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Global Overview

Contemporary environmental problems are predominantly global in their cumulative consequences. Traditional transboundary issues of water management and air pollution, increased demand and decreased supply, and a continued decline in biodiversity have an enormous impact on our highly interdependent world economy and remain the principal drivers of global environmental policy and regulation. This introduction considers some of the main trends and themes in international environmental law and how these might influence its future development.

Climate Change

The future of international environmental law will continue to be framed by the complexity of the interlinked environmental, social and economic challenges now confronting decision-makers. Deemed the most critical, climate change continues to be the predominant driver of current global environmental policy. Record high temperatures, polar ice loss, wildfires and droughts continue to worsen, affecting communities, nations and economies around the world. In 2021, catastrophic flooding due to record-breaking heavy rainfall in Western Europe, Australia, China, India and the USA caused significant damage to infrastructure, agriculture and electrical grids.

Climate change continues to be a critical business issue. Efforts to reduce carbon emissions continue to drive development of renewable technologies. Globally, carbon mitigation techniques include waste-to-energy, improved management of manure and herds, and fluorinated gas substitution. Market shifts continue to favour lower-carbon products and services. However, the main driver of fossil fuel consumption and reduction is energy security and independence.

Corporations are focused on implementing environmental, social and governance (ESG), carbon reporting and management of their global carbon footprint and extended supply chains.

Industries that will continue to bear the brunt of regulations include oil and gas, real estate, automotive and transport, power generation, and agriculture. Decarbonisation efforts – the most visible response to climate change concerns as the world shifts to low-carbon and renewable energy and energy efficiency across all sectors – will deeply impact heavy transportation, heavy industry and construction. Climate-risk management extends into the financial sector as well, particularly as corporations respond to shareholder demands for ESG strategies.

Among recent actions undertaken by nations, China introduced a carbon emission trading scheme based on a flexible emissions cap which is now the world’s largest emissions trading market. The initial participants are primarily power plants but it is anticipated to include the petrochemical, chemical, building materials (including cement, steel, non-ferrous metals), pulp and paper, and aviation sectors as well.

The UK Emissions Trading Scheme (UK ETS) replaced the UK’s participation in the EU ETS on 1 January 2021. The European Commission introduced a Carbon Border Adjusted Mechanism to mitigate emissions associated with international trade.

Hong Kong announced the next steps to advance its green and sustainable finance strategy – in particular, climate-related disclosures and sustainability reporting, carbon market opportunities and the launch of the new Centre for Green and Sustainable Finance. Brazil committed to...
increase funding for environmental enforcement and to end deforestation by 2030. Given the interconnectivity of the global economy, these actions will have global repercussions.

The 26th UN Climate Change Conference of the Parties (COP26) ended with an agreement of the parties to “phase down” rather than fully “phase out” usage of coal, the single biggest contributor to climate change. Countries will reconvene next year to pledge further cuts to CO₂ in an effort to keep 1.5°C within reach. Tougher pollution policies should follow. Rules for the global trading of carbon offset credits were agreed upon, emphasising the importance of financial markets and investment in carbon reduction efforts. The Global Methane Pledge – an EU/USA initiative, signed up to by more than 100 countries – aims to cut emissions of the greenhouse gas methane by 30% by 2030, compared with 2020 levels. Importantly, the USA and China committed to further co-operation, which will drive environmental regulations in both nations going forward.

Global Water Crisis
The single largest issue beyond climate change is water stress – the availability, access and quality of water. At the highest level, water supply, sanitation and hygiene are the most critical issues faced by developed and developing nations alike. Over-exploitation of water resources, insufficient access to safe drinking water and water scarcity, water pollution and ageing water infrastructure systems across developed nations reflect ever-growing global pressures on this vital resource. Water availability contributes to food insecurity.

In June 2020, the UN launched the SD6 Global Acceleration Framework to unify the implementation of regulations as the world seeks to achieve Sustainable Development Goal 6 of the 2030 Agenda for Sustainable Development, ensuring the availability and sustainability of water and sanitation for all by 2030.

Water availability remains a major economic driver as corporations consider potential constraints on new locations due to water scarcity, possible operational and supply chain disruptions, and increasing costs of water. New markets will also develop for water-efficient technologies, from water recycling and reuse technologies to desalination products and waste water treatment technologies, from heat-pumps to anaerobic digestion and incineration. There is a continued focus on the development of technologies for watershed, utility, consumer and industrial water-use.

Pollution Reduction
Ongoing reduction of pollution in air, water and waste management is a constant theme of environmental law internationally. Rapid urbanisation and industrialisation bring new challenges for developing countries. This perspective could have significant implications for the future direction of environmental law, because it directly addresses environmental impacts on the life, health, private life and property of individual humans, rather than on other states or the environment in general.

In 2021, China issued Regulations on Management of Pollutant Discharge Permits with compliance obligations for enterprises with operations in China that discharge pollutants in the form of air emissions, water discharges or wastes.

Biodiversity
The loss of biodiversity and the degradation of the ecosystem is seen as an increasingly significant issue internationally. In the past, discussions on biodiversity have focused on specifics such as coral reef degradation, deforestation or declining fish stocks. More recently, the wider importance of biodiversity and ecosystems,
including to businesses, and the potentially profound consequences of their loss have been recognised. Natural resource depletion and adverse impacts of environmental degradation, including desertification, drought, land degradation, freshwater scarcity and loss of biodiversity, add to and exacerbate the list of challenges which humanity faces. Look to see a push to strengthen rulemaking on illegal trade in wildlife and exploitation of natural resources.

The loss of biodiversity and impairment of the ecosystem exacerbates and amplifies other environmental risks. For example, the removal of key coastal ecosystems often increases the severity of coastal flooding, ecosystem degradation has been a key driver of desertification, and food security is highly dependent on biologically diverse soils and other key ecosystem services such as water regulation, pollination and climatic stability.

The UN 2030 Agenda for Sustainable Development provides for the cessation of biodiversity loss as a measurable goal. Specifically, it seeks to take urgent and significant action to reduce the degradation of natural habitats, halt the loss of biodiversity and, by 2030, protect and prevent the extinction of threatened species. This also includes provisions to protect, restore and promote sustainable use of terrestrial ecosystems, sustainably manage forests, combat desertification, and halt and reverse land degradation.

Increased market, reputational and regulatory pressure to reduce biodiversity presents both business risks and opportunities. There are physical risks to business arising from scarcity and increased costs of resources and potentially reduced productivity. Companies may also face increased litigation risks as a result of their exploitation of biological resources or their adverse impacts on ecosystems.

COVID-19
The world continues to grapple with the COVID-19 crisis, including the impact on the environment. Human-wildlife interactions, single-use plastics, increased health risks of air pollution, and continued impact on economic resources can potentially be subject to further rulemaking and policy decisions.

Testing kits, protective equipment – including the packaging and delivery of these supplies – have increased the production of single-use plastics, making medical, household and hazardous waste management and sanitation infrastructure an increasing focus.

COVID-19 has also created unexpected operational and supply chain disruptions. We can expect to see further developments as industry and corporations react to these challenges, while also facing an increase in ESG reporting requirements.
**INTRODUCTION**

*Contributed by: Gregory DeGulis, McMahon DeGulis LLP*

**McMahon DeGulis LLP** was founded in 1994, and is the largest law firm in Ohio to concentrate its practice exclusively on environmental law. MD offers a value-driven alternative to large firm environmental law departments by providing experienced legal representation in environmental law, energy, toxic torts and litigation. Specific areas of focus include environmental contamination and remediation strategies, regulatory counselling and permitting, enforcement defence, transactional support, environmental management systems, compliance auditing and litigation. On the private sector side, clients range from Fortune 500 companies to small businesses; on the public sector side, the firm represents state, regional and local governments as well as other institutions such as port authorities.

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**Gregory DeGulis** is a founding partner of McMahon DeGulis LLP, Ohio’s largest environmental and related litigation firm. Greg has 35 years of experience prosecuting and defending environmental and toxic exposure claims, with significant experience in environmental cost recovery matters, environmental insurance litigation, construction litigation and wetlands cases. He represents a wide array of clients, including manufacturers, real estate developers, railroads, waste water treatment facilities, contractors and municipalities. Greg is a co-founder of the Environmental Law Network (ELN), the first environmental law firm network that makes local environmental legal representation available globally.

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1. REGULATORY FRAMEWORK

1.1 Key Environmental Protection Policies, Principles and Laws

The Austrian environmental protection regime is one of the strictest in the world. As a member state of the European Union, Austria is obliged to implement and put into effect the (already strict) European environmental law. However, the national policies and laws often provide for even more rigorous rules on topics such as permitting requirements, thresholds, rights of third parties and liabilities. According to the Federal Constitutional Law on Sustainability, Animal Welfare, Environmental Protection, Securing Water and Food Security and Research (Bundesverfassungsgesetz über die Nachhaltigkeit, den Tierschutz, den umfassenden Umweltschutz, die Sicherstellung der Wasser- und Lebensmittelversorgung und die Forschung), fundamental principles of environmental law include the preservation of the natural environment (ie, water, air and soil) as the basis of life for future generations. Other fundamental principles of Austrian environmental law include inter alia the precautionary principle, the “polluter pays” principle, and the principles of no deterioration and amelioration of elements of the environment.

From a systematic perspective, Austrian environmental policy and law are characterised by the distribution of competences between the federation and the nine provinces. Thus, some policies are decided upon at the federal level and others at the province level. The distribution of competences is one of the main reasons why all efforts to codify environmental law have been – so far – in vain. Therefore, Austrian environmental law remains scattered across numerous federal and provincial legal acts. Key laws include those set out below.

Federal Acts
• Environmental Impact Assessments (Umweltverträglichkeitsprüfungsgesetz, UVP-G).
• Waste (Abfallwirtschaftsgesetz, AWG).
• Water (Wasserrechtsgesetz, WRG).
• Trade (Gewerbeerordnung, GewO).
• Air Pollution Control (Immissionsschutzgesetz-Luft, IG-L).
• Mining (Mineralrohstoffgesetz, MinRoG).
• Electricity (Elektrizitätswirtschafts- und -organisationsgesetz, ElWOG).

Provincial Laws
• Nature Protection (Naturschutzgesetze, NSchG).
• Construction (Baugesetze und -ordnungen, BauO).
• Land Use and Zoning (Raumordnungsgesetze und -ordnungen, RO).

2. ENFORCEMENT

2.1 Key Regulatory Authorities

In Austria, due to the complex distribution of competences between the federal government and the provinces already mentioned in 1.1 Key Environmental Protection Policies, Principles and Laws, responsibility for environmental-related enforcement is very fragmented. In addition, some authorities, such as the district administrative authority (Bezirksverwaltungsbehörde), act for both the federal and the provincial governments. Furthermore, the provincial governors (Landeshauptmänner) often act for the competent federal minister. Therefore, only an approximate overview of the responsibilities can be given at this point.

Federal Level
At the federal level, competence is divided between the different ministries. The most important environment-related ministries are:
the Federal Ministry for Climate Protection, Environment, Energy Mobility, Innovation and Technology (Bundesministerium für Klimaschutz, Umwelt, Energie, Mobilität, Innovation und Technologie, BMK);
• the Federal Ministry for Agriculture, Regions and Tourism (Bundesministerium für Landwirtschaft, Regionen und Tourismus, BMLRT); and
• the Federal Ministry for Digitalisation and Business Location (Bundesministerium für Digitalisierung und Wirtschaftsstandort, BMDW).

Most environmental matters – such as water, waste, forestry, mineral raw materials, aviation, chemistry and trade law – are assigned to the federal government.

Provincial Level
At the provincial level the provincial governments (Landesregierungen) are the highest authorities. The provinces enforce environmental topics such as spatial planning, environmental impact assessments and nature conservation. For certain matters – eg, in the field of nature conservation – the competent authority is the district administrative authority. In addition, local municipalities are often competent to enforce certain aspects of planning law, such as land use and zoning plans as well as building law.

Given the complex distribution of competences, the competent authority has to be identified for each relevant matter.

3. ENVIRONMENTAL INCIDENTS AND PERMITS

3.1 Investigative and Access Points
In Austria, environmental incidents and breaches of law (also comprising breach of permits) can have consequences under criminal, administrative and civil law. The regulatory authorities are only competent for the execution of administrative criminal and administrative law; the prosecution of severe incidents or breaches of environmental law is regulated in the Criminal Code (Strafgesetzbuch, StGB) and lies within the competence of the Public Prosecutor’s Office (Staatsanwaltschaft). Private damages from environmental incidents and breaches of environmental law must – in principle – be claimed by the damaged party; investigations related to private damages lie within the responsibility of the civil courts.

Investigative and Access Powers of Regulatory Authorities
The investigative and access powers of regulatory authorities are scattered over a wide range of federal and provincial Acts, depending on the nature of the incident or the breach of environmental law in question. They range from access to private property, the collection of samples, interrogations, orders (eg, on the operation of machines/plants and the implementation of mitigation measures), to the arrest of those suspected of having committed acts punishable under (administrative) criminal law.

The execution of investigative and access powers is limited by the principle of proportionality, requiring that the specific use of a power is proportional to its specific scope and that no milder measures are available. Thus, before severe means (such as shutdowns or arrests) are implemented, the authorities will usually investigate via the collection of samples or interrogations (eg, the discussion of voluntary mitigation measures). Finally, all investigative and access acts of administrative powers are contestable, although not all remedies have suspensory effect.
Investigative and Access Powers of Public Prosecution
Severe environmental incidents or breaches of environmental law can lead to investigations by the Public Prosecutor’s Office. Depending on the severity and the specific case, the Public Prosecutor’s Office might use the full range of investigative and access powers foreseen in the Criminal Procedure Code (Strafprozessordnung, StPO). Since the regulatory authorities are tasked not only with the investigation but also the mitigation of environmental damages, the investigative and access powers of the Public Prosecutor’s Office related to environmental incidents and breaches of environmental law differ slightly from the regulatory authorities’ powers. The Public Prosecutor’s Office wields, for example, the power to:

• access and even seize private property (eg, machines or even factories, but also documents and digital data);
• interrogate suspects and witnesses;
• arrest suspects; and
• impose detention awaiting trial (pending authorisation by a court).

However, the Public Prosecutor’s Office cannot, for example, issue orders for mitigation measures.

The principle of proportionality also applies to the Public Prosecutor’s Office’s use of these powers.

Investigative and Access Powers of Civil Courts
The Austrian civil courts have far less investigative and access power than regulatory authorities and the Public Prosecutor’s Office. Though specific procedures allow for injunctions and the preservation of evidence, the taking of evidence regularly requires deliberate co-operation of the parties. However, the courts expressly can (and will) take a possible denial of co-operation in investigations into consideration when deciding the respective case.

3.2 Environmental Permits
When Is an Environmental Permit Required?
As a general principle, environmental permits are required under Austrian law if the “public interest” or third-party rights (eg, landowners’ or fishing rights) can be affected by the envisaged activity. The permitting procedures vary immensely and can range from simple notification obligations to thorough environmental impact assessments lasting up to several years.

Due to the constitutional division of competences, all efforts for a comprehensive environmental permit have so far been in vain. A single permit from only one competent authority (“one-stop-shop”) is only foreseen for very large projects under the Environmental Impact Assessment Act (Umweltnachhaltigkeitsprüfungsgesetz, UVP-G). Thus, activities potentially affecting the public interest or third-party rights in Austria usually require more than one environmental permit (and usually from more than one competent authority). The construction and operation of a single industrial plant can require multiple environmental permits (eg, under the Trade, Water, Forestry, Nature Protection and Construction Acts). The question of which permits a certain activity requires can therefore only be answered on a case-by-case basis. Although the Austrian legal framework on environmental permits might seem complex at first sight, our experience has shown that diligent preparation allows an efficient permitting process even in parallel with several authorities.

Procedure
The individual permitting procedures are in general initiated via application to the competent authority by the person envisaging the specific activity with potential effects on the “public inter-
est” or third-party rights. The applicant sets the scope of the activity and therefore also for the permitting procedure. Thus, the application must comprise all necessary documentation for the envisaged activity. The authorities usually examine the documentation with the help of their own authoritative or non-authoritative experts (ie, experts paid by the applicant but working for and in the name of the authority). If the legal requirements for obtaining the permit are met, the applicant has a legal right to the issuance of the permit.

If an environmental permit is denied, the regulatory authorities’ decision can be appealed before the administrative courts (and in some cases before another regulatory authority). The administrative court’s decisions can be appealed before the Constitutional Court (Verfassungsgerichtshof, VfGH) and the High Administrative Court (Verwaltungsgerichtshof, VwGH).

A recurring topic in permitting procedures under almost all relevant acts of environmental law is the question of parties and their procedural rights. In short, under Austrian law a legal interest is required in order to have a right to be heard and to appeal against decisions in administrative procedures. International and European law, on the other hand, foresee additional rights to be heard and to appeal decisions on environmental permits.

4. ENVIRONMENTAL LIABILITY

4.1 Key Types of Liability

Breaches of environmental law (encompassing all kinds of environmental damage as well as environmental incidents) can lead to various liabilities of offenders under criminal, administrative, administrative criminal and civil law in Austria.

Liabilities under Administrative Law and Administrative Criminal Law

In practice, breaches of environmental law in Austria usually lead to measures under administrative law and fines under administrative criminal law. Various (environmental) administrative acts grant regulatory authorities the power to investigate breaches of environmental law (see 3.1 Investigative and Access Points) and to take all necessary steps to prevent, mitigate and remediate environmental damage. To this end, regulatory authorities may either order offenders to take the necessary steps or organise the requisite measures themselves. In the latter case, the offender (if identifiable) must bear all costs of necessary measures.

Under administrative criminal law, regulatory authorities routinely impose fines on offenders. Alternatively if a fine cannot be paid, regulatory authorities might even order imprisonment for several weeks. It should be noted that administrative fines can, under certain circumstances, accumulate in Austria. Therefore, a single environmental incident or damage can lead to a multitude of administrative fines, in some cases reaching six-digit (or even higher) sums. According to the Constitutional Court, there might be an upper limit for administrative fines; however, this limit is well above EUR1 million.

Additionally, administrative fines are primarily to be imposed on individuals. Legal entities usually only bear subsidiary liability if a responsible representative is incapable of paying a fine (see 6. Corporate Liability).

Liabilities under Criminal Law

Under criminal law, both natural and legal persons (see 6. Corporate Liability) responsible for offences against the environment can face serious fines. Individuals responsible for severe environmental damages face not only criminal
fines under the Austrian Criminal Code but even prison sentences of up to several years.

**Liabilities under Civil Law**

Since the relevant environmental acts also protect third-party rights, operators or polluters can also face liabilities under civil law. It should be noted that several environmental acts foresee liabilities without fault. Thus, plant operators or polluters often bear civil liabilities even in cases where no administrative, administrative criminal or criminal measures can take effect.

## 5. ENVIRONMENTAL INCIDENTS AND DAMAGE

### 5.1 Liability for Historical Environmental Incidents or Damage

As a general principle, the liability for environmental damages can only be imposed on the person(s) responsible for the damage. This principle applies particularly to administrative criminal and criminal law: liability for criminal offences committed by a person other than the current operator or landowner is only possible if the current operator knows of the environmental damage and maintains the unlawful situation.

However, several administrative acts foresee the subsidiary liability of current or purchasing operators of facilities or landowners:

Under the Austrian federal and provincial Environmental Liability Acts (*Umwelthaftungsgesetze*), current operators are obliged to notify the competent authority of – and to take all necessary measures to prevent, mitigate and remediate – environmental damages, even those resulting from historical activities. Landowners face those obligations only if the operation (e.g., of a facility) was terminated and if they knew of and accepted the operation. Furthermore, these operators or landowners usually have an obligation to bear all costs relating to the prevention, mitigation and remediation of (historical) environmental damages if they cannot prove that the environmental damage results from activities of third parties other than their legal predecessors or authoritative orders. Similar provisions exist, for example, in the Water and Waste Acts.

**Possibility of Action against the Original Polluter**

If the cost for preventing, mitigating and remedying historical environmental damages was enforced against a person with subsidiary responsibility under administrative law, the Austrian civil law grants the payer actions against the polluter. Such claims are obviously only useful if the original polluter can still be held responsible.

### 5.2 Types of Liability and Key Defences

For the types of liability for environmental incidents or damages in Austria, see **4.1 Key Types of Liability**. Due to the multitude of possible liabilities and the different prerequisites for the attribution of liabilities, potential defences against liabilities (and their prospects of success) can only be determined on a case-by-case basis. In general, liability for environmental damages under all legal regimes (criminal, administrative criminal, administrative and civil law) can be avoided if the defendant can prove that:

- there is no damage (e.g., if the “damage” turns out to be a natural process or is based on flawed investigations/samples); or
- the damage is attributable to others (including authorities).

Other arguments can include (but are not limited to):

- limitations of time;
- lack of sufficient evidence;
- lack of jurisdiction;
- lack of causality;
• lack of negligence; and
• lack of proportionality.

The effectiveness of defences depends on the specific case: a lack of negligence will not be sufficient to avoid liability without fault (eg, under certain provisions of civil law); and a limitation of time will not be sufficient to avoid liability if no limitation of time is foreseen (eg, under certain provisions of administrative law). In our experience, defences against liability can be found in most cases of environmental damages. Whether liability can be fully avoided, or only be reduced or postponed, depends on the individual case.

6. CORPORATE LIABILITY

6.1 Liability for Environmental Damage or Breaches of Environmental Law
As mentioned in 4.1 Key Types of Liability, breaches of environmental law and environmental damages can lead to a variety of liabilities under Austrian law. Corporations (and other legal entities) can be held accountable only if a provision expressly stipulates such liabilities.

Criminal Law
Under the Statute on Responsibility of Legal Entities (Verbandsverantwortlichkeitsgesetz, VbVG), legal entities can be held liable in two cases.

In the first case, a legal entity may be liable if:

• a “decision-maker” (Entscheidungsträger) of the entity;
• culpably (ie, depending on the offence, intentionally or negligently) and illicitly;
• commits a crime punishable under the Criminal Code (StGB);
• in his or her role as decision-maker;
• for the benefit of the entity; and
• in breach of the entity’s legal obligations.

The second case is employee crimes, for which legal entities can only be held liable if:

• an employee of the entity;
• culpably (depending on the offence, intentionally or negligently) and illicitly;
• commits a crime punishable under the Criminal Code (StGB);
• for the benefit of the entity; and
• this was enabled or substantially simplified by the disregard of the necessary diligence by decision-makers, especially due to the lack of technical, organisational or personal measures preventing such offences.

If the prerequisites are met, legal entities can be fined up to 50% of their annual yield (to a maximum of EUR1.8 million). The criminal liability of legal entities does not exclude the criminal liability of their decision-makers or employees for the same offence.

Administrative Criminal Law
As already mentioned in 4.1 Key Types of Liability, administrative fines, in Austria, are primarily imposed on individuals. Legal entities only bear subsidiary liability if a responsible representative is incapable of paying a fine.

Administrative and Civil Law
Corporations and other entities as well as individuals can be liable under administrative and civil law. If environmental damage can be attributed to a legal entity, notification, prevention, mitigation and remediation obligations must be fulfilled by the legal entity under administrative law. If third parties’ rights are affected by environmental damage, entities could also be liable under civil law.

6.2 Shareholder or Parent Company Liability
Under Austrian criminal and administrative criminal law, parent companies cannot be held
accountable for environmental damages or breaches of environmental law caused by their subsidiaries, not even in the event of the subsidiary’s insolvency. Shareholders can be held liable under criminal and administrative criminal law only for their own crimes – that is, if their roles exceed simple (part-)ownership (eg, if a shareholder takes part in the management of or is employed by a company).

Liability of shareholders or parent companies under administrative law is only possible in very specific cases. As a rule, only the subsidiaries are responsible for environmental damages or breaches of environmental law under administrative law. Therefore, regulatory authorities will usually order the subsidiary to take the required measures to prevent, mitigate or remediate environmental damages or bear the cost of such measures. Examples of liability of parent companies or shareholders include, but are not limited to, liability for historical environmental damages – for example, if the affected assets of the subsidiary are transferred to shareholders or parent companies (see 5.1 Liability for Historical Environmental Incidents or Damage) – or direct involvement in environmental incidents.

Austrian civil law primarily stipulates the liability of the damaging party. The possible liability of parent companies or shareholders depends, above all, on the character of the company primarily responsible for the environmental damage. On the one hand, shareholders (including parent companies) of partnerships (Personengesellschaften) bear liability for all obligations of the company exceeding its funds. Therefore, civil claims based on environmental damages against partnerships regularly entail liability of their shareholders.

The liability of shareholders and parent companies of corporations (Kapitalgesellschaften), on the other hand, is limited to very specific (and usually highly theoretical) cases (eg, directors’ liability – if a shareholder is appointed as a managing director – or blatant undercapitalisation).

7. PERSONAL LIABILITY

7.1 Directors and Other Officers
Under the Austrian Administrative Criminal Act (Verwaltungsstrafgesetz), the directors and other officers that represent a company are the prime persons responsible for compliance with all relevant provisions of the Austrian administrative law. However, a company can name responsible persons to the authority for certain matters. If the announcement to the authority is lawful, only the responsible person is liable to the authority for the respective matter (eg, compliance with waste regulations or compliance with all administrative provisions at a certain site). Since possible penalties include fines ranging from the low hundreds of euros to six-digit (or even higher) sums, responsible persons must agree to their appointment.

Liabilities under criminal and civil law usually require culpable conduct. The liability of directors and other officers under criminal and civil law is thus limited to their own actions on the one hand, and, on the other hand, this liability cannot be delegated (unlike responsibility under administrative criminal law).

Since corporations and individuals are equal under administrative law (see 6. Corporate Liability), directors and other officers are only liable under administrative law if fault may be attributed directly to them (and not the corporation).

7.2 Insuring against Liability
Directors’ and officers’ insurance (D&O policies) are common in the Austrian insurance market. However, certain insurers will exclude certain liabilities/penalties based on the terms of insur-
ance and the nature of the misconduct. Therefore, certain liabilities/penalties – for instance, caused intentionally or by gross negligence – could turn out, ultimately, not to be insurable.

8. LENDER LIABILITY

8.1 Financial Institutions/Lender Liability
Austrian law does not stipulate liability for environmental damage or breaches of environmental law only based on business relations with the offender. However, if the business relationship encompasses co-management rights or the transaction/ownership of assets, the financial institutions or lenders may be liable (see 5.1 Liability for Historical Environmental Incidents or Damage and 6. Corporate Liability).

8.2 Lender Protection
Liability risks of financial institutions or lenders can be avoided through abstention from (co-)management rights and the transaction/ownership of assets. If (co-)management rights and/or ownership of assets are transferred, (financial) environmental due diligence are common (see 16.1 Environmental Due Diligence).

9. CIVIL LIABILITY

9.1 Civil Claims
The most important legal basis of civil liability for environmental damages is the Austrian Civil Code (Allgemeines bürgerliches Gesetzbuch, ABGB). However, specific liability provisions can also be found in other acts – for example, in the Water Act (Wasserrechtsgesetz), Forest Act (Forstgesetz), Genetic Engineering Act (Gentechnikgesetz) or the Nuclear Liability Act (Atomhaftpflichtgesetz). Finally, certain contracts may stipulate some form of civil environmental liability (eg, contracts with protective effects in favour of third parties).

Essential legal bases for civil claims are (i) neighbourhood law, aiming at achieving an appropriate balance between conflicting interests of use, (ii) the general liability for fault, and (iii) a system of strict liabilities. Under neighbourhood law (i), the exercise of the property or (plant) operation rights must not lead to an unreasonable impairment of the rights and interests of others. The Austrian Civil Code thus provides for defences against impermissible emissions (ie, the excess of thresholds), negative emissions (eg, deprivation of light or air) or certain emissions from licensed installations (ie, a form of compensation for permitted emissions).

The general liability for fault (ii) provides for a legal responsibility under civil law for the illegal and culpable violation of legal assets or rights of third parties.

According to the Austrian systems of strict liability (iii), the injuring party is liable for damage resulting from a permitted hazard which he or she was able to control. Under this regime, civil claims are possible for example for certain damages from permitted water utilisation plants or nuclear facilities.

9.2 Exemplary or Punitive Damages
The concept of punitive damages does not exist in Austrian law. Neither exemplary damages nor punitive damages can be awarded. As far as is apparent, there is currently no need (and no relevant call from stakeholders) to introduce so-called punitive damages in Austria.

9.3 Class or Group Actions
In Austria, class or group actions under civil law are only common in the form of an accumulation of actions, which is known as a “class or group action of Austrian character”. In this case, the
claims of many affected parties are transferred to a single plaintiff by means of assignments.

Under constitutional and administrative law, class or group actions such as the cases presented in 9.4 Landmark Cases are (strictly speaking) also individual actions that are aggregated by the courts due to the similar facts.

9.4 Landmark Cases
In 2014, the improper combustion of blue lime contaminated with hexachlorobenzene (HCB) in a cement factory caused extensive contamination with highly toxic HCB. Cow’s milk had to be poured away, slaughtered cattle were not saleable, and even green fodder or vegetables in domestic gardens were rendered unusable. In addition to various initiated criminal proceedings, a total of 95 claims for damages were filed. These concerned the possibility of damage to health as well as compensation for possible impairment of the affected properties. One of the defendants was the Republic of Austria. The total value of the claim was approximately EUR23 million. In the end, a settlement worth approximately EUR6 million was reached, although it does not cover long-term health damages. In the meantime, the area is once again HCB-free, and the operator had to secure the blue lime landfill.

Climate-Damaging Tax Provisions
A further case, which could have become a landmark, concerns the individual applications filed in February 2020 by more than 8,000 people, and by various environmental organisations such as Greenpeace, against specific climate-damaging provisions on tax breaks for kerosene and air travel. The court was asked to examine whether the climate-damaging provisions of the Value Added Tax Act and the Mineral Oil Tax Act violate basic and human rights by actively promoting climate-damaging behaviour. The case was rejected from the Constitutional Court. Despite the rejection, the motions clearly show the direction for future lawsuits.

Schedule for Backing Out of Fossil Fuels
In May 2021, an environmental NGO (together with several individuals) applied for an ordinance from the Federal Minister for Digitalisation and Business Location, to govern the schedule for backing out of fossil fuels. In August 2021, the Minister decided that the applicants had no right to such an ordinance. Currently, this procedure is pending at the Vienna Administrative Court and will ultimately be decided by the Constitutional and/or High Administrative Court(s).

Extension of Rights under the Aarhus Convention
In connection with the Aarhus Convention, the Austrian High Administrative Court (Verwaltungsgerichtshof) – in line with the ECJ – extended rights for environmental organisations in environmental-related procedures. In a nutshell, the complex legal situation can be described as follows: in a constellation where participation in an administrative procedure is a requirement for challenging administrative decisions, in Austria acknowledged environmental organisations have participation rights in procedures where European environmental law could be affected. This has led to numerous adjustments in the affected Austrian laws, such as under the Water Rights Act, Waste Act, Clean Air Act, Forestry Act and Nature Conservation Acts.

10. CONTRACTUAL AGREEMENTS

10.1 Transferring or Apportioning Liability
As a principle, the liability for incidental environmental damages and breaches of environmental law is borne by the person responsible for the incident or the breach (see 4.1 Key Types of
Liability and 6.1 Liability for Environmental Damage or Breaches of Environmental Law. However, Austrian law provides for several possibilities to transfer or apportion such liabilities.

The most prominent example is the appointment of responsible persons for certain matters (see 7.1 Directors and Other Officers). If a responsible person is lawfully appointed to the authority, only this person is liable for breaches of administrative criminal law within their responsibilities. The responsibility under criminal, civil and administrative law cannot be transferred under this regime.

Civil liability can be transferred or apportioned by means of contracts if the transfer or apportion is not contra bonos mores. According to Austrian jurisprudence, the transfer of liabilities for gross negligence is – in principle – not transferrable. Also, the (ultimate) bearing of fines under criminal and administrative criminal law is contra bonos mores if the contract is concluded before the event giving rise to liability.

Indemnities are common in Austria and in some cases explicitly mentioned in legal acts (eg, in the Water Act for damages to fishing rights). Legal limits to indemnities include, but are not limited to, general immorality (Sittenwidrigkeit), disproportionality and bribery (eg, in the case of payments to municipalities or persons holding public offices).

In short, Austrian law allows for different options to transfer or apportion liabilities under civil and administrative criminal law. Liabilities under criminal and administrative law, however, usually cannot be transferred.

10.2 Environmental Insurance
A wide range of environmental insurance is offered on the Austrian insurance market. The most common policies cover incidental environmental damages and related liabilities under civil and administrative law (see 4.1 Key Types of Liability; for D&O policies see 7.2 Insuring against Liability). As usual, the specific risks covered depend on the terms of the policy. Typically included are:

- (costs for) remediation obligations;
- damage claims; and
- legal expenses.

Environmental damages resulting from intentional breaches of environmental law usually cannot be insured. Most policies cover only cases of (very) mild negligence. For example, environmental damages resulting from the operation of facilities may only be covered if all the obligations under environmental law and the necessary permits were observed (eg, maintenance obligations, limitations to the facility’s operation).

11. Contaminated Land

11.1 Key Laws Governing Contaminated Land
Regulations concerning contaminated land can be found in numerous laws in Austria, particularly the Water Act (Wasserrechtsgesetz), the Waste Management Act (Abfallwirtschaftsgesetz), the Trade Act (Gewerbeordnung) and Contaminated Sites Remediation Act (Altlastensanierungsge-setz). Under all acts, the “polluter pays” principle applies. Thus, the primary responsibility for remediating contamination lies with the polluter.

However, several provisions also provide for a subsidiary liability of the property owner. This subsidiary liability may arise, for example, if the person primarily obliged cannot be identified or is no longer legally able to carry out the remediation. This liability may also affect legal successors, in which case it does not matter how
many owners lie between the historical last and the current owner.

The Water Act (Wasserrechtsgesetz) is the most important basis for initiating remediation or safety measures: In line with the general concern to keep water bodies (especially groundwater) clean, permits under the Water Act are required for impacts on water bodies that impair their quality. In the absence of such permits or if the source of danger is in itself sensitive, the water authority must issue a remediation order. Very similar provisions can be found in the Waste Act and the Environmental Liability Acts; in many cases remediation measures are therefore prescribed under more than one legal basis.

The Act on the Remediation of Contaminated Sites (Altlastensanierungsgesetz) aims to (i) identify contaminated sites in need of remediation that pose a significant risk to human health or the environment, (ii) finance and (iii) implement appropriate remediation measures. It lays down the framework conditions for risk assessment procedures of contaminated sites and for issuing remediation orders for contaminated sites. In addition, a contribution is levied for the landfill and incineration of waste (so-called “contaminated site remediation contribution”) for the remediation of contaminated sites.

In Austria, three categories are generally distinguished in connection with contaminated land, as listed below.

- “Contaminated sites” are only those areas that were contaminated before 1989 and that are registered as contaminated sites in the register of contaminated sites. Since these old deposits and old sites pose a significant risk to human health or the environment, they must be secured or remediated, or be under observation after remediation.

- “Suspected contaminated sites” are those areas reported by the provinces (Länder) to the federal government which have yet to be identified; they are listed in the register of suspected contaminated sites.

- Contamination after 1989 is referred to as “new damage”: critical deposits and facilities are subject to strict environmental monitoring, the aim of which is to identify, prevent, reduce and remediate environmental problems promptly.

12. CLIMATE CHANGE AND EMISSIONS TRADING

12.1 Key Policies, Principles and Laws

Like the European Union, Austria is a member of the Paris Convention on Climate Change. Therefore, the Convention objectives such as keeping anthropogenic global warming under 2°C, also apply for Austria. Within the European Union, by 2030 greenhouse gas emissions must be reduced by 40% compared to 1990, the share of renewable energy must be 32% and energy efficiency must be improved by 32.5% (EU Climate and Energy Package). The targets are currently being revised, especially since a 55% reduction in greenhouse gas emissions by 2030, as compared to 1990 levels, has been issued as a new goal (“Fit for 55”). The instruments to reach these goals are, for example, the emission trading system (ETS) and “effort sharing” between member states.

In Austria, the main laws concerning these instruments are the Emission Certificate Act (Emissionszertifikategesetz, EZG), the Climate Protection Act (Klimaschutzgesetz, KSG) and the Federal Energy Efficiency Act (Bundes-Energieeffizienzgesetz, EEffG). The key principles of the Austrian climate strategy are:

- expansion of the share of renewable energy;
12.2 Targets to Reduce Greenhouse Gas Emissions

Surpassing the European Union legal requirements, the current Austrian government passed a new climate strategy, which provides the following climate targets:

- reducing non-ETS emissions by 36% compared to 2005 by 2030;
- reducing ETS emissions by 43% compared to 2005 by 2030;
- coverage of 100% of Austrian electricity consumption with renewable energy by 2030; and
- climate neutrality by 2040 (2050 at the latest).

13. ASBESTOS

13.1 Key Policies, Principles and Laws Relating to Asbestos

As soon as the harmfulness of asbestos was recognised, certain asbestos products were banned in Austria as early as 1978. In 1990 the placing on the market of all objects containing asbestos – with only a few exceptions – was finally prohibited. Since 2004, the placing on the market and use of asbestos has been generally prohibited (Chemicals Prohibition Ordinance). Since 2007, all asbestos waste must be collected, treated and disposed of as hazardous waste. Even the import of asbestos waste into Austria is prohibited.

Built-in products containing asbestos should not be removed without cause. Installed asbestos-cement products do not automatically endanger the health of residents. However, both an assessment of the building material condition or a comparison of indoor/outdoor air pollution can serve as the “cause” required for the removal of built-in asbestos products.

During removal, asbestos-containing products must be dismantled and stored in separate collection containers in order to prevent the release of asbestos fibres, while complying with employee protection regulations.

