studies. The government can require financial guarantees to ensure compliance with remediation of environmental liabilities.

17 Environmental aspects in other transactions

What are the main environmental aspects to consider in other transactions?

When a transaction involves real estate, lands or other similar assets, the risk that is assumed may not be solely with respect to the remediation thereof (liability for which can be imposed upon the prior owner), but it may involve the risk of reduced value of the property or asset or the loss of the right to carry out the intended use as a result of an environmental impact, harm or violation. Representations, warranties and indemnities to compensate any breach thereof may mitigate the risk to the acquirer. Also, an acquirer of a contaminated property will have a cause of action against a seller for any 'hidden defect' that was not discoverable by an inspection that was properly carried out. Conducting environmental due diligence prior to any such acquisition remains an important step.

Environmental assessment

18 Activities subject to environmental assessment

Which types of activities are subject to environmental assessment?

All commercial and industrial activities that may negatively impact the environment require an environmental study. The Ministry of the Environment reviews and approves environmental impact studies for government programmes and the ministries in individual sectors review the studies for projects within their sectors.

Environmental studies must be approved prior to the commencement of activities. Most activities also require other licences and permits that must be obtained prior to, during and after commencement

of the project, notwithstanding the approval of an environmental study.

19 Environmental assessment process

What are the main steps of the environmental assessment process?

The type of study required to be submitted to the appropriate ministry for the sector (Statement of Environmental Impact (DIA), Semi-Detailed Environmental Study (EIASd), or Detailed Environmental Study (EIA)) is based on whether minimal, moderate or significant environmental impacts are anticipated, which in turn depends on which category the subject activities are classified in. The procedure for the study is generally the same regardless of the type required.

First, the corresponding request, whether it is a DIA, EIASd or EIA, is submitted to the relevant ministry summarising the type of activities, the anticipated impacts, the environmental management strategy, a plan for local community participation, closing and rehabilitation measures and additional documentation required based on the category in which the project is classified. The studies must be carried out by an unrelated party duly registered with the relevant ministry. Environmental studies require comments from the public on the project and/or beginning August 2011, to undergo a prior consultation process if the project is deemed to affect indigenous or native populations. The consultation process is handled with the participation of regional government authorities, or a special designated committee from the Intercultural Vice Ministry of the Ministry of Culture via public hearings on the project.

The governmental authority reviews the submitted documentation, issues comments and questions to the applicant and provides a deadline for responding. The responses are evaluated, and if the information submitted is sufficient, the authority issues an order approving the study. The authority follows up on the project and reviews the activities to ensure compliance with the approved study and applicable legislation.

Regulatory authorities

20 Regulatory authorities

Which authorities are responsible for the environment and what is the scope of each regulator's authority?

There is no sole authority for regulating and enforcing environmental laws, granting licences and imposing sanctions. The Ministry of the Environment designs, carries out and supervises national environmental policies. Management of environmental matters involves various government agencies and national, regional and local public government entities, each with their own jurisdiction (often overlapping). Their activities are carried out in a decentralised, collaborative manner. The new Environmental Assessment and Audit Agency (OEFA) is responsible for ensuring enforcement of environmental laws via the supervision, control, evaluation and sanctioning of environmental matters and violations. In 2009, the National System for Environmental Evaluation and Investigation (see question 2) was created to ensure compliance with environmental legislation and to provide supervision of environmental authorities to ensure that they are properly carrying out their functions, and the system is implemented by OEFA. Also, among the various governmental entities are the other ministries that enforce environmental regulations within their respective sectors (ie, the Ministry of Agriculture and the Ministry of Energy and Mines), and other specialised environmental-related agencies, such as the National Natural Protected Areas Service (SER-NANP); the Supervisory Agency of Energy and Mining Activities (OSINERGMIN) with authority over hydrocarbons, mining and electricity; and the National Water Authority (ANA).

21 Investigation

What are the typical steps in an investigation?

There is no general procedure for investigation applicable to all activities. Each regulatory agency carries out its own investigations, some of which are specific and exclusive under an agency's procedures and regulations, and others pursuant to the general Regulations on Administrative Proceedings. There are certain steps that are common to investigations between various administrative authorities. These are:

- inspections and other initial activities of the agency;
- notification to the party to be investigated of the possible infractions and investigation, providing an opportunity to respond;
- upon expiration of the deadline for receiving the response, the authority obtains and examines relevant information, often including a visit to the location under investigation;
- upon conclusion of the collection of evidence, the authority determines whether or not there has been a violation and determines the actions, fines and penalties applicable to the violator; and
- notice of the order applying the penalties or dismissing the proceedings is sent to the investigated party, and the party may appeal the order if an administrative appeal process is available.

22 Powers of regulatory authorities

What powers of investigation do the regulatory authorities have?

Each regulatory agency that has authority with respect to environmental matters determines its own procedures for investigation; however, in general the powers that these authorities have in common are: requesting information and documentation (except with respect to information protected by law, such as trade secrets and other intellectual property); carrying out onsite inspections; taking samples; testing and other examination of data; and requesting the intervention and cooperation of other entities or authorities.