The protection of workers against risks relating to exposure to asbestos in the workplace is regulated by the Workers’ Protection Act, providing inter alia for the use of personal protective equipment during renovation work. Additionally, specific ordinances provide for limit values, the suitability and follow-up examinations in the case of asbestos exposure or the labelling of asbestos (products) at workplaces.

Asbestos waste may only be passed on to an authorised waste collector in compliance with the provisions of the Waste Documentation Ordinance (Abfallnachweisverordnung). According to the Landfill Ordinance (Deponieverordnung), asbestos waste, including asbestos cement waste, may only be deposited in landfills for non-hazardous waste under very specific conditions.

14. WASTE

14.1 Key Laws and Regulatory Controls

The European Waste Framework Directive (2008/98/EG as amended) is implemented – in principle – in the Austrian Waste Management Act (Abfallwirtschaftsgesetz, AWG). It covers a broad range of waste-related regulations, such as recycling and recovery targets, definitions,
treatment obligations, permitting and waste shipment regulations.

Key regulatory controls comprise not only the permitting of collection and treatment of waste activities, but also the building and operation of waste treatment (and other waste-related) plants. Documentation requirements are generally vast and may force stakeholders to implement extensive record-keeping systems. Specific regimes cover, for example, the prerequisites for the operation of collection and recovery systems or the notification of waste shipments.

However, key regulations are not limited to the Waste Act: for many areas of waste law specific ordinances were issued that are based on the Waste Act. Those ordinances govern inter alia:

- packaging and packaging waste;
- batteries;
- waste electronic and electrical equipment;
- landfill;
- waste labelling; and
- waste incineration.

14.2 Retention of Environmental Liability

In our experience, many cases of environmental liability of corporations can be attributed to missing or false information about (waste) materials. Compliance with the documentation obligations is therefore a huge step to prevent liability. A second main source of liabilities is the illegal deposition or export of waste. Thus, the waste handlers are well advised to examine the authorisation of the consignee. It is worth highlighting that Austrian waste law requires the presence of a person with the necessary skills for the handling of waste in companies that collect and treat waste. In other companies, responsibilities (and therefore liabilities) under waste law may be delegated to responsible persons under the Administrative Criminal Code (see 7.1 Directors and Other Officers).

14.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

The obligations in relation to design, take back, recovery, recycling and disposal of goods are scattered across several legal areas and even more legal acts in Austria. The most prominent provisions can be found in, for example, food, machine, pressure equipment and waste law, and aim to reduce the environmental impact of goods and regulate especially the use of chemicals, ecological design, or take-back, recovery or recycling obligations. Since there are no general obligations that apply to all goods, the specific obligations must be determined for goods on a case-by-case basis.

15. ENVIRONMENTAL DISCLOSURE AND INFORMATION

15.1 Self-Reporting Requirements

Reporting requirements foreseen in the Seveso Directive and the IPPC Directive have been implemented in Austria in various laws and ordinances, for example in: the Trade Act (Gewerbeordnung), the Waste Act (Abfallwirtschaftsgesetz), Mining Act (Mineralrohstoffgesetz), the Emission Control Act (Emissionsschutzgesetz für Kesselanlagen) and the Industrial Accidents Ordinance (Industrieunfallverordnung). These obligations are accompanied by purely national reporting requirements throughout the relevant Environmental Acts. Since the reporting requirements vary greatly by plant type, an assessment must be made on a case-by-case basis. Regulations on public environmental information are uniformly regulated in the Environmental Information Acts (one federal, nine provincial) and in the Major Accidents Information Ordinance.
Reference should also be made to the Helsinki Convention as the international legal basis of industrial accident law.

**Notification Obligations**

After a major accident, the operator is obliged to notify the authority immediately (without culpable delay and prior to detailed investigations), in the most appropriate manner, of:

- the circumstances of the accident;
- the substances involved;
- the available data for assessing the consequences of the accident for health, the environment and material assets;
- immediate measures taken; and
- planned steps to mitigate the medium-term and long-term consequences of the accident and to prevent them in the future.

In any case, the industrial accidents to be notified are:

- those involving ignition, explosion or release of dangerous substances in a certain quantity;
- incidents involving dangerous substances that may result in death or hospitalisation or cause damage to property of at least EUR2 million; and
- those accidents in which the operator has reason to believe that the outcome has caused significant consequences for human health, the environment or property damage.

Failure to comply with the obligation to notify is punishable by law.

Owners of establishments posing a risk must inform each other about potential domino effects in industrial accidents and exchange information. Furthermore, they must inform persons potentially affected by industrial accidents at regular intervals about the dangers of major accidents and about the necessary behavioural measures to be taken in the event of a major accident, and make this information available on the internet.

**15.2 Public Environmental Information**

Under Austrian law, public authorities and public institutions must grant access to information on the environment to everyone. In addition, Austrian environmental information law goes beyond mere free access to environmental information and obliges public authorities to obtain information on their own initiative and to make it available to the public.

Informative environmental information is understood to be data on the state of the environment (eg, water, air, soil and the landscape), environmental factors (eg, substances, energy, noise and radiation), measures (eg, plans and programmes, and administrative acts), cost-benefit analyses and other economic analyses, etc. However, the right of access is granted only in relation to environmental information and does not cover the right to inspect specific documents or entire procedural acts.

Information must be provided by administrative authorities, organs of regional and local authorities, legal persons under public law and natural and legal persons under private law who perform public tasks or provide public service listings under one of the above-mentioned bodies (eg, energy supply companies). The environmental information right has the character of an actio popularis because everyone is granted a right of free access to environmental data.

**Limitations on Disclosure**

Disclosure may be refused if:

- the request for information relates to an internal communication;
- the request was apparently committed in an abusive manner;
the request has remained too general; and
the request concerns material in the process of being completed, unfinished documents or similar.

Before refusal, the interests speaking for and against the disclosure must be weighed by the competent authorities.

Compulsory Disclosure
Environmental information that must, in all cases, be actively disseminated includes:

- the wording of international treaties;
- policies, plans and programmes relating to the environment;
- environmental status reports;
- authorisations with an environmental impact;
- environmental impact assessments.

The co-ordination task has been assigned to the Federal Environment Agency (Umweltbundesamt).

15.3 Corporate Disclosure Requirement
In Austria, large corporations, groups of companies and companies of public interest are required to include, in their annual management reports, information necessary for understanding the impact of their activities, covering at least environmental, social and labour issues, respect for human rights and the fight against corruption and bribery.

Many national laws impose a wide range of reporting and verification obligations on operators (landfills, hydroelectric plants, industrial installations, etc). Environmental permits may also require recurring information to be submitted to the competent public authorities on the environmental status of installations and compliance with the provisions of the relevant permit.

16. TRANSACTIONS

16.1 Environmental Due Diligence
Environmental due diligence is typically conducted on M&A, finance and property transactions with targets in Austria. The scope and depth of the due diligence depend on the parties’ guidelines and the type of target. In real estate transactions, zoning and permit reviews as well as all aspects of contamination are typically within the scope. If the target is an existing company, further aspects such as concessions, permissions and production-related topics can be relevant.

In general, the focus in an environmental due diligence is on:

- the historical and current use of the site;
- the product, production process and related environmental risks;
- the site-related aspects and requirements, such as the zoning and development plan, contaminations and war relics, asbestos, etc;
- the existence of, and compliance with, relevant permits, approvals and licensing requirements;
- the identification of completed, pending or announced authority enforcement actions; and
- the quantification of relevant risks and risk mitigation recommendations.

16.2 Disclosure of Environmental Information
There is no general legal obligation for a seller to disclose any environmental information to a purchaser. However, a seller must consider that potential future claims by a purchaser are less promising if the purchaser was precisely aware of the risks at the time of the purchase. Furthermore, a certain degree of environmental disclosure is common sense. A total absence of disclosure could therefore arouse the purchaser’s
suspicion. Disclosure could also be advisable if the purchaser explicitly asks for certain information.

17. TAXES

17.1 Green Taxes
In Austria there are various taxes and fees which can be considered environment related. However, these taxes are very selective and there is not an holistic approach to environmental taxation. The taxes and fees can be divided as follows.

Energy
- Mineral oil tax.
- Energy taxes (coal, gas, electricity).
- Emission certificates.

Transportation
- Engine-related insurance tax.
- Standard consumption tax.
- Car registration tax.
- Car tax.
- Flight tax.
- Road user tax.

Environmental Pollution
- Contaminated site remediation contribution.

Resources
- Property tax B.
- Hunting and fishing fees.
- Landscape and nature conservation levy.
Schoenherr Rechtsanwälte is a full-service firm, offering not only transactional advice of the highest level, but also unmatched expertise in competition, regulatory, intellectual property and other more specialised areas of law. With offices across Central and Eastern Europe, tailor-made teams assembled from the firm’s various practice groups share resources, local knowledge and international expertise. Within the firm, the environmental group is a leader in advising clients, authorities and other stakeholders on all aspects of environmental law, permits and authorisations. Many of the landmark cases and most important approvals in recent years, such as the third runway at Vienna Airport, can be traced back to the team.

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Law and Practice

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1. REGULATORY FRAMEWORK

1.1 Key Environmental Protection Policies, Principles and Laws

In addition to the Federal Constitution, which devotes a specific chapter to the protection of the environment (Article 225), the main federal policies and laws governing the environment are:

• the National Environmental Policy (PNMA), instituted by Federal Law 6.398/1981;
• the Environmental Crimes Law, established by Federal Law 9.605/1998, which also provides for administrative infractions arising from environmentally harmful actions and activities; and
• Complementary Law 140/2011, which sets forth rules governing co-operation between the federal government, the states, the federal district and municipalities in administrative actions arising from the exercise of their environmental authority.

Additional policies exist that have been created by force of law to govern specific topics, as follows:

• National Urban Mobility Policy – Federal Law 12.587/2012;
• Brazilian Forest Code – Federal Law 12.651/2012;
• National Policy on Sustainable Development and Traditional Peoples and Communities – Federal Decree 6.040/2007;
• National Policy on Solid Waste (PNRS) – Federal Law 12.305/2010; and
• Policy for Territorial and Environmental Protection of Indigenous Lands (PNGATI) – Federal Decree 7.747/2012.

The main governing principles are internationally recognised ones: polluter-pays, prevention and precaution. Brazilian courts have recently discussed the concept and scope of the principle of non-regression as applied to environmental law.

2. ENFORCEMENT

2.1 Key Regulatory Authorities

Federal Law 6.938/1981, which established the National Environment Policy (PNMA), also provided that the components of the National Environmental System (SISNAMA) are the relevant federal, state, federal district and municipal authorities, together with public foundations responsible for environmental quality protection and improvement. Thus, each member of the Federation is responsible for environmental policy and enforcement within its jurisdiction. To prevent jurisdictional conflicts and overlap, Complementary Law 140/2011 and the Federal Constitution set forth the purview of each of the entities and bodies that comprise the SISNAMA.

3. ENVIRONMENTAL INCIDENTS AND PERMITS

3.1 Investigative and Access Points

To determine liability for environmental incidents, environmental agencies launch administrative proceedings to keep record of the actions of the environmental authorities and interested parties. This applies both to preventive protection (ie, environmental licensing proceedings) and
in repressive enforcement of actions in breach of the environmental law (eg, fine, warning, suspension). Environmental authorities rely on inspections, technical reports and other technical information produced under the proceedings by the authority itself and by the interested party, in line with due process.

3.2 Environmental Permits
Since 1981, according to Federal Law 6.938/1981, environmental licensing has become mandatory nationwide. Effectively or potentially polluting activities cannot take place without proper licensing. Environmental licences are obtained by means of the applicable administrative proceedings. They can be granted separately or successively, depending on the type of activity to be licensed.

Environmental licensing is a three-step administrative procedure, as follows.

• Preliminary Licence (LP) – must be requested in the planning phase of a project’s implementation, alteration or expansion. This licence only addresses environmental feasibility and establishes a project’s technical requirements (“conditions”), but does not authorise it.
• Installation Licence (LI) – approves projects. This licence authorises commencing a project’s implementation. It is granted after the conditions of the preliminary licence are met.
• Operational Licence (LO) – authorises operational start-up of a project’s productive activities. It is granted after inspection to verify that all requirements have been met.

In the event of refusal, the law and the Federal Constitution guarantee the refused applicant’s right to appeal to the refusing authority’s upper jurisdiction (Article 5, item LV, of the Federal Constitution, and Article 56 of Federal Law 9.784/1999).

4. ENVIRONMENTAL LIABILITY

4.1 Key Types of Liability
At the administrative level, liability is subjective. An infraction is not characterised by the occurrence of damage, but by noncompliance with legal regimes, regardless of whether or not consequences ensue. In other words, accountability for environmental infractions at the administrative level is present if a conduct (whether by action or omission) exists that can be characterised as in breach of the law. There is no need for concrete damage to occur, but only irregular behaviour.

The conduct may be attributed to an individual or legal entity, whether public or private, that has participated, by action or omission, in a breach of the law.

At the criminal level, responsibility is also subjective, and only affects the one causing environmental damage. Because of the personal nature of the penalties, they must be endured by the damages-causing agent.

According to Law 9.605/1998, a legal entity may be held accountable, without prejudice of the liability of a culprit, co-culprit or accessory participating in the same fact.

Regarding civil liability, an individual or legal entity, whether public or private, that is directly or indirectly responsible for an activity that causes environmental degradation is deemed a polluter, with objective liability being defined as imposing an obligation on the polluter to repair and/or indemnify the damages caused to the environment, regardless of the existence of fault.

Therefore, a party shall be held civilly liable that directly or indirectly causes or aggravates the damage. Whatever the participation in the out-
break of damage, there is a duty to indemnify, and the consequent reparatory solidarity.

5. ENVIRONMENTAL INCIDENTS AND DAMAGE

5.1 Liability for Historical Environmental Incidents or Damage
Due to the Brazilian law's regime of objective civil liability, in the presence of environmental damage, the beneficiary of an activity (or the owner of the property) accepts any harmful consequences inherent thereto simply by engaging in such an activity. This means that whosoever engages in an activity can be held liable in the civil level for all damages arising from it, even if unaware of any fault, by simple demonstration of the damaging event and its link with the activity. Thus, even if an activity is regularly carried out, its agent will be held responsible for any damages it may cause. Therefore, the acquirer of a property that has experienced environmental damage is deemed equal to the agent, so that they (the owner or acquirer) may also be held responsible for reparations.

At the administrative level, according to Article 70 of Federal Law 9.605/1998, any party engaging in unlawful acts may be held liable, even if such actions cause no environmental damages. Thus, the agent or property owner may be held liable at the administrative level if they have acted unlawfully.

At the criminal level, liability only affects the party that effectively causes environmental damages, and any penalties are levied on the agent that caused the damages. Also, according to Law 9.605/1998, a legal entity may be held accountable, without prejudice of the liability of a culprit, co-culprit or accessory participating in the same fact.

5.2 Types of Liability and Key Defences
Accountability takes place independently at three different levels – namely, administrative, civil and criminal.

At the administrative level, liability is subjective. An infraction is not characterised by the occurrence of damage, but by noncompliance with legal regimes, regardless of whether or not consequences ensue. In other words, accountability for environmental infractions at the administrative level is present if a conduct (whether by action or omission) exists that can be characterised as in breach of the law. There is no need for concrete damage to occur, but only irregular behaviour.

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damage. Whatever the participation in the outbreak of damage, there is a duty to indemnify, and the consequent reparatory solidarity.

When an environmental authority understands that an individual or legal entity has caused environmental damages or acted in breach of environmental laws, a report is drawn and administrative proceedings take place to investigate the matter. In the course of these proceedings, the investigated party is given an opportunity to mount a defence at the administrative level and potentially appeal to the upper relevant authority, based on Law 9.784/1999, which governs federal-level administrative proceedings and guarantees the right to a defence.

6. CORPORATE LIABILITY

6.1 Liability for Environmental Damage or Breaches of Environmental Law
All entities, be they natural or legal, can be held accountable at all three levels – civil, administrative and criminal – in the same way. When individuals and legal entities act as co-culprits or as participants, all individuals and legal entities may be held liable.

6.2 Shareholder or Parent Company Liability
According to the law, only the company responsible for an activity, conduct or environmental damage may be held liable for environmental damages or noncompliance. However, certain situations exist where the corporate veil may be pierced, so that shareholders or parent companies may be held liable. In such an event, the law embraces the objectivist doctrine of disregard, providing that it is enough for a corporate shield to constitute “an obstacle to the compensation of damages caused to the quality of the environment” (Article 4 of Law 9.605/1998). What is required is the simple proof of the impossibility of the legal person honouring its obligations.

7. PERSONAL LIABILITY

7.1 Directors and Other Officers
In principle, whenever corporate criminal responsibility is found, the managers who ordered unlawful conducts will also be at fault. Similarly, any employees who has in any way collaborated with a certain outcome or followed illegal orders must answer for any such actions. In certain cases, however, Brazilian courts have lately been admitting liability of legal entities alone.

At the administrative level, liability remains with the company, unless the conduct of the individual is not confused with that of the company itself – that is, in the event that an officer or employee was acting in their own interest in a manner unrelated to the activities and interests of the company.

At the civil level, responsibility as a rule remains with the legal person, unless there is an event justifying piercing the corporate veil, or (as discussed above) an individual acts in their own interests, unrelated to the activities and interests of the company, in which case such an individual may be sued directly.

7.2 Insuring against Liability
There are some types of environmental liability insurance available for legal entities, but they cannot be generally considered sufficient to insure against every liability or penalty.
8. LENDER LIABILITY

8.1 Financial Institutions/Lender Liability
Financial institutions may be held liable for environmental damages arising from activities they supported. The argument for this emerges essentially from Law 6.938/1981, which established the National Environmental Policy and which has been regarded as quite broad in terms of how it defines polluters. They are held liable – regardless of whether they may be natural or legal entities, and governed by public or private law, provided that they have directly or indirectly carried out an activity that causes environmental damages. The argument is further based on the objectiveness of environmental civil liability (see Article 14, paragraph 1 of Law 6.938/1981) and its joint-and-several nature.

8.2 Lender Protection
The best way for creditors and funders to protect themselves is through compliance monitoring of the activities they fund, requiring obligors to provide documents substantiating the regularity and regularity of their works or projects, as well as audit reports and other similar documents. In addition, mechanisms such as environmental insurance and environmental damage repair funds may be used.

9. CIVIL LIABILITY

9.1 Civil Claims
Whenever a conduct or activity causes environmental damage, the party responsible for it may be required to repair the damages caused, restore the environment to its previous condition, or compensate for any environmental damages that cannot possibly be repaired.

9.2 Exemplary or Punitive Damages
Brazilian law does not recognise exemplary or punitive damages. However, the STJ (Higher Court of Appeals) states that judges must take into account the theory of discouragement (which has a punitive character) when setting the amount of a conviction.

9.3 Class or Group Actions
Lawsuits for the reparation of environmental damages may be collective or individual, and collective actions are quite common. Class Actions such as these are mainly governed by Federal Laws 7.347/1985 and 4.717/1965.

9.4 Landmark Cases
In August, the oil slick that affected 877 locations in more than 127 municipalities in 11 Brazilian states was detected for the first time. It was declared the largest oil leak-related environmental tragedy in Brazilian history. A Federal Police investigation indicates a Greek vessel – the Boubolina – as a possible source of the leak.

The marine ecosystem was directly affected all along the Brazilian coast, including fish, turtles, whales, shellfish, corals and sea birds and mammals, with impact also on the economy and on beach tourism, with particularly severe consequences for fisher-folk and shellfish harvesters.

The federal government put into motion the National Oil Incidents Contingency Plan (PNC) and more than 5,000 tons of oil were collected from Brazilian shores. An estimated 5–12.5 million litres of oil have been leaked into the ocean.

The Brazilian Navy is still investigating the causes of the accident, and has come to no conclusion on any parties potentially responsible for the tragedy. Investigations have confirmed that the oil originated in Venezuela, which does not mean that it was released by Venezuelan ships or companies.
Approximately 30 tanker ships from different countries that sailed Brazilian waters were summoned to testify; on 24 August 2020, the Navy concluded its report without naming any culprits (i.e., liable parties) and submitted it to the Federal Police, which is running a criminal investigation under conditions of secrecy in order to determine liability.

**10. CONTRACTUAL AGREEMENTS**

**10.1 Transferring or Apportioning Liability**

Civil environmental liability is joint-and-several and objective. Nevertheless, specific contract clauses may be used to transfer the liability for remediation of any environmental damages to third parties. This, however, does not mean that a party jointly and severally responsible for environmental damages will not be held liable if the contracting party does not honour the agreement.

**10.2 Environmental Insurance**

Civil law defines insurance as a contract by means of which the insurer receives an insurance premium for consideration and, in exchange, undertakes to guarantee the insured party’s legitimate interests in a person or thing against certain predetermined risks. Objectively speaking, the structure and characteristics of environmental insurance are the same as other types of insurance. The distinction lies solely and exclusively in the object to be insured, or, as the Civil Code puts it, in “the insured person or thing”. The fury caused by the inclusion of the term “environmental insurance” in the national legislation is unwarranted, since it has always existed. There was never anything in the law to prevent parties from entering into insurance contracts to protect against risks in respect of environmental resources.

Environmental insurance, like indemnity funds, are important instruments for implementing the principle of full compensation for environmental damages. This is because they guarantee funds required to fully repair damages caused to the environment, even in the event of the polluter’s bankruptcy.

Even for solvent companies, in the event of a major accident – which is not uncommon in certain industries – the economic impact of the massive investments that must be made, not only to remedy damages but also to implement more efficient pollution control equipment, should not affect a company’s financial stability of the business, therefore ensuring complete damage reparations as well as the preservation of jobs and continued business activity.

To illustrate, the National Policy on Solid Waste, Article 40 of Law 12.305/2010 provides that “in connection with the environmental licensing of projects or activities whose operations involve hazardous waste, licensing authority Sisname may require civil liability insurance for damages caused to the environment or to the public health, subject to coverage rules and maximum contract limits as provided in the applicable regulations”.

Practice has shown that environmental insurance in Brazil stands as a minor appendage to general civil liability insurance, and only covers damages arising from so-called “sudden or unexpected pollution”, whose cost and requirements are more modest than specific insurance against “ongoing pollution”. Furthermore, rigorous environmental diagnosis, for which few are effectively prepared, is lacking.

In any case, when environmental insurance is in place, it must be appropriate to a project’s size, nature, location and characteristics, as reflected in the potential for damages.
11. CONTAMINATED LAND

11.1 Key Laws Governing Contaminated Land

The Brazilian laws in force provide for preventive procedures relative to contaminated areas, establishing certain criteria and metrics when chemicals are present, as well as guidelines for the environmental management of these areas.

Soil protection must be carried out preventive-ly, or correctively when contamination already exists. In any case, the purpose must be safeguarding the quality and socio-environmental purpose of the land.

The management of contaminated areas takes place through procedures ranging from the identification of suspected contaminated areas to intervention, with possible environmental remediation and control actions.

Areas in which contamination has been identified should be reported by the environmental agencies. Public disclosure is relevant to ensure the restricted use of the affected areas and pursue recovery of their environmental quality. In addition, access to this information is an important tool so that those who have effectively contributed to the contamination of these areas may be held responsible for repairing the damages. Without such disclosure and preventive studies, contamination would be perpetuated and responsibility for remediation will simply be conveyed to any new purchasers.

At the federal level, this matter is addressed by Conama Resolution 420/2009. At the state level, it is worth mentioning the following standards of the State of São Paulo, which pioneered the management of contaminated areas nationally and stands as a domestic benchmark for it: Decree 47.400/2002, which regulates the provisions of Law 9.509/1997 (State Environmental Policy of São Paulo), determines that undertakings subject to environmental licensing shall notify the environmental authority of the suspension or closure of their activities; such notification is to be accompanied by a Deactivation Plan contemplating the current environmental situation and, as the case may be, providing information on the restoration of, and quality recovery measures for, areas that will be deactivated or released (Article 5).

This measure aims to identify areas with environmental problems and avoid the simple transfer of environmental liabilities to the acquirers of contaminated areas. Also noteworthy are São Paulo State Law 13.577/2009, regulated by Decree 59.263/2013, which provides guidelines and procedures for the protection of soil quality and management of contaminated areas, and Collegiate Resolution 038/2017/C.

12. CLIMATE CHANGE AND EMISSIONS TRADING

12.1 Key Policies, Principles and Laws

Federal Law 12.187, of 29 December 2009, regulated by a Federal Decree of 16 September 2010, instates the National Climate Change Policy and its principles, objectives, guidelines and instruments. Also relevant is Federal Law 13.576/2017, which created the National Biofuel Policy, RenovaBio. The purposes of RenovaBio include contributing to the country’s commitments under the Paris Agreement and the United Nations Framework Convention on Climate Change. RenovaBio further pursues an appropriate energy efficiency ratio as a means to reduce greenhouse gas emissions.

Brazil also adhered to the Montreal Protocol by enacting Federal Decree. 99.280/1990, committing to the control of ozone-depleting substances (ODSs) and to gradually reducing their
production and consumption until complete elimination.

12.2 Targets to Reduce Greenhouse Gas Emissions
Greenhouse gases include carbon dioxide (CO₂) and methane (CH₄). The greenhouse effect takes place as these gases pervade the atmosphere and absorb part of the infrared radiation reflected by the earth surface, keeping the radiation from escaping into space and thereby causing what is referred to as climate change.

Many countries have mobilised to address this issue. To this end, the United Nations Framework Convention on Climate Change, enacted in New York in May 1992, required the signature of all member states during the United Nations Conference on Environment and Development, held in the City of Rio de Janeiro in June of the same year. This convention led to the late 1997 enactment of the Kyoto Protocol, which Brazil signed. This was the most comprehensive commitment on climate change, and remained in force until 2020.

The Kyoto Protocol led to an effective search for clean development mechanisms for the pursuit of greenhouse gas emissions reduction.

Another important international treaty on climate change is the Paris Agreement, established on 12 December 2015, during the United Nations Climate Change Conference (COP21) held in Paris. According to the treaty, 195 countries and the European Union committed to the goal of limiting the planet’s temperature rise to 1.5°C from the average global temperature in pre-industrial times. The Paris Agreement entered into force in 2020, superseding the Kyoto Protocol, and was signed by 147 member states including Brazil.

13. Asbestos

13.1 Key Policies, Principles and Laws Relating to Asbestos
The Brazilian Ministry of the Environment has established an especial commission regarding asbestos and issues related thereto (CONAMA, Conselho Nacional Do Meio Ambiente, Resolution No 5, 4 January 1986). It also has enacted resolutions about the asbestos, as follows:

- CONAMA No 7, 1987;
- CONAMA No 19, 24 October 1996;
- CONAMA No 307, 5 July 2002; and
- CONAMA No 348, 16 August 2004.

Brazil has also signed two conventions regarding labour law and the asbestos issue:

- International Labour Organisation – Convention No 162 – Geneva, 1986; and

Furthermore, responsible use of the product is governed at the federal level by Law No 9.976, of 3 July 2000.

14. Waste

14.1 Key Laws and Regulatory Controls
Federal Law No 12.305, of 2 August 2010, regulated by Federal Decree No 7.404, from 23 December 2010, instated Brazil’s National Policy on Solid Waste (PNRS). The law applies to natural and legal entities, whether governed by public or private law, that are directly or indirectly responsible for the production of solid waste. The law also applies to parties that carry out activities in connection with the integrated management of solid wastes. Aiming at regulating this law, the federal government created the Interministerial Committee for the National
Policy on Solid Waste. The Committee’s purpose is to support the Policy’s structuring and implementation by articulating governmental authorities and private-sector entities.

14.2 Retention of Environmental Liability
Brazilian environmental law embraces strict liability – this means that, combined with the shared responsibility over the life cycle of a product as provided by Article 30 of the PNRS, the producer will retain post-consumer responsibility for its products, even if a third party causes environmental damage.

14.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods
According to Article 33 of the PNRS, every producer, distributor, seller and importer (“business sector”) has an obligation to implement a Reverse Logistic System, consisting in causing a post-consumer good to return to the business sector to be given an appropriate environmental destination. Those parties may endure administrative penalties, such as warnings and fines, if they are non-compliant with the reverse logistic obligation.

At present, Reverse Logistics System-related obligations apply only to:

- batteries;
- light bulbs;
- tires;
- electronics and their components and general packaging;
- pesticides and their waste and containers;
- lubricating oils and their waste and containers; and
- medicines and their containers.

Pursuant to the contents of the regulation or of sectoral pledges, and to commitments executed by and between the authorities and the business sector, the systems provided for in the Article shall extend to all products sold in plastic, metal or glass containers, and to all other products and containers, prioritising public health and the environmental impact of the waste generated. This currently includes containers overall and medications.

15. ENVIRONMENTAL DISCLOSURE AND INFORMATION

15.1 Self-Reporting Requirements
Although no specific legal obligation exists governing self-reporting duties, certain non-law standards are in place at the federal and state levels establishing procedures and guidance to this effect. In the case of potentially polluting projects, environmental licences often include conditions providing for immediate and mandatory notice of accidents or damages to the relevant environmental authorities.

To illustrate, at the federal level, when it comes to the obligation of self-reporting environmental incidents or damage to regulators or the public, Article 6 of Normative Instruction No 15 of 2014 from the Brazilian Institute for the Environment and Renewable Natural Resources (IBAMA) establishes that the polluter responsible for ventures or activities licensed or authorised by the Brazilian federal environmental body should report the occurrence of environmental accidents immediately, regardless of the measures taken to control them.

The report should be done by filling in the online form available in a platform called the National Environmental Emergencies System (SIEMA), a computerised tool for communicating environmental accidents, visualising interactive maps and generating statistical data on environmental
accidents recorded by IBAMA. SIMEA provides for two types of environmental accident reports which are (i) accident report involving oil, and (ii) notification of other environmental accidents.

However, if a project or activity is licensed by the state or municipal environmental body, the reporting of the accident through SIEMA is not mandatory, unless the licensing body so requires, based on a co-operation agreement previously established with IBAMA (Article 6, single paragraph, Normative Instruction No 15 of 2014).

At the state level, São Paulo State Law 13.577/2009 provides that it is the duty of the party responsible for a contaminated area to notify the environmental authorities of any indication or suspicion of soil or groundwater contamination. Notification must be immediate where the contamination poses a risk to the residents’ lives or health.

Finally, according to Article 14, item II, of Federal Law 9.605/1998, which governs criminal and administrative penalties for environmentally harmful conduct and activities, advance self-reporting by a party causing imminent risk of degradation is an extenuating circumstance for environmental crimes. At the state level, according to Technical Instruction 30/2019 of the São Paulo State Environmental Company (CETESB), the absence of self-reporting in connection with accidents is an aggravating circumstance as concerns administrative fines. In principle, within the scope of the civil law as applied to environmental liability, self-reporting is of little consequence, given this domain’s purpose of providing reparation and/or indemnity.

**15.2 Public Environmental Information**

In Brazil, Article 5, items XIV and XXXIII of the Federal Constitution instate a universal right to access to information. The National Policy on the Environment itself (Law 6.938/1981, Article 4, item V) had already listed the dissemination of environmental data and information as one of its purposes and, in Article 9, item VII, provided for the national environmental information system – regulated by Article 11, item II, of Decree 99.274/1990 – as one of its instruments.

Law 10.650, amended in 2003, regulates public access to the data and information existing in the agencies and entities that form the national environmental system. This law guarantees universal access to information, irrespective of evidence of specific interest, in response to a written request, in which the applicant undertakes not to use the information collected for commercial purposes, under the penalties of civil law, criminal law, copyright law and industrial property rights, as well as to credit the sources if the data or information is disclosed by any means. According to Article 2, paragraph 5, agencies must respond within 30 days from the date of request. Where an authority refuses to provide information, its decision must be substantiated and subject to appeal.

The Information Access Law (Law 12.527, of 18 November 2011) was enacted in 2011. It provides that any citizen may request – in person, by telephone or over the internet – a copy of any public documents of the executive, legislative and judiciary, at the federal, state and municipal levels, as well as of direct administration and private law entities collecting governments subsidies, except when this involves the privacy of others or constitutional secrets.

**15.3 Corporate Disclosure Requirement**

Corporations are not required to disclose environmental information in their annual reports. Private citizens and public authorities and bodies rely on published financial statements for corporate social responsibility information as disclosed in “social balance sheets”, which...
serve as instruments for this purpose. Publication of this report is not mandatory but may facilitate identifying companies that are concerned with these aspects for the purposes of including ESG-compatible criteria.

Notwithstanding, to address integration of social, environmental and climate risks into the management of risks traditionally present in credit operations, the Central Bank of Brazil (BACEN/BCB) enacted six different regulations on 15 September 2021. They improve upon the rules governing management of social, environmental and climate risks as concerns financial institutions, and reinforce establishment thereby of climate, environmental and social responsibility policy (PRSAC). Furthermore, the regulations create new social and environmental risk concepts and distinguish between transitional and physical climate risks. The subject of each regulation is as follows:

• BCB Standardising Instruction No 153/2021 – establishes standard tables for the disclosure of the Social, Environmental and Climate-Related Risks and Opportunities Report (GRSAC Report);
• BCB Resolution No 139/2021 – governs disclosure of the GRSAC Report;
• BCB Resolution No 140/2021 – governs the creation of Section 9 (Social, Environmental and Climate-Related Constraints) of Chapter 2 (Basic Terms and Conditions) of the Rural Credit Manual (MCR);
• CMN Resolution No 4.943/2021 – amends Resolution No 4.557/2017, which governs risk-management and capital-management structures and information disclosure policies;
• CMN Resolution No 4.944/2021 – amends Resolution No 4.606/2017, on the simplified elective method for determination of the minimum required Simplified Reference Equity (PRS5), requirements for selecting this method, and additional requirements for the simplified continued risk management framework;
• CMN Resolution No 4.945/2021 – On Social, Environmental and Climate Responsibility Policies (PRSAC) and actions towards the effectiveness thereof.

16. TRANSACTIONS

16.1 Environmental Due Diligence

Environmental due diligence has been typically conducted in Brazil in connection with M&A, finance and property transactions. Environmental issues may arise from a large number of activities, especially those involving polluting activities, which may create environment-related issues requiring legal due diligence.

16.2 Disclosure of Environmental Information

Acquirers become liable for the acquired asset, even if the environmental damage has taken place prior to the acquisition, in the same way they would be held responsible for any other damages. As previously discussed, as an acquirer becomes an owner, they become propter rem responsible for conservation of the property towards fulfilment of its social purpose.

Therefore, a seller is required to disclose environmental information to a purchaser, in accordance with the principle of good faith governing mutual contracts in Brazil, as provided by the Brazilian Civil Code. However, it is worth emphasising that a seller may be unaware of effective or potential environmental liabilities affecting the asset under negotiation, which is why environmental due diligence is so relevant in such cases.

As previously discussed, analysis of the following relevant environmental aspects takes place in asset sales and purchases:
17. TAXES

17.1 Green Taxes
Brazilian law places severe restrictions on the creation of new taxes, including green taxes, requiring constitutional amendments for this purpose.

This leads to the application of certain standards – not to create green taxes per se, but to use existing taxes extra-fiscally to induce cleaner and preservation-oriented behaviours.

Federal Law No 6.938, of 31 August 1981, established the National Environmental Policy, whose purpose is to preserve, improve and recover the quality of life-supporting environments. Article 17-B of the law allowed the Brazilian Institute for the Environment and Renewable Natural Resources (IBAMA) to instate the Environmental Supervision and Control Fee (TCFA) for the regular exercise of policing power to control and oversee potentially polluting activities that use natural resources. Annex VIII of the same law lists the potentially polluting activities that use natural resources subject to the Environmental Supervision and Control Fee (TCFA).
Milaré Advogados is a boutique law and consultancy firm in São Paulo that is exclusively dedicated to environmental law practice and the resolution of sustainability-related issues at all levels. It operates nationwide in Brazil, as well as globally. With 19 highly regarded professionals, Milaré is structured as six specialised departments: (i) agribusiness, trade and financing; (ii) real estate and due diligence; (iii) energy and mining; (iv) environmental sanitation; (v) international and comparative law, human rights and water management; and (vi) environmental crimes. All departments work across the entire environmental law spectrum in addition to their respective niches, and operate in tandem with a multidisciplinary team of scientists. The firm supports its clients with both consultancy and litigation expertise, including assistance with judicial and administrative procedures, alternative dispute settlement and negotiations, legislative and policy reform, expert legal and technical opinions, comparative legal analysis, and advocacy and advice in international policy and legal processes.

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The National Environmental Policy’s Instruments
Brazilian law has long paid attention to the economy and the market in an effort to pursue environmental protection and foster sustainable development.

Law 6.938/1981, which reached its 40th anniversary in 2021, enacted the National Environmental Policy (Política Nacional do Meio Ambiente – PNMA) and provides – in Article 9, items V and XIII – economic instruments as a means to encourage sustainable environmental practices. It is worth pointing out that the purpose of the PNMA, in line with Article 2 of Law 6.938/1981, is to preserve, improve and recover a life-fostering environmental quality to ensure conditions in Brazil for socio-economic development, uphold the interests of national security and protect the dignity of human life.

Article 9 of the law in question lists several instruments to achieve these ends – such as the establishment of environmental quality standards, environmental zoning, environmental impact evaluations, licensing and revision of effectively or potentially polluting activities – as well as the economic instruments thereto, such as forest concessions, environmental rights-of-way and environmental insurance.

The National Environmental Policy established – in a pioneering way at the time – economic instruments as mechanisms to stimulate the replacement of development standards for a model that was more sustainable, socially just and ethically correct. The PNMA thus contains the basics for a more environmentally balanced economic policy, providing that economic endeavour must go hand-in-hand with respect for the environment.

Since then, new environment-oriented economic instruments have emerged. These include payment for environmental services, environmental ICMS (value-added tax), environmental compensation as provided in Article 36 of Law 9.985/2000, and Environmental Regularisation Planning as provided in Article 59 of Law 12.651/2012. Over time, the market itself established rules and incentives to bring about this change in business, including incorporating environmental, social and governance risks among their key decision-making variables.

In recent years, the business sector’s engagement in the wider socio-environmental context gained increasing scope as companies began to play a less passive role, not merely internalising the negative impacts of their activities (for example, through the use of the economic instrument of environmental compensation), but rather acting in such a way as to foster positive social and environmental impacts.

Propositive action arises mainly from an intent to prevent systemic negative impacts as a direct consequence of social and/or environmental accidents, as well as from business firms’ need for long-term survival, which they may attain by building closer ties with the society in which they operate, as well as by adopting policies to reduce the usage of the natural resources on which they rely and/or promote improved environmental quality. This is the backdrop against which the environmental, social and governance
(ESG) paradigm emerges as the cornerstone of economic actions and instruments recently embraced worldwide, and which can now also be seen in Brazilian initiatives.

The Paradigm Shift – ESG

ESG (sometimes referred to as ASG, given its Portuguese language equivalent – ambiental, social e governança) concerns new corporate processes and procedures to be adopted in pursuit of companies’ longevity and profitability. It is based on embracing ethical, social and environmental purposes, in line with the respective core businesses, in a dynamic process of interacting with the societies of which they are a part. These purposes, materialised as positive deliveries/outcomes to society, can be fulfilled both internally and externally through governance.

The paradigm shift is this: the new task taken on by companies is to generate positive social and environmental impacts as they fulfil those purposes, which must be in line with the relevant business. Profit no longer suffices if it is uncoupled from an active socio-environmental role: it must go hand-in-hand with this wider task, which becomes part of the business strategy to support and secure earnings.

This is why ESG must move beyond the previous kind of sustainable conduct, which was characterised by the pursuit of a balance between debits and credits to be achieved by means of mitigation and compensation of negative social and environmental impacts. Instead, companies must prioritise socio-environmental action as a positive consequence of the pursuit of business.

A business can no longer achieve long-term viability by minimising the social and environmental effects of its activities, or by acting in such a way as to not deplete the stock of natural resources available to future generations and by mitigating impacts and conflicts. It is no longer enough to refrain from doing harm – businesses must actively do good.

In the financial markets, green bonds, green funds, sustainable investments based on new principles, among many more, illustrate this new corporate reality that signals an end to “business as usual”. Nothing appears as effective for this reality shift – in terms of development, and in the way of producing and doing business – as a rearrangement of the market itself, replacing traditional policy practices full of command-and-control measures.

The ESG movement is aligned with significant initiatives around the world – particular notice being owed to the Global Compact, the Principles for Responsible Investment and the European Climate Pact – based on which, products such as label bonds and impact funds have emerged.

It seems beyond question that this movement adds important momentum for sustainable development and will, in time, spread to all links along the production chain. It is not a fad, but a legitimate and relevant change emerging from within the market and, for this very reason, with a far better chance of becoming a widespread practical reality than isolated policy initiatives.

ESG is the silver bullet of economic instruments, and provides the backdrop for a new world market order. Welcome to “The Age of ESG”.
**BRAZIL**  
**TRENDS AND DEVELOPMENTS**

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**Milaré Advogados** is a boutique law and consultancy firm in São Paulo that is exclusively dedicated to environmental law practice and the resolution of sustainability-related issues at all levels. It operates nationwide in Brazil, as well as globally. With 19 highly regarded professionals, Milaré is structured as six specialist departments: (i) agribusiness, trade and financing; (ii) real estate and due diligence; (iii) energy and mining; (iv) environmental sanitation; (v) international and comparative law, human rights and water management; and (vi) environmental crimes. All departments work across the entire environmental law spectrum in addition to their respective niches, and operate in tandem with a multidisciplinary team of scientists. The firm supports its clients with both consultancy and litigation expertise, including assistance with judicial and administrative procedures, alternative dispute settlement and negotiations, legislative and policy reform, expert legal and technical opinions, comparative legal analysis, and advocacy and advice in international policy and legal processes.

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TRENDS AND DEVELOPMENTS

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1. REGULATORY FRAMEWORK

1.1 Key Environmental Protection Policies, Principles and Laws
In Canada, the federal (national) and provincial/territorial (regional) governments have responsibility for the protection of the environment. Federal laws will generally apply to all projects or operations throughout the country, while provincial/territorial laws apply only to those projects or operations located within the specific province or territory.

The key federal laws governing environmental protection include the Canadian Environmental Protection Act, the Fisheries Act, the Impact Assessment Act, the Transportation of Dangerous Goods Act and the Canadian Navigable Waters Act. Provinces bolster these laws with legislation within their jurisdiction, such as British Columbia’s Environmental Management Act or Ontario’s Environmental Protection Act. Territories also have legislation within their jurisdiction, such as Nunavut’s Environmental Protection Act.

Each one of these acts is underscored by regulations, orders and guidelines designed to ensure compliance and further the goals of each respective act.

2. ENFORCEMENT

2.1 Key Regulatory Authorities
The key federal regulatory authorities in Canada include Environment and Climate Change Canada, Fisheries and Oceans Canada, the Impact Assessment Agency of Canada, Crown-Indigenous Relations and Northern Affairs Canada, Transport Canada, Parks Canada and Natural Resources Canada.

Other key regulatory authorities exist in each province or territory, many of which will co-ordinate their approach to regulation and enforcement with their federal counterparts.

3. ENVIRONMENTAL INCIDENTS AND PERMITS

3.1 Investigative and Access Points
Most regulatory authorities employ officers or other enforcement personnel, who are often granted the power to conduct inspections and investigations. These inspections and investigations may be routine or in response to suspected regulatory breaches. For example, a federal fishery officer may enter and inspect a facility or vessel if he or she has reasonable grounds to believe that federal fishery regulations are being breached. In this example, they may also open containers, examine fish or take samples of them, conduct tests, or take copies of documents. Regulatory officers investigating an offence may be required to obtain search warrants or may request voluntary disclosure.

The approach to the enforcement of environmental law varies according to the severity of the environmental incident or breach of the regulation. Whenever possible, Canadian authorities enforce environmental law through voluntary agreements and specific orders to comply. Canadian authorities will hold polluters responsible for the clean-up costs of pollution or contamination, and may seek further penalties where necessary.

3.2 Environmental Permits
Environmental permits are issued by the federal and provincial/territorial governments, depending on the nature and location of the activity at issue.
Environmental permits may be necessary for a wide variety of activities. For example, activities that may harm a threatened or endangered species will require a permit under the federal Species at Risk Act, while activities related to forestry will require a permit from the relevant provincial or territorial regulatory authority. While federal and provincial jurisdictions may not strictly overlap in this instance, environmental activities often require both federal and provincial permits and authorisations, thereby increasing compliance concerns for businesses. Some activities will also require municipal or regional permits and authorisations.

Depending on the circumstances, some projects may be able to obtain multiple environmental permits through a single process, but this is not always the case. Project proponents or operators in Canada will need to obtain permits from each of the responsible government authorities, at the federal and provincial/territorial levels, as required. As noted above, either federal or provincial environmental assessment (or both) may be required before permits may be issued.

Investors looking to purchase Canadian projects or operations will want to ensure they acquire the project’s associated permits. Most environmental permits can be transferred, but governmental consent may be required to do so. This can require a lengthy process in some circumstances, which may trigger consultation with indigenous groups. Usually, change of control will not trigger the need for governmental consents, but the specific requirements of the applicable legislation as well as the language of the permit itself must be carefully reviewed to determine whether governmental consents are required.

Environmental permits are generally obtained by applying to the appropriate government authority with responsibility over the permitting scheme; for example, permits around fish or fish habitats will commonly be obtained from Fisheries and Oceans Canada.

In many cases, the applicable legislation explicitly states that environmental permits will only be granted to individuals or businesses that can show they are qualified to hold them. As an example, the federal Nuclear Safety and Control Act forbids transfers of licences unless the licensee can show that they are authorised to carry out the particular activity granted under the licence.

Some permitting regimes, but not all, will allow for an appeal to a quasi-judicial authority (often an administrative tribunal) or a member of the federal government – ie, a minister. In all cases, the decision to grant or refuse a permit can be reviewed by the courts through an application for judicial review. Further appeals from these decisions may find themselves in courts of competent jurisdiction.

4. ENVIRONMENTAL LIABILITY

4.1 Key Types of Liability
The key types of liability faced by project proponents or operators in Canada for environmental damage or breaches of environmental law
include monetary fines, remediation orders, the loss of environmental permits and prosecution.

Environmental legislation, such as the Fisheries Act, include a provision that makes it an offence to fail to comply with the legislation. Furthermore, the Fisheries Act and others like it state that any committed or continued offence that occurs over time shall be considered a separate offence for each day the contravention occurred. The result is that offenders may be subjected to multiple convictions and large monetary fines should environmental breaches continue. It is often possible for an employee, agent or a director or officer to be held personally responsible for an offence under environmental legislation.

5. ENVIRONMENTAL INCIDENTS AND DAMAGE

5.1 Liability for Historical Environmental Incidents or Damage
Subject to available defences, a current or purchasing operator or landowner will be subject to liability if they acquire contaminated land. The Canadian liability regime is designed to ensure that liability always falls on either past or present owners or operators of land in order for federal and provincial governments to avoid incurring remediation costs.

5.2 Types of Liability and Key Defences
Most environmental legislation in Canada operates on the “polluter pays” principle, which requires the party that caused the harm to the environment to bear the ultimate cost of any clean-up or remediation.

However, Canadian contaminated sites legislation can impose liability for historic environmental incidents or damage on a current operator or landowner of contaminated land; for example, if the new landowner is aware of contamination and takes no steps to mitigate its spread, then the new landowner may be liable (subject to the various defences set out in the legislation).

There are several types of liability for environmental incidents or damage in Canada. Project proponents, operators, or suppliers and transporters of products may face liability for pollution or harm to the environment, for failing to comply with specific environmental regulations or permits, for the ownership, operation, or control of contaminated sites, or for the supply of products to contaminated sites. They may also face claims of nuisance or negligence from private parties affected by contamination.

A defence of due diligence is normally available to parties accused of breaching environmental legislation, as well as various common law and equitable defences. However, there are some offences where due diligence is not available.

A recent case that demonstrates many of the key principles and issues in a contaminated sites context is JI Properties Inc v PPG Architectural Coatings Canada Ltd, 2015 BCCA 472. This appellate decision provides commentary on the legislative/regulatory regime, the status of pre-legislation comfort letters and due diligence by the defendants, the operation of limitation periods on environmental damage, and the scope of reasonably incurred remediation costs.

6. CORPORATE LIABILITY

6.1 Liability for Environmental Damage or Breaches of Environmental Law
As previously noted, Canada has adopted the polluter pays principle for environmental liability, and this includes corporations. Corporate entities that damage the environment or breach environmental legislation will be liable for the harm caused. This can include damage caused
by oil spills and sewage pollution, or breaches of regulations around wildlife, fisheries, the transportation of dangerous goods, the disposal of hazardous materials and contaminated sites.

6.2 Shareholder or Parent Company Liability
It is uncommon in Canada for the shareholders or parent company of a polluting corporate entity to be held liable for the environmental damage. However, Canadian contaminated sites legislation contains broad liability provisions that may apply to shareholders or a parent company that owns, controls, or manages a contaminated piece of property. Also, in very rare circumstances, a party or government may seek permission from the court to “pierce the corporate veil” and sue the parent company for actions taken by the subsidiary.

7. PERSONAL LIABILITY

7.1 Directors and Other Officers
Several pieces of federal environmental legislation impose responsibilities on directors and officers for their company’s environmental performance. Penalties for environmental damage or breaches of environmental law can include:

- being fined or imprisoned for the corporation’s pollution, even if the corporation has never been prosecuted or convicted;
- being fined for the corporation’s failure to obtain the necessary permits or approvals, follow required environmental processes, or report spills;
- being prosecuted for failure to take all reasonable care to prevent the corporation from causing or permitting pollution;
- being heavily fined or imprisoned for the corporation’s contempt of court where there are repetitions of events that led to a previous environmental conviction; or
- being personally liable for the costs of remediating historical and current property contamination associated with any real estate that the corporation owns, controls or occupies, or formerly owned or controlled.

7.2 Insuring against Liability
Most directors and officers in Canada rely on director and officer insurance to insure them against any errors and omissions made in the course of their duties. Given the serious consequences of potential environmental breaches, it is not uncommon for directors and officers to have coverage for environmental breaches as part of their insurance policies. However, such policies are often additional and expensive, as they are not traditionally included as part of standard policies.

Directors and officers may seek further indemnification from the company itself for any liability that arises from their role in the company; however, this may be of less utility if the company becomes insolvent due to environmental penalties.

8. LENDER LIABILITY

8.1 Financial Institutions/Lender Liability
It is unlikely that financial institutions or lenders will be liable for the environmental damage caused by one of their clients. However, Canadian contaminated sites legislation contains broad liability provisions that may apply to a lender who owns, controls or manages a piece of property. For example, if a lender realises on security taken on real property assets that are contaminated, the lender may have sufficient “control” over the situation to incur liability for clean-up.
8.2 Lender Protection
To protect themselves from liability risk, lenders should investigate the potential environmental liabilities inherent in an undertaking before investing, and should ensure that money is allocated towards meeting environmental contingencies. Furthermore, lenders can make it a term of any lending agreement that the owner or operator of a site meets and/or exceeds any environmental regulations or policies in furtherance of the agreement. Finally, a lender could ask for an indemnity or for the provision of an insurance policy naming them an additional insured in order to further mitigate any potential fallout from an environmental offence.

9. CIVIL LIABILITY

9.1 Civil Claims
Civil claims for compensation or other remedies can be brought through common law causes of action, such as nuisance, negligence, trespass, or loss of property value, or through statutory causes of action set out in environmental legislation.

9.2 Exemplary or Punitive Damages
Canadian courts of inherent jurisdiction almost always have jurisdiction to award exemplary or punitive damages. However, generally speaking, they are unlikely to award such damages unless the conduct in question is high-handed, malicious, arbitrary or highly reprehensible. The bar for awarding punitive damages is high, but punitive damages have been awarded in certain jurisdictions such as Alberta for breaches of environmental responsibilities.

9.3 Class or Group Actions
Class actions are available for environmental-related civil claims. However, class actions in Canada must first be “certified” by a court in order to proceed. This process ensures that the claim raises common issues and that a class proceeding is the preferred way to resolve those issues. However, few environment-related cases have made it past this initial threshold.

9.4 Landmark Cases
Two appellate decisions, released in 2014, confirmed that class action regimes are not often appropriate to remedy environmental harms: Canada (Attorney General) v MacQueen, 2013 NSCA 143 and Windsor v Canadian Pacific Railway Ltd, 2014 ABCA 108. Although environmental causes of action may seem to involve common issues among class members, proof of those claims is often an individual issue.

10. CONTRACTUAL AGREEMENTS

10.1 Transferring or Apportioning Liability
Indemnities and other contractual arrangements can be used to transfer or apportion liability for environmental pollution or breaches of law, although the appropriate terms for each set of parties will be fact-specific. However, third parties – including regulators – are not likely to be bound by such agreements, and are entitled to prosecute or seek compensation from the party who is liable at law. Polluters relying on such indemnities and contracts must seek indemnification or compensation through those mechanisms on their own.

10.2 Environmental Insurance
Most commercial general liability policies in Canada exclude pollution liability. Businesses can purchase an optional pollution liability extension, although such extensions will be subject to strict exclusions.

Instead, Canadian businesses may wish to purchase an environmental liability policy from one
of a variety of insurers in Canada. These policies can provide coverage for liability arising from a sudden or gradual pollution event, waste management services, storage tanks and contractors, among other things.

11. CONTAMINATED LAND

11.1 Key Laws Governing Contaminated Land

Jurisdiction over contaminated sites is divided between the federal and provincial/territorial governments in Canada. The federal government has some powers to issue remedial and preventative orders regarding water and soil contamination, and has jurisdiction over any federal lands. All other lands are governed by provincial contaminated sites legislation.

Provincial contaminated sites legislation details hazardous waste disposal and storage, site investigations, permitting and authorisations, pollution prevention, site remediation, administration, penalties, etc. All of these fall under provincial jurisdiction relating to the environment and property management.

Contaminated sites are defined as areas of land where the soil, sediment, vapour, or groundwater contains a prescribed substance in quantities or concentrations exceeding risk-based criteria, standards or conditions. Prescribed substances generally include hazardous substances such as sulphur, petroleum hydrocarbons, heavy metals and CFCs.

When a “responsible person” has not remediated an identified contaminated site, a regulatory authority can issue a remediation order to ensure remediation is carried out. This could occur if the contamination is severe, or if the responsible person will not voluntarily carry out the remediation requirements.

Persons who may be liable for the costs of remediating a contaminated site include the current owner or operator of a site, a previous owner or operator of a site, persons who produced the prescribed substance found on the site, and persons who transported the prescribed substance found on the site.

However, specific exclusions apply. For example, a prior owner or operator might not be found liable if they can demonstrate that the site was not contaminated at the time they owned or controlled it, and that they did not contribute to the contamination. Similarly, a current owner who can demonstrate that none of their conduct exacerbated or contributed to the costs of remediation may not be found liable.

More than one person can be liable for remediation of contaminated land, with liability typically apportioned according to the degree of fault or contribution by the parties to the pollution. Gehring et al v Chevron Canada Limited et al, 2006 BCSC 1639 provides commentary on the allocation of remediation costs. The recent appellate case Victory Motors (Abbotsford) Ltd. v Acton Super-Save Gas Stations Ltd., 2021 BCCA 129 confirmed that, at least in British Columbia, remediating parties may claim both litigation legal costs and legal costs incurred throughout the actual remediation of the contaminated site.

A person liable for remediating contaminated land can seek recourse from the original polluter or former landowner. Such actions may be available in contract law, in negligence, or through a statutory cause of action in some provinces.

A polluter or landowner can transfer liability for a contaminated site to a purchaser by way of contract. However, environmental legislation in most provinces permits regulators to order those who formerly owned or controlled contaminat-
ed property to carry out remediation measures. Parties seeking to rely on contractual terms to recover their costs or limit liability will need to seek a remedy through those mechanisms.

12. CLIMATE CHANGE AND EMISSIONS TRADING

12.1 Key Policies, Principles and Laws
Although a large part of the Canadian economy is resource-based, the country’s economy varies greatly from coast to coast. The strategies to combat climate change have therefore been as varied as the economies in which they are implemented. As it currently stands, Canadian provinces have a patchwork of different environmental policies in play, with varying adherence to policies concerning carbon credits, renewable energy credits and emission standards.

12.2 Targets to Reduce Greenhouse Gas Emissions
Canada is a signatory to the major international climate change conventions. As a party to the Paris Agreement, Canada has committed to an economy-wide target to reduce greenhouse gas emissions by 40-45% below 2005 levels by 2030. The Canadian Net-Zero Emissions Accountability Act formalises Canada’s target to achieve net-zero emissions by the year 2050, and establishes a series of interim emissions reduction targets at five-year milestones toward that goal.

Although the federal government signed the Paris Agreement and has set emission targets, Canada is a federal system and the federal and provincial levels of government have the jurisdiction to regulate matters concerning the environment.

In recognition of the collaborative approach needed for progress on climate change, the federal and provincial Ministers of the Environment developed the Pan-Canadian Framework on Clean Growth and Climate Change, which required all provinces and territories to have carbon pricing initiatives in effect by 2018. However, the framework gives the provinces and territories the flexibility to design their own policies to meet emission-reduction targets through the different initiatives or mechanisms that best suit their individual economies. The federal government subsequently issued a further climate plan in 2020 – A Healthy Environment and a Healthy Economy. The plan builds on the efforts that are currently underway through the Pan-Canadian Framework.

Canada maintains a number of legal requirements with respect to energy efficiency. Regulations apply to a range of products, including appliances, light bulbs, heating and cooling systems, and vehicles. Many incentive programmes also exist to support the construction of energy-efficient homes and buildings, and the development of energy-efficient industries and businesses.

In 2017, the federal government announced that the provinces and territories in Canada had to develop their own carbon pricing system that met federal standards or the federal government would impose their own programme on the provinces and territories. Since 2019, every jurisdiction in Canada has had a price on carbon pollution, either their own pricing system tailored to local needs or the federal pricing system. If a province or territory decides not to price pollution, or proposes a system that does not meet minimum standards set by the federal government, the federal system is put in place.
13. ASBESTOS

13.1 Key Policies, Principles and Laws Relating to Asbestos

Asbestos management in Canada is governed by occupational health and safety legislation and environmental legislation. It is governed federally by legislation such as the Hazardous Products Act and the Canada Consumer Product Safety Act, and provincially by legislation such as the Workers Compensation Act. The federal Prohibition of Asbestos and Products Containing Asbestos Regulations prohibit the import, sale and use of asbestos, as well as the manufacture, import, sale and use of products containing asbestos (with some exceptions).

The responsibility for removing or managing asbestos present in a building generally falls on the building owner. However, in some provinces the occupier of a building, such as a tenant or project developer, may also bear some responsibility.

Landowners or occupiers must conduct a pre-work assessment before commencing certain building work. Any asbestos found must be removed, enclosed, encapsulated, or carefully managed prior to renovations or alterations. The legislation mandates that specific procedures are implemented during asbestos removal, relating to ventilation, waste containers and decontamination.

Asbestos was used frequently in Canadian insulation, fireproofing and construction until the 1980s. Canada was also an active producer of asbestos until 2011. As a result, Canadian exposure to asbestos has been relatively widespread, and asbestos-related diseases continue to be one of the top causes of workplace death in Canada.

Despite this, asbestos litigation against employers is relatively uncommon. Canada has a socialised medical insurance system and most provinces operate a mandatory workers’ compensation scheme, which means that the majority of workers injured by asbestos exposure will receive medical treatment and compensation without resorting to litigation.

Where asbestos litigation has been undertaken, it has been initiated by workers’ compensation boards, the bodies responsible for administering the workers’ compensation schemes, and brought against manufacturers of asbestos products to recover the costs of paying out compensation to workers and their families.

To establish a claim for damages for asbestos exposure, a litigant must demonstrate actual physical harm or injury. However, the long latency period of asbestosis and mesothelioma means that the injury or harm may not be realised and litigation not commenced for decades.

This has created challenges for Canadian courts. Litigants have often been exposed to asbestos from a variety of sources over a long period of time, making causation and the proper apportionment of liability a difficult issue. More recent jurisprudence suggests courts will take a more relaxed approach to causation in such cases; see Clements v Clements, 2012 SCC 32.

One of the leading cases with respect to asbestos liability in Canada is Privest Properties Ltd v The Foundation Co of Canada Ltd (1995), 11 BCLR (3d) 1 (SC), aff’d (1997), 31 BCLR (3d) 114 (CA). Privest was the first suit to be tried in Canada involving asbestos in buildings. The court rejected the plaintiffs’ position that the building in question had been contaminated by the presence of asbestos-containing spray fireproofing. The court concluded that the substance at issue was not an inherently dangerous product,
because the fireproofing contained chrysotile, rather than crocidolite or amosite forms of asbestos. This decision set a meaningful precedent in Canada by constraining liability with respect to the use of asbestos in fireproofing and construction. It also departed significantly from earlier US authorities.

14. WASTE

14.1 Key Laws and Regulatory Controls
In Canada, the responsibility for managing and reducing waste is shared among federal, provincial, territorial and municipal governments. The federal government regulates the export and import of waste and the interprovincial movement of waste, while the provinces regulate the use and disposal of waste. Both “extended producer responsibility” and “product stewardship” programmes are used to manage products at their end-of-life.

14.2 Retention of Environmental Liability
Whether or not a producer or consigner of waste retains liability for waste after it has been disposed of by a third party depends on the province in question. In some provinces, the legislation includes an automatic ownership transfer provision that is triggered once waste is accepted by an authorised waste management facility, which limits further liability of producers or consigners.

In provinces where such a provision does not exist, any past or present owner or person that possessed, controlled or managed the waste remains exposed to liability for waste after it has been disposed of by a third party. However, generally speaking, some direct involvement in the release is necessary in order for the liability to crystallise. Under both schemes, producers or consigners remain liable for any damage caused while the waste was in their possession or in transport.

14.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods
Producers in Canada are not generally required to take back, recycle or dispose of goods once they become waste. However, legislation across Canada is widely used to impose some or all of the costs of recovery, recycling, and disposal of goods on the producers of waste. These laws are intended to incentivise producers to design products that can be disposed of responsibly.

15. ENVIRONMENTAL DISCLOSURE AND INFORMATION

15.1 Self-Reporting Requirements
There are requirements to self-report environmental incidents or damage to regulators in Canada. These requirements often apply to spills or releases of environmentally harmful substances such as oil, sewage, and ozone-depleting substances. Larger spills or releases may also be required to be reported to the public at large.

In addition to legal requirements to report spills or other environmental breaches, a failure to notify may be used against an offender as evidence of conduct worthy of sanction via punitive damages or an increased fine for a conviction.

15.2 Public Environmental Information
Canadian government agencies often publish environmental information on their websites. The public may also request government documents and information through access to information requests, which apply to nearly all public authorities and bodies and nearly all government documents.
15.3 Corporate Disclosure Requirement
The disclosure of environmental information in annual reports is still largely voluntary in Canada. However, under Canadian securities rules, reporting issuers (which are largely public companies) must disclose all material information, including material information about environmental and social issues. Report issuers may also have disclosure obligations under the policies of a particular stock exchange.

16. TRANSACTIONS

16.1 Environmental Due Diligence
Environmental due diligence is typically conducted on M&A, finance and property transactions in Canada. The level of due diligence conducted may vary according to the level of risk a particular property may present (such as a gas station or dry cleaner).

In a share sale, all the assets and liabilities of the target company remain with the company, meaning that the buyer will absorb any outstanding environmental liabilities for historic environmental damage or breaches of environmental law.

In an asset sale, the buyer typically does not inherit the pre-acquisition environmental liabilities associated with the purchased assets. However, by law, the buyer may inherit liability for the pre-existing environmental condition of the assets, especially in the case of a contaminated site. A buyer may also be liable where it takes over an ongoing situation of regulatory non-compliance.

Typically, a purchaser of Canadian shares or assets will request any of the relevant environmental studies, reports, permits, orders, key correspondence from regulatory authorities and other critical environmental documents from the vendor. A purchaser can also search public registries for information regarding the target company’s environmental compliance, conduct interviews with senior environmental employees of the target company, or obtain an environmental audit or site assessment.

Private companies may provide Phase I and Phase II assessments, with Phase I inspections consisting of database and visual searches while Phase II inspections consist of site inspection, sample collection and analysis, and often the provision of a review and recommendations regarding the site and potential remediation.

16.2 Disclosure of Environmental Information
There is little legislation that mandates the disclosure of environmental information to a purchaser. In some jurisdictions, for example, provincial legislation will require a vendor of real property who knows or should know that the property has been used for an industrial or commercial purpose to provide a site disclosure statement to a prospective purchaser. More commonly, the requirement to disclose environmental information to a purchaser is built into Canadian contracts. Robust representations and warranties regarding the property or the company’s environmental status will create liability where those statements prove untrue.

There are no “typical” environmental warranties, indemnities, or similar provisions in a share or asset sale; the allocation of risk depends on the parties themselves. However, it is common in Canadian business transactions to include representations, warranties and indemnities that will affect the allocation of environmental liability. Topics that may be covered by these provisions include the state of the property, the absence of contamination and the company’s environmental compliance status. Often, such warranties and indemnities will be limited in time.
17. TAXES

17.1 Green Taxes
In Canada, environmental taxes are imposed on activities or products that have a negative impact on the environment. They are designed to limit environmentally harmful behaviour through a price incentive, and are levied on the tax bases of energy, transportation, pollution and natural resources, among other things. Examples include federal and provincial fuel consumption taxes, and provincial taxes on mineral use, waste management and carbon emissions. Other provisions may allow businesses to recoup costs or receive accelerated depreciation write-offs for pollution control or energy conservation equipment and machinery.
Lawson Lundell LLP differentiates itself as one of the largest and most experienced law firms in Western Canada. It is a leading, full-service, business law firm, with over 170 lawyers located in offices in Vancouver, Calgary, Kelowna and Yellowknife. The environmental practice group comprises 20 lawyers, who provide their expertise to clients in a wide range of industries, including banking, construction, energy, forestry, government, mining, real estate, transportation and utilities. The team provides advice and assistance to clients in all aspects of environmental law, including commercial transactions, environmental management systems, environmental project assessment, regulatory and licensing requirements, contaminated sites, reclamation, closure and remediation, and environmental offences.

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Trends and Developments

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Miller Thomson LLP see p.71

National Developments
Courts adapt to COVID-19
Courts around the country significantly revised their procedures in response to the COVID-19 pandemic. Many court appearances, which traditionally took place in person, are now facilitated by remote technology such as audio and videoconference. In many cases, this has resulted in a more efficient system for managing busy courtroom dockets.

The elimination of travel time for counsel and litigants, the use of virtual “waiting rooms” – and other efficiencies realised by these changes – may well become permanent fixtures that survive the pandemic.

Enhanced focus on environmental, social and governance (ESG)
Momentum on issues surrounding ESG has continued to swell as more companies integrate ESG matters into their practices. While some organisations voluntarily report on ESG issues, others are mandated to do so in compliance with strengthened regulatory requirements.

The Task Force on Climate-Related Financial Disclosures (TFCD), commonly referred to as the global standard for corporate climate reporting, has continued to gain recognition in Canada. In response to the COVID-19 pandemic, the federal government launched an emergency loan programme for large Canadian businesses which required loan recipients to commit to publishing annual climate-related disclosure reports consistent with the TFCD. In the 2021 budget, the federal government also committed to engaging with provinces and territories to make climate disclosures consistent with the TFCD.

Responding to the climate crisis
Canadian climate laws and policies continue to evolve. Under the federal Impact Assessment Act, the Minister of Environment and Climate Change is directed to consider how a designated project would help or hinder Canada’s abilities to meet its domestic and international climate commitments. The Strategic Assessment of Climate Change outlines what climate and emissions information project proponents ought to submit throughout a federal impact assessment, as well as providing guidance on how climate change will be considered throughout the impact assessment process.

The Supreme Court of Canada upheld the constitutionality of the Greenhouse Gas Pollution Pricing Act, finding that Parliament has jurisdiction to enact this law. The court acknowledged that the climate crisis “poses a grave threat to humanity’s future” and addressed the difficulty of the “collective action problem” in which greenhouse gas emissions in one province may be offset by increased emissions in another province. While this ruling allows the federal carbon pricing scheme to continue applying in provinces and territories that lack an appropriate carbon pricing scheme, the power of Parliament to regulate provincial emissions reductions more broadly remains unclear.

In April 2021, the federal government increased Canada’s 2030 emissions reduction target from a 30% to a 40–45% reduction below 2005 lev-
els by 2030. This target, however, remains less ambitious than the targets of the USA and EU.

Canada’s first-ever climate accountability legislation was passed into law in June 2021. The Canadian Net-Zero Emissions Accountability Act enshrines Canada's 2050 target of reaching net-zero emissions, and sets out a framework to set and report on milestone emissions reduction targets.

In July, the Minister of Natural Resources launched an engagement process to provide feedback on potential elements of legislation regarding a just and equitable transition to a low-carbon future for impacted workers and communities. The federal 2021 budget also allocated CAD2 billion to create new employment opportunities over the next five years, with CAD250 million of that funding focused on helping workers transition.

**Heightened attention to indigenous peoples’ issues**

In May 2021, the remains of 215 indigenous children were found at the site of a former residential school in British Columbia (BC), sparking investigations at other school sites. As of August 2021, more than 1,300 unmarked graves had been found at five former residential school sites; many more sites remain unsearched. These discoveries, coupled with coverage of the 45 long-term drinking water advisories in 32 First Nations communities, continue to increase awareness of indigenous issues and are likely to result in greater attention to all impacts on indigenous rights including those arising from environmental laws and policies.

In September 2019, the United Nations Special Rapporteur on human rights and hazardous substances reported that indigenous peoples in Canada are disproportionately affected by toxic waste. MP Lenore Zann introduced a Private Member’s Bill in February 2020 to develop a national strategy to redress “environmental racism” which she defined as “the disproportionate number of environmentally hazardous sites established in areas inhabited primarily by members of Indigenous and other racialized communities”. Parliament recessed before the bill was passed.

After BC passed the Declaration on the Rights of Indigenous Peoples Act in 2019, requiring the province to harmonise its laws with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), it has been entangled in numerous high-profile resource conflicts. In December 2019, the BC Supreme Court granted Coastal GasLink an injunction against Wet’suwet’en First Nation members who were blocking its access to the pipeline project in protest of the project being built on their traditional territory. While a Memorandum of Understanding (MoU) was signed in May 2020 between Canada, BC and Wet’suwet’en hereditary chiefs which outlined a process for negotiating shared jurisdiction, the MoU did not address the Coastal GasLink pipeline, and Wet’suwet’en protests continue to date.

In June 2021, Canada passed the United Nations Declaration on the Rights of Indigenous Peoples Act, which similarly requires the federal government to harmonise its federal laws with UNDRIP. Progress on the alignment of federal laws with UNDRIP remains to be seen.

**British Columbia (BC)**

**Provincial hydrogen strategy released**

Shortly after Canada released a national hydrogen strategy in December 2020, BC released its comprehensive hydrogen strategy in July 2021, and declared itself the first Canadian province to do so.
The primary goals of the strategy are to: (i) encourage the use and adoption of low-carbon hydrogen to help it meet its 2050 net-zero emissions target; and (ii) encourage the innovation and production of low-carbon hydrogen in BC to grow the sector and position the province as a leader in hydrogen research and production.

Given that two-thirds of BC’s energy used for transportation, buildings and industry currently comes from fossil fuels, transitioning to a cleaner, low-carbon energy system will be pivotal for BC to meet its 2050 target. BC is geographically well-positioned in its proximity to key trading partners, with the export markets of China, Japan, South Korea and California predicted to account for nearly half of the total global hydrogen demand by the year 2050.

**Court holds legal fees recoverable as remediation costs**

In March 2021, the BC Court of Appeal held that legal costs which were reasonably incurred in connection with the remediation of a contaminated site could be fully recoverable under the Environmental Management Act. In Victory Motors (Abbotsford) Ltd v Actton Super-Save Gas Stations Ltd (2021 BCCA 129), the Court noted that nothing indicated that the words “all costs of remediation” in the Act could not include “full indemnification” for reasonably incurred remediation legal costs.

**Prairie Provinces**

**Extension of time to commence an environmental contamination claim**

In most cases, in Alberta, a claimant must commence an action in the earlier of (i) two years after the date on which the claimant first knew, or ought to have known, about the alleged injury or damage attributable to the defendant, or (ii) within ten years after the claim arose.

The ten-year limitation period operates as an absolute bar, as it prohibits a claim from being initiated regardless of when (or even whether) the claim was discovered. This “ultimate drop-dead rule” was designed to give parties some finality to legal exposure.

However, bringing an environmental claim within ten years is often not possible due to factors such as: the time it takes for pollution to develop or be detected; the difficulty of ascertaining the cause, nature or extent of the contamination; and the uncertainty of whether or not there is need for remediation.

While strict application of the ten-year ultimate drop-dead rule would satisfy the objective of ensuring timely resolution of liability and disputes, it would run directly contrary to the established “polluter pays” principle that is enshrined in case law from the Supreme Court of Canada, as well as in Alberta’s Environmental Protection and Enhancement Act.

To try to resolve this conflict, Section 218 of the EPEA expressly gives the court discretion to extend the ten-year limitation period in certain cases.

**Case law in Alberta**

In Brookfield Residential (Alberta) LP (Carma Developers LP) v Imperial Oil Limited, 2019 ABCA 35 (“Brookfield”) and United Inc. v Canadian National Railway Company, 2020 ABQB 413 (“United”) the Alberta courts provided some guidance on the application of that discretion under Section 218.

In Brookfield, Imperial Oil sold the property in question decades before it was acquired by Brookfield from a later owner. During excavation for re-development, Brookfield discovered contamination and initiated the claim against Imperial Oil – more than 60 years after Impe-
rial had sold the property. The Court of Appeal was not willing to extend the limitation period in this case, as there was a complete lack of evidence available to speak to the events that had occurred. The court ultimately found that the prejudice suffered by Imperial Oil as a result of this passage of time was too great to allow the claim to proceed.

In United, the plaintiff, a residential developer, purchased lands formerly owned by CN Rail. Similar to Brookfield, United had purchased the lands from an intervening owner, and discovered significant contamination some three to four years after expiry of the ten-year period. The court in United paid particular attention to CN’s allegations of prejudice, and closely tested each potential issue raised, including:

- loss of documents;
- fading witness memories;
- any loss of ability to test the contamination;
- inability to call evidence to establish the proper standard of care;
- loss of ability to assess causation and whether that was an issue; and
- the death of a key witness.

The court found that, while the passage of time had resulted in some prejudice to CN in its ability to defend the claim, there was not enough evidence of real prejudice that arose during the almost 15 years between when the contamination occurred and when the claim was filed to deny the extension of the limitation period.

**Timing is everything**

These decisions make it clear that undue prejudice to the defendant is by far the most critical factor to be considered in exercising the discretion under Section 218. Of course, greater prejudice is more likely to be inferred with greater passage of time. For example, in Brookfield, the court was particularly concerned that the parties would not even be able to establish what the standard of care was back in 1949 when the contamination was alleged to have occurred.

While these decisions add some much-needed clarity, we will undoubtedly see more applications under Section 218 given the nature of environmental claims and the broad discretion that has been given to the courts under the section.