23 Administrative decisions

What is the procedure for making administrative decisions?

The Law on General Administrative Procedures regulates the actions of administrative agencies and provides for general administrative procedures. Administrative decisions are orders issued by agencies following administrative proceedings (consisting of investigations and other activities) of a binding legal effect with respect to the parties subject thereto. In order for a decision to be valid, among other things it must be issued by an agency with proper jurisdiction, its content must be lawful, precise and legally possible, it must have a purpose that serves the public and it must be duly supported by and based on administrative procedure. Administrative proceedings can be initiated by the appropriate agency or upon request by any third party.

Where administrative proceedings result in the issuance of a decision that affects an unidentified party (for example, where unknown persons caused environmental harm), administrative regulations provide for a public hearing to allow for the participation of third parties.

24 Sanctions and remedies

What are the sanctions and remedies that may be imposed by the regulator for violations?

Regulatory agencies may impose penalties and require corrective measures as provided for under the specific laws and regulations applicable to each such agency. These include: warnings, training courses, fines, payment of compensation, environmental mitigation and remediation, injunctions and suspension or closure of activities.

25 Appeal of regulators' decisions

To what extent may decisions of the regulators be appealed, and to whom?

Administrative decisions may be appealed if they violate, affect, disregard or harm a right or a legitimate interest of a party that is bound thereby. In the event an appeal is successful, the decision can be amended or overruled completely. There are two types of appeal processes for administrative proceedings. A request for reconsideration can be filed with the agency that issued the decision in question based on the submission of new evidence. A request for review is an appeal filed with a superior agency based upon errors or omissions with respect to evidence or questions of law in the initial proceedings. When these options are exhausted, in some cases further appeals can be filed with a court via a constitutional process that allows for the adjudication of administrative matters before the judiciary.

Judicial proceedings**26 Judicial proceedings**

Are environmental law proceedings in court civil, criminal or both?

Violations of environmental laws may result in civil, criminal and administrative proceedings, and in some cases these proceedings may run parallel to one another. Suits may be brought in civil court in cases where the violations give rise to civil tort (non-contractual) or contract claims and damages are sought. Criminal charges may be brought where the environmental violation constitutes a crime under the Criminal Code. As mentioned previously, in administrative proceedings administrative agencies investigate, evaluate and impose sanctions for violation of specific environmental regulations.

27 Powers of courts

What are the powers of courts in relation to infringements and breaches of environmental law?

The power of courts in relation to infringements and breaches of environmental law depends on the forum in which proceedings for those violations take place, which in turn depends on whether the basis for any suit or proceedings is civil, criminal or administrative in nature.

In civil matters, courts may order the payment of damages in favour of the plaintiff. Criminal courts have the power to penalise individuals by imposing incarceration, the payment of fines, or both, and they also have the authority to order the payment of civil damages as a form of redress for persons harmed by the violation of criminal laws. In administrative proceedings, the court or investigative board has the authority to impose fines and other penalties.

Criminal, civil and administrative courts also have the authority to order interim relief and protective measures designed to halt, on a temporary or permanent basis, activities that are causing or creating a risk of environmental harm in order to prevent further damage to the environment, or to ensure that there will be appropriate funds to carry out any necessary remediation. These types of measures can include injunctions or similar orders for the suspension of activities, orders for financial guarantees or even the closure of facilities.

28 Civil claims

Are civil (contractual and non-contractual) claims allowed regarding breaches and infringements of environmental law?

Civil claims are permitted for breaches and infringements of environmental law. In the case of contractual claims, they must be based on a violation of environmental legislation and on the failure of the violating party to properly carry out its obligations under the contract and subject to penalty under the contract. In civil suits for non-contractual/tort claims, after the verification of the existence and extent of harm and verifying that the harm resulted as a consequence

Update and trends

In a country such as Peru with a large sector of the population still living in poverty and in underdeveloped communities lacking essential services, social discontent continues to have a significant effect on various industries and their regulation, especially with respect to environmental matters. One example of social issues causing a change in the country's environmental policy within the course of this year is the new consultation law with respect to indigenous and native populations, which requires that any legislative or administrative measure that directly affects any such population must first undergo a strict consultation process with the affected indigenous community, expressly recognising the right to consultation provided for under Convention 169 of the International Labour Organization. This consultation right is independent of and in addition to the right of public participation applicable to environmental studies, and aims at incorporating within such documents certain cultural and social aspects with respect to the communities within the area of influence of the project. In addition, the Forest and Wildlife Law was repealed in 2009 and enacted in new form in July 2011 partially in response to the extreme protests in the Yurimaguas and Baguas jungle region of Peru, where there was strong social opposition over oil exploitation and the inadequate use of the rainforest. Another example can be seen in the new environmental measures presently under consideration which seek stricter regulations and zoning of the Madre de Dios jungle region as a response to severe environmental damage caused by informal mining activities in that area. Social discontent and environmental regulation are closely intertwined when related to poverty, cultural beliefs and lack of development, because underprivileged communities seek new economic opportunities in, but at the same time fear the potential negative impacts of, the industries that seek to be developed in their areas. Peru has taken a step forward by addressing social discontent within its environmental policy.

of the infringement of environmental legislation by the defendant, the defendant will be required to pay damages to the plaintiff for the harm suffered.