**Ontario**

**Regulatory developments**

Several regulatory initiatives were announced in 2021, including proposed amendments to the Low Carbon Fuels Regulation (Ontario Regulation 79/15). The regulation was intended to streamline the approvals process for certain manufacturers so they are able to switch from fossil fuels to alternative fuel materials that would otherwise be disposed of as waste. The proposed changes expand eligible fuel sources, eliminate some reporting obligations, increase limits on demonstration projects and reduce some of the pre-conditions to permit applications.

Ontario continues to have limited regulatory control over odour emissions beyond broad legislative prohibitions against emissions that may cause an “adverse effect”. In May 2021, an update to the guideline to specifically address odour mixtures was announced. However, the absence of specific regulation in this area continues to create uncertainty and remains a barrier to even benign development proposals such as composting facilities, faced with an inability to point to objective compliance measures in response to local opposition raising odour concerns.
Ontario Land Tribunal absorbs ERT and others
In June 2021, the Ontario Land Tribunal was established to hear matters formerly heard by five separate tribunals, including the Environmental Review Tribunal. While this amalgamation allows for the possible elimination of the need for multiple hearings where an undertaking requires multiple approvals, it does create the potential for loss of tribunal expertise and, in turn, the potential for reduced judicial deference to the tribunal by courts undertaking judicial review of a tribunal decision.

Continued implementation of Excess Soils Regulation
Ontario’s long-awaited Excess Soils Regulation finally saw implementation of its first phase in January 2021. The regulation is intended to create better management and control of excess soil generated during construction excavations. The second phase of the regulation comes into effect in January 2022, with the third and final phase coming into effect in 2025. Although the regulation has no doubt increased some of the immediate costs of handling, storing and disposing of excess soils, in the long term many of the problems cause by the previous unregulated system should be greatly reduced, if not eliminated entirely.

Court rules Ontario government acted unlawfully
In September 2021, the Divisional Court declared the Minister of Municipal Affairs acted unlawfully in failing to comply with the public consultation requirements of Ontario’s Environmental Bill of Rights (EBR) regarding the expansion of ministerial powers related to Ministerial Zoning Orders (MZO). Both the use of MZO and the decision attracted a lot of controversy, with developers favouring the expanded powers over the objection of several environmental groups. The decision, while hailed as a victory by the latter, may well have little practical effect in that Section 37 of the EBR specifically protects the validity of any instrument even if it was issued in a manner that did not comply with the Act.

Court rules against tactical decisions made by litigants in contaminated land cases
Continuing a trend seen in the 2019 decision of Soleimani v Rolland Levesque, 2019 ONSC 619 (Canadian Legal Information Institute, Canlii), Ontario courts once again ruled against what they saw as tactical decisions by a litigant that created the potential for unfairness. In Soleimani, the court ruled that the plaintiff could not rely on Section 5(1)(iv) of the Limitations Act to stop its limitation period from running. Under the unique exemption created by that subsection, the limitation period is suspended if “having regard to the nature of the injury, loss or damage” a proceeding would not be “an appropriate means to seek a remedy”. The court found that Mr Soleimani made a “manifestly tactical decision” to avoid litigation costs in allowing the Ministry of Environment to direct the defendant’s actions for four years before commencing litigation. The court found that the elements required to rely on the Section 5(1)(iv) of the Limitations Act had not been established.

Similarly, in Tre Memovia Developments Ltd. v 1491316 Ontario Inc. (2020 ONSC 1568) the plaintiff developer delayed seeking an order to conduct environmental testing of the neighbour’s property until after it had completed the construction of a new development on its lands. The plaintiff had discovered unexpected contamination when the development started. The court found the plaintiff’s tactical decision to delay the inspection request until after construction was completed resulted in prejudice to the defendant in that the plaintiff’s site had been so disturbed as to render evidence obtained from the inspection to be of limited probative value. Furthermore, the construction had taken away
any meaningful opportunity for the defendant to undertake its own testing of the plaintiff's property. Leave to appeal to the Divisional Court was denied in April 2020.

Both decisions are consistent with a longstanding trend in Ontario civil litigation in which courts look unfavourably on what they consider to be tactical practices by one litigant that lead to a potential for unfairness. Contrast these decisions with Aragon Investments Ltd. v Moloney Electric Inc. (2021 ONSC 4686) issued in June 2021, in which a very late application to conduct an environmental investigation of a non-party’s lands was granted. In Aragon, the matter had already been set down for trial when the plaintiff’s expert, in preparing a responding expert report in accordance with the rules of practice, unexpectedly advised that additional evidence was required which could only be obtained by the additional subsurface investigation. It is clear from the decision that the court accepted that the plaintiffs were caught by surprise by this development and that the timing of the proposed investigation would not result in any unfairness to the defendants.

Quebec

**Energy transition in Quebec**

On 7 April 2016, the government of Quebec released the 2030 Energy Policy, which sets out Quebec’s goal of becoming a North American leader in energy efficiency and renewable energy by 2030. On 16 November 2020, the government unveiled the 2030 Plan for a Green Economy, which prioritises the development of the green hydrogen and bioenergy sector, as well as its action plan for the implementation of the policy covering the 2021–26 period.

**The 2030 Energy Policy and its implementation**

The policy defines Quebec’s energy transition strategy until 2030. Its objectives include promoting a low-carbon economy, making optimal use of Quebec’s energy resources and taking full advantage of the potential of energy efficiency.

To achieve these objectives, the government has adopted five targets to be met by 2030, including increasing the share of renewable energy in total energy production by 25% and increasing bioenergy production by 50%. The policy is implemented through amendments to the existing legislative and regulatory framework.

The first implementation action amended the Act respecting the Régie de l’énergie (Quebec’s energy regulator) to introduce the concept of renewable natural gas (RNG), which in turn led to the adoption of a regulation that requires natural gas distributors to deliver a minimum volume of RNG to their customers each year. This volume will gradually increase by 2025, from 1% to 5% of the total volume of natural gas delivered in a year.

The Minister of Energy and Natural Resources is now responsible for ensuring effective governance of the energy transition, innovation and efficiency.

**The 2030 Plan for a Green Economy**

The Plan aims to reduce greenhouse gas emissions by 37.5% by 2030, compared to 1990, through the implementation of measures such as increasing the electrification of transportation and buildings, reducing the free allocation of emissions allowances to the industrial sector and increasing the use of other forms of renewable energy.

In addition, the government announced, in early 2021, the allocation of funding to support the development of the green hydrogen industry.

While several renewable hydrogen production projects aimed at adding hydrogen to natural gas are already under development in Quebec,
these projects have evolved until now in the absence of standards and regulations adapted to allow the development of this new form of renewable energy. The Quebec legislative and regulatory framework only deals with hydrogen as a hazardous material.

However, on 30 September 2021, the National Assembly adopted Bill 97, which, among other things, amends the Act respecting the Régie de l’énergie to include hydrogen as a “gas from renewable sources” that can be added to traditional natural gas. This legislative change should allow for the accelerated development of the green hydrogen industry in Quebec.

The rapid changes put in place by the Quebec government suggest that renewable energy projects will be accelerated and are intended to facilitate the achievement of the objectives of energy transition and reduction of GHG emissions by 2030.

Contaminated soil management
While the province is working to promote the development of green energy, it is also taking action to regulate the treatment, transportation, reclamation and landfill of contaminated soil.

In June 2021, Quebec adopted the final version of the highly awaited regulation respecting the traceability of excavated contaminated soil. It will be gradually enforced as of 1 November 2021. The adoption of this new regulation aims, among other things, to put an end to the unethical practice of burying contaminated soil excavated in Quebec outside of the province, particularly in Ontario.

This regulation is part of the many changes to environmental law in Quebec that began in 2015 with the tabling of a green paper on the reform of the Environmental Quality Act.

Other measures have also been taken to tighten the framework for contaminated soils. These include amendments to the Land Protection and Rehabilitation Regulation and to the regulation respecting contaminated soil storage and contaminated soil transfer stations, as well as the adoption of the regulation respecting the regulatory scheme applying to activities on the basis of their environmental impact (REAFIE).

Under the latter regulation and in accordance with the EQA, the vast majority of activities involving contaminated soil require an authorisation from the Quebec Minister of the Environment prior to carrying out such activities. The application for an authorisation must include a monitoring programme for soil entering or leaving the facility, station or site.

Based on the modular approach of the REAFIE, the reception of contaminated soils on or under land may be eligible for a declaration of conformity or an exemption allowing a relaxation of the measures governing this activity – however, such an exemption applies under very limited conditions that present a lower risk to the environment.

Conclusion
Canadian environmental law continues to evolve at a rapid pace. Climate change, issues impacting indigenous peoples and day-to-day pollution regulation remain the active focus of most Canadian lawmakers and courts. All signs point to these trends continuing for the foreseeable future.
Miller Thomson LLP is comprised of approximately 500 lawyers, situated in 12 strategically placed offices across Canada. National and multinational businesses must navigate Canada’s environmental laws and regulations, which evolve constantly and vary from province to province. Miller Thomson’s environmental law group is a trusted partner when it comes to managing environmental risk, including undertaking environmental due diligence, ensuring environmental regulatory compliance, preventing and defending against regulatory prosecutions, pursuing or defending environmental civil claims, structuring transactions involving environmental risk, and keeping up with this fast-moving area of the law. Its lawyers include legal planners, negotiators, former regulators and advocates who have the expertise that comes with deep experience and an understanding of the complex issues that face corporate decision-makers, lenders and regulators.

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1. REGULATORY FRAMEWORK

1.1 Key Environmental Protection Policies, Principles and Laws

The Chilean Constitution currently in force (Article 19 No 8), sets forth the right to live in an environment free of pollution and establishes that it is the state’s duty to ensure both that the environment is not negatively affected and the preservation of nature.

On 25 October 2020, Chile voted on a referendum to replace this constitutional text; as of the date of this writing, the democratically elected Conventional Convention is working on the new Constitution, creating different special commissions to discuss and make proposals to the plenary Convention for their approval. Among these, there is the Commission on Environment, Rights of Nature, Natural Commons and Economic Mode.

It is not entirely clear how protection of nature will be addressed in this new Constitution. However, in the current context, where the effects of climate change are becoming more apparent and the country is experiencing a decade-long drought, it is probably that some ideas – such as sustainable development, protection of nature and ecosystems, and access to water – will be issues of high relevance in the new constitutional text.

Law No 19,300

The mandate to the state to ensure both that the environment is not negatively affected and the preservation of nature present in the Chilean Constitution currently in force is further detailed in Law No 19,300 on General Bases of the Environment, which outlines the main aspects of several mechanisms to protect the environment, such as:

- the Environmental Impact Assessment System (Sistema de Evaluación de Impacto Ambiental, SEIA):
  - the strategic environmental assessment;
  - environmental audits; and
  - environmental responsibility.

It also details the functions, organisation and other aspects of the Ministry of the Environment and the Environmental Assessment Service (Servicio de Evaluación Ambiental, SEA).

The key principles of environmental law in Chile are also found in Law No 19,300. These include the preventive principle, the participation principle and the efficiency principle.

S.D. No 40/2012

There is also the S.D. No 40/2012, Regulations of the Environmental Impact Assessment System, that detail the functioning of the SEIA. Any project or activity listed in Article 10 of Law No 19,300 must be assessed through the SEIA in order to obtain an environmental licence (Resolución de Calificación Ambiental, RCA).

A recent development is the new requirement for assessment in the SEIA of projects or activities that might affect wetlands located partially or totally within the urban radius (Article 10 letter s) of Law No 19,300, added by Law No 21,202 which amended, in turn, several statutes increasing protection of wetlands).

Within the SEIA, several public agencies comment on projects submitted and are able to impose conditions for those projects’ operation within the sphere of their respective competencies. The project must then be carried out in accordance with the conditions established in its permit.
Law No 20,417
Another key environmental regulation is Law No 20,417, Organic Law of the Superintendence of the Environment (Superintendencia del Medio Ambiente, SMA), which provides the regulatory framework for that institution and its main functions, such as environmental inspections, punitive procedures and incentives for compliance.

Law No 20,600
Law No 20,600 creates the Environmental Courts. There are currently three Environmental Courts in Chile with jurisdiction in the northern (Antofagasta), central (Santiago), and southern (Valdivia) regions of the country. The Environmental Courts are collegiate bodies comprised of two judges who are lawyers and one with a degree in the sciences. This range of expertise enables them to grasp the technical complexities of the cases brought before these courts. It is important to note that, as this legislation is relatively new, the contours of the right to live in a pollution-free environment, and of environmental law in general, have been defined, in many respects, by jurisprudential criteria. Therefore, the Environmental Courts and the Supreme Court play an important role in the construction of environmental law application criteria, permanently shaping the limits and powers of each environmental agency when they regulate an issue or adjudicate over a dispute. They are not part of the executive branch; they are independent and impartial.

2. ENFORCEMENT

2.1 Key Regulatory Authorities

Ministry of the Environment
The main regulatory authority on environmental matters in Chile is the Ministry of the Environment (Ministerio del Medio Ambiente, MMA), which collaborates with the President of the Republic in the design and application of policies, plans and programmes on environmental matters, as well as in the protection and conservation of biological diversity and of renewable and water resources, promoting sustainable development, the integrity of environmental policy and its normative regulation.

The Council of Ministers for Sustainability is chaired by the Minister of the Environment and composed of the Ministers of: Agriculture; Finance; Health; Economy, Development and Tourism; Energy; Public Works; Housing and Urban Development; Transport and Telecommunications; Mining; and Planning. The main functions of this Council are proposing environmental public policy to the President of the Republic, and giving its opinion regarding environmental bills and administrative acts.

SEA
Another key regulatory authority is the SEA, which is in charge of managing the SEIA and, when applicable, the process of citizen participation and of participation of indigenous communities in the SEIA in accordance with ILO Convention 169.

The SEA, additionally, manages a public information system about the projects that are assessed within the system, handling the environmental licences and authorisations and a public register of certified environmental consultants.

Regarding its regulatory authority, the SEA is in charge of drafting guidelines that standard-
ise and unify criteria for the application of environmental law. Also, the SEA interprets RCAs, whenever there are doubts over the scope of their text or their content.

The SMA
Another key agency is the SMA, which is in charge of overseeing compliance with environmental licences, laws, regulations and other permits. The SMA also has broad authority to inspect, and request information from, regulated parties and is entitled to impose significant fines and penalties in cases of environmental breach. These penalties include fines up to 10,000 Yearly Tax Units (YTU) – approximately USD8 million – cancellation of the RCA, and temporary or permanent closure of facilities.

As an independent and impartial body, the role of the Environmental Courts, described in 1.1 Key Environmental Protection Policies, Principles and Laws, is also key, as they oversee the application by the SMA, SEA and MMA of the environmental law and regulations.

Biodiversity and Protected Areas Service
It must be noted that, at the time of writing, Chile still does not have a public agency devoted to managing protected areas. The Bill creating the Biodiversity and Protected Areas Service (Servicio de Biodiversidad y Áreas Protegidas, SBAP), which is an institution envisioned in the institutional reform of 2010, is still under discussion in the Chilean Congress, after over ten years.

Other Authorities
Finally, other authorities with relevant attributions in environmental terms are:

- the General Water Directorate (Dirección General de Aguas, DGA);
- the Agricultural and Livestock Service (Servicio Agrícola y Ganadero, SAG);
- the National Corporation of Forestry (Corporación Nacional Forestal, CONAF); and
- the National Service of Geology and Mining (Servicio Nacional de Geología y Minería, Sernageomin).

3. ENVIRONMENTAL INCIDENTS AND PERMITS

3.1 Investigative and Access Points
The enforcement of environmental licences, legal standards and regulations in Chile is carried out by the SMA. The SMA has powers to investigate and prosecute administrative liability due to environmental damage or to breaches of RCAs and other applicable regulations.

In this context, the SMA may impose fines and penalties, which include fines up to 10,000 YTU (approximately USD8 million), termination of the RCA, and temporary or permanent closure of facilities.

Additionally, the SMA manages several reporting and disclosure systems, which operate on web-based platforms and are not publicly available, unless the SMA starts a punitive proceeding against a regulated entity.

The SMA is also charged with managing several incentives for compliance, such as compliance programmes and self-reporting measures. A compliance programme is a set of verifiable measures to return a project or activity to environmental compliance. If the programme is accepted by the SMA and is successfully fulfilled, it will result in the non-application of the fine that would have been imposed otherwise.

Self-reporting, on the other hand, consists of the informing, by a regulated party, of an environmental breach to the SMA. The result of the self-report is that, if the party successfully com-
pletes a compliance programme, the fine that would have been applicable will not be applied by the SMA.

Finally, any person or entity may file a complaint before the SMA denouncing a breach of environmental licences or regulations. The SMA may further investigate and, if it deems it appropriate, will pursue a punitive proceeding.

3.2 Environmental Permits
The SEIA is an administrative process managed by a specialised agency, the SEA, in which several public agencies with environmental competencies, make observations within the scope of those competencies regarding the environmental impact(s) of the project or activity being assessed. As a result, these agencies can, with respect to the relevant statutes, impose measures and conditions on the project owner in order to mitigate these impacts.

Article 10 of Law No 19,300 lists the projects or activities that must be assessed under the SEIA, in order to obtain an RCA to operate. If the RCA approves the project assessed, it will also approve the environmental contents of sectorial permits applicable, which may not be rejected thereafter due to environmental reasons.

DIA and EIA
A project can enter the SEIA by means of an environmental impact declaration (declaración de impacto ambiental, DIA) or study (estudio de impacto ambiental, EIA). In general, a project that must enter the SEIA will be assessed by a DIA; unless it generates or creates any of the impacts, effects or circumstances described in Article 11 of Law No 19,300. If the project generates any of these more significant impacts, it must be submitted through an EIA.

These impacts, effects or circumstances are significant adverse impacts and consist of, among others:

- endangerment to public health;
- adverse effects on natural resources;
- proximity or location inside protected areas.

Community Input
The administrative record of the environmental assessment is always publicly available, whether on the website of the SEIA or in the offices of the SEA. Exceptionally, and at the request of the interested party, the authority may keep technical, financial or other background information under reserve so as to protect commercial or industrial confidentiality, or to protect patents or inventions linked to the assessed project or activity.

Additionally, communities affected by a project under assessment may participate in the process, making observations to the project being assessed. Communities may always participate in an EIA, and in a DIA if:

- this is requested by ten directly affected persons, or by two or more citizen organisations with valid legal entity; or
- when the project assessed places an environmental burden on nearby communities.

Whenever an indigenous community is affected by a project assessed in the SEIA, the SEA will open a special participation stage, tailored to the requirements laid out by ILO Convention 169.

Observations and comments made by the community or by indigenous communities will be considered by the SEA as an integral part of the assessment process and must be addressed by the SEA, who must issue a well-founded response to every one of these comments. If the SEA fails to properly respond to any of the
observations and comments made by the community, the person who made the observation my file an appeal to invalidate the RCA.

**Amendments and Permits**
RCA provisions are strictly binding throughout the life cycle of the project. Any significant amendments must be assessed within the SEIA. Where there is doubt over whether an amendment is significant, it is possible to ask the SEA its opinion through an appropriateness letter (consulta de pertinencia). The answer of the SEA will not have the status of a permit or an authorisation, rather it will be merely the opinion of the SEA as to, in light of the information provided, whether the project or amendment studied should enter the SEIA.

Within the SEIA, the project’s owner must also request specific permits for the project. These are sectoral permits granted by different sectoral authorities, but that have environmental contents. These are the environmental sectorial permits (permisos ambientales sectoriales, PAS). Examples of these permits include

- permits to cut down native forest;
- permits to build a tailings deposit; or
- permits to build large hydraulic works.

The environmental aspects of those permits are assessed and approved within the SEIA, and the RCA will duly note this circumstance. The project holder will have to then process these permits before the corresponding authority for the sectoral approval, showing the RCA. Although the authority might reject the permit for technical reasons, it will not be allowed to reject the sectoral permit for environmental reasons.

**Appeals Process**
The project holder may appeal the RCA if it imposes onerous conditions or requirements; or if the RCA rejects the project assessed. Appeals against an RCA shall be filed before the Executive Direction of the SEA if the challenged RCA was based on a DIA, or before the Council of Ministers, if the challenged RCA was based on an EIA. In turn, these decisions may then be reviewed by the Environmental Court; whose decisions are subject to review by the Supreme Court via a cassation remedy, in applicable cases.

Also, as previously mentioned, members of the community that made observations of the project assessed, and who feel their observations were not duly considered in the RCA, may also appeal the RCA, following the same routes mentioned above.

**4. ENVIRONMENTAL LIABILITY**

**4.1 Key Types of Liability**
The following are the key types of liability related to environmental damage or to the breach of environmental regulation.

**Administrative Liability**
Administrative liability arises from a breach of environmental regulations, of the project RCA, or from the causation of environmental damage, regardless of any further environmental or civil liability that might arise. The SMA, as stated in 2.1 Key Regulatory Authorities, can investigate any project or activity in order to verify environmental compliance. Note that the SMA usually considers any deviation from the RCA a breach of its contents.

If a breach is detected, the SMA can file charges against the project owner, starting an administrative procedure that can conclude with penalties ranging from a written reprimand to fines of up to 10,000 YTU (approximately USD8 million),
including total or partial closure of the respective project and/or revocation of its RCA.

Alternatively, if environmental damage can be repaired, the SMA can order the project owner to execute a repair plan. If the damage cannot be repaired (such as damage to an archaeological site), then the SMA can impose a fine, or other measures such as the ones detailed above.

When indicted, a project holder can also submit to the SMA a compliance programme for its approval. Note that compliance programmes can be presented only once and cannot cover very serious violations.

This plan must be executed in its entirety, and any breach in the programme will result in the reopening of the penalty proceeding and imposition of up to twice the original fine. If the plan is completely executed, and this is approved by the SMA, then the proceeding will be concluded and no other penalty will be imposed.

Penalties imposed by the SMA can be appealed before the Environmental Court.

Civil Liability
Civil liability arising from environmental damage is set forth in Articles 51 to 55 of Law No 19,300. According to this Law, anyone causing environmental damage, whether by malice or fault, must restore those damages. In addition, breach of any administrative regulations will result in a presumption of liability. After the Environmental Court has established liability, the affected parties may seek redress as per general rules before the civil courts.

Criminal Liability
At the time of writing (October 2021) there are no general provisions setting forth a general regime for criminal liability linked to environmental violations. The Criminal Code and other statutes set forth few specific provisions of limited scope related to criminal offences of an environmental nature.

For example, the Criminal Code punishes, among other things, the malicious poisoning or infection of water intended for public consumption as well as withdrawal of water flows without water rights. Another environmental criminal offence is found in the General Law on Fishing and Aquaculture, which punishes anyone who introduces, or orders the introduction of, any pollutants into any body of water causing damage without previous neutralisation.

Indeed, the Chilean criminal environmental liability system has been considered as insufficient. There is currently a Bill in Congress whose purpose is to set forth a broader scheme for criminal liability linked to environmental crimes and damage. It should be noted that, under the current legislation, environmental damage is not a criminal offence.

5. ENVIRONMENTAL INCIDENTS AND DAMAGE

5.1 Liability for Historical Environmental Incidents or Damage
In Chile, there are no special regulations regarding the environmental liability of current landowners arising from historical incidents or past owners’ actions.

In accordance with Law No 19,300, there is a five-year statute of limitations to file an environmental damage claim, beginning from the definitive cessation of the event causing the damage.

Regarding civil damages, if the claim is filed directly before a civil court (without a ruling from an Environmental Court establishing the existence of environmental damage), the term to file
the claim is the general term for torts (four years from the occurrence of the event).

5.2 Types of Liability and Key Defences

Administrative Liability

Administrative liability has been addressed in the 4.1 Key Types of Liability. As previously discussed, the SMA can file charges against the project owner, who may:

• respond to the charges submitting its defences; or
• submit a compliance programme, in applicable cases.

Please note that these are either/or alternatives.

If a project owner decides to submit a defence, it can use all means admitted by law, which will be evaluated by the SMA pursuant to the logical and reasonable rules of evaluation and procedure (sana crítica).

Environmental Damages Liability

In relation to liability due to environmental damage, Chile operates a fault-based system, and apart from specific cases where the law sets forth a strict liability scheme (such as application of pesticides, hydrocarbon spillages into bodies of navigable waters, etc), fault expressed as malice or negligence is required to establish liability. Additionally, the following requirements must be met:

• an action causing environmental damage;
• significant damage or injury to the environment; and
• the causal connection between action and damage.

Environmental damage claims such as these must be filed before the Environmental Court by:

• the individual who suffered the damage;
• the municipality in whose territory the environmental damage happened; or
• the state.

In this case, the burden of proof lies on the plaintiff. Key defences include:

• denying causal connection between action and damage;
• arguing against the significance of the damage; or
• proving there was no malice and that standards of due care were followed.

It is important to note that, in order to give rise to environmental liability, the damage must be “significant”. It is accepted that any human activity will cause some sort of injury to the environment, so that not any effect to the environment can be considered as environmental damage. Therefore, the damage must be significant in order to allow a claim for reparations from the person or entity that caused it. The law does not define the concept of “significance”, so the Environmental Courts and the Supreme Court have defined some criteria to establish the existence of significant damage on a case-by-case basis, which include:

• duration and entity of the damage;
• quality and quantity of natural resources affected;
• effects on the ecosystem; and
• capacity, and time required, for regeneration.

6. CORPORATE LIABILITY

6.1 Liability for Environmental Damage or Breaches of Environmental Law

According to Chilean legislation, environmental damage can be caused by any person or legal entity, and the same can be said of breaches of environmental law.
There is a general provision related to corporate liability in Chilean Law No 18,046, on Stock Corporations, transferring the liability of the company to its administrators or representatives unless their lack of participation in, or their opposition to, the act constituting the infringement is proven. In other words, in case of breach of environmental law, or in case of environmental damage, the administrators or legal representatives of a stock corporation will be liable unless it is proven that they did not participate or that they opposed to the act constituting the violation.

A recent development is the enactment of Law No 20,393 that established criminal liability of legal entities, in relation to specific crimes. Some of these crimes are set forth in the General Law on Fishing and Aquaculture, and involve some environmental contents; such as the contamination of water bodies resulting in harm to hydrobiological resources; extraction or commercialisation of resources subject to extraction bans; and the unauthorised extraction of resources within benthic resources management areas.

However, this could change in the future, as there is currently a Bill in Congress aimed at expanding the scope of criminal liability of legal entities (Bill No 13204-07).

6.2 Shareholder or Parent Company Liability

Currently, in Chile, shareholders or parent companies are not liable for breaches of environmental law. As stated in 6.1 Liability for Environmental Damage or Breaches of Environmental Law, the party liable before environmental authorities is the project owner. However, it should be noted that this could change in the future with the Bill regarding the expansion of criminal liability of legal entities (Bill No 13204-07).

In some cases, however, financial entities had been held liable for environmental damage. In a 2013 ruling, the Supreme Court ordered the company Forestal León Ltda. and the Banco de Chile to jointly repair the environmental damage caused in the El Peñasco estate by the illegal cutting down and burning of native forest (Supreme Court, Case No 8593-2012).

7. PERSONAL LIABILITY

7.1 Directors and Other Officers

According to Chilean legislation, any person – whether a natural or a legal entity – wilfully or negligently causing environmental damage is liable both to restore the damaged environment and also to compensate those affected by that damage.

Breaches of an RCA or of environmental law, prosecuted by the SMA, may result in fines of up to 10,000 YTU (approximately USD 8 million), as well as closure or cancellation of that RCA.

In case of stock corporations, liability can be transferred to its administrators or representatives unless their lack of participation in, or their opposition to, the act constituting the breach is proven.

In relation to obligations arising from a mine closure plan, Law No 20,551 provides that the mining company or the mining entrepreneur are responsible for compliance with the closure plan, whether that plan is executed directly or by a third party. If the requirements of the mine closure plan are infringed, the legal representatives of the mining company, and whoever is responsible for the breach, will be sanctioned with a fine ranging from 100 to 1,000 YTU (approximately USD6,750–67,500). The specific amount to be applied will be determined on a case-by-case basis by the Superintendent of the Environment,
depending on the seriousness of the breach and the criteria provided in Law No 20,417, which include: intent, prior conduct, economic benefit and endangerment to the environment or public health.

7.2 Insuring against Liability
There is no regulation in Chile regarding insurance against environmental liability. However, insurance could be purchased to cover the civil damages related to this liability.

8. LENDER LIABILITY

8.1 Financial Institutions/Lender Liability
The party appearing as the project holder before the environmental authority is liable for breaches of environmental laws and regulations, or for environmental damage according to Article 24 of Law No 19,300.

Therefore, financing or lending entities are not liable before the environmental authorities in the case of a breach of environmental laws and regulations, or in the case of environmental damage.

8.2 Lender Protection
Even though lender protection is not regulated in Chile, and lenders will not be liable before the environmental authorities if they are not listed as the project owners before those environmental authorities, there are several steps that can be taken in order to protect their investments.

For example, lenders could protect themselves by conducting environmental law due diligence to investigate potential environmental liabilities, and by drafting contractual clauses limiting their liability in the case of an environmental offence or contingency.

9. CIVIL LIABILITY

9.1 Civil Claims
Environmental liability arises from the generation of environmental damage. If environmental liability is established, it is possible to claim reparation for civil damages derived from the environmental ones.

This claim must be filed before a civil court, only after the Environmental Court has determined that environmental damage exists.

If the Environmental Court rules that there was no environmental damage, there could still be liability to compensate those civil damages caused, actionable as per the general rules of civil liability before civil courts.

9.2 Exemplary or Punitive Damages
Chilean legislation provides that compensation should cover only the damage caused according to the principle of “integral damage reparation” (ie, the claimant should be restored to the position they would have held if the damage had not occurred). Therefore, the courts cannot award exemplary or punitive damages.

9.3 Class or Group Actions
There are no class or group actions in Chilean environmental law. Parties with standing to claim environmental damage are those directly affected (whether natural or legal entities), municipalities or the state.

In some cases, the Supreme Court has broadened the definition of “standing”, admitting a more relaxed evidential standard for parties to prove they have been “affected” in relation to the constitutional right to live in an environment free of pollution. However, this broader standing does not fall into the definition of a class or group action. The only class actions recognised
in Chilean law can be found in consumer protection legislation.

9.4 Landmark Cases
As there are no class actions in Chile, there are no landmark cases to highlight.

10. CONTRACTUAL AGREEMENTS

10.1 Transferring or Apportioning Liability
The holder of an environmental licence is solely responsible for its fulfilment and is the only liable party in the case of a breach of permits or regulations, or in the case of environmental damage. Because of this, the relevant environmental authority must be informed of any change in ownership of a project that has been environmentally approved. Even though it is possible to transfer or apportion liability among the parties, these agreements are only binding among the parties, and not to the regulator. In other words, the party registered as the project owner before the authority is the only liable party, regardless of any private agreement to the contrary.

10.2 Environmental Insurance
Chilean legislation does not provide for overall environmental insurance covering environmental damage or breaches of environmental legislation. There are, however, forms of private insurance that could cover such events, such as policies covering the costs of compensation to third parties or the costs derived from a clean-up operation. These are governed by the common rules applicable to insurance.

11. CONTAMINATED LAND

11.1 Key Laws Governing Contaminated Land
There is no special legal regime related to remediation of contaminated land in Chile, which shall fall under the environmental damage regime.

If environmental damage is caused with negligence or intent, it will give rise to two different liabilities:

• the “environmental” liability to repair the damaged environment; and
• a civil torts liability, to indemnify those whose rights have been harmed by the environmental damage.

Usually, the SMA will pursue reparation, and then the government might pursue civil liability against the responsible parties.

12. CLIMATE CHANGE AND EMISSIONS TRADING

12.1 Key Policies, Principles and Laws
Chile has been an active part of the international negotiations regarding climate change, and is part of the UN Framework Convention on Climate Change, the Kyoto Protocol and the Paris Accords. However, Chile is not among those countries with binding greenhouse gas emissions reductions targets.

In 2020, Chile presented its Nationally Intended Contribution (NIC), which consists of different measures, aimed at reducing greenhouse gas emissions.

The NIC also proposes means of implementation and data to improve the quality of information and transparency.
It is noteworthy that, as per its NIC, Chile is aiming at reducing its greenhouse gas emissions by 30% by 2030 in relation to 2019 emission levels, with the long-term goal of becoming carbon neutral by 2050.

Moreover, the NIC states that under certain enabling conditions there is a 45% by 2030 emission reductions potential target, taking into account mitigation and/or carbon capture actions.

Finally, at the time of writing, there are Bills being discussed in the Chilean Congress that relate to climate change. One of these is the Framework Law on Climate Change, which lays the foundations for drafting and implementing long-term climate policy. Another one is the Glacier Protection Law, which establishes an absolute prohibition on mining or any other type of industrial activity on glaciers of any type (whether white or rocky) glaciers, except for those activities intended for scientific research, tourism or sustainable sports.

12.2 Targets to Reduce Greenhouse Gas Emissions

In April 2020, the Chilean government presented its 2020 NIC to the UN Framework Convention on Climate Change, which contains Chile’s commitment to reduce its greenhouse gas emissions by 30% by 2030 (compared to 2019 emission levels) and to become carbon neutral by 2050.

Additionally, the Ministry of Energy has set the goal of closing every thermoelectric power plant in Chile by 2040. Regarding this matter, a Schedule of Withdrawal or Reconversion of Coal Plants was presented. It establishes the closure of the eight oldest plants by 2024, which represents 19% of Chilean carbon-based power plant capacity. The schedule also establishes a commitment to define dates in worktables formed every five years, which will allow the setting up of specific retirement schedules in the future.

As a way to reduce greenhouse gas emissions and promote decarbonisation, the Chilean government is developing a strategy to develop and promote the green hydrogen industry, which can be produced without emitting greenhouse gases or pollutants. It should be noted that Chile has a great potential for renewable energies to generate green hydrogen, and could reach more than 1,800 GW of installed capacity if this potential is exploited.

The national green hydrogen strategy is a long-term policy that establishes Chile’s ambitions to create a new industry in this sense, having as its axis the promotion of investment and financing of renewable energy generation, international co-operation on the matter and the revision of the applicable regulations. For its elaboration, technical tables, citizen workshops and an advisory council have been formed. A public consultation process was also carried out, whose results and conclusions must be published by the Ministry of Energy.

13. ASBESTOS

13.1 Key Policies, Principles and Laws Relating to Asbestos

Since the enactment of S.D. No 656/2000, the production, import, distribution, sale and use of asbestos or any other product of material that contains it is forbidden, with the exceptions set forth in the mentioned regulation.

Asbestos is also addressed in S.D. No 594/2000, which provides for minimum health and safety standards in workplaces, forbidding the use of blue asbestos-crocidolite, and considering asbestos (both dust and fibres) as a hazardous waste material to be handled as per the regulations set forth in S.D. No 148/2003.
14. **WASTE**

14.1 **Key Laws and Regulatory Controls**

There are various statutes governing the handling, storage, transportation and final disposal of waste according to the different classes of waste involved:

- hazardous waste (S.D. No 148/2003);
- solid industrial waste and health and environmental conditions in workplaces (S.D. No 495/2000);
- waste from hospital centres (S.D. No 6/2009);
- sludge from waste water treatment plants (S.D. No 4/2009);
- health and safety conditions in landfills (S.D. No 189/2005).

Generation, transport and elimination of waste, whether hazardous or not, must be reported through the Pollutant Release and Transfer Registry (Registro de Emisiones y Transferencias de Contaminantes, RETC) web platform. It should be noted that the above-mentioned statutes merely include provisions governing the handling of waste that has already been generated and do not provide any mechanisms for incentivising waste minimisation, recycling or recovery.

Law No 20,920 on extended producer responsibility and recycling promotion (Ley de Responsabilidad Extendida del Productor, REP Law), is the broader statute pertaining to waste and includes an economic instrument for waste management, seeking to reduce waste generation and increase recovery. The MMA will gradually set goals for waste generation and recovery, and compliance will be overseen by the SMA.

The REP Law sets forth a hierarchy for waste handling:

- first – prevention of waste generation;
- second – reusing;
- third – recycling;
- fourth – total or partial energy recovery.

Waste elimination is seen as the last resort for waste handling. Also, the REP Law represents an important step towards a more comprehensive waste-handling policy, that includes recovery and recycling in the life cycle of waste.

14.2 **Retention of Environmental Liability**

The REP Law sets forth an extended liability for the producers of products designated as a “priority” by the Law due to their size, hazardous characteristics, or the presence of exploitable components, with the purpose of decreasing generation of waste and promoting their reuse, recycling and other types of recovery. Those priority products are lubricating oils, electric and electronic equipment, packaging and containers, tyres, and batteries.

The extended producer liability set forth by the REP Law entails that the producer of priority products will remain responsible for them until they are properly recovered or eliminated by another authorised entity, such as a waste-treatment facility or a landfill.

14.3 **Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods**

The REP Law sets forth a hierarchy in waste handling where elimination is the last alternative (see 14.1 Key Laws and Regulatory Controls). This way, any waste with the potential to be recovered must be recovered. This is one of the obligations that form the extended responsibility of the producer of a priority product.

The MMA will issue regulations considering different instruments to prevent generation of waste, such as eco-design, labelling and rebates. Also, the MMA will set goals for waste
collection and recovery. To date, the regulations in force are the Regulations of the Recycling Fund (S.D. No 7/2017) and the Regulations Setting the Procedure for Setting Recycling Goals for priority products (S.D. No 8/2017).

As of the date of this writing (October 2021), the Ministry of the Environment has enacted two regulations setting the recollection goals for priority products: S.D. No 8/2019 setting collection goals for tires and S.D. No 12/2020, setting collection goals for packaging and containers. These regulations will enter into force in 2023.

Other laws related to the use of single-use plastics have been passed, such as Law No 21,100 for the elimination of plastic bags, and Law No 21,368 that limits the generation and use of disposable plastic products (prohibiting the delivery of plastic cutlery, light bulbs and others in food establishments), to be fully implemented in November 2024.

Additionally, a new Bill banning the use of non-compostable plastic products in political campaigns is being discussed in Congress (Bill No 14024-12).

15. ENVIRONMENTAL DISCLOSURE AND INFORMATION

15.1 Self-Reporting Requirements
Projects with an RCA, and also those sources subject to emissions standards and other instruments named in R.E. No 885/2016, must inform the SMA of any environmental emergency or event associated to them. The SMA, from time to time, also issues general reporting requirements applicable to certain classes of projects, such as: R.E. No 2257/2020, applicable to regulated parties who discharge treated waste water into continental bodies of water as per S.D. No 90/2000; and R.E. No 680/2021, applicable to thermal power plants required to report emissions online.

Also, RCAs often include different disclosure obligations to the SMA, which are determined on a case-by-case basis. Reporting must be conducted online through the RCA follow-up system of the SMA, within 24 hours of the event.

The SMA also has different computer systems to report environmental variables, for example:

• a system to report emissions by thermoelectric power plants;
• a system to report the payment of green taxes; and
• a system to report updates in the execution of Compliance Programmes.

Finally, projects with an RCA must inform the SMA whenever the development stage of the project changes (ie, the start of construction, commissioning or abandonment).

15.2 Public Environmental Information
Public services in Chile are guided by the principle of transparency. All information held by the administration, and all administrative proceedings, shall be public unless there are reasons provided in the law for making that information reserved or secret. If the information has not been made publicly available by the authority, the public is allowed to request access to such information, which will be granted unless there is a legally valid reason for not releasing such information.

There are several public databases of environmental information. The most relevant of these are the following:
E-SEIA, where the electronic records of environmental impact assessment processes are publicly available;

- Sistema Nacional de Información de Fiscalización Ambiental, SNIFA, where all punitive proceedings carried out by the SMA are public; and

- the website of the MMA, which also contains public databases of the process of elaboration or review of policies, regulations, and emission and quality standards; there is also a public registry in the MMA website regarding the declaration processes of urban wetlands in Chile.

15.3 Corporate Disclosure Requirement
There are different regulations providing the corporate disclosure of environmental information. For example, release of emissions and waste must be reported through the RETC carried by the MMA. Different emissions standards provide reporting requirements. Also, many RCAs establish the obligation to provide monitoring and reports that must be disclosed to the relevant authority.

Finally, all regulated parties have the duty to disclose any information requested from them by the SMA.

16. TRANSACTIONS

16.1 Environmental Due Diligence
The party liable for the breach of environmental obligations is the party appearing as the holder of the project before the SEA. Therefore, environmental due diligence is usually conducted whenever there is a relevant transaction involving projects, activities or facilities governed by environmental law.

The review is usually composed of documents and information provided by the seller, public information sources and rounds of questions and answers targeted to determine compliance and possible exposure to liability due to the breach of environmental obligations.

Liability is determined by the statute of limitations, which runs for five years following the environmental damage being evidenced, and for three years for administrative breaches in general.

16.2 Disclosure of Environmental Information
Although Chilean contract legislation is built upon the principle of good faith, there is no specific obligation to disclose environmental information to a prospective purchaser.

Considering that environmental liability falls upon the party registered as the project owner before the authority, environmental due diligence is a useful tool for having a clearer view of the risk involved in a specific transaction. In addition, indemnity clauses, even when they have no validity before the regulator, can be an aid to recovery of costs associated with liability.

17. TAXES

17.1 Green Taxes
Chile recently established a tax on emissions to the atmosphere of carbon dioxide, particulate matter, nitrogen oxide and sulphur dioxide produced by facilities whose fixed sources, formed by heaters or turbines, add up to 50 MWt or more.

The tax is also applicable to new vehicles, light and medium, depending on their performance, emissions and sales price. The tax levied amounts to USD5 per ton.
This regulation was modified by Law No 21,210, which removed the requirement that these emissions should be produced by establishments whose fixed sources are heaters or turbines, as well as the requirement of thermal power. This modification will come into effect on 1 January 2023.
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Trends and Developments

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Writing Process for a New Constitution
In October 2020, Chileans voted on a referendum to replace the Constitution of 1980 with a new text, to be drafted by a Constitutional Assembly formed by 155 citizens, elected according to a criteria of gender parity and with reserved seats for members of indigenous peoples.

The Constitutional Assembly commenced its functions on 4 July 2021, and has devoted itself to preparing the regulations for its operation, the text being finally approved on 29 September 2021. The Constitutional Assembly started working on the constitutional text on 18 October 2021, divided in seven different commissions. It is expected that the Constitutional Assembly will start working on the constitutional text itself during October 2021.

As a part of the regulations, seven commissions were created to discuss specific aspects of the future constitutional text that will be then proposed to the plenary Convention for their approval. Among them, there will be a Commission on Environment, Rights of Nature, Natural Commons and Economic Model. This Commission will discuss, among others, issues pertaining to the climate crisis, the duty to protect nature, intergenerational justice, environmental crimes and several principles of environmental law, such as the non-regression principle, and precautionary and preventive principles.

In this context, it can be highlighted that there is a certain consensus in strengthening the role of government in preserving nature and the environment, as well as the possibility to include an ecocentric view of the environment. These visions aiming at a stricter protection of nature have arisen from the increasingly common view that prior legislation has not been able to avoid “sacrifice zones” (areas that have become environmentally impaired due to the impacts of intensive economic activities) and that, in the current context of extreme drought, have not been successful in providing access to water to communities affected due to the lack of this resource.

Note that the Constitutional Assembly has a nine-month deadline for delivering a new constitutional text, extendable for three additional months. After that term, then there will be a referendum on the adoption or rejection of this new text.

Bill of Law for the Framework Law on Climate Change
In January 2020, the Chilean Senate started to discuss the Bill for the Framework Law on Climate Change (Bill No 13.191-12). It is noteworthy that, prior to its submission to the National Congress, the Ministry of the Environment subjected a draft of this bill to a public participation process, allowing the community to submit its input before the bill was sent to Congress.

The purpose of the bill is to face the challenges of climate change, moving towards a development that is low in greenhouse gas (GHG) emissions, to increase resilience to the effects of climate change, and to comply with international commitments.

In this vein, one of the goals of the Bill is to achieve neutrality in GHG emissions by 2050,
in accordance to Chile’s National Determined Contribution under the Paris Agreement, setting forth a range of instruments to make this possible at both the national and the local levels. Among these instruments is the Long-Term Climate Strategy that will include: national and sectorial emissions budgets to the years 2030 and 2050; medium-term objectives, goals and indicators; and guidelines for cross-sectional adaptation measures.

On the other hand, the bill sets forth several instruments for managing climate change at the local level, such as strategic plans for hydric resources in basins and emissions-reduction certificates.

In relation to this matter, there is currently another Bill being discussed in Congress to modify Law No 19,300 on the General Bases of the Environment, in order to add the phenomenon of climate change in its provisions, as an element to be taken into account in the environmental assessment of projects and activities.

**Bill of Law Creating the Service of Biodiversity and Protected Areas**

The creation of a specialised government agency in charge of managing protected areas is long overdue in Chile.

First, Law No 18,362 on the National System of Protected Areas of the State (SNASPE), promulgated in 1984, never entered into force.

Second, the Service of Biodiversity and Protected Areas (SBAP) is the last outstanding institution to be created after the reform of the environmental institutions carried out by Law N 20,417 – and it still has a long way to go. The first bill creating the SBAP was submitted to Congress in 2011 and withdrawn on 2014 (Bill No 7,487-12). The second bill entered the Senate that same year (Bill No 9,404-12) and is still being processed in Congress. The bill has completed its review in the Senate and is currently being processed in the Chamber of Deputies, as the government has noted that it should be processed urgently.

The objective of the Bill is the integration of the attributions and responsibilities for the protection of nature and protected areas in a single agency, which co-ordinates the different actors around its management, with an integrated view of the country. Currently, these functions are dispersed among different ministries: Agriculture, Economy, Environment, Culture and National Property.

The Bill also seeks to create a single National System of Protected Areas (SNASPE), integrated by all the existing protected areas in Chile. It is a system that has not yet fully existed in the country, hindering management of protected areas.

**Law Protecting Urban Wetlands and the Discussion on Commencement of Protection Status**

On the initiative of some Chilean Senators, it was decided to create a law aimed at protecting urban wetlands, an initiative that was later sponsored by the Executive through the Ministry of the Environment: Law No 21,202 amending various legal bodies with the aim of protecting urban wetlands (Law No 21,202), which was published in the *Official Gazette* on 23 January 2020.

Law No 21,202 protects urban wetlands, which are declared by the Ministry of Environment or at the request of the respective municipality. One of the most relevant aspects of this law is the amendment it makes to Article 10 of Law No 19,300 on the General Basis of the Environment (Law No 19,300), that details the different projects or activities that have to be assessed in the Environmental Impact Assessment System.
(SEIA), having to attain an environmental licence (RCA) to operate.

This amendment adds a new type of projects or activities that must be previously assessed in the SEIA. These are activities that are carried out in or near a wetland located within an urban radius and that could generate its physical alteration, or the chemical alteration to the biotic components or their interactions or their ecosystem flows.

The amendment is written in broad terms, covering all types of activities that may affect wetlands located within an urban radius. In order to further specify activities falling into this category, the Executive – through the Ministry of Environment – drafted a regulation published on 30 July 2020, contained in S.D. No 15/2020 (S.D. No 15/2020), setting forth the minimum criteria for the sustainability of urban wetlands and the procedure for the recognition of a wetland as an urban wetland, whether as by the request of the relevant Municipality or by the Ministry of the Environment ex officio.

Since Law No 21,202 entered into force in January 2021, multiple processes for the declaration of urban wetlands have been initiated, both by the Ministry of the Environment and at the request of different municipalities. To date (October 2021), approximately 50 processes have been initiated by the Ministry of the Environment, of which 24 have resulted in the declaration of urban wetlands and 26 are still in process.

There has been, however, a discussion on the moment after which a wetland is considered as protected under the category of urban wetland. Does protection start when the urban wetland has been officially declared – or, does protection start whenever the procedure for declaring this protection commences?

The Supreme Court and the General Comptrollership of the Republic have been on opposite sides of this discussion, understanding in very different terms how this new protection category must be understood and applied.

On one hand, the Supreme Court required environmental impact assessment of a real estate project located nearby a wetland that was in the process of being recognised as a protected urban wetland, whose building permits had been granted before the procedure to recognise as an urban wetland had commenced (Case No 21970-2021).

On the contrary, the General Comptrollership of the Republic ruled that before its official recognition, a wetland could not be considered as an urban wetland protected under Law No 21,102. Therefore, a wetland that was in the process of being declared as a protected urban wetland could not yet be considered as protected under this new statute (Ruling No E129413/2021).

The latter was partially reconsidered by the General Comptrollership of the Republic (Ruling No E157665), ruling that projects affecting wetlands that have not been declared yet, must enter the SEIA anyway, if said wetlands meet the criteria for being declared as protected urban wetlands.

This ruling might finally set the criteria for determining when protection status starts, with important consequences for any projects or activities located in the vicinities of wetlands that could be declared as protected urban wetlands.

Decarbonisation Plan
In order to comply with Chile’s nationally determined contribution under the Paris Agreement of achieving carbon neutrality by 2050, different mechanisms have been structured, such as the previously mentioned Framework Law on Climate Changed, and the decarbonisation plan.
CHILE TRENDS AND DEVELOPMENTS

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As roughly 78% of Greenhouse Gas emissions are generated from the energy sector, the government made the commitment to start the process of decarbonisation of the Chilean electrical matrix. For this purpose, a “Timeline for the withdrawal or reconversion of coal-powered plants” was presented, the main objective of which is to close the entirety of carbon power plants in Chile by 2040.

This timeline established the closure of the eight oldest plants by 2040, which amount to 19% of the capacity of Chilean coal power plants. The timeline also established the commitment to define dates by a task force formed every five years, which will allow the set-up of specific retirement schedules.

Moreover, in 2019, the President of Chile, Sebastián Piñera, announced the early closure of four coal-fired power plants by 2025, accelerating the decarbonisation plan, which contemplated their retirement by 2040.

This advance in the plan means 1,097 MW of power would be retired from the electric system and only ten of the 28 coal-fired plants would remain in operation between 2026 and 2040, equivalent to 20% of the current installed capacity.

Also, as a way to further reduce greenhouse gas emissions and promote decarbonisation, the Chilean government is working on a strategy to develop and promote the green hydrogen industry as a long-term policy. An advisory council and a public consultation process, among other initiatives, have been carried out by the government in order to develop the strategy.

New Jurisprudential Developments

In 2012, the entrance into functions of specialised Environmental Courts initiated an adjustment period, where the limits of the authority of these courts and the superior courts of justice in relation to the Constitutional Action for Protection of Fundamental Rights have been put to the test.

In this sense, a changing balance has been generated between the matters that can be subject of a Constitutional Action, and the matters that can be subject to a claim before the Environmental Court.

At first, until approximately 2016, the Courts of Appeals ruled that the proper legal forum to review the legality of an Environmental Assessment Resolution (RCA) was the Environmental Court. On the contrary, where the challenge was linked to community participation, ILO Convention 169 or another issue directly affecting constitutional rights, then the Courts ruled that Constitutional Action was the proper remedy.

Then, the Constitutional Action regained it prior relevance, returning to the Courts and, especially, to the Supreme Court, an active role in the creation of environmental policy, seeking not only to rule on the cases under its jurisdiction, but also seeking an additional result. For example, on one occasion the Supreme Court ruled that rejection of a request for a community participation stage during the assessment of an Environmental Impact Declaration (DIA) constitutes a violation of the constitutional right to equal treatment under the law (eg, rulings of the Supreme Court in the cases Tronaduras Mina Invierno and Prospección Minera Terrazas – respectively, Cases No 55,203-2016 and No 104,488-2020). In another case, the Court held that a real estate project located adjacent to a Nature Sanctuary, that did not fit into any type of projects that must be environmentally assessed, should have been assessed under an Environmental Impact Study (EIA) (Dunas de Con Con Supreme Court, Case No 12,808-2019). Both of these examples demonstrate ways in which the
Supreme Court has sought an additional result when issuing a ruling on a particular case, even when it entails going beyond the text of the law.

There are more instances of the creation of environmental policy by the Supreme Court – in some cases, even replacing the Environmental Authority. For example, in relation to a desalination project that had been assessed by a DIA and had been environmentally approved, the Court voided such RCA, stating that the project should have been assessed by an EIA instead (Modulos de Desalacion Ventanas, Case No 22,356-2021).

In other cases, the Supreme Court has expanded legal requirements for the assessment of projects within the SEIA, whether by a broad interpretation of statutes in force, or by the imposition of new requisites, not established directly in Law No 19,300.

We find examples of the Supreme Court’s broad interpretation of statutes in force in a recent ruling analysed above, where the Supreme Court ordered an environmental impact assessment of a real estate project located nearby a wetland that was in the process of being declared as a protected urban wetland pursuant to Law No 21,202 (Case No 21,970-2021).

With relation to the imposition of new requisites not directly provided in statutes in force, the Supreme Court ruled that an environmental impact assessment must cover not only impacts declared by project proponents, but also all other circumstances known to the authority that could have relevance in the effects of the project in the environment, such as climate change – thus proceeding to void the RCA of the operational continuation of a mining project, reopening the assessment process in the SEIA and ordering to assess the effects of the project in relation to climate change (Continuidad Operacional Cerro Colorado, Case No 8,573-2019).

We find another example in the recent ruling by the Supreme Court, related to a constitutional action filed by the workers of coal-fired thermal power plants that would lose their jobs as a result of the Decarbonisation Plan. On that occasion, the Court mandated the Ministry of Energy to implement, in the short term, a plan to help the career reinvention of those workers whose labour rights have been affected as a result of the Decarbonisation Plan (Case No 25,530-2021).

Conclusion

The creation of the Environmental Court has entailed a significant improvement on the access to environmental justice, enabling an institutional channel to resolve environmental conflicts through formal instances. However, from the perspective of project proponents, this means greater judicial challenges, where the results are often uncertain, and in a context where the Supreme Court has leaned towards a concept of environmental justice that goes beyond what is strictly stated in the relevant statutes.

In other words, in the past couple of years, the Supreme Court has led new approaches to environmental regulation, being a relevant actor with those administrative agencies that regulate different activities and investment projects. Often, the legal challenges mentioned above occur when a project has already been approved in the Environmental Impact Assessment System by an RCA, so that many times these challenges turn into a “new instance” of discussion on whether a determined investment project will – or will not – be executed.
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1. REGULATORY FRAMEWORK

1.1 Key Environmental Protection Policies, Principles and Laws

After more than 40 years of development, China’s overall capability of environmental supervision and policy management has been comprehensively improved. Under the guidance of the National Ecological Civilisation Strategy, the main goal and task of China’s environmental protection policy has gradually changed from pollution prevention and control to continuous improvement of environmental quality.

Key Environmental Protection Policies, Principles and Laws

China’s Environmental Protection Law (Trial) was issued in 1979. The Environmental Protection Law was formally promulgated in 1989 and was revised in 2014, coming into force on 1 January 2015. The revised Environmental Protection Law makes it clear that “environmental protection shall adhere to the principle of giving priority to protection, focusing on prevention, conducting comprehensive treatment, engaging the general public, and enforcing accountability for damage”.

The Civil Code, which combines nine laws including the Marriage Law, the Succession Law, General Principles of the Civil Law, the Contract Law, the Real Rights Law and the Tort Law came into force on 1 January 2021. The Civil Code clearly defines the “Green Principle” in civil activities, requiring that “civil activities should save resources and protect the ecological environment”.

Key Environmental Protection Laws

China’s legal system consists of:

• laws, adopted by the National People’s Congress and its Standing Committee;
• administrative regulations, adopted by the State Council;
• local regulations, adopted by local people’s congresses and their standing committees;
• departmental rules, adopted by a central ministry or commission; and
• provincial government rules, adopted by provincial governments.

It also includes national standards (GB), industry standards (HJ) and local standards (DB).

As for environmental management in national law, the Environmental Protection Law is the basic law. Other specific environment laws include: the Law on the Prevention and Control of Air Pollution, Water Pollution, Noise Pollution, Pollution by Solid Waste, Soil Pollution, Radioactive Pollution; the Environment Impact Assessment Law; and the Marine Environmental Protection Law.

At the same time, the State Council also issued the Regulations on Environmental Protection of Construction Projects, the Regulations on the Management of Ozone Depleting Substances and the Regulation on the Administration of Permitting of Pollutant Discharges. The Standing Committee of the Provincial People’s Congress have also formulated corresponding local environmental protection regulations. Additionally, there are a number of standards related to environmental management and pollutant discharge limits.

According to regulations, the Supreme People’s Court can make judicial interpretations for judicial trials. The Supreme People’s Court in the field of the environment has also issued some judicial interpretations, such as environmental criminal liability, administrative litigation, environmental tort, environmental public interest litigation and ecological environmental damage compensation litigation.
2. ENFORCEMENT

2.1 Key Regulatory Authorities
The Plan for Reforming State Institutions, adopted in 2018, stipulates that the Ministry of Ecology and Environment (MEE) manages and supervises the environmental protection work of the whole country. At the same time, it retains the National Nuclear Safety Administration and establishes the National Office for the Import and Export of Ozone-Depleting Substances. The MEE’s main responsibilities include tackling climate change and the usual environmental supervision.

At the local level, the Environment Protection Law stipulates that the local people’s governments should be responsible for the environmental quality of their own region. The Ecological and Environmental Department (EED), above the county level, should manage and supervise the environmental and ecological work of the entire region.

3. ENVIRONMENTAL INCIDENTS AND PERMITS

3.1 Investigative and Access Points
The investigators of the EED have the right to take the following measures:

• enter relevant sites for inspection, reconnaissance, sampling, voice recording, photographing, video recording and on-site sampling monitoring and testing;
• enquire of the business entities and relevant personnel and request them to explain relevant matters and provide relevant materials;
• review and copy production records, waste water discharge records and other relevant documents.

When facing government inspection, obstructing law enforcement or dishonesty will be fined by the EED. This is required in the entire environmental law system, including Article 98 of the Air Pollution Prevention Law, Article 81 of the Water Pollution Prevention Law and Article 103 of the Solid Waste Law.

3.2 Environmental Permits
Environmental Impact Assessment (EIA) Approval and Registration
According to the Law on Environmental Impact Assessment and the Regulations on the Management of Environmental Protection for Construction Projects, EIA should be carried out before construction and be approved or registered by the EED.

EIA documents include the EIA Report, EIA Form and EIA Registration Form, in accordance with the Classified Management Directory of Environmental Impact Assessment of Construction Projects (2021). This directory has simplified the EIA approval process compared to the old one, and projects with little environment impact have been exempted from EIA.

Pollutant Discharge Permit or Registration
On 1 March 2021, the Regulation on the Administration of Permitting of Pollutant Discharges came into force. Pollutant discharge industries, before the construction project operation, must obtain a Pollutant Discharge Permit or registration, which needs to follow the list of Fixed Pollution Emission Permit Classification Management (2019) released by the MEE.

A Pollutant Discharge Permit is the main basis for the ecological environment on-site supervision. A Pollutant Discharge Permit is valid for five years; an extension application needs to be submitted for approval to the department 60 days before the expiration.

If the administrative counterparty or the interested party disagrees with the examination and
approval of the Pollutant Discharge Permit, it can file an administrative reconsideration or lawsuit within a specified time.

**Permit for Sewage into Drainage Pipe Network (Drainage Permit)**
According to the Regulations on Urban Drainage and Sewage Treatment, enterprises, institutions and individual industrial and commercial households engaged in industrial, construction, catering, medical and other activities, if they discharge sewage into urban drainage pipelines, need apply to urban drainage authorities for a drainage permit. Drainage permits are valid for five years.

**X-ray Radiation Safety Licence**
According to the Regulations on the Safety and Protection of Radioisotopes and Radiation Devices, an enterprise that produces, sells and uses radiation and radiological devices shall obtain a Radiation Safety Licence in accordance with the provisions of this chapter. The licence is valid for five years.

**Hazardous Waste Trading Licence**
According the Solid Waste Law, enterprises engaged in collecting, storing, utilising and disposing of hazardous waste should apply for a Hazardous Waste Trading Licence and a Hazardous Waste Collection Licence, in accordance with relevant state regulations; the former is valid for five years and the latter for three years.

If the administrative counterparty or interested party disagrees with the approval or permit, it may file an administrative reconsideration or bring an administrative lawsuit within a specified time limit.

### 4. ENVIRONMENTAL LIABILITY

#### 4.1 Key Types of Liability
China’s environmental legal liability includes criminal liability, administrative liability and civil liability. The subject of liability includes enterprises, enterprise managers and individuals who commit pollution damage acts.

**Environmental Criminal Liability**
Environmental criminal liability mainly includes the crime of environmental pollution stipulated in Article 338 of the Criminal Law, the crime of destroying a computer information system stipulated in Article 226 of the Criminal Law, and the crime of issuing false proof documents for EIA and environmental monitoring reports in Article 229 of the Criminal Law.

According to the Amendment to the Criminal Law (XI), enterprises or enterprise managers may be the criminal subjects of organising or carrying out serious environmental pollution. Generally, enterprises’ crimes will be fined, while individual crimes would be sentenced for less than seven years and fined. If the following illegal acts occurred and cause a serious outcome, the imprisonment can increase to a maximum of 15 years:

- discharging, dumping, or disposing of any hazardous waste in protective areas and causing serious outcome;
- discharging, dumping, or disposing of any hazardous waste to any water area of important rivers and lakes as determined by the state, with especially serious circumstances;
- causing the serious loss of farmland;
- causing any serious injury, illness, disability or the death of a person.
**Environmental Administrative Liability**

The environmental administrative liability is mainly administrative penalty and administrative compulsory enforcement.

The Administrative Penalty Law of China was issued in March 1996 and the new version came into force on 15 July 2021. This law stipulates the types of administrative punishments, including:

- warning and circulation of notice of criticism;
- fines, confiscation of illegal gains and illegal property;
- temporarily detaining the licence, lowering the level of qualification and revoking the licence;
- restricting the development of production and business operation activities, ordering the suspension of production or business operation, ordering closure and restricting employment;
- administrative detention; and
- other administrative penalties as prescribed by laws and administrative regulations.

According to the Administrative Penalty Law, an administrative authority may seek penalty against a citizen, legal person or another organisation for violation of the administrative order in accordance with the law by reducing rights and interests or increasing obligations, such as fine, confiscation of illegal gains and illegal property. According to the Environmental Protection Law of China, those who fail to rectify within the time may also be fined by day, which could significantly increase the penalty.

If the violation is serious, the licence may be temporarily detained, and the level of qualification would be lowered or revoked. Other options are restricting production and business operation, ordering to suspend production or business operation, closing down and administrative detention (the last being a punishment measure made to the main person-in-charge, as detailed in 7.1 Directors and Other Officers).

In addition to the administrative penalty, enterprises committing illegal acts may also face administrative compulsory enforcement measures such as sealing up and distraining the property. In the field of ecological environment, Article 25 of the Environmental Protection Law, Article 30 of the Air Pollution Law, Article 27 of the Solid Waste Law, and Article 78 of the Soil Pollution Law all provide corresponding provisions on sealing up and distraining the property.

**Environmental Civil Liability**

Environmental civil liability is mainly the liability for environmental pollution and ecological damage.

According to the Civil Code, the ways to bear civil liability are: cessation of the infringement, removal of obstacle, elimination of danger, restitution of property, restoration to the original condition, repair, reworking or replacement, continued performance, compensation for loss, payment of liquidated damages, elimination of adverse effects and rehabilitation of reputation, offering an official apology. Where any law provides for punitive damages, such a law shall apply.

Where environmental pollution or ecological damage causes harm to others, the tortfeasor shall assume the tort liability. The infringed party may claim to bear tort liability in the form of compensation for losses, apology or restoration of the original state.

For damage to the ecological environment, a state-prescribed organ or an organisation prescribed by law shall have the right to claim damages from the infringer for the damage to the ecological environment, expenses for investigation, appraisal and evaluation, expenses for
cleaning up pollution, expenses for restoring the ecological environment and reasonable expenses for preventing the occurrence and expansion of damage. Article 1232 of the Civil Code stipulates a punitive compensation system for environmental pollution and ecological damage under specific conditions.

Environmental civil liability adopts the principle of no-fault liability and the inverse principle of proof liability. If a dispute arises due to environmental pollution or ecological damage, the actor shall bear the burden of proof for the circumstance of not bearing liability or mitigating liability as stipulated by law, and there being no causal relationship between his or her behaviour and the damage.

**5. ENVIRONMENTAL INCIDENTS AND DAMAGE**

**5.1 Liability for Historical Environmental Incidents or Damage**

Historical pollution problems mainly exist in soil and groundwater pollution. Since the historical pollution prevention and control facilities and environmental management system is not satisfied, there may be landfill waste, chemical leakage and sudden accidents which result in soil and groundwater pollution.

When the land is handed over to the next owner or returned to the government, it may be found that the damage caused by the historical pollution accident still exists. The site needs to be investigated and evaluated according to the current laws and regulations or even organised for restoration. Responsibility for restoration is still allocated according to the polluter’s responsibility principle. The “Changzhou poisoned land event” has proved that the unit which cause historical pollution should bear the environmental tort liability.

**5.2 Types of Liability and Key Defences**

In China, environmental accidents may lead to legal liability including criminal, administrative and civil liability. Please refer to **4.1 Key Types of Liability** for details.

**Criminal Liability and Key Defence**

According to the latest Criminal Law in 2021, criminal liability for environmental pollution can be up to 15 years in prison with a fine. The main defences of criminal liability include:

- whether the limitation of accountability has been exceeded;
- whether the identification of the responsible person is accurate;
- the authenticity, legality and relevance of evidence, especially criminal facts and damage consequences – this could include monitoring reports and identification reports of hazardous waste;
- the legitimacy of the procedure;
- the suspect’s attitude in admitting a mistake can be used as a defence of diminished responsibility;
- criminal compliance – according to the Guidance on Establishing Third-party Supervision and Evaluation Mechanism for Compliance of Enterprises Involved (Trial, issued on 3 June 2021), if a company involved has a compliance system and is able to be audited by a third party, the compliance material could be taken as the basis to reduce punishment.

**Administration Liability and Key Defence**

In environmental administrative liability, according to the new version of Administrative Penalty Law, the main defences include:

- limitation of accountability – if normal/general illegal acts are not found within two years, there should be no administrative punishment, but those acts that involve citizens’ lives, health and safety, financial safety
and causing harmful consequences will be extended to five years;
- whether the identification of the responsible person is accurate;
- whether the fact determination is accurate, whether the evidence has authenticity, legitimacy and relevance, especially the legitimacy of the sampling procedure in the environmental monitoring report;
- whether the law enforcement procedures are in compliance with law;
- whether the violator has enough evidence to prove that it has no subject fault;
- whether the illegal circumstances are minor or consequences are serious.

Civil Liability and Key Defence
In recent years, there have been cases of compensation of hundreds of millions of yuan (CNY). The main defences for environmental civil liability include:

- whether the limitation of action exceeds three years;
- whether force majeure exists;
- whether there has been fault from the third party or victim;
- whether it is joint liability or several liability;
- whether the identification and assessment of ecological environment damage is following proper procedures and standards.

6. CORPORATE LIABILITY

6.1 Liability for Environmental Damage or Breaches of Environmental Law
Existing environmental protection laws in China specify that the production operator should prevent and reduce environmental pollution and ecological damage, and should bear liability for any damage caused. It also specifies the requirements for pollution prevention and control.

When an enterprise violates the relevant laws and regulations, if it does not cause serious environmental pollution then it will bear administrative responsibility. If the pollution act is serious, it may constitute a criminal offence. Those who cause damage to the interests of others or the public may also bear civil compensation.

Environmental pollution crimes are unit crimes, which shall be fined; the main persons-in-charge and other persons-in-charge should be sentenced to criminal punishment.

An enterprise in violation of laws related to environmental protection – besides administrative, criminal and civil liability – may also suffer a negative impact on their environmental credit assessment. It will be subject to disciplinary action, including negative evaluation results of the public, losing the qualifications of government procurement, affecting bank loan financing, getting more frequent supervision, etc.

6.2 Shareholder or Parent Company Liability
A parent company has independent legal status and normally is not impacted from the environment liability caused by its subsidiaries. However, if the parent company has engaged in acts that related to the causes of an environment accident, such as excessive control, the subsidiaries’ illegal behaviours could also be attributed to the parent company. Hence, in particular cases, the shareholders might bear civil, administrative or even criminal liability.

An environmental pollution crime with civil public interest occurred in Nanjing, Jiangsu Province (Jianli No 86 from the Supreme People’s Procuratorate of China). The waste water treatment plant (WWTP) was required to bear the cost of ecological environment restoration. In this case, the People’s Procuratorate signed a mediation agreement with WWTP and its parent company.
WWTP shall pay CNY470 million in compensation and the parent company shall undertake the joint liability.

Another typical case is the “3.21” Xiangshui hazardous waste explosion accident which happened at Xiangshui Country, Jingsu Province on 21 March 2019, and caused 78 fatalities. A total of 13 persons from the company – including the legal representative and the general manager – were sentenced to bear criminal liability; two members of the leadership team of the parent company were also sentenced to bear criminal liability.

7. PERSONAL LIABILITY

7.1 Directors and Other Officers
China does not yet have an environmental liability insurance system for individual executives. There may be some commercial insurance companies that offer something similar. However, except for the situation of environmental accidents causing damage, the aforesaid violation of laws requiring administrative or criminal liability may be excluded from the insurance coverage.

7.2 Insuring against Liability
According to the Criminal Law and relevant provisions, if the environmental pollution crimes are unit crimes, the directly responsible persons in charge and other responsible persons should be fined and punished. The “directly responsible person in charge” includes the actual controller of the unit, the principal person in charge or the authorised person in charge and senior management personnel.

In environmental administrative responsibility, administrative detention measures are targeted at company executives and other directly responsible persons. The detention is less than 15 days for the following acts:

- refusing to stop construction when there is no EIA;
- refusing to stop discharging although there is no valid discharge permit;
- dishonesty with regard to discharging and data;
- producing or using forbidden pesticide.

In accordance with the Law on the Prevention and Control of Water Pollution and the Law on the Prevention and Control of Air Pollution and other relevant laws, when water pollution or air pollution accidents occur, besides fining the company, the directly responsible persons in charge and other responsible persons would be punished with less than 50% of their annual income.

8. LENDER LIABILITY

8.1 Financial Institutions/Lender Liability
The Environmental Protection Law does not directly regulate the environmental protection responsibilities of financial institutions and lenders. In the past, environmental protection was regarded more as the social responsibility of financial institutions. In recent years, green finance-related policies and standards have included provisions on green loans.

In 2012, the China Banking Regulatory Commission (CBRC) issued Green Credit Guidelines to provide guidance for the development of green credit for banking financial institutions, and proposed that environmental risk assessment and management should be strengthened. It also proposed that pre-loan due diligence should be undertaken and customers with non-compliant environmental and social performance should not be granted credit.
In practice, there have been cases of banks receiving administrative penalties from regulatory authorities for failing to conduct pre-loan investigations and providing environmental standards financing to enterprises.

For example, CBRC announced on its website the administrative penalty decision on a bank (Penalty Decision of Tianjin CBRC [2018] No 35). According to the decision, this bank failed to carry out pre-loan investigations and provided financing to enterprises that failed to meet environmental standards. The local authority decided to fine the bank CNY500,000.

**8.2 Lender Protection**

At present, seven Chinese banks have announced the adoption of the Equator Principles, of which the environmental risk assessment is an important element.

According to China’s Green Credit Guide, banking financial institutions shall establish and constantly improve the system of environmental – including social risk management policy – procedure, developing the customer’s environmental and social risk assessment standard and social risk evaluation and classification. The results should be the basis of rating, credit access, management and exit. In terms of process management, the lender shall:

- promote credit due diligence, clarifying the content of environmental, social risk due diligence, seeking support from qualified, independent third parties and relevant authorities if necessary;
- strengthen the management of credit approval, credit fund allocation and post-loan management, and establish and improve the internal reporting system and accountability system for customers’ major environmental and social risks;
- consumers should invest in progressing environmental and social risk management by improving contractual terms.

If necessary, qualified and independent third parties may also be engaged to evaluate or audit the activities of banking financial institutions, so as to fulfil their environmental and social responsibilities.

**9. CIVIL LIABILITY**

**9.1 Civil Claims**

Where an enterprise or an individual causes personal injury or property damage to others due to environmental pollution or ecological damage, the party which commits the infringing act shall bear tort liability. The infringed party may file a civil lawsuit in accordance with the relevant provisions of tort liability in the Civil Code and relevant environmental protection laws.

If pollution causes harm to the public interest, the legally prescribed authorities (the People’s Procuratorates) and qualified environmental NGOs may file civil environmental public interest litigation against the polluter. The people’s governments at the provincial or municipal level and their assigned departments (eg, environmental authorities) may ask for compensation through negotiation. If the negotiation cannot reach agreement, then the authorities mentioned above have a right to sue the court, which is named “litigation of compensation for ecological environmental damage”.

**9.2 Exemplary or Punitive Damages**

Punitive damages are clearly stipulated in the Civil Code (which did not exist before December 2020). Where the infringer intentionally pollutes the environment and destroys the ecology in violation of the law and causes serious consequences, the infringed shall have the right
to request corresponding punitive damages. There are three conditions: (i) violation to laws, (ii) intentional violation, and (iii) causing serious consequences.

9.3 Class or Group Actions
In China, the Civil Procedure Law regulates the joint action, in which one party consisting of numerous persons may be brought by a representative elected by such persons. The procedural acts of such representative shall be binding on all members of the party he or she represents.

If the object of the action is of the same category and a party consists of numerous persons, and upon institution of the action the number of persons is not determined yet, the court may issue a public notice stating the particulars of the case and the claims and requesting that the claimants register with the court within a certain period of time.

Claimants who have registered with the people’s court may elect a representative to engage in litigation; if no such representative can be elected, the court may discuss with the registered claimants in determining on such representative. The procedural acts of a representative shall be binding on the party he or she represents.

9.4 Landmark Cases
Since the implementation of the revised Environmental Protection Law in 2015, the Supreme People’s Court and the Supreme People’s Procuratorate have released typical environmental resource cases annually, including criminal, civil and administrative penalties.

The historical pollution of some enterprises caused soil environmental pollution in Changzhou, a city of Jiangsu Province, also causing secondary pollution in the process of remediation. From 2016 to 2018, these polluting enterprises were sued by NGOs, and this environmental public interest litigation received extensive social attention. Based on the principle of “polluter to bear responsibility”, although the land polluters have returned the land use right, the court still ruled that the polluter should be liable.

10. CONTRACTUAL AGREEMENTS

10.1 Transferring or Apportioning Liability
Article 153 of the Civil Code stipulates that a juristic act violating the imperative provisions of any law or administrative regulation shall be void, unless the imperative provisions do not result in the nullity of the juridical act.

The parties may agree on the allocation of the responsibility and liability for the prevention and control of pollution through agreement, without violating the mandatory provisions of laws and administrative regulations. When environmental violations occur, one party has the right to require the other party to bear the corresponding liability for pollution.

In the construction stage, the proprietors and the constructor can agree on their respective responsibilities for environmental protection and pollution prevention and control.

In the process of transferring land use right, the legal liability of soil environmental pollution could be divided.

In the solid waste disposal contract, the entrusted company and the disposal transportation
company shall agree on pollution prevention and control requirements in the contract.

Pollutant-discharging enterprises may entrust a third party to provide treatment services and perform corresponding responsibilities and obligations according to the environmental service contract. However, the responsibility of pollution prevention and control agreed through an agreement cannot be a defence for the infringed to claim compensation, nor can it be a defence for administrative punishment.

10.2 Environmental Insurance

China’s current environmental pollution liability insurance is divided into compulsory and voluntary.