29 Defences and indemnities

What defences or indemnities are available?

The Civil Code and the Civil Procedural Code provide for defences available in civil lawsuits, which include *res judicata*, statute of limitations, force majeure and others claiming that the harm resulted from an intervening act out of the defendant's control. Also available are defences of joint or shared liability between two or more parties that caused the harm.

Strict liability applies in cases where hazardous activities are involved, regardless of any acts of subcontractors, subordinates or

other third parties that would have otherwise constituted intervening acts or would have provided at least a joint liability defence to the company that is strictly liable for such activities.

30 Directors' or officers' defences

Are there specific defences in the case of directors' or officers' liability?

Environmental legislation does not provide for any specific defences for director or officer liability in civil cases. The defences described in question 29 would be available to officers and directors.

A determination of the civil liability of officers, directors or other employees of an entity takes into consideration certain elements, such as the existence of some form of fault (a wilful or negligent act), what the benefit was to the entity or to the subject officer or director and whether the actions were carried out on behalf of the person or on behalf of the company. Criminal legislation does set forth that only a person that committed a crime is responsible for the crime. Given that intent is a required element, while representatives of a legal entity can be criminally liable for environmental crimes, the legal entity itself cannot be held criminally liable.

31 Appeal process

What is the appeal process from trials?

The appeal process is designed for parties that wish to request a review by a higher court of a decision made in a lower court on the basis of an error or omission in the facts or with respect to the law. Appeals are available with respect to judicial and administrative decisions. Once the appeal has been accepted, the original decision is suspended until the high court elects to confirm, revoke or revise the decision, or in some cases to issue a new decision.

International treaties and institutions

32 International treaties

Is your country a contracting state to any international environmental treaties, or similar agreements?

Peru is a contracting state to various international treaties and multilateral and bilateral agreements on environmental matters, including on biodiversity, energy (including solar and other renewable energies), conservation of flora and fauna, climate change, clean air, waste management, contamination control, environmental clean-up and sustainable development, among others.

Most notably, Peru is a signatory to: the Kyoto Protocol to the UN Framework Convention on Climate Change; the Convention on Biological Diversity; the Rio Declaration on Environment and



Sandra Orihuela

info@orihuelalegal.com

Los Halcones 257
San Isidro
Lima 27
Peru

Tel: +511 441 1574 (Peru)
Tel: +1 305 381 0900 (USA)
Fax: +1 305 428 2709
www.orihuelalegal.com

Development; the Montreal Protocol on Substances that Deplete the Ozone Layer and the Vienna Convention for the Protection of the Ozone Layer; the Basel Convention on the Control of Transboundary Movement of Hazardous Wastes and their Disposal; the Stockholm Convention on Persistent Organic Pollutants; and the Convention on International Trade in Endangered Species of Wild Fauna and Flora. In 2009, Peru signed the Statute of the International Renewable Energy Agency, an organisation formed to promote the widespread and increased adoption and sustainable use of all forms of renewable energy.

33 International treaties and regulatory policy

To what extent is regulatory policy affected by these treaties?

Under the Peruvian Constitution, international treaties to which Peru becomes a party and that are in full force and effect become national law. In order to have full effect, following the signing of the treaty, when the subject matter of the treaty is related to national defence, financial obligations of the government, modification or elimination of taxes, modification or repeal of any law or if legislative acts are required to carry it out, it must be approved by the Peruvian Congress. Following approval by Congress, the enactment of procedural rules or the modification of national legislation may be required.



Annual volumes published on:

- | | |
|--------------------------------------|------------------------------|
| Air Transport | Licensing |
| Anti-Corruption Regulation | Life Sciences |
| Arbitration | Merger Control |
| Banking Regulation | Mergers & Acquisitions |
| Cartel Regulation | Mining |
| Climate Regulation | Oil Regulation |
| Construction | Patents |
| Copyright | Pharmaceutical Antitrust |
| Corporate Governance | Private Antitrust Litigation |
| Corporate Immigration | Private Equity |
| Dispute Resolution | Product Liability |
| Dominance | Product Recall |
| e-Commerce | Project Finance |
| Electricity Regulation | Public Procurement |
| Enforcement of Foreign
Judgments | Real Estate |
| Environment | Restructuring & Insolvency |
| Franchise | Right of Publicity |
| Gas Regulation | Securities Finance |
| Insurance & Reinsurance | Shipping |
| Intellectual Property &
Antitrust | Tax on Inbound Investment |
| Labour & Employment | Telecoms and Media |
| | Trademarks |
| | Vertical Agreements |

**For more information or to
purchase books, please visit:
www.GettingTheDealThrough.com**



The Official Research Partner of
the International Bar Association



Strategic research partners of
the ABA International section