The Environmental Protection Law, which was revised in 2015, stipulates encouragement of environmental pollution liability insurance. The Law on the Prevention and Control of Environmental Pollution by Solid Waste, which took effect in September 2020, stipulates that units collecting, storing, transporting, utilising and treating hazardous waste should take out environmental pollution liability insurance in accordance with relevant state regulations.

In 2013, the former Ministry of Environmental Protection and the China Insurance Regulatory Commission jointly issued a policy document to carry out the pilot policy of compulsory environmental pollution liability insurance. In 2017, the Measures for Compulsory Environmental Pollution Liability Insurance (Draft) was also published, but the official regulations have not yet been published.

According to the draft, compulsory environmental pollution liability insurance contains personal damage to third parties, property damage, ecological damage and emergency treatment and clean-up costs. However, such insurance coverage does not cover administrative penalties caused by illegal acts, fines from criminal penalties or losses caused by environmental crime accidents.

11. CONTAMINATED LAND

11.1 Key Laws Governing Contaminated Land

Soil pollution in construction land laws and regulations are as follows:

- the Soil Pollution Prevention and Control Law;
- Management Measures for the Soil Environment of Contaminated Land;
- Management Measures for the Soil Environment of Industrial and Mining Land (Trial); and
- Soil Environmental Quality Soil Pollution Risk Control Standards for Construction Land (Trial) (GB 36600 – 2018).

According to the law, the person or persons responsible for soil pollution has the obligation to implement soil pollution risk control and remediation. If the persons responsible for soil pollution cannot be identified, the land-use righter shall carry out soil pollution risk control and remediation, including soil pollution investigation, risk assessment, risk control, remediation, risk control effect assessment, remediation effect assessment and later-stage management.

Article 94 of the Soil Pollution Prevention and Control Law stipulates the “substituted fulfilment” system; if an enterprise violates this law and fails to fulfill pollution liability, the local ecological and environment or other departments may require corrections and impose a fine between CNY20,000 and CNY200,000.

For refusing corrections, it shall be fined between CNY200,000 and CNY1 million. The ecological and environment department can entrust others
to fulfill the liability, and the expenses shall be paid by the person responsible for pollution or the land-use right holder. Meanwhile, the directly responsible person-in-charge and other directly responsible persons shall be fined between CNY5,000 and CNY20,000.

12. CLIMATE CHANGE AND EMISSIONS TRADING

12.1 Key Policies, Principles and Laws

China is a member of the United Nations Framework Convention on Climate Change and the Kyoto Protocol. It is also a signatory to the Paris Agreement on Climate Change. China has accepted the Montreal Protocol on Substances that Deplete the Ozone Layer, to strengthen the control of non-carbon greenhouse gases.

In terms of legal standards, China has enacted the renewable energy Cleaner Production Promotion Law, the Provisional Regulations of Voluntary Greenhouse Gas Emissions Trading Management, and the Measures for Carbon Emissions Trading Management (Trial). It has also released carbon emissions calculations and verification standards for 24 industries (e.g., power generation, steel, civil aviation, chemical, cement). China is drafting regulations on carbon emissions trading and preparing to draft a Climate Change Response Law.

The Ministry of Ecology and Environment, together with the Development and Reform Commissions, the People’s Bank of China, the Banking and Insurance Regulatory Commission and the China Securities Regulatory Commission, jointly issued the Guidelines on Promoting Investment and Financing in Response to Climate Change, to promote climate investment and financing. Low-carbon technologies and projects will have opportunities to receive green capital, tax relief and other green financial support.

At the local level, the Regulations on Ecological and Environmental Protection of Shenzhen Special Economic Zone was revised in 2021, specifically adding a chapter on “Addressing Climate Change”, which stipulates the general work on addressing climate change, carbon peak and carbon neutrality, and carbon emission trading.

Since 2013, China has piloted carbon trading in eight provinces or cities – Beijing, Shanghai, Tianjin, Chongqing, Hubei, Guangdong, Fujian and Shenzhen. At this stage, China’s carbon emission quota is allocated free of charge, and will gradually be compensated in the future.

In July 2021, the National Carbon Emission Trading Market opened. It was firstly run in the thermal power generation industry and is gradually expanding to other industries. Greenhouse gas (GHG) emitting units belonging to a trading market with annual GHG emissions of 26,000 tons of carbon dioxide (CO₂) equivalent shall be listed in the GHG emitting units, their carbon emission quotas shall be paid annually, and they could participate in the national carbon emission market trading.

12.2 Targets to Reduce Greenhouse Gas Emissions

In 2007, the National Leading Group to Address Climate Change of China was set up. At the Copenhagen Climate Conference in 2009, the Chinese government set a target for controlling GHG emissions, and decided to reduce CO₂ emissions per unit of GDP by 40% to 45% by 2020 compared with the 2005 level. At the end of 2017, China’s CO₂ emissions per unit of GDP had dropped 42% compared with 2005, fulfilling the commitment of the Copenhagen Climate Conference three years ahead of schedule.

On 22 September 2020, President Xi Jinping announced at the United Nations General Assembly that China would strive to peak its
CO₂ emissions before 2030 and achieve carbon neutrality before 2060. On 12 December 2020, at the Beijing Climate Summit, President Xi Jinping further announced that, before 2030, China’s CO₂ emissions per unit of GDP will drop by at least 65% from 2005, the percentage of non-fossil energy in primary energy consumption will rise to around 25%, and the forest stock will increase by 6 billion mᵌ from 2005. The total installed capacity of wind and solar power will reach over 1.2 billion kW.

According to the 14th Five-Year Plan and the Long-term Goals for 2035, by 2025, energy consumption and CO₂ emissions per unit of GDP will be reduced by 13.5% and 18%, respectively, from 2020 levels.

China is working out a timetable and road-map for carbon peak and carbon neutrality, and relevant top-level design policies will be released in due course.

On 22 September 2021, the State Council of China issued the working guidance for CO₂ peaking and carbon neutrality in full and faithful implementation of the new development philosophy, which is based on the development stage and national conditions of China. Five major goals have been put forward:

• creating an initial framework for a green, low-carbon and circular economy;
• improving the energy efficiency;
• increasing the proportion of non-fossil energy consumption;
• reducing CO₂ emissions; and
• increasing the carbon sink capacity of ecosystems.

13. Asbestos

13.1 Key Policies, Principles and Laws Relating to Asbestos

Although China has not completely banned asbestos mines and asbestos products, it has long been aware of the harm of asbestos dust to the environment and the human body. In 2007, China issued the National Standard for Occupational Health Management of Asbestos Operations (GBZ/T 193-2007). From the perspective of occupational health monitoring, the standard provides effective and feasible occupational disease-prevention measures and operation procedures for preventing asbestos dust emission during asbestos operation and to control dust pollution.

14. Waste

14.1 Key Laws and Regulatory Controls

Major laws and regulations of waste management in China are as follow:

• Solid Waste Law (2020 revised);
• Law on the Promotion of a Circular Economy;
• Regulations on the Management of Medical Waste; and

China has issued the National Hazardous Waste List (2021 edition), which is subject to dynamic adjustment.

The prevention and control of environmental pollution by solid waste in China adheres to the principles of reduction, recycling and harmlessness. Depending on waste type and harmfulness, the Solid Waste Lawset requirements for industrial solid waste, domestic garbage, construction waste, agricultural solid waste, hazardous waste pollution prevention, and stricter
management and punishment of industrial solid waste and hazardous waste.

Enterprises and individuals that produce, collect, store, transport, utilise and treat solid waste shall take measures to prevent or reduce environmental pollution or bear the legal consequences of improper disposal. Enterprises engaged in the collection, storage, utilisation and treatment of hazardous waste shall apply for and obtain licences according to the relevant state regulations.

Many local governments have issued regulations on the management of domestic garbage, setting requirements for classification, collection, transportation and disposal.

Article 24 of the Solid Waste Law stipulates that the state will gradually achieve zero import of solid waste. At the end of 2020, the Ministry of Ecology and Environment and other departments jointly issued the announcement on matters related to the total prohibition of the import of solid waste. It is forbidden to dump and stack solid wastes in China. The announcement came into force on 1 January 2021.

14.2 Retention of Environmental Liability

Generally, after the waste disposal handling is passed on to a third party, the corresponding responsibility for pollution is also removed. However, according to the Solid Waste Law, if an entity that produces industrial solid waste entrusts others to transport, utilise or treat waste, it shall, before signing the entrustment, verify the qualification and technical capacity of the entrusted party and sign a written legal contract, which should also stipulate the requirements for pollution prevention and control responsibilities and consequences of all parties.

If an enterprise that produces industrial solid waste fails to verify the technical capability of the transportation and disposal enterprises, and fails to stipulate the requirements for pollution prevention and control in the written contract, it may still be subject to administrative punishment, and shall bear joint responsibilities with the entrusted party that causes environmental pollution and ecological damage.

14.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

Article 66 of the Law on the Prevention and Control of Environment Pollution Caused by Solid Wastes stipulates that the state shall establish an extended producer responsibility (EPR) system for electrical and electronic products, lead storage batteries, and automotive traction batteries.

The producers of electrical and electronic products, lead storage batteries, automotive traction batteries, and other products shall, as required, implement a used product recovery system that fits the sales of the products themselves, disclose the system to the public, and achieve effective recovery and utilisation.

The design and manufacture of products and packaging shall comply with the state regulations on cleaner production. Enterprises that produce, sell or import products and packages that are listed in the compulsory recovery list shall recycle such products and packages in accordance with the relevant regulations.

In addition, the state encourages the R&D, production, sale and use of agricultural film that is environmentally degradable and harmless.
15. ENVIRONMENTAL DISCLOSURE AND INFORMATION

15.1 Self-Reporting Requirements
According to the Emergency Response Law, when an accident or disaster occurs, enterprises shall immediately organise the emergency rescue team and staff to rescue victims, evacuate people, resettle threatened persons, control hazards, indicate the danger zone, block the dangerous sites, and take other necessary measures to prevent the harm from expanding, at the same time reporting to the local people's government at the county level.

Measures for Emergency Management of Environmental Emergencies stipulates that when an enterprise causes an environmental emergency accident, it shall immediately initiate an environmental accidents emergency plan to cut off or control pollution, and take other necessary measures to prevent harm from expanding, give timely notice to related units and residents, report to the local county level environmental department, and accept investigation and processing.

15.2 Public Environmental Information
Chapter V of the Environment Protection Law stipulates information disclosure and public participation. Citizens, legal persons and other organisations shall have the right to access environmental information, participation and supervision and the right of environmental protection. The environmental protection department shall make environment information available to the public, improve the public participation procedure, provide convenience for citizens, legal persons and other organisations to participate in and supervise environmental protection. Information disclosed includes:

- national environmental quality, monitoring information of key pollution sources and other major environmental information, and a bulletin of provincial environmental conditions;
- county-level environmental quality, environmental monitoring, environmental emergencies, environmental administrative permission, administrative punishment, levy and use of pollutant discharge tax, etc;
- county-level government departments shall record environmental illegal information of enterprises, public institutions, producers and business operators in social credit files, and promptly publish the list of offenders to the public.

According to the Regulations on the Disclosure of Government Information, administrative organs should take disclosure as normal, non-disclosure as an exception, and follow the principles of fairness, justice, legality and convenience. There are two forms of disclosure of government information by administrative organs: voluntary disclosure and application disclosure. However, those involving state secrets, trade secrets and personal privacy shall not be open to the public.

For information disclosure, the administrative organ shall give a reply within 20 working days from the date of receiving an application; if necessary, this can be extended for up to 20 working days.

The public can apply to the environmental department to provide government environmental information in the form of a written application. The purpose or use is not required to be stated in the application.

If the party refuses to accept the decision on information disclosure, it can file an administrative reconsideration or an administrative lawsuit.
15.3 Corporate Disclosure Requirement
According to Article 55 of the Environmental Protection Law, pollutant discharging entities under intensified supervision shall honestly disclose to the public the names of their major pollutants, the method of discharge, the concentration and total volume of the pollutants discharged, any discharge beyond the approved quota, as well as the construction and operation of pollution prevention and control installations to receive supervision from the general public.

Measures for the Disclosure of Environmental Information by Enterprises and Public Institutions, which came into force in 2015, stipulates more detailed disclosure information of key polluting-discharging units. Key pollutant-discharging units on the list of state monitoring enterprises shall open to the public their self-monitoring plans for the environment.

The above information shall be disclosed through the website of the enterprise, the environmental information disclosure platform of the enterprise and the public institution, the local newspaper, or other convenient mediums.

The China Securities Regulatory Commission (CSRC) and stock exchanges of China have relevant regulations on environmental information disclosure of listed companies. In 2021, the CSRC issued the Standards on the Content and Format of Information Disclosure by Companies Offering Securities to the Public No 2 – Contents and Formats of Annual Reports (2021 Revision), specifying that key polluters and their subsidiaries should disclose major environmental information in annual reports by a national law enforcement body.

Non-key pollution-discharging enterprises shall disclose the administrative penalties of environmental problems during the reporting period, and may disclose other environmental information in accordance with the above requirements. If they fail to disclose other environmental information, they must fully explain the reasons.

GHG emission reduction is also included in the scope of environmental information disclosure incentives. Enterprises can voluntarily disclose the measures and effects they have taken to reduce their carbon emissions during the reporting period.

16. TRANSACTIONS

16.1 Environmental Due Diligence Investigation on Excessive Emission involving Change of Land Use or Recovery and Transfer of Land Use Right
According to Article 67 of the Law on the Prevention and Control of Soil Pollution, land use right owners shall conduct soil pollution investigations, in accordance with regulations, before the use of land for production and the operation of key units under supervision of soil pollution is changed or their land use right is withdrawn or transferred.

The investigation report on soil pollution shall be submitted to the real estate registration organ of the local people’s government as real estate registration materials and submitted to the competent ecological environment department of the local people’s government for record.

The state has issued the Guidance for Environmental Investigation, Assessment and Restoration of Industrial Enterprise Sites (Trial) and technical guidelines for soil pollution investigation, monitoring and risk assessment in construction land (from HJ.1-2019 to HJ 25.6-2019) to guide due diligence work.
Environmental Risk Assessment and Investigation in Credit Financing Procedures
Except that banking financial institutions are required to conduct environmental due diligence in accordance with regulations and standards before granting credit lines (as mentioned in 8.2 Lender Protection), other national environmental protection laws do not require environmental due diligence.

Some localities have issued relevant regulations. In March 2021, Shenzhen implemented the Regulations on Green Finance of Shenzhen Special Economic Zone. It stipulates that financial institutions should establish a green investment evaluation system to evaluate investment projects of a specific scale before investment and carry out post-investment management.

Financial institutions may entrust professional institutions to assist in the assessment of green investment. According to the regulation, financial institutions are also required to evaluate the ability of investment project subjects to manage environmental risks. The evaluation includes the internal system, governance structure and organisational system of environmental risk management and control, as well as the continuous willingness, execution ability of environmental risk management and control systems and measures.

The Scope of Environmental Due Diligence
In order to prevent and control potential environmental legal liability risks, some enterprises usually carry out special environmental due diligence voluntarily before listing and M&A. The scope and depth of environmental due diligence in specific mergers and acquisitions shall be determined by each client according to their own needs. Due diligence, in our experience, usually includes:

• enterprise overview, enterprise production and enterprise surrounding environment (eg, water, atmosphere, noise and soil around the enterprise);
• environmental impact assessment and the implementation of the “three simultaneities” system;
• discharge of pollutants up to standard, total control of major pollutants and completion of emission reduction tasks;
• discharge permit and environmental tax payment implementation;
• general industrial solid waste and hazardous waste treatment and disposal;
• environmental risk assessment prevention and emergency measures;
• hazardous chemical pollution prevention and control and registration of new chemical substances;
• specifications on whether to protect environmentally sensitive areas;
• environmental management and establishment of environmental management system;
• cleaner production implementation;
• environmental information disclosure and environmental report preparation and release;
• environmental disputes and punishment;
• historical environmental emergencies and major environmental pollution accidents;
• soil and groundwater environmental conditions of the site.

Environmental due diligence is the basis for enterprises to carry out follow-up environmental risk prevention and control. Increasingly, enterprises attach importance to the pre-investigation and entrust corresponding professional institutions, such as lawyers and technical experts, to carry out corresponding investigations, which can help enterprises effectively identify and control corresponding risks.

16.2 Disclosure of Environmental Information
In the process of product sales, procurement vendors have a legal obligation to disclose
some environment-related information, such as a seller’s request to the buyer to provide MSDS.

Measures for the Administration of Limiting the Use of Harmful Substances in Electrical and Electronic Products stipulates that sellers of electrical and electronic products shall not sell any products that violate the national or industrial standards for limiting the use of harmful substances in these products.

In the process of merger and acquisition, it is not a mandatory legal requirement for the seller to disclose information to the buyer. However, the principle of good faith stipulated in Article 7 of the Civil Code is the basic principle that civil subjects should follow when engaging in civil activities.

In the process of mergers and acquisitions, to prevent potential environmental legal risks, the buyer will generally require the seller to provide major environmental information. If the environmental information provided by the seller is false, which may be considered as a material misunderstanding or fraud, the buyer may apply to the court or arbitration institution for the right to apply for cancellation within one year (within 90 days of the material misunderstanding).

17. Taxes

17.1 Green Taxes
In January 2018, the Environmental Protection Tax Law came into effect, replacing the original sewage fee system. According to the law, enterprises, public institutions and other producers and operators that directly discharge taxable pollutants into the environment are regarded as payers of environmental protection tax and should do so in accordance with the law.

Taxable pollutants include air pollutants, water pollutants, solid waste and noise, as stipulated in the Table of Taxable Pollutants and Taxable Pollutants and Applicable Quantities of Environmental Protection Tax.

In order to encourage enterprises to reduce the discharge of pollutants, the Environmental Protection Tax Law stipulates that, if the concentration of taxable air pollutants or water pollutants discharged by taxpayers is less than 70% of the national and local standards for the discharge of pollutants, the tax is levied at a reduced rate of 75%. Where the concentration of taxable air pollutants or water pollutants discharged by a taxpayer is less than 50% of the pollutant discharge standards set by the state or local authorities, the tax is be levied at a reduced rate of 50%.

Environmental protection tax is not required for urban and rural centralised sewage treatment sites or domestic garbage centralised treatment sites that provide domestic sewage treatment services to the public and do not discharge taxable pollutants into the environment in excess of the discharge standards prescribed by the state and local authorities.

Natural resource tax is also regarded as a kind of green tax. On 1 September 2020, China’s Resource Tax Law was implemented. Taxable products include energy minerals (oil, natural gas, coal, geothermal, etc), metal minerals, non-metallic minerals, hydro gas minerals and salt. The Interim Regulations on Resource Tax formulated by the State Council in 1993 shall be abrogated simultaneously.

The Resource Tax Law stipulates that enterprises and individuals developing taxable resources within Chinese territory and other sea areas under their jurisdiction shall pay resource tax in accordance with this law, and the specific scope of the resource tax shall be determined by the Table of Resource Tax Items and Rates.
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Trends and Developments

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Accelerating the Studying and Drafting of Policy and Regulations Related to Climate Change

In September 2020, Chinese President Xi Jinping announced to the international community that China would strive to peak carbon dioxide (CO₂) emissions before 2030 and attain carbon neutrality before 2060 (henceforth referred to as the “3060 Target”). From the stage of peak CO₂ emissions to projected carbon neutrality, most Western developed countries will take more than 50 years, while China have set the challenging goal of reaching carbon neutrality within 30 years from its peak.

The National People’s Congress of the People’s Republic of China in March 2021 passed the “14th Five-year Plan and the Outline of the Vision for 2035”, (henceforth, the “14th Five-year Plan”) which introduced the “3060 Target”. This has become a compelling environmental topic in China. The Chinese government is working on a specific strategy. Some local governments have set up their own targets on carbon emission peaking and carbon neutrality; for instance, the Shanghai government announced its aim is to reach its carbon emissions peak before 2025.

In order to achieve the 3060 Target, China is taking positive action to research emission-reduction technologies, governance methods and to formulate policies to guide governments, enterprises and individuals to participate in climate change action in the following areas:

• to further reduce energy consumption and improve energy efficiency;
• to adjust the energy structure, lower the proportion of fossil fuels (eg, coal and oil), significantly increase the proportion of new energy, and support investing in new energy projects such as solar energy, wind energy and hydrogen energy;
• to adjust the industrial structure, strictly restrict the construction of projects with high-energy consumption and high pollution, strongly develop emerging industries, encourage scientific and technological innovation, etc, as well as to co-ordinate the management of pollution reduction and carbon reduction; companies and investors should pay strong attention to corresponding policy changes.

In October 2021, the State Council released an action plan to peak CO₂ emissions before 2030. The plan puts forward China’s main objectives for the 14th Five-Year Plan period (2021–25) and the 15th Five-Year Plan period (2026–30), including increasing the share of non-fossil energy consumption, improving energy efficiency and reducing CO₂ emissions. China’s responses to climate change are an important part of its efforts to achieve eco-environmental progress and high-quality development. The State Council Information Office of China has released a white paper entitled “Responding to Climate Change: China’s Policies and Actions” to document the country’s progress in mitigating climate change, and to share its experience and approaches with the rest of the international community.
Development of Renewable Energy Policy and Regulations
The 14th Five-Year Plan claims that, as a guarantee for infrastructure and economic development, energy also needs to deal with the increasing constraint of “carbon peak and carbon neutrality”. Opportunities and challenges coexist in this carbon-reduction process, which should not only ensure energy security, but also should achieve green transformation. The national policy on new energy is as follows.

Increasing the proportion of green industries
On 22 February 2021, the State Council issued the “Guidelines on Accelerating the Establishment and Improvement of the Green and Low-carbon Circular Development Economic System”. It proposes promoting high-quality development and high-level protection, with an emphasis on improving the production system of green and low-carbon recycling development. Further, it aims to:

• promote industry systems for efficient energy conservation, state-of-the-art environmental protection, and resource recycling, boosting the growth of the new-energy vehicle industry, new energy industries and energy-saving and environmental protection industries;
• promote the green energy system and proposes to give high priority to energy conservation, improving controls on both total energy consumption and energy intensity.

Promoting the research and development of hydrogen energy technology
In 2021, the 14th Five-Year Plan clearly listed hydrogen energy development as a key task. China’s cities are gearing up for the development of hydrogen fuel cell energy, another green energy solution for vehicles. Many local governments have issued hydrogen energy development plans that cover hydrogen production, transportation and consumption over the next decade. The environmental protection and safety requirements related to hydrogen energy projects will attract considerable attention from the industry and regulatory authorities.

Strengthening financial support for green manufacturing of renewable energy
On 24 February 2021, the National Development and Reform Commission, the Ministry of Finance, the People’s Bank of China and five other ministries jointly issued the “Notice of Guidance on Intensifying Financial Support to Promote the Health Development of Wind Power and Solar Power Generation Industries”, providing information on subsidies and loans support to help solve the problem of renewable energy companies being restricted by cash flow, and thereby promoting the development of wind power, solar power generation and suchlike industries. In actively developing green finance, China will take the following actions.

• Promote the development of green and low-carbon financial products and services in an orderly manner. China will develop monetary policy tools to support carbon emission reduction. The green credit initiative should be included in the macro-prudential evaluation framework, and guidance will be given to banks and other financial institutions on providing long-term, low-cost capital to green and low-carbon projects. The People’s Bank of China, the nation’s central bank, announced that it has rolled out a support-
ing tool for carbon reduction. The central bank also requires those financial institutions to publicly disclose information on carbon-reduction loans and the emission cuts financed by such loans.

- Encourage development and policy-backed financial institutions to provide continued long-term funding support for the goals of CO₂ peaking and carbon neutrality through market-oriented and law-based means.
- Support qualified enterprises in going public and refinancing for the purpose of developing and running green and low-carbon projects, and to increase green bonds.
- Carry out exploratory work on establishing a national fund for low-carbon transformation. Nongovernmental capital will be encouraged to set up green and low-carbon industrial investment funds.

**ESG Investment and Practice are Beneficial to the Transformation and Realisation of Zero Carbon Socio-economic Value**

ESG is the abbreviation of environmental, social and corporate governance. It is an investment concept and enterprise evaluation standard that pays attention to enterprise environmental, social and governance performance rather than financial performance. At present, the three aspects of ESG have evolved comprehensive and systematic information disclosure standards and performance evaluation methods, becoming a complete ESG concept system.

ESG combines the operation of enterprises with the needs of national carbon peak and carbon neutralisation, as well as the value of enterprise development and the needs of balanced development of the ecological environment and economy.

At present, Shanghai and Shenzhen have put forward mandatory requirements for ESG information disclosure of listed companies. Based on ESG evaluation, the public and investors can evaluate the performance of enterprises in promoting sustainable economic, environmental and social development by observing their ESG performance. Enterprises need to further improve the quality and level of ESG information disclosure on the basis of environmental protection compliance.

**Development Opportunities and Business Risks of Green PPP Projects**

Driven by environmental policies, the number of green PPP projects is currently huge and covers a wide range of industries. In many industries – such as ecological construction and environmental protection, renewable energy, science and technology, and forestry – PPP projects can support pollution prevention and control and promote a green and low-carbon economic structure. However, the financial burden brought by green PPP projects to the government and the unbalanced development among regions also brings certain problems that need to be addressed.

A green PPP project has the disadvantages of a large investment gap, a long cycle and a low return. When the project rewards are lower than expected or the income uncertainty is strong, the project is prone to business risks, such as financing failure, insufficient income, cost rise caused by changes in environmental protection policies, etc, which will bring corresponding legal risks to private enterprises.

In recent years, enterprises have sought to reduce the risk of capital investment and undertake orderly withdrawal from low-benefit PPP projects, and the demand for legal services has therefore increased.

**Maintaining the Strict Enforcement of Pollution Prevention Laws, Protecting Existing Achievements in Environmental**
Protection and Improving Environmental Quality

China has made remarkable achievements in the prevention and control of environmental pollution in recent years. Environmental degradation has been reversed: the most significant change is the improvement of air quality. China is formulating the 14th Five-Year Plan for environmental protection and has specific plans in various fields. The 14th Five-Year Plan for environmental protection of local government is in the process of drafting and publishing.

With the Law on Prevention and Control of Pollution from Environmental Noise under revision, China has completed a new improvement cycle of environmental laws and regulations in the past five years, including:

• the Water Pollution Prevention and Control Law;
• the Atmospheric Pollution Prevention and Control Law;
• the Law on the Prevention and Control of Environment Pollution Caused by Solid Wastes;
• the Soil Pollution Prevention and Control Law;
• the Law on Environmental Impact Assessment;
• the Regulation on the Administration of Permitting of Pollutant Discharges.

In China, the government’s environment supervision and management has gradually changed from setting the conditions for examination and approval to strengthening the supervision and management of daily environmental protection, which is reflected in more frequent law enforcement inspections and more severe punishment for infringement.

Enterprises should accurately understand the requirements of laws and regulations and strengthen their environmental compliance systems. The following are the key items of environmental supervision and law enforcement inspection:

• the requirements for greenhouse gas (GHG) emission shall be covered in the EIA document;
• the “Three Simultaneities” of construction projects should be complete and in compliance;
• compliance management of the pollutant discharge permit system, including a self-monitoring plan, and a quarterly and annual implementation report;
• management of solid waste (especially hazardous waste), prevention and control of soil and groundwater pollution.

The Impact of New Criminal, Administrative and Civil Laws on Environmental Protection

Civil liability

The Civil Code of the People’s Republic of China, which took effect on 1 January 2021, is the first law named after the code, marking a milestone in China’s legal history. The Civil Code integrates nine laws, including the General Principles of the Civil Law, the Contract Law, the Real Right Law and the Tort Law. “The Green Principle” is a basic principle established in the Civil Code, and it has been mainly reflected as follows:

• the tort liability section stipulates the liability of environment pollution and ecology damage, which provides the legal basis for environment public interests litigation;
• in environmental pollution tort cases, the polluter should bear the burden of proof that there is no causal relationship between his or her behaviour and the damage;
• for intentionally polluting behaviour that causing serious consequences, the infringed can request punitive damages;
• the party causing the infringement shall bear the work of ecological restoration or compensation costs;
• the property right section stipulates that construction land shall be in compliance with the requirements of saving resources and protecting the environment.

The Supreme People’s Court of China has issued the latest relevant judicial interpretations and amendments on the application of the Civil Code.

**Criminal liability**
Amendment (XI) to the Criminal Law of PRC, which took effect on 1 March 2021, increases the criminal penalty for polluting the environment, and for dishonesty in an EIA report or monitoring report. At the same time, this law increased the criminal penalty for destroying wild animals and plants, genetic and other biological resources, infringement of intellectual property rights, dangerous operations and other violations. Enterprises should be aware of the above changes and avoid violating relevant laws.

**Administrative liability**
The revised Law on Administrative Penalty took effect on 15 July 2021. This amendment reflects that law enforcement is more reasonable and enforceable in procedure, extends the legal duration for applying for a hearing from three days to five days and clearly establishes that the administrative authority shall make a decision on the basis of the hearing transcripts. The flexibility of the authority’s discretion may be increased in revised Administrative Penalty Law. This version adds “no punishment for the first minor offence” and “no punishment for those who have evidence to prove that they have no subjective intention fault” when certain specific conditions are met.

The Ministry of Ecology and Environment is revising the Measures for Environmental Administrative Punishment and the Provisions on the Procedures for the Hearing on Environmental Administrative Punishment. Local governments are also revising the Law Enforcement Guidelines and other regulations related to environmental administrative penalties. Predictably, administrative law enforcement is expected to be more formal.

**New Environment Legislative Developments**
The Yangtze River Protection Law, which took effect on 1 March 2021, is China’s first river basin law, covering 19 provinces, autonomous regions and municipalities directly under the Central Government related to the Yangtze, China’s longest river. The Yellow River Protection Law is already on the legislative agenda.

The Yellow River Protection Law (Draft) was drafted. The draft stresses enhancing ecological conservation and restoration, saving and intensive utilisation of water resources, pollution prevention and control, while imposing stringent legal liability on unlawful acts.

On 24 October 2021, Chinese authorities unveiled a guiding document on the country’s work to achieve carbon peaking and carbon neutrality goals under the new development philosophy, laying out key specific targets and measures for upcoming decades. In legislation, China will:

• remove the contents in existing laws and regulations that are incompatible with the task of CO₂ peaking and carbon neutrality and strengthen integration and coordination between laws and regulations;
• conduct research on formulating a specific law on carbon neutrality, and take action to expedite the revision of the Energy Conservation Law, the Electric Power Law, the Coal...
Industry Law, the Renewable Energy Law, the Law on Promoting the Circular Economy, the Regulations on the Control of Ozone-Depleting Substances and Hydrofluorocarbons and other laws, in order to make relevant laws and regulations more targeted and effective.

Focus on Biodiversity Conservation Protection
The Convention on Biological Diversity (CBD) COP15 was held in Kunming, China, 11–15 October 2021. The white paper “Biodiversity Conservation in China” was issued at the meeting, which establishes biodiversity conservation as a national strategy. The protection measures mentioned in the white paper are on-site protection, off-site protection, gene banks and legal systems.

According to the statement of the Ministry of Ecology and Environment, in terms of policies and regulations, China’s Biodiversity Conservation Strategy and Action Plan (2011–2030) will be further updated to improve policy and institutional guarantee. China has also formulated and implemented the Ten-year Plan for Major Biodiversity Conservation Projects (2021–2030), which aims to provide regulatory data and information platforms for biodiversity conservation.

As for China’s biodiversity protection laws and regulations system, one part is comprehensive legislation such as the Environmental Protection Law. The other part comprises administrative regulations, departmental rules, local regulations and the judicial interpretations related to biodiversity protection formulated by the Supreme People’s Court, including the Biosafety Law, the Wildlife Protection Law, the Forest Law and the Yangtze River Protection Law.

In terms of the judicial system, China has set up environmental and resource tribunals and taken biodiversity protection cases into the accepting scope of the jurisdiction of court. In 2015, the Supreme People’s Court issued the Interpretation on Several Issues concerning the Application of the Law to the Trial of Environmental Civil Public Interest Litigation Cases, marking the establishment of environmental public interest litigation at the legal level. Criminal punishment is also a way to protect biodiversity: the Criminal Law and the Wildlife Protection Law provide criminal punishment for acts that damage biodiversity, reflecting China’s ambition to severely crack-down on such acts.

Carbon reduction is the central work of ecological and environmental protection during the 14th Five-Year Plan. Biological capture is the most effective means of carbon capture right now, while biodiversity conservation is co-related with biological application. In addition, the Plan stipulates improvement of market-based and diversified ecological compensation, and encourages all kinds of social capital to participate in ecological protection and restoration. Hence, green finance and the enterprise ESG system are set to be a focus in the future.

Changes of EHS Management Responsibilities after the Implementation of the Work Safety Law
As an important part of EHS management, work safety and environmental protection often fall within the responsibility scope of the same management department of an enterprise. On 10 June 2021, the Decision of the Standing Committee of the National People’s Congress to Amend the Work Safety Law of the People’s Republic of China was adopted and came into force on 1 September 2021. The following changes should be noted by an enterprise and included in the scope of their EHS management.

- Senior managers of other management departments shall also undertake corresponding work safety management respon-
sibilities. The management group, especially the main person in charge, is responsible for the work safety of the company. This law stipulates that production and business operation entities must establish the responsibility system for the safety of all employees.

- The enterprise shall establish the risk prevention mechanism known as risk hierarchical control, which means the enterprise shall identify the dangerous and harmful factors existing in production and operation activities, determine the risk severity by using qualitative or quantitative statistical analysis methods, and then determine the priority of risk control and risk control measures, so as to achieve the measures and regulations taken to improve the safe production environment and reduce and eliminate production accidents.

- The enterprise shall establish the hidden danger investigation and treatment mechanism, including hazard identification and evaluation, hidden danger treatment tracking records management (including closed-loop management of hidden danger troubleshooting, reporting, rectification and review), hidden danger rectification and evaluation, etc.

- The enterprise shall pay attention to the physical and psychological health and behavioural habits of employees, strengthen the psychological counselling and spiritual care of employees, strictly implement safety responsibilities for specific work positions, and prevent accidents caused by the abnormal behaviour of any employees.

- Enterprises may need to deal with more frequent law enforcement inspections, and illegal acts will lead to more severe administrative penalties. For violating behaviour or work safety accidents, besides the company being fined per the law, the main responsible person in charge, other responsible persons, work safety management professionals, the directly responsible person in charge and other directly responsible persons shall be fined as well.

- This law also authorises the Prosecuting Authority to initiate public interest litigation on work safety.

Conclusion

In terms of legislation, China has completed the revision of laws related to environmental pollution prevention and control. In the past five years, against the background that the regulatory authorities have implemented strict administrative supervision and law enforcement and investigated the criminal responsibility of violators, the environmental compliance awareness of enterprises and the public has been generally improved.

In response to the international focus on climate change, the Chinese government’s supervision mode of enterprise environmental and safety protection has gradually shifted from punishment for violations to prevention and control of pollution and industrial accidents. On the basis of environmental protection and safety compliance, the enterprise shall further reduce pollutant emission, save energy and reduce the occurrence of accidents.

After improving the quality of environmental compliance and environmental information disclosure, enterprises will have more opportunities to obtain financial and tax policy support, financing opportunities and competitiveness of sustainable development. The compliance of enterprises is no longer only a cost that they should bear, but will create more economic value and development opportunities for such enterprises.
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1. REGULATORY FRAMEWORK

1.1 Key Environmental Protection Policies, Principles and Laws
The Constitution of the Dominican Republic, enacted in 2010, recognises the right of the country’s inhabitants to enjoy a healthy environment for the development and preservation of life, the landscape and nature.

The General Law of Environment and Natural Resources No 64-00 (GENRL) was enacted in 2000, which organised the legal and environmental framework in the Dominican Republic and established the basis for environmental protection, management, liability, and the use of natural resources.

The fundamental values of the GENRL include the prevention, polluter-pays, tort, participation, dubio pro-natural, ab initio prohibition, strict liability and public order principles.

The legal framework is completed by several other legal instruments and technical regulations in water, waste, agrochemicals, soil, dangerous materials, the metal sector and air. Other vital instruments include the law on protected areas.

Recently, a new waste management law was approved that brings together all the Dominican Republic’s waste management regulations and establishes a new legal framework indicating all parties responsible for waste in its different stages and how its final disposition must be.

2. ENFORCEMENT

2.1 Key Regulatory Authorities
The GENRL appointed the Ministry of Environment and Natural Resources as the “environment, ecosystems and natural resources policy-making body”. In addition, this entity has the responsibility to monitor environmental policy compliance through environmental impact assessment and inspections.

The Office for the Defence of the Environment and Natural Resources is a specialised department of the Attorney General’s Office, which exercises representation and defence of the state’s and society’s interests on environmental issues in all proceedings for violations of environmental legislation.

Finally, the National Council on Climate Change promotes and follows up all initiatives and policies regarding climate change.

3. ENVIRONMENTAL INCIDENTS AND PERMITS

3.1 Investigative and Access Points
The environmental regulator has broad powers to require documents, take samples during inspections, conduct site inspections, interview employees and take whatever other measures are needed to determine the existence of an infringement to environmental law.

Accessibility to the sites for inspection must always be available without restrictions in favour of the environmental authorities.

Also, according to the Environmental Authorisation Proceeding, the Environmental Agency will be in charge of following up, auditing, inspecting and verifying compliance of the operations under specific environmental authorisation. If the environmental authorities find failure to fulfil the obligations, it shall enforce several penalties through administrative actions that include suspension of activities and cancellation of the permit.
In this context, the Environmental Control, Surveillance and Inspection, and Administrative Sanction Enforcement Regulations establish that inspectors from the Environmental Agency (the Ministry of Environment and Natural Resources) are empowered to take all necessary measures to prevent environmental damage. These powers include confiscation of objects and related measures.

3.2 Environmental Permits
Prior to implementation, it is necessary to apply for an environmental permit or licence for every project, infrastructure work, industry or any other activity that may affect the environment and natural resources, the quality of the environment, and the population’s health.

There are four categories for activities and projects requiring a licence, permit, or certificate approval, depending on the impact level. The first two categories (A and B) require an environmental impact assessment. The remaining two categories (C and D) require technical information to be completed to evaluate correctly if an environmental management plan is required. Category D will apply for certain activities or projects with minimum impact, and the environmental agency will issue the environmental permit.

The Environmental Authorisation Proceeding (EAP) – in force since September 2015 – includes two different lists of projects, one regarding the projects that need environmental authorisation to operate and a second list that includes those projects and activities that are exempt from requesting environmental authorisation. In this order, specific sectorial permits (non-objection) could be granted for those activities or minor projects that may have a particular impact on the environment.

Obtaining Permits and Rights to Appeal
The environmental permit is obtained after complying with the administrative process that has been developed in the compendium of environmental legislation; this establishes that the promoter of the activity must present several relevant documents containing information on the project. These documents will then be evaluated by the environmental authorities, which will determine the category of the project through the reference terms (TDR). After the promoter presents the environmental studies to the ministry’s specifications, if the project complies with the regulations then the permit is issued.

Given that environmental authorisation – or its denial – is an administrative act, it may be challenged through the different remedies available in the Dominican legislation, including appeal or revision, as appropriate.

Another option available for the promoter of the project or activity would be to file relevant information that proves that the project or activity has been substantially modified and meets the requirements to be approved by the environmental agency.

As a last resort, and in the presence of a final judgment issued by the Administrative Court, it may be contested through an appeal to the Supreme Court of Justice.

4. ENVIRONMENTAL LIABILITY

4.1 Key Types of Liability
Civil, administrative and criminal liability could result from environmental damage or breaches of environmental law, depending on the fault committed.
The GENRL sets forth the environmental liability by including the strict liability principle whereby the classic exclusions in liability clauses are not applied to environmental civil liability. Legal responsibility arises from the production of the damage itself. This doctrine establishes that anyone who causes damage to the environment and natural resources will be liable for it and will have to restore it to its previous condition (Article 169 of the Environmental and Natural Resources General Law 64-00). If that is not possible, additional compensation will apply.

5. ENVIRONMENTAL INCIDENTS AND DAMAGE

5.1 Liability for Historical Environmental Incidents or Damage
Within the Dominican legal framework, the seller is responsible for any defects, even if unknown to them; this principle applies to contaminated land. Contractual provisions may reduce such liability at the moment of the sale. However, the provisions are not valid before third parties.

The GENRL sets forth environmental liability by including the strict liability principle. Anyone who causes damage to the environment and natural resources will be liable for it and must restore it to its previous condition.

The current owner may impose restoration and compensation measures by the authorities, despite the liability imposed on the former landowner.

5.2 Types of Liability and Key Defences
Administrative liability has become the most frequent type of liability when a breach of environmental laws and permit occurs. The main administrative penalties foreseen in environmental legislation are the following:

- a fine of up to 3,000 times the minimum wage;
- seizure and confiscation; and
- prohibition or temporary suspension of activities, or partial or total closing of the establishment.

Civil liability damages caused to third parties due to pollution are considered within the Civil Code. Several penalties can arise:

- the order materially to restore the damage caused;
- an indemnity order in favour of the state (for the community where they did the damage) and any individuals affected; and
- re-establish the environment to the condition before the deed, whenever possible.

As to criminal liability, competent criminal jurisdiction may impose penalties on individuals or companies which have infringed the Environmental General Law, including:

- imprisonment, if deaths occurred due to the infringement;
- fines;
- forfeiture;
- the obligation to compensate those who suffered damages;
- temporary or definitive withdrawal of the authorisation, licence or permit; and
- the obligation to repair, replace, compensate, restore or rehabilitate to its original state the natural resource affected.

Regardless of the type of liability in question, the individual or company sanctioned will always have the corresponding remedies or procedural defence in administrative and judicial courts.
6. CORPORATE LIABILITY

6.1 Liability for Environmental Damage or Breaches of Environmental Law

In general, as per the provisions outlined in the GENRL, the consequences of environmental disasters originated by negligence shall be the exclusive responsibility of the persons or entities that caused the same, which shall restore the areas or resources destroyed or affected, if possible, and shall respond criminally and civilly for caused damages (Article 76). Additionally, the GENRL provides that, notwithstanding the sanctions provided by said law, anyone who causes harm to the environment or natural resources shall have strict liability for damages that may occur, following said law and other supplementary provisions of the law. Also, said persons shall be compelled to repair materially at their own expense, if possible, and to indemnify accordingly.

When more than one person commits an infraction under the GENRL, everyone participating in the infraction shall be jointly and severally liable for economic damages. The GENRL also provides that in the case of the legal person (e.g., corporate entities), liability provided above shall also be established considering the participation of the directives and representatives of the legal entity that caused the damage.

6.2 Shareholder or Parent Company Liability

Traditionally, at least for the more common business associations and corporate vehicles used in the Dominican Republic, the country’s legal regime has provided for companies to have different legal capacity (as a legal person) and assets and liabilities different and separate from those of their shareholders, members, directors, officers and employees. Dominican corporate law recognises the principle of separate legal capacity of companies and partnerships, except in the case of businesses carried out by sole proprietors and partners in general or limited partnerships, forms of business associations provided under Dominican law in which the partners may each be liable for all the debts of the business (i.e., unlimited liability).

The system follows the legal assumption of a “corporate veil” and that actions of the corporation are not the actions of its shareholders; therefore, in principle, shareholders have no individual liability for the corporation’s actions. Their liability is limited to the sums they have contributed to the company’s capital stock—that is, to the extent of their investments in shares or quotas. In the absence of fraud or other deceptive practices, there is no personal recourse against shareholders for the company’s obligations. Thus, in principle, the corporate entity will protect the shareholders from liability beyond their investments—i.e., shareholder’s liability is limited to the amount individually invested.

Based on the above, civil liability to a shareholder that has caused damages to the environment or its natural resources may only be established in principle if the shareholder has participated directly in the actions or has authorised them.

7. PERSONAL LIABILITY

7.1 Directors and Other Officers

As provided by Article 171 of the GENRL, any manager, administrator, director or officer of a company authorising activities, actions or the developments of a project that causes harm to the environment shall be jointly and severally liable with the company and other individuals implementing the activity or development. Criminal liability of a representative or shareholders of a company, as per the provisions outlined in Articles 174 and 186 of the GENRL, may only be
established upon such person’s wilful misconduct or criminal intent.

In general, a person determined as liable for damages to the environment shall be required to repair or indemnify for such damages for an amount set by the court by taking into consideration the reports from the Ministry of Environment’s technicians and inspectors, or any other experts appointed by the acting judge. A corporate entity may also be required to pay fines, and a court may order its activities to be suspended from a month up to three years. Other criminal penalties may include imprisonment of up to three years.

7.2 Insuring against Liability
As provided by Article 173 of the GENRL, the Ministry of Environment may require a mandatory civil liability insurance policy to cover damages to the environment to the extent caused accidentally.

8. LENDER LIABILITY

8.1 Financial Institutions/Lender Liability
A lender, in general, should not be liable for the actions of its borrower or individuals acting on behalf of said borrowers, in the case of corporate entities.

8.2 Lender Protection
Typically, lenders would include indemnification clauses in their loan documents and provide affirmative and negative covenants on the borrower concerning its environmental obligations. Monitoring the borrower’s activities periodically and requesting evidence of formal compliance with any regulatory reporting requirements to the environmental authorities is also common for credit facilities in the Dominican Republic.

9. CIVIL LIABILITY

9.1 Civil Claims
As indicated in the Dominican Civil Code, civil liability arises from damages caused to third parties. This means that any damage caused shall be paid to the victim (Article 1382 Civil Code and following), including the damages brought by negligence or imprudence and those caused by dependents (children, employees, etc).

9.2 Exemplary or Punitive Damages
The Dominican legal system is a civil law system primarily influenced by French law. Regarding damages, it does not allow the use of punitive damages. The criteria in this matter only include compensation up to the amount of the damages caused to the victim.

So, the concept of punitive damages as a sanction or exemplary manner of making a statement in some instances would exceed the limit of simple retribution. Nevertheless, within the “compensatory issue”, the judge has a wide range of actions and could decide a more or less severe compensation, depending on the case or the circumstances, without trespassing the limit of the indemnity.

9.3 Class or Group Actions
The GENRL set forth the possibility of class action for pursuing environmental claims. Certain restrictions regarding NGOs apply, as it is required that the NGO has as its primary object the protection of the environment and should have been incorporated before the date of the environmental damage.

9.4 Landmark Cases
In 2020, the Dominican Republic had a change in its government. The new administration has been characterised by being stricter in compliance with the country’s environmental regulations, including the following actions:
suspension and elimination of permits in environmentally sensitive zones;  
the control of invaded protected areas;  
initiation of administrative proceedings against public authorities for mismanagement; and  
cases related to land use are expected to increase within the following years.

10. CONTRACTUAL AGREEMENTS

10.1 Transferring or Apportioning Liability

Environmental provisions in the Dominican Republic, as established by the GENRL, are of public order. Therefore, any agreements between the parties that lower liabilities in the case of environmental damage will not affect third parties, including the regulators.

However, it is possible to limit liability. Said contractual provisions may include the creation of an escrow fund to protect the purchaser in case of any event and would be valid among the parties.

10.2 Environmental Insurance

An insurance bond to fulfill the obligations established in the Environmental Management Programme for the operation are mandatory and will be presented as a condition of approval of the environmental authorisation. The renewal must be requested yearly by the environmental regulator.

No additional insurances have been requested so far.

11. CONTAMINATED LAND

11.1 Key Laws Governing Contaminated Land

The newly approved law for the management of wastes includes a section regarding contaminated land. Additionally, different dispositions apply, including specific provisions in the GENRL and special resolutions from the Ministry of Environment and Natural Resources. The new Law for Comprehensive Management and Co-processing of Waste establishes a new national programme for the remediation of contaminated sites.

The programme’s main objective is to prevent the contamination of sites and establish the necessary actions for the remediation and rehabilitation of contaminated sites. The law states the registry of all contaminated sites in the Ministry of Environment and Natural Resources. Those who are found responsible for contaminating the sites are liable for their remediation. If the contaminated sites are located within private property, the owners will be considered jointly responsible for the contaminated site.

The GENRL also sets forth environmental liability by including the strict liability principle. Anyone who causes damage to the environment and natural resources will be liable for it and will have to restore it to its previous condition. If that is not possible, additional compensation will apply. The polluter must rectify contamination to soil or groundwater, who must also control the impacts and immediately notify the environmental authorities, as established by Article 83 of the GENRL.

The Environmental Agency may also use public funds to restore land contaminated by unknown persons.
12. CLIMATE CHANGE AND EMISSIONS TRADING

12.1 Key Policies, Principles and Laws
The Dominican Republic has signed various treaties regarding climate change, such as the United Nations Convention on Climate Change in 1992, the Kyoto Protocol to the United Nations Framework Convention on Climate Change, signed in 1996, and the Paris Convention on Climate Change.

Additionally, the Dominican Constitution recognised the importance of climate change for the Dominican territory and ordered the approval of territorial planning law considering this aspect. In this sense, the government created the National Council for Climate Change, which has the general goal of implementing renewable energy, energy efficiency, methane recovery, the use of cleaner fuels, and reforestation projects, among others, within the framework of the Convention on Climate Change and the Kyoto Protocol.

Consequently, the National Congress approved the Law on National Development Strategy 2010–30 (Law 1-12), which establishes the fundamental objectives for sustainable development and adequate adaptation to climate change.

There is currently a discussion of an initiative at the Congress that aims to establish the regulatory framework or policies, principles, strategies and instruments to manage the cause and consequences of climate change in the national territory.

Moreover, a recently issued Presidential Decree (Decree No 541-20) creates a National System for the Measurement, Reporting, and Verification of Greenhouse Gases in the Dominican Republic. This system aims to establish a framework for accounting for greenhouse gas emissions and executing mitigation actions to guarantee to finance sustainable climate actions.

12.2 Targets to Reduce Greenhouse Gas Emissions
Law 1-12 on National Strategy of Sustainable Development (2010–30) refers to specific measures to reduce greenhouse gas emissions, but without establishing targets.

The Dominican Republic contributes with low environmental emissions and has committed to reducing emissions by 27% under the “business as usual” (BAU) project by 2030, taking as baseline the 2010 emissions.

The Economic Development Plan, compatible with climate change, includes the strategy promoted by the Dominican government to reduce emissions (GEI) for the following sectors: energy, transportation, tourism, cement and solid waste. These sectors are the ones with the highest potential to achieve relevant reductions in emissions to the air.

13. ASBESTOS

13.1 Key Policies, Principles and Laws Relating to Asbestos
The Management of Hazardous Substances and Chemical Waste Regulation, which refers to the National List of Hazardous Substances and Chemical Waste, classifies asbestos as a toxic substance. Any activity that involves the management of substances requires a permit and special registration from the Ministry of the Environment.
14. WASTE

14.1 Key Laws and Regulatory Controls
The new Law for Comprehensive Management and Co-processing of Waste was approved during August 2020. It includes several new dispositions regarding the management of wastes and promoting the reduction and recycling of such wastes. These regulations apply to both the public and private sector and to citizens and private companies and organisations.

For the first time in the Dominican Republic, the producer’s extended liability principle is in force, and several rulings will have to be approved in this sense.

Certain products that are considered non-recyclable or produce large amounts of waste have also been forcibly subjected to special extended responsibility programmes destined to reduce waste. The manufacturers of these products (such as polystyrene foam, plastic bags and plastic bottles) will have to reduce the amount of waste they produce and increase the amount of waste they recover from their products.

The Ministry of Environment has approved several regulations for different types of waste. In this sense, it is relevant to mention the Regulation for Environmental Management of Non-Hazardous Solid Waste, pathogenic waste, hazardous waste, metallic waste and radioactive waste.

In general, said regulations include specific dispositions concerning labelling, elimination of hazardous materials, segregation, transportation and final disposal.

The Dominican Republic is also part of the Basel Convention on Transboundary Movements of Hazardous Waste and Disposal, which implies fulfilling certain obligations when importing and exporting such wastes.

14.2 Retention of Environmental Liability
Disposal of specific waste (hazardous or pathogenic, for example) that needs specific handling and compliance with disposal obligations has to be dealt with by authorised companies, among other requirements. In general, the producer would retain liability if obligations that were not fulfilled.

However, if the producer complied with all obligations and still there has been damage to the environment, the producer’s liability – even joint and several liabilities with the third party – would depend on the circumstances of disposal. The transfer of the waste would not release the producer from third-party claims.

14.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods
The extended liability producer was recently included in the Dominican legal framework by means of the above-mentioned Law No 225-20 on wastes. The new obligations include dispositions regarding design, take back, recovery, recycling or disposal of the goods once they become waste.

The Environmental Agency issued a new ruling on waste to promote waste recycling, as mentioned in recent updates. New obligations apply to single homes, buildings, towers, commercial businesses, industry and public institutions. In this sense, waste has to be segregated and disposed of in two bags: inorganic waste (paper, carton, plastics, glass and metals) in one bag and organics (food, wood, etc) in another bag. Local authorities have to provide a selective service for handling said bags and transporting them to particular areas for recycling. However, certain aspects remain uncertain, especially regarding timings, implementation of selective recovery, etc.
15. ENVIRONMENTAL DISCLOSURE AND INFORMATION

15.1 Self-Reporting Requirements
All citizens are responsible for notifying the environmental regulator of any event that could negatively affect the environment. If said damage could cause risks to the community’s health, it must be immediately notified to the Ministry of Health.

In the event that the pollution is caused under operations authorised by an environmental permit, the operator must inform the authorities as soon as possible, restore and fix the problems that caused the incident, and include this information within the Environmental Compliance Report filed every six months with the environmental authority. The events will be described in the report, and the actions taken to restore the environment to the previous condition will be taken.

15.2 Public Environmental Information
The GENRL establishes the right to free access to environmental information as it guarantees all citizens “access to truthful and timely information concerning the situation and condition of natural resources and the environment” (Article 6 of General Law 64-00).

In addition, the Free Access to Public Information General Law No 200-04 sets forth that “any individual has the right to request and receive complete, truthful, adequate and timely information from anybody of the Dominican State, as long as this access does not affect national security, public order, health or moral, or the right to privacy and intimacy of a third party or others’ right to reputation”.

However, certain exceptions apply when “information may jeopardise public health and safety, the environment and public interest in general” (Article 17 of Free Access to Information General Law).

As mentioned, recent developments include the signing by the Dominican state of the Escazu Agreement, the regional Latin American environmental treaty that includes provisions regarding access to environmental information and justice, and protection to environmental activists.

15.3 Corporate Disclosure Requirement
Corporate entities are not required to disclose environmental information in their annual reports. However, under the country’s securities market law and regulation, a corporate entity issuing debt or equity instruments may be required to disclose environmental information. This is understood as any facts, circumstance or information that may influence its value or an investor’s decision in negotiation with such security.

16. TRANSACTIONS

16.1 Environmental Due Diligence
Environmental due diligence is typically conducted on M&A and finance deals. However, in many circumstances, depending on the activities of the targeted business, the due diligence is limited to verifying formal compliance with the GENRL and its rulings of enforcement by assessing the existence of required environmental permits and compliance with reporting obligations.

A business deemed potentially and materially to affect the environment may require the appointment of special environmental consultants to carry out further and more extensive due diligence and assessment efforts.
16.2 Disclosure of Environmental Information
In general, a seller would be required to disclose all environmental information to a purchaser.

17. TAXES
17.1 Green Taxes
There is only one type of green tax in the Dominican Republic, introduced in 2012 with the tax reform. This green tax would consist of a reduction of the payment of the first registration of the car if the vehicle were considered to have minor environmental impact due to low emissions of CO₂.

For companies, an exceptional contribution must be made relating to the company’s income. Several different income brackets dictate the amount of money to be paid. Companies that have no income will still have to pay this unique contribution under the lowest income bracket.

As the legality of such a tax could be questioned, it will be necessary to wait for the rulings of this newly approved law.

The Law for Comprehensive Management and Co-processing of Waste (recently approved) contemplates a unique contribution that all companies, organisations and public institutions must make. This is a new tax to organise and create the infrastructure for the final disposal of waste. It will directly contribute to the new public-private Trust for the Comprehensive Management of Solid Waste created by the aforementioned Law.
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Trends and Developments

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Environmental Challenges
The Dominican Republic is one of the strongest economies in Central America and the Caribbean region. It has experienced significant growth over the past 20 years, reflected in the increase in the gross domestic product of approximately 5% annually in recent times.

In the Dominican Republic, an appropriate legal framework has contributed to increasingly important investment in sectors such as tourism, construction, mining, energy and free zones.

It is expected that the pressure for the use of natural resources will increase over time, so the country has made significant efforts to preserve its natural resources and environment. These efforts have had a positive impact on the country’s sustainable development and environmental recovery. The result has been mitigation of the effects of climate change, preservation of water resources, increase of protected areas and biodiversity, recognition of punishable crimes, and a strengthening of the environmental education of the population.

Climate Change
As the Dominican Republic is an island, climate change takes first place on its environmental agenda. The biggest challenge that the country faces is its adaptation to the consequences of the most significant environmental impact caused by human activity – global warming.

Governmental agencies are already working in different fields to decrease the effects of climate change. Finding the appropriate responses will help us manage the expected consequences of climate change, such as: water shortages, increased intensity of extreme weather (hurricanes, rain), floods in coastal areas, and displacement of population, among others.

The Dominican Republic has become the 13th country in the world and the third in Latin America to sign a Payment Agreement for the Reduction of Greenhouse Gas Emissions (GHG) with the World Bank. This will allow the nation to receive payments of USD25 million in order to offset the verifiable reductions of these gases from forest carbon over the next five years.

During the past 12 months, the Dominican Republic has increased its ambition to reduce GHG emissions by 27%, while international cooperation projects worth USD67.4 million have been co-ordinated to increase local capacities.

Water Preservation
Water is one of the oldest pending issues to address in the Dominican Republic.

With the government’s support, the Ministry of Environment has initiated the Management Plan for priority hydrographic basins, in which six out of 15 basins supply the water to most of the people that have access to it.

To assure the success of water preservation in the Dominican Republic, a Water Law has been elaborated by the authorities.

Other plans include a solution to the lack of potable water, its distribution through collective and efficient systems, together with the adequate and permanent management of solid waste, and the reduction of liquid losses.
Reforestation
In the last year, around 13,185,896 trees have been planted to guarantee the country’s forest cover and water production. These plantations have been developed with the support of the Technical Executing Unit for Agroforestry Projects (Unidad Técnica Ejecutora de Proyectos de Desarrollo Agroforestal, UTEPDA) and other institutions, impacting 187,679 land tasks at different points.

Protected Areas, Biodiversity and Coastal-Marine Resources
The recovery of the National System of Protected Areas, which represents around 25% of the national territory, safeguards biodiversity. An example of recent actions taken is the return of manatees Juanita, Pepe and Lupita to their natural habitat.

Considering the previously stated facts, we are proud to say that the foundations to rescue the Valle Nuevo National Park, Los Haitises, Sierra de Bahoruco, among other vital areas for water production, have been established.

An agreement with the Real Estate Jurisdiction to clean up the protected areas and endow them with property titles has been pledged.

Ecological restorations are being carried out on all the country’s coasts, accompanied by educational campaigns, allowing the Ministry to plant 23,250 mangroves to date. In addition, work has been carried out on the recovery of beaches such as Cabeza de Toro, Arena Gorda and El Valle.

Soil Exploitation Control
The Ministry of Environment has issued several resolutions for the control and strengthening of the extraction of material from rivers, such as the Nizao river intervention, with the goal that its channel can be re-established in the lower part and guarantee the production and supply of water in the next two years.

Penalty for Crimes
Correspondingly, during the last 12 months, the Ministry of Environment has imposed fines of approximately DOP80 million for environmental crimes. The majority are for violations of permits and illegal extraction in rivers. More than 1,300 people have also been fined and administratively sanctioned.

Solid Waste Management
Law No 225-20 for Solid Waste Management was issued, providing the foundation for the National Solid Waste Programme, which is a crucial area to advance in the solution to the recovery of waste and the correct final disposal of waste in the Dominican Republic. It introduces fundamental principles regarding waste management such as “extended producer responsibility”, that are essential to start organising the waste sector, at least in the country’s major cities.

In addition, the authorities managed to rehabilitate 70% of the principal landfill of Santo Domingo City, controlling the smog pollution that affected the population.

However, despite the great efforts and diverse actions taken towards environmental protection, relevant challenges still remain, and new issues have surfaced.

Seaweed
The phenomenon of sargassum (a large, brown type of seaweed) mainly affects Caribbean beaches in the summer months and has surged at a time when the Dominican Republic’s tourism industry is trying to recover from last year’s pandemic-triggered disruptions. According to some observers, its increase may be linked to climate change and rising ocean temperatures.
Seaweed is not garbage or pollution, but the large amounts that reach the Caribbean coast – and are projected to continue arriving over the next few years – represent an economic and environmental problem.

Faced with the challenge of its arrival, barriers in the region have been installed, and tests have been carried out to establish whether the sargassum can be recycled for such purposes as fertilisers, chemical compounds, biofuels, or biogas, as well as clothing and footwear.

However, more studies and public-private initiatives are needed to overcome the uncertain availability of sargassum and the properties of this seaweed.

The Dominican Republic’s Minister of Tourism, David Collado, has also proposed to the region’s countries to create a common fund to combat sargassum, which is mainly affecting Caribbean beaches.

Integration of Environmental Policies and Sectoral Law
As a developing country, the Dominican Republic needs investment opportunities, primarily in infrastructure and essential services. The introduction of environmental variables and overall sustainability in investment development is, and should be, a priority for the state. The legislators focused on approving the Law on National Development Strategy 2010-2030 in 2021. This law seeks an integrating economy that is competitive and environmentally sustainable. It also seeks a society that protects the environment and natural resources via environmentally sustainable production and consumption, adapting to climate change, and managing and controlling risk equity and efficiency. However, one of the primary energy projects in development, promoted by the government, does not fully comply with this spirit, as energy production will be based on coal.

Ensuring the compatibility of development objectives with sustainability is undoubtedly one of the most critical challenges of the near future.

Lack of Land Management
The Dominican Republic does not have a national or regional land management plan in place, the main objective of which would be to define the limits of political and economic activities.

When it comes to investment development and environmental protection, the absence of a strategic land use regulation – as required by the Dominican Constitution of 201 – has led to more and more significant conflicts arising between the state, private sector and local communities.

The Ministry of Economics launched the National Plan for Territorial Organisation and is reaching an agreement with the other ministries that intervene in the territory to carry out joint work and to draft an Organic Law on Territorial Organisation.

The National Plan for Territorial Organisation has been conceived as a policy document that guides national decisions about the use of the territory, ensuring compatibility with the different sectoral policies, providing a blueprint to manage and take advantage of resources to achieve sustainable development, promote territorial cohesion and improve the living conditions of the people of the Dominican Republic.

This is undoubtedly an important pending task, the consequences of which are immense.
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1. REGULATORY FRAMEWORK

1.1 Key Environmental Protection Policies, Principles and Laws

In France, the main provisions regarding environmental protection are included in the French Environmental Code, which contains a legislative part and a regulatory part. However, there are additional implementation provisions that have not been codified in the French Environmental Code. Please note that the mining regulation is provided in a separate code – the French Mining Code – which is not covered in this guide. Some fundamental principles are also included in the French Environmental Charter.

Key Policies

A main aspect of the French environmental law relates to the classified facilities regulation. An industrial or agricultural facility that could have an impact on the environment is usually subject to this regulation. French law lists the activities that are subject to regulation (nomenclature) and establishes thresholds for declaration, registration or authorisation of those activities – all of which are discussed further in 3.2 Environmental Permits. The regulatory authorities may impose requirements on regulated facilities or activities.

A similar regulation provides that an activity affecting waters (surface waters and groundwater) can be subject to declaration or authorisation from the relevant authorities. Those authorities may impose some requirements on regulated activities.

Another main aspect of environmental regulation concerns waste management. The governing principle is that waste producers or owners are legally responsible for collection, elimination and recycling. Waste producers or holders must be able to document the final destination of waste as well as the method of disposal.

Key Principles

The French Environmental Charter enshrines the fundamental principles of environmental protection at a constitutional level. The precautionary principle states that, if an activity is likely to cause environmental harm, measures to avoid it must be implemented prior to that activity being taken. The right to live in a healthy environment, the right to environmental information, and the duty not to harm the environment, to preserve it and repair the damage are also contained in the Charter. The “polluter pays” principle proclaims that the costs resulting from pollution must be borne by the polluter. The prevention principle serves as a basis for regimes of declaration, registration or authorisation of potentially polluting activities.

The Charter also sets out the principle of sustainable development as a central objective of public policies. Finally, attempts have been made to include in the first article of the Constitution that the state promotes all actions in favour of climate and biodiversity protection. The proposal issued by the Citizen’s Climate Convention failed, as both Chambers of Parliament were unsuccessful in agreeing on a common text proposal. In July 2021, the Prime Minister announced the termination of the constitutional reform process.

Additional principles are defined in the French Environmental Code and embody legal concepts such as the principle of participation, which allows affected people to express their opinion on a project with potential environmental impacts. Since 2016, another new key principle is “non-regression”, which implies that measures protecting the environment can only be improved with regard to constant scientific progress, and shall not be reduced.
2. ENFORCEMENT

2.1 Key Regulatory Authorities
In France, the governmental body in charge of environmental policies is the Ministry for the Ecological and Solidary Transition (Ministère de la transition écologique et solidaire). Its missions mostly involve the drafting of environmental regulatory provisions.

The Ministry is directly represented throughout the country by the prefects of the departments (local subdivisions of the French regions), which are the main regulatory authorities. They are responsible for issuing orders or authorisations relating to the activity of regulated facilities, and for ensuring compliance with regulatory requirements. In carrying out these functions, the prefect relies on local administrative services, such as the Regional Directorates for the Environment, Planning and Housing (DREAL) in the region as well as the Departmental Direction of the Territories (DDT), which all come in support of those authorities and participate in the local implementation of the national policy.

Finally, other specific agencies play a role in some defined sectors – for example, the Nuclear Safety Authority (ASN) or the Regional Health Agency (ARS).

In 2019, one large agency was created regarding all biodiversity matters: the Office Français de la Biodiversité (OFB). This law of July 2019 aims at better protecting biodiversity by merging under a single agency all the competent services for the preservation of French ecosystems.

3. ENVIRONMENTAL INCIDENTS AND PERMITS

3.1 Investigative and Access Points
Under French law, the environmental authorities have investigative and access powers with respect to environmental incidents and breaches of law/permits. They have both administrative and criminal enforcement rights. Since 2012, inspections and investigations by regulatory authorities have been harmonised and simplified.

The Energy and Climate Law (Loi Energie-Climat of September 2019) specifies the role of the Environmental Authority (Autorité Environnementale), which is the advisory body regarding projects that are likely to affect the environment. Its role is to give an opinion on the quality of the environmental impact assessment; this is further discussed in 3.2 Environmental Permits.

French administrative courts stated that the Environmental Authority shall remain totally independent and be different from the authority in charge of delivering the permit. In this context, a decree was adopted in July 2020, making the prefect of a region the official authority in charge of case-by-case decisions (ie, when the environmental impact assessment is not automatically applicable).

Administrative Inspections
The French Environmental Code provides that administrative inspections can be performed under certain conditions. When the administrative authority conducts such inspections, it has several powers regarding access to the facility and the documents it may request. The law creating the Office Français de la Biodiversité (commonly referred to as Loi OFB) of July 2019 gives additional powers to environmental inspectors. They now have competence to take samples and place them under seal, which can be of use as proof. The new European Public Prosecutor, Environmental Justice and Specialised Criminal Justice Law of December 2020 has extended their competence even more.
If irregularities are found during the inspection, the administrative authority can impose sanctions. However, such authorities cannot impose administrative sanctions without a due process and formal notice. After the visit of the inspector, the operator receives a copy of the report and thus becomes aware of the case against him or her and can respond to the prefect. The operator may then receive a formal notice requesting him or her to comply with the law. Before actual sanctions are taken, the operator is given the chance to comply. If nothing is done, the regulatory authority will proceed with sanctions.

The Loi OFB of July 2019 had introduced a new criminal offence in the Environmental Code: in the specific case where an operator, who has conducted his or her activity without authorisation or certification, is being ordered by the regulatory authority to take remediation measures in the context of the cessation of his or her activity, and does not respect this order, the sanction might result in a two-year prison sentence and a maximum fine of up to EUR100,000 for the operator.

Negotiated settlements are not allowed under French law. In fact, the authorities cannot agree to either reduce sanctions or decline to bring an enforcement action in their role as administrative police. In concrete terms, authorities neither contractually agree nor settle on a limitation of their powers in this field.

Criminal Investigations
Criminal investigations are accomplished by regulatory authorities in the case of a breach of environmental law, in a manner that must be conducted according to the French Environmental Code. In the event of a criminal investigation, the inspection performed is similar to the administrative procedure but the prerogatives of the inspector are extended as he or she may, for example, conduct identity checks.

Similarly, the inspector issues a report to the prosecutor and remains, with the prefect, at the prosecutor’s disposal for further investigations. The inspector may, for instance, interview the operator on behalf of the prosecutor. Since the Loi OFB, environmental inspectors will also be able to collaborate with other police services for a given case, but they will remain entirely autonomous in their investigations. The new European Public Prosecutor, Environmental Justice and Specialised Criminal Justice Law of December 2020 enables these environmental inspectors to have the same competences as judicial police officers for the judicial investigations they lead.

These laws illustrate an overall harmonisation of prerogatives among judicial and environmental inspectors, where the latter have been given much more power to investigate and punish environmental offences. In this respect, a decree of April 2020 institutionalised the right of prefects to derogate from certain national standards in the fields of environment, agriculture and forestry, among others, under some restrictive conditions.

3.2 Environmental Permits
Requirements for Environmental Permits
Under French law, an environmental permit may be required, depending on the project. The classified facilities nomenclature and the water activities nomenclature provide categories and thresholds that determine the legal framework applying to the project (declaration, registration and authorisation for classified facilities; declaration and authorisation for water activities). Facilities with the highest environmental risks fall under a special category, determined by the Seveso Directive (high or low rank) and require specific controls and prescriptions.

An environmental authorisation (ie, a permit) is required for activities that materially affect protected interests listed in the French Environmen-
tal Code (nature and the environment, water, health, safety, agriculture, historical monuments and archaeological heritage).

Recently, classified facilities and water regulations have been simplified. Since March 2017, all the procedures necessary for projects subject to authorisation under the classified facilities regulation or the water regulation have been merged into a single environmental authorisation.

This environmental authorisation thus covers other specific authorisations when they are required for the project, subject to classified facilities or water activities regulations (eg, land-clearing activities, derogation for destruction of protected species, greenhouse gas emissions allowances). However, the building permits are not included in this broad authorisation and instead are issued separately.

In order to improve the efficiency and speed of the process, the procedure has been standardised in 2019 for every project application. From now on, prospective operators must fill in an appropriate form called CERFA. This new system is part of an overall tendency supported by public authorities to dematerialise administrative procedures (ie, to aim at a paperless, computerised system).

For each level of environmental permit, the French Environmental Code provides the criteria and procedures to obtain the permit.

Firstly, the declaration regime only requires to report the facility to the regulatory authorities before the implementation of the activity. The procedure must be completed entirely online since 1 January 2021.

Secondly, above the declaration threshold, some facilities must submit an application in order to be registered by the regulatory authorities. From 1 May 2022, the registration can be submitted online. This is an alternative to paper, and not an obligation. Under those two regimes, the administrative authority can order additional prescriptions on the projects if deemed necessary.

Thirdly, some facilities are required to file an authorisation application, which will be reviewed by the regulatory authorities. The French Environmental Code states that construction projects or any intervention in the natural environment that are likely to have significant effects on the environment or human health must undergo an environmental impact assessment.

The Environmental Impact Assessment Directive sets criteria and thresholds integrated in French law and determines whether the projects are likely to have notable consequences. Depending on their expected impact, not all projects have to fulfil the same assessment obligations. The environmental assessment mechanism was modified in both 2016 and 2018. With the new procedure, projects with a potential impact on the environment must undergo either a systematic environmental assessment or an assessment after a case-by-case review depending on certain thresholds.

After a public enquiry, regulatory authorities issue the authorisation with prescriptions or refuse it with justifications.

In order to appeal permitting decisions, it is mandatory to lodge a claim before the administrative court within two months after the permitting decision for the operator, and four months for interested third parties.

Finally, a law of 2019 has introduced the concept of “industrial platform” (Plateforme industrielle) in the Environmental Code. This legal innovation does not create a new category of permits, but rather provides a new legal framework for
a concentration of facilities within the same restricted geographical area, which exercise similar activities and thus can pool the administration of some goods and services required for their activity. This concept aims at simplifying the day-to-day operations of those sites. From an environmental point of view, the pooling of their devices enables the facilities to reduce their waste production and their energy consumption, and to optimise their safety checks.

Transferring Environmental Permits
Under French law, an environmental permit can generally be transferred. The change in the permittee is contingent upon the declaration by the new permittee to the regulatory authority within three months after the transfer.

While most permits can be transferred through a simple declaration, the transfer of the environmental authorisation for facilities requiring financial guarantees (landfilling, quarries or some other polluting activities) must be authorised by the relevant prefect. The new operator must file an application for the transfer in order for the regulatory authorities to review the financial guarantees. If the authority authorises the transfer, it may impose additional prescriptions or requirements.

Penalties/Sanctions for Breach
The French Environmental Code includes both criminal and administrative sanctions to punish the breach of permitting requirements.

Firstly, if one runs a facility without an environmental authorisation, the criminal sanctions include a one-year prison sentence and a maximum fine of EUR75,000, which is multiplied by five when the offender is a corporate entity.

Secondly, independently and cumulatively, the regulatory authority may (i) require, by issuing a formal notice, compliance with the regulation within a time limit, and then (ii) impose administrative sanctions on the offender. In addition to the suspension of the facility’s activity, the regulatory authority may hold a deposit until the required work is completed. The authority can also have the prescribed measures carried out automatically, in place of the person summoned, and at his or her own expense. In order to ensure that the measures will be fully implemented, the regulatory authority can impose a maximum fine of up to EUR15,000, or a daily penalty payment of up to EUR1,500 until compliance is achieved.

According to the new Climate and Resilience Law of August 2021, the sanction can be more severe when a risk of harmful and lasting harm to the environment results from this offence.

The fines and penalty payments shall take into account, in particular, the importance of the harm caused to the environment.

4. ENVIRONMENTAL LIABILITY

4.1 Key Types of Liability
In French law, three types of liability can be imposed on operators and polluters.

Environmental Liability
There is an environmental liability attached to administrative obligations to protect the environment. Such liability is imposed by regulatory authorities on operators of facilities or activities subject to environmental laws and regulations. The regulatory authorities evaluate the damage and the measures taken to prevent or mitigate it to determine liability.

Civil Liability
Civil liability in environmental matters occurs for torts or negligence resulting in pollution. The causal link between the harmful event and the
damage has to be proven and may result in the award of compensatory damages (dommages et intérêts). Besides, the French Civil Code embodies the ecological prejudice reparation concept, codifying the Erika case resolution (see 9. Civil Liability). Additionally, it is possible to be held liable for environmental damage under contractual liability. Such liability would likely arise in lands purchases, when a seller retains important information regarding the facility and the industrial history of the land (see 16. Transactions).

Criminal Liability
Criminal liability applies to both individuals and corporate entities. The head of a company may be criminally liable for the actions of the company. Sanctions can include imprisonment, a criminal fine, etc. The Climate and Resilience Law of August 2021 introduced new environmental offences, notably:

- a general offence of environmental damage sanctioned by a five-year prison sentence and a EUR1 million fine;
- an uncontrolled waste-dumping offence sanctioned by a three-year prison sentence and a EUR150,000 fine; and
- an “ecocide” offence have been introduced in the case of a voluntary environmental endangerment sanctioned by a ten-year prison sentence and a EUR4.5 million fine.

In addition, two more offences now sanction the endangerment of the environment when caused by the breach of a formal notice. The sanction is a three-year prison sentence and a EUR250,000 fine.

5. ENVIRONMENTAL INCIDENTS AND DAMAGE

5.1 Liability for Historical Environmental Incidents or Damage
Administrative obligations and liability for historic incidents or damage may be transferred from one operator to another if the new operator is conducting the same activities. Therefore, the new operator will be liable for the pollution relating to the continued activity even if he or she was not the operator at the time the pollution originated (for instance, the transfer of a gas station to one operator from another). In other words, the new operator is responsible for damage caused after it purchases the assets but it is also liable for the activities of the prior operator, as long as the damage relates to the same types of operations.

Liability for the pollution from the former operator that is unrelated to the continued activity is not transferred. The landowner cannot be liable for historic environmental incidents or damage, except under specific situations. In that regard, if none of the above-mentioned former stakeholders can be identified, the owner of the contaminated land may be liable if his or her negligence or participation in the pollution can be proven. It means that the Code does not impose strict liability on an owner of land if he or she did not cause the pollution and was not negligent.

5.2 Types of Liability and Key Defences
Administrative Liabilities
Operator’s liability
In relation with the administrative obligations, the French Environmental Code provides that, when the classified facilities regulation applies, the prefect may order any measure necessary to address a threat to the environment. Similar provisions are applicable under the water regulation or to any type of environmental damage supervised by a regulatory authority.
State’s liability
Besides, interested third parties (eg, neighbours of a classified facility) may seek the state’s legal responsibility for the lack of action taken to protect the environment. Such a situation arises, for instance, when the prefect does not exercise sufficient control over a classified facility’s activity, which consequently generates pollution. Public authorities can elude liability if they demonstrate that they have conducted the necessary checks to ensure the given facility’s safety.

On a more general note, one shall take into account the overall tendency to seek state liability for its inaction or the insufficiency of the latter regarding environmental protection. For instance, state liability has recently been recognised in several landmark cases. The Administrative Supreme Court found the state liable in several cases regarding the insufficiency of the measures enshrined in the Protective Atmospheric Plan, and the state was ordered to pay a penalty of EUR10 million for every six months of inaction. In another case, the same Court found the state liable for the insufficiency of implemented measures regarding the reduction of greenhouse gases. As a remedy, the Court found that the state ought to act appropriately.

Civil liability
The key concepts of civil liability include “disturbances of the neighbourhood” and “control over the things under one’s guard” (see 9.1 Civil Claims).

Under these concepts, which are similar to the concepts of nuisance and strict liability under most US laws, an operator can be held liable in civil terms for harms caused to another in the context of an environmental incident or damage even if he or she has complied with all the requirements provided in its environmental permit. The plaintiff must demonstrate that one of his or her interests was affected by the operator’s actions.

What is more, the French Civil Code sets out the ecological prejudice reparation concept (see Section 9. Civil Liability) and provides that any person who causes an ecological prejudice must repair it in kind.

6. CORPORATE LIABILITY

6.1 Liability for Environmental Damage or Breaches of Environmental Law
A corporate entity may be liable for environmental damage or breaches of environmental law when acts of negligence or faults are demonstrated. Under French criminal law, the liability of the individual does not exclude the liability of the corporate entity. The main difference is in relation to the potential penalties. The French Environmental Code provides that the maximum fine for a corporate entity is five times the sanction for an individual.

In addition, the French Environmental Code refers to the French Penal Code for the sentencing of corporate entities. A new European Public Prosecutor, Environmental Justice and Specialised Criminal Justice Law of December 2020 provides the possibility for corporate entities whose actions have harmed the environment to pay a public fine, in the framework of an environmental judicial agreement. In other words, this law establishes a transactional protocol allowing for the payment of a fine, in the event of an environmental offence. Moreover, the same law has created a specialised court (juridiction spécialisée) in charge of environmental disputes.

Concerning the interaction between corporate law and environmental law, a 2019 law called the Plan d’Action pour la Croissance et la Transformation des Entreprises (“Loi PACTE”) has
created obligations for companies. It imposes that any decision related to the company management shall take into account corporate social responsibility (CSR) and environmental considerations (which were not a compulsory obligation before). Voluntary firms also have to explain their raison d’être to justify what they can bring to customers on a competitive market. Additionally, a company’s board of directors, when setting the annual guidelines, shall take into account all the environmental and social stakes.

6.2 Shareholder or Parent Company Liability
Since 2010, the French Environmental Code provides that a parent company may be held financially liable for the remediation measures when it wrongfully contributes to its subsidiary’s bankruptcy.

7. PERSONAL LIABILITY

7.1 Directors and Other Officers
Directors and other officers can be held personally liable for environmental damage or breaches of environmental law committed by the company if the offence was the result of their personal conduct (neglect or fault in causing the offence) or if it can be shown that they had personal knowledge of the offence and did not act accordingly. This standard is not specific to the environmental area.

The level of authority of a director, officer or executive is not taken into account when finding an individual liable, but rather the fact that they were acting in the capacity of a company’s representative or acting on the company representative’s instruction or delegation. In the latter situation, the judge will carefully examine the scope and regularity of the delegation or representative’s instruction.

The penalties for environmental offences range from a fine of up to EUR100,000 to a prison sentence of up to two years. Additional penalties, such as prohibition to do business in a similar area for a time period of up to five years, may also be imposed.

7.2 Insuring against Liability
Global liability insurances for company directors can cover defence expenses and damages arising from civil procedures, thus including environmental matters, and can sometimes benefit the spouse and/or inheritors or legal representatives. Criminal fines are not covered by liability insurances. The company will be the signatory of the insurance contract for the benefit of all natural persons likely to be held personally responsible and therefore who had, have or will have an executive or representative position in the company or in its subsidiaries.

8. LENDER LIABILITY

8.1 Financial Institutions/Lender Liability
Financial institutions and/or lenders can be held liable for damages arising from projects they fund, depending on their level of involvement and their awareness of the risks. The same liability regime applies to financial institutions as to any corporate entity.

Furthermore, investing in environmental protection is a tremendous opportunity for banks and private investors to improve their reputation. The French government has demonstrated its will to promote green finance by launching Greenfin, a label that aspires to be the first state certification for green finance. This certification aims at ensuring transparency and the environmental involvement of financial products. Recently, a European regulation has established a framework to encourage sustainable investment, by
setting series of environmental objectives that allow an economic activity to be labelled “environmentally sustainable”.

8.2 Lender Protection
Since financial institutions and/or lenders’ liability is not specific to environmental project funding, these entities should be aware, just like any other corporate entity, of the risks taken in becoming involved in their borrower’s projects and of the level of involvement. The more involved a lender or financial institution is, the more likely it could be held liable for a damage or breach, including environmental damage or breach. This is why thorough due diligence is necessary (see 16.1 Environmental Due Diligence). In this regard, the Energy Climate Law of 2019 requires investment companies to include in their policies information about the risks associated with climate change and biodiversity.

9. CIVIL LIABILITY

9.1 Civil Claims
Some of the key concepts of civil liability applied to the environment are “disturbances of the neighbourhood” and the “control over the things under one’s guard”. The former provides that no one should cause excessive damage to his or her neighbour, even if an environmental permit authorises the industrial activity. However, in the context of environmental harm, the theory of “prior occupation” applies under certain conditions: one could not bring claims over a nuisance that already existed prior to his or her occupation of the neighbouring site. The second concept provides that a person may be held liable for the harms caused by the things under his or her effective control. Moreover, the French Civil Code provides for the tortious liability, which may impose an obligation to repair the damage resulting from wrongful acts or negligence.

Finally, since 2016 the French Civil Code states that anyone who causes environmental damage can be held liable and be obliged to repair it in kind. If impossible, the reparation ought to be pecuniary. This provision incorporates what is referred to as a “pure” environmental damage, meaning that it is no longer necessary to prove the violation of a “human interest” (for instance, financial loss, physical injury, property damage).

9.2 Exemplary or Punitive Damages
Under French law, exemplary or punitive damages cannot be awarded. This category of damages would be a violation of the principle of full compensation of prejudices. Indeed, under French law, the French judge must contribute to the repair of the full extent of prejudice caused, nothing more.

9.3 Class or Group Actions
A 2016 law created the possibility for groups protecting collective interests to go to court in the event they have suffered the same damage. Indeed, the French Environmental Code states that a group action is possible when several people in a similar situation suffer from an environmental damage, caused by the same person and having for common origin a breach in legal or contract-based duties. Such legal action may seek the cessation of the violation and/or the reparation of the damage.

Regarding environmental class actions, environmental groups that are “approved associations” (which is a specific status) can lead a group action. Approved associations working for the defence of those who suffered physical injury damage or defending an economic interest may also do so.

9.4 Landmark Cases
The landmark case establishing the civil liability for environmental damage was the Erika case of 2012 regarding the oil spill caused by Total’s
tanker, Erika. In this case, in addition to criminal liability, civil liability has been recognised. In its ruling, the court recognised for the first time the legal concept of an ecological prejudice. Since then, the Paris administrative court found the French state liable for the ecological prejudice related to climate change endured by several NGOs.

Climate litigation is currently considerably increasing and this trend is certainly going to take on a greater importance in years to come. Liability regarding climate change and global warming are gradually becoming more sought; for example, the French state has been found liable for its lack of climate action, as mentioned in 5.2 Types of Liability and Key Defences.

In addition, the fire at the Lubrizol chemical products plant and warehouse in September 2019 will surely become a major civil and criminal case and is giving rise to a governmental action plan for the prevention and the management of industrial risks.

10. CONTRACTUAL AGREEMENTS

10.1 Transferring or Apportioning Liability

It is possible to transfer or apportion liability for incidental damage or breaches of law through a contract between two private parties. This type of private contract does not affect private parties’ potential liability to regulatory authorities.

There is also one possibility allowing the last operator to transfer its administrative liability. Indeed, regarding liability for pollution caused by a classified facility, the French Environmental Code has provided since 2014 a mechanism that allows an “interested third party” (tiers demandeur) to conduct remediation under the provisions issued by the regulatory authority. This results in the transfer of the last operator’s liability to the purchaser. The operator has a residual liability if the third party cannot fulfil its new obligations.

10.2 Environmental Insurance

Environmental insurance contracts are available for events that can occur in the course of the operation of an activity, including events causing ecological prejudice. There is also a special insurance for historic pollution, but it only covers currently unidentified pollution and is yet to be further developed in France. Depending on the contract, the insurance may cover, for example, clean-up costs, operating losses and legal costs.

11. CONTAMINATED LAND

11.1 Key Laws Governing Contaminated Land

First, one of the key laws governing contaminated land in France is the classified facilities regulation. This regulation addresses the contaminated land obligations in the context of the cessation of activity.

There is no definition of contaminated land under French law. However, a 2017 French methodology, partly introduced in the French regulation by an August 2021 Ministerial Decree on the end of operations regarding classified facilities, provides criteria in order to determine the environmental condition according to which a site must be managed, if need be.

The general approach taken by regulatory authorities is a risk versus use approach (approche risque par rapport à l’usage – the sanitary conditions of the site must be compatible with the use of the site through a Human Health Risk Assessment) and in respect of the protected interests under the French Environmental Code.
The remediation is mandatory at the end of the facility operations. Remediation goals are made in a manner consistent with the expected future use of the site, which is determined in accordance with the French Environmental Code. If the future use is most frequently an industrial use, a different use can be suggested by the operator, regarding the planning regulation. Usually, the mayor (le maire) and the landowner, when different from the operator, are consulted on the use suggested by the operator to the prefect within the determination of the future use of the site.

Under the classified facilities regulation, every operator is responsible for its own activities. Therefore, several operators can be held responsible by the regulatory authority for parts of the remediation when several activities have generated pollution on the same site – for example, the gas station will be responsible for the fuel pollution and the industrial laundry will be responsible for the chemical pollution.

Secondly, the French Environmental Code provides a “contaminated land” section that describes the specificities of the remediation mechanism and the obligations of each stakeholder. On sites where pollution occurs or might occur as a threat to the public health or safety, the regulatory authority may implement the necessary remediation works at the expense of the person responsible for the remediation. The regulatory authority may also charge a deposit until the remediation works are finalised.

Traditionally, the last operator of an industrial site would only be responsible for remediation necessary to allow safe operation of continued industrial uses, while a person seeking to change the use of the site would be responsible for the additional remediation necessary to permit the change of use. Therefore, when remediation has properly been carried out, the person who changes the use must provide measures to manage the pollution in order to ensure that the land is compatible with public safety or health. Additionally, consultancy firms (bureaux d’étude) are increasingly involved in cessation of activities procedures, as shown by a December 2020 law on the simplification of public action. An August 2021 Decree further developed these consultancy firms’ involvement as they now have to deliver several certifications for the operator of an industrial site to prove to the regularity authorities that he or she complied with their requirements.

Finally, it is also notable that the waste regulation does not apply to contaminated land anymore, except for the provisions addressing the waste present on the site or the excavated soils.

12. CLIMATE CHANGE AND EMISSIONS TRADING

12.1 Key Policies, Principles and Laws
France is involved in international climate negotiations in the framework of the United Nations Framework Convention on Climate Change (UNFCCC). In 2015, France hosted the 21st Conference of the Parties (COP21), which resulted in the adoption of the Paris Agreement. Key policies, principles, laws and case law relating to climate change in France largely derive from this legal framework. At the national level, the Citizen’s Climate Convention, whose proposals were released in June 2020, aimed at reducing carbon emissions in keeping with social justice. The Climate and Resilience Law of August 2021 provides that France aims at respecting the reduction goals set in the Paris Agreement, thus enacting the Citizen’s Climate Convention proposal.

Key Policies
Reduction of atmospheric concentrations of greenhouse gases in order to prevent danger-
ous anthropogenic interference with Earth’s climate system is considered as a national priority. This goal is implemented through global targets of reduction of greenhouse gas emissions and sectoral policies.

Key Principles
To meet the objectives of the Paris Agreement and the commitments of greenhouse gas reductions made by France through its Intended Nationally Determined Contribution (INDC), the French Climate Plan unveiled in 2018 sets the goal of carbon neutrality by 2050 in order to contain global warming below 2°C.

The Climate Plan is divided into several focus areas: thermal renovation, clean mobility development, encouragement and promotion of a circular economy. It also aims at achieving carbon neutrality by 2050 through banning new hydrocarbon exploration projects and reinforcing ecological taxation (increase in the price per ton of carbon dioxide – CO₂ – used as a basis for the calculation of internal consumption taxes).

Some other objectives include the transformation of agricultural systems to adapt to climate change, the strengthening of international mobilisation, and in respect of the financial commitments of the Paris Agreement, notably towards the least developed countries.

Key Laws
Key laws relating to climate change are increasing. Law No 2009-967, dated 3 August 2009 (Grenelle II), and Law No 2015-992 of 17 August 2015 on the Energy Transition for Green Growth are both codified in the French Environmental Code and the French Energy Code and set the guiding principles. In 2019, the law “Energie Climat” (discussed in 2.1 Key Regulatory Authorities) has introduced in the French Energy Code the concept of “ecological and climate emergency” so that every climate policies must be conducted with high environmental standards accordingly to this objective.

More recently, the August 2021 Climate and Resilience Law has introduced new sets of climate policies on food, work and production, transports, housing and criminal law matters. It is meant to provide updated regulation to tackle the climate crisis.

12.2 Targets to Reduce Greenhouse Gas Emissions
Currently, legal goals are determined by the French Environmental Code, which contains a legal target for greenhouse gas emissions reduction of 40% between 1990 and 2030. The proposals of the Citizen’s Climate Convention that have partly been enacted in the August 2021 Climate and Resilience Law aim at achieving this goal. For 2021–30, the Ministry for the Ecological and Solidary Transition has issued a series of objectives aiming at reducing greenhouse gas emissions by 43% (by comparison to 2005 levels), with a particular focus on aviation and industry.

The Environment Code provides for a series of reduction objectives contributing to the overall objective of reducing greenhouse gas emissions (especially regarding energy consumption). In respect of the ambition to emancipate the country from fossil energy, the Energie-Climat law of 2019 sets a reduction by 40% of the consumption of fossil energy by 2030, and has anticipated the shutdown of the four remaining coal-fired power plants.

13. Asbestos
13.1 Key Policies, Principles and Laws Relating to Asbestos
Historically, asbestos was a frequently used substance in construction in France. Therefore,
exposure to asbestos is widespread and is the most common cause of workplace death.

Use of asbestos and all products containing asbestos is strictly forbidden in France subsequent to a decree issued in 1996 based on reports from the Labour and Social Affairs Department, the Housing Department and the Health Department, among others.

Protection measures for the general public against asbestos are provided in the Public Health Code and the Construction Code. They range from organising research and monitoring of the state of conservation of buildings containing asbestos, to setting out the rules in connection with responsibility of building/apartment owners, and organising the communication of technical documentation between participants (landlords, construction companies, lessors, etc).

The Labour Code also provides a set of rules to protect workers from inhaling asbestos in the course of their normal work activities in direct connection with asbestos products (dismantling or handling).

Physical harm or injury does not have to be established for a claim in damages. Since 2010, French courts recognise the existence of a specific anxiety prejudice for workers who have been exposed to asbestos during the time of their past work activities and who are expecting a possible diagnosis of an asbestos-related illness.

The main principles and objectives of those regulations are to limit the production and the toxicity of future waste at their source, to organise waste management so as to be respectful of the self-sufficiency and proximity principles, to add value to waste through recycling and to proceed to the disposal of waste as a last recourse solution. Therefore, there is a hierarchy in waste management.

Traditionally, the person responsible for waste management is either the waste producer or the waste-holder.

In regard to the regulatory inspections, the mayor is the regulatory authority for the application of the waste regulation, except if the waste is subject to the classified facilities regulation. In that case, the prefect will be the competent authority to take action.

Circular economy became a priority in 2020, particularly with a law of February 2020, which aims at reducing waste by improving their recovery and recycling, and undermining planned obsolescence. This law also provides further duties for producers: under this new legislation, there will be a global prohibition of the destruction of unsold products in order to preserve resources. This law also introduces a deposit return scheme in order to increase recycling and drop significantly the amount of waste. A recent ordinance of July 2020 (transposing EU directives) complements this law aiming at broadening the exit from waste status and to strengthen the management of biowaste.

14. WASTE

14.1 Key Laws and Regulatory Controls

The key laws governing waste come from an EU Directive on waste management, which was incorporated in the French Environmental Code.
the final disposal or recovery and treatment of the waste.

Indeed, the person responsible for the waste has a legal obligation to ensure that the person to whom he or she delivers it is authorised to take charge of it and will comply with the applicable regulations.

The waste producer or waste holder may not contractually exhaust his or her regulatory liability, but he or she can obtain an indemnity from the waste hauler or treatment facility.

A 2019 decision from the European Union Court of Justice ruled that in accordance with the precaution principle, when the hazardousness of waste cannot be determined, it must be classified and disposed as a dangerous waste.

14.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

The French Environmental Code has provided for the principle of extended producer responsibility (responsabilité élargie du producteur, REP) since 1975. The responsibility reverts to the producer of the product, the manufacture of which ultimately results in the creation of the waste. In some sectors, producers, importers and distributors of the products, or of the materials used in their production, may be required to contribute or to provide for their disposal or recycling.

Now about 30 sectors are regulated. For all these sectors, producers usually have to pay an eco-contribution in order to fulfil their REP obligation. The economic circular law of 2020 has created nine new REP sectors such as building materials, cigarettes, toys, sport and handiwork equipment. In addition, a penalty is established for producers that do not meet the prevention and management objectives.

The 2020 legislation has also launched a system of economic bonuses and maluses to encourage more environmentally friendly methods of production (the use of recycled materials, of renewable resources, the durability, reparability and reuse of products, as well as the reduction of hazardous substances in the process). This system will have an impact, either positive or negative, on the final price of products, and will apply to every product that belongs to an REP sector.

The law also extends the existing obligation of the manufacturer to take back an old device, free of charge, when the consumer buys a new one. This obligation also applies to online commerce.

15. ENVIRONMENTAL DISCLOSURE AND INFORMATION

15.1 Self-Reporting Requirements

The operator of a classified facility must report to the regulatory authorities incidents or accidents that were caused by the facility’s operation and that may harm the protected interests listed in the French Environmental Code. The report must address the circumstances and causes of the incident or accident, its consequences on people and the measures taken to avoid a similar incident or accident and to neutralise its long and medium-term effects.

Since the Lubrizol incident (see 9.4 Landmark Cases), a great deal of work has been carried out to improve crisis management and information, such as a September 2020 decree aiming at improving the prevention and the management of industrial risks, within the facilities in which dangerous substances can be the cause of major accidents. The decree introduced new notions relating to hazardous authorised facili-
ties, especially when they go through substantial modifications.

For activities which affect water, the mayor and the prefect must be informed as soon as possible by any person aware of any incident or accident that endangers the public safety or the quality, the circulation or the conservation of water. The person who caused the incident must, as soon as he or she is aware of it, take or have measures taken to stop the cause of the danger or the harm affecting water, evaluate the consequences of the accident/incident and solve it.

15.2 Public Environmental Information
Under French law, the public has the right to obtain environmental information from public authorities and bodies. The French Environmental Code enshrines this principle, which applies to every interested person and to all public and private bodies with an endeavour of environmental public service, to the extent that it is not sensitive information (classified, public security, etc) and that it is related to environmental matters.

The public authorities affected by such provision are the state, regional and other local authorities, the public bodies and the person in charge of a public service that relates to the environment, under the condition that the information requested falls under their jurisdiction. The French Environmental Code provides the procedure and the conditions to obtain environmental information. It is to be noted that specific activities (waste, high industrial risks, contaminated lands, etc) are regulated by particular provisions.

The website Géorisques enables public to be informed about both natural and technological risks. Indeed, the site gathers several databases such as the Informative Zones on Soils (Secteurs d’Information sur les Sols) or BASOL for the classified facilities. Thus, this website aims at providing the general public with knowledge on the historic pollution of a given land, and at guaranteeing the absence of sanitary and environmental risks for future land uses.

15.3 Corporate Disclosure Requirement
Under the French Commercial Code, some corporate entities have the obligation to annually disclose to their shareholders information relating to the entity’s corporate and social responsibility (CSR) engagements, which include management of the social and environmental consequences of its activity.

Furthermore, the Duty of Vigilance Law of 2017 creates for the parent company an obligation to implement a “vigilance plan”. It applies to two kinds of companies:

- companies headquartered in France which employ, for two consecutive years, at least 5,000 employees in the parent company and in its direct and indirect subsidiaries headquartered in France; and
- companies headquartered in France which employ, for two consecutive years, at least 10,000 employees in the parent company and in its direct and indirect subsidiaries headquartered in France and abroad.

The plan aims at controlling the corporate entity’s activities and preventing significant breaches in environmental or human rights regulations. In 2020, the first claims have been lodged for failure to comply with the duty of vigilance. Moreover, in March 2020, the association Notre Affaire à Tous published a comparative legal study of the plans of 25 multinationals. This report has an informative aim and it also allows a better interpretation of the Duty of Vigilance Law of 2017. In January 2020, Notre Affaire à Tous sued Total for the breach of its duty of vigilance. The procedure is still ongoing. In March 2021,
the French supermarket brand Casino was also sued by Notre Affaire à Tous for the insufficiency of its vigilance plan on deforestation issues in the Amazon rainforest.

16. TRANSACTIONS

16.1 Environmental Due Diligence
Environmental due diligence is typically conducted on M&A, but is less frequent for financial and real estate transactions.

In general, environmental due diligence is highly recommended. It is particularly important when a classified facility is included in the deal as the environmental due diligence is the only way to identify the compliance issues regarding every environmental regulation and the liabilities issues in connection with contaminated lands.

An environmental due diligence performed by a purchaser typically ensures that the seller complies with applicable environmental regulations. In the case of a classified facility, the environmental due diligence will also check the possession and validity of the permits and licences required for the activity, as well as the fulfilment of the prescribed conditions. The buyer will also check the legal implications of the different identified risks and contingencies.

Environmental due diligence would typically include at least a Phase 1 report that relates to compliance and historical activities on the facility. The Phase 2 report (site investigations) is generally recommended. It would attempt to verify the environmental condition of the site based on actual testing of soil and/or groundwater.

16.2 Disclosure of Environmental Information
When it comes to land acquisition, the French Environmental Code provides that the seller must inform the purchaser by a written statement that a classified activity used to operate on the site. The landowner must also inform the potential buyer of any danger or harm resulting from the previous facility operation. When the seller is also the facility’s operator, the contract must demonstrate that the seller provided information regarding whether or not the facility’s operation led to the use or storage of hazardous substances.

Regarding M&A transactions, there is a general duty to provide information.

A seller who fails to provide the appropriate information by voluntary omission or negligence might retain environmental liability for historic environmental damage or breaches of environmental law in the following situations.

Hidden Defects Warranty (Garantie des Vices Cachés)
In principle, the law provides for the responsibility of the seller in case of hidden defects. A hidden defect reduces or renders impossible the use of the property to the extent that the buyer would not have acquired it, or only at a lower price, had he or she known it.

The buyer may then cancel the sale partially or totally. However, many contracts contain a provision excluding the seller’s responsibility for hidden defects. Such clauses are not applicable if it is proven that the seller had the knowledge of the defect at the time of the sale.

For the sale of shares, only defects affecting the use of the share would be affected by the warranty and not the ones affecting the value of the share.

Fraud (Dol)
When the seller intentionally retains information in order to mislead the buyer, the buyer may then
cancel the contract. A fraud can be applied to share or asset deals.

17. T A X E S

17.1 Green Taxes
Environmental taxation, based on the “polluter pays” principle, aims at forcing a business whose operations have adverse environmental consequences to integrate the costs of those environmental harms into their business planning.

Taxes on Energy
In 2014, the government introduced a carbon tax. The price of final products increases in proportion to the carbon dioxide emissions generated by the production, thus favouring products with the lowest emissions. Initially the tax amounted to EUR7 per ton of CO₂. It has been reassessed each year, and in 2020 totalled EUR44.60. The government decided not to increase the tax in 2020 after a year of social protests throughout the country, arguing for a fairer system geared towards climate justice. The tax rate remains unchanged to this day.

Regarding the use of electricity, any electricity consumer (regardless whether the electricity was generated by clean energy or not) must pay a tax. This tax is called a “contribution to the electricity utility” (Contribution au Service Public de l’Electricité, CSPE). It contributes to subsidising renewable energies.

On the flip side, there are also tax credits available to certain activities that reduce energy consumption. The finance law for 2021 implemented tax credit for small and medium-sized business helping them to finance buildings in the service sector that they use for their activities.

Taxes on Air Pollution
The bonus-malus on automobiles aims at changing the fleet to the lowest emitters of CO₂ vehicles by increasing the price of diesels and to a certain extent of oil motors, to encourage the production and number of electric cars. In addition, certain emissions of industrial origin (eg, polluting air emissions of classified facilities that exceed certain thresholds) are subject to the general tax on polluting activities (Taxe sur les activités polluantes, TGAP).

Taxes on Water Pollution
The tax policy on water pollution is implemented through the taxes of water agencies. It aims at limiting water pollution, covering, for example, the emission of pesticides by taxing companies discharging polluting products in a watercourse (categories and thresholds listed in the French Environmental Code).

Taxes on Waste
Finally, the “incentive pricing” of household waste was developed to reduce its quantity and to promote recycling. It is based on the “waste TGAP”, which taxes all waste stored or incinerated, by penalising the least effective methods of treatment in terms of pollution or recovery.
Foley Hoag LLP has offices in Boston, New York, Washington, DC, and Paris, and 300 lawyers worldwide, including 20 who specialise in environmental law. In Paris, the environment team’s expertise mainly focuses on four areas: (i) the management of facilities, risks and pollution, which encompasses support and assistance in industrial projects, including securing administrative proceedings, compliance issues, environmental and health issues, and technological risk management; (ii) site redevelopment, including the development of strategies for the reconversion of industrial sites and the environmental aspects of corporate or real estate transactions; (iii) waste management, including waste recycling, waste-to-energy conversion and the restructuring of extended producer responsibility programmes; and (iv) the sustainable management of companies and their products, including environmental reporting, hazardous product management and the regulation of substances such as biocide and nanomaterial.

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1. REGULATORY FRAMEWORK

1.1 Key Environmental Protection Policies, Principles and Laws

The Italian Constitution does not contain any express provisions relating to environmental protection.

However, the Constitutional Court – the highest court in the Italian legal system – has consistently held that a general principle of environmental protection can be acknowledged by means of interpretation of the constitutional principles on the protection of landscape (Article 9.2) and human health (Article 32.1).

As a member of the European Union, Italy has implemented many principles from the European Regulatory Framework. According to Article 4 of the Treaty on the Functioning of the European Union, environmental law is indeed a shared competence between the member states and the European Union. Legislative Decree No 152 of 3 April 2006 (the Environmental Code) is the main Italian legislation on the matter, setting out the legislative framework applicable to several matters concerning environmental protection, such as air emissions, waste water discharge, waste disposal, hazardous substances and soil contamination.

More specifically, Article 3 ter of the Environmental Code establishes the most relevant principles governing environmental protection, as follows.

- The polluter-pays principle, according to which the polluter should bear the cost of measures needed to reduce pollution, based either on the extent of the damage caused to society or on exceeding an acceptable level (standard) of pollution.
- The precautionary principle, which may be invoked when there is the possibility that a phenomenon, product or process may have harmful effects that have been identified by scientific and objective evaluation, provided that such evaluation does not allow the risk to be determined with certainty.
- The prevention principle, which allows action to be taken to protect the environment at an early stage. It is now a question of not only repairing damages after they have occurred, but also preventing those damages from occurring altogether. This principle is not as far-reaching as the precautionary principle.
- The sustainable development principle – ie, development that meets the needs of present generations without compromising the possibility for future generations to meet their own needs.

2. ENFORCEMENT

2.1 Key Regulatory Authorities

In Italy, the environmental policy, its implementation and the related control activities are assigned to a plurality of central and local bodies.

More specifically, the key regulatory authorities and bodies in environmental matters are as follows.

Ministry of Ecological Transition

The Ministry of Ecological Transition (MiTE) is the central body responsible for implementing environmental policy. It was established by Law Decree No 22 of 1 March 2021, replacing the former Ministry of the Environment and taking up some functions of the Ministry of Economic Development (ie, those relating to energy policy). It performs functions in a number of areas, such as biodiversity conservation, land and water protection, climate change and global warming, promotion of renewable energies and energy efficiency, reduction of greenhouse gas emis-
sions, sustainable development, circular economy and remediation of “sites of national interest” (SIN), energy infrastructure, transportation networks, single electricity market, national gas and hydrocarbon market and policy. MiTE oversees the activities of the Institute for Environmental Protection and Research (ISPRA – see below) and is also responsible for issuing environmental permits for plants under Italian jurisdiction.

Provinces/Metropolitan Cities
Provinces/metropolitan cities are large-area territorial entities with environmental responsibilities mainly in relation to contaminated sites and the issue/renewal of Integrated Pollution Prevention and Control permits (IPPC – see 3.2 Environmental Permits).

ISPRA is the public research and technical institute supporting the MiTE. Its tasks include issuing and updating guidelines for the remediation of contaminated sites, and co-ordinating the Regional Agencies for Environmental Protection (ARPA – see below).

The ARPA
The ARPA is a public body established in each Italian region and in the autonomous provinces of Trento and Bolzano in accordance with Law No 61 of 21 January 1994. The ARPA is responsible for:

- monitoring air, water, soil, noise and electromagnetic pollution;
- monitoring compliance with current legislation and provisions issued by the competent authorities in environmental matters; and
- giving technical-scientific support to bodies with planning functions in environmental matters, such as ISPRA or MiTE.

Regulatory Authority for Energy, Networks and Environment
The Italian Regulatory Authority for Energy, Networks and Environment (ARERA) is the independent regulatory body for energy markets, integrated water services and the waste sector. It was established by Law No 481 of 14 November 1995, as the AEEG (Authority for Electricity and Gas), with the purpose of safeguarding the interests of users and consumers, promoting competition and ensuring efficient, cost-effective and profitable nationwide services with satisfactory quality levels in the electricity and gas sectors.

3. ENVIRONMENTAL INCIDENTS AND PERMITS

3.1 Investigative and Access Points
The regulatory authorities and bodies responsible for environmental policy (see 2.1 Key Regulatory Authorities) frequently use the ARPA’s technical support to carry out inspections at plants and verify any breaches of law and permits.

More specifically, Article 14.7 of Law No 132 of 28 June 2016 states that the ARPA shall identify among its staff the officers in charge of inspections and periodic audits. These officers may access the facilities and plants subject to inspection and obtain all the data, information and documents necessary to carry out their activities. Such data and documents cannot be covered by industrial secrecy.

In any case, inspection activities on companies are subject to the following principles:

- proportionality of the inspections relative to the risk of the activity under inspection;
- co-ordination and planning of inspections so as not to interfere with the ordinary exercise of the company’s activities; and
• constant collaboration with private entities.

3.2 Environmental Permits
As a general rule, any undertaking of a new activity or change to an existing activity that has a potential impact on an environmental compartment (soil, air, water) requires a permit.

The main environmental permits in Italy are as follows.

Environmental Impact Assessment
The Environmental Impact Assessment (VIA) could be defined as the preliminary assessment of the potential effects on the environment of a prospective project. This kind of permit replaces all the authorisations, licences and opinions usually required in environmental and cultural heritage matters (Article 5.1 of the Environmental Code). More specifically, such permit is issued by the Ministry of the Ecological Transition for projects falling under state competence, or by regions – or other entities designated by regions – for projects falling under regional competence. Works and projects listed in Part II Annex II of the Environmental Code shall be subject to the VIA under state jurisdiction (for instance, oil refineries, LNG plants, hydroelectric power stations, gas pipelines and motorways).

On the contrary, works and projects listed in Part II Annex III of the Environmental Code shall be subject to the VIA under regional competence (for instance, small waste disposal plants, paper mills and onshore wind parks). The procedure is activated at the request of private citizens with the presentation of a finalised project and of an assessment of its environmental impact. The projects and works listed in Part II Annexes II bis and IV of the Environmental Code are subject to a screening procedure, which aims to assess the necessity of starting the VIA procedure on the basis of the possible effects on the environment of the project/work.

By Law Decree No 76 of 16 July 2020 (also known as the “Simplification Decree”), the Italian Legislator has amended in several parts the VIA regulations provided for in Part Two, Titles I and III, of the Environmental Code, by shortening procedural deadlines and simplifying procedures, with the aim of avoiding any delay or blockage in the issue of such permits. Law Decree No 77 of 31 May 2021 has recently introduced further simplifications to this procedure (and some other related procedures) to streamline the authorisation process for the projects included in two national plans for economic recovery (PNRR) and ecological transition (PNIEC).

Integrated Pollution Prevention and Control Permit
The Integrated Pollution Prevention and Control permit (AIA) is required for any company wishing to carry out activities falling under the scope of AIA regulations (Part II, Annex VIII, of the Environmental Code), such as energy activities, chemical industry and metal processing. The AIA permit adopts an integrated approach, where all environmental aspects are considered simultaneously, together with site-specific issues. The relevant authority must apply emission limit values based on the best available techniques (BAT). This permit replaces all the authorisations listed in Part II, Annex IX of the Environmental Code, such as those permits relating to air emissions, waste water discharges and waste.

AIA permits are issued by the Ministry of Ecological Transition for activities falling under state competence (Part II, Annex XII of the Environmental Code), by regions – or other entities designated by regions, usually provinces/metropolitan cities – for activities falling under regional competence (activities listed in Annex VIII not included in Annex XII). An AIA permit lasts for ten years, unless renewed. The operator shall notify the relevant authority of any change to the plant.
A new AIA proceeding shall be started if there are any significant changes.

**Environmental Single Permit**
The Environmental Single Permit (AUA), established by Presidential Decree No 59 of 13 March 2013, applies to small/medium-sized companies and plants not subject to the IPPC regulations. It replaces the single environmental permits listed in Article 3 of the same Decree – for instance, waste water discharges, air emissions and noise pollution. The Environmental Single Permit is issued by a specific office for production activities (SUAP) in partnership with the relevant province/metropolitan city and lasts for 15 years, unless renewed.

### 4. ENVIRONMENTAL LIABILITY

**4.1 Key Types of Liability**

In Italy, breaches of environmental law are punished with administrative fines or criminal penalties, depending on the importance of the offences, according to a classification established by law. Generally, criminal liability is personal; companies may only be held liable from an administrative point of view.

In the case of environmental damage, the polluter-pays principle states that only the polluter is liable to pay for the environmental remediation of the area. In any case, the polluter must be identified based on an unambiguous direct link. The causal-link criterion aims to establish a clear relationship between the person/company’s behaviour and the environmental damage that has occurred. Environmental damage liability can be excluded if the person/company can prove the lack of such link.

A landowner that is not responsible for the environmental damage is not required to carry out remediation activities. Nonetheless, they are free to decide to take care of the remediation at their own expense and then claim compensation from the polluter – see 11.1 Key Laws Governing Contaminated Land.

With reference to corporate/personal liability, see Sections 6. Corporate Liability and 7. Personal Liability.

### 5. ENVIRONMENTAL INCIDENTS AND DAMAGE

**5.1 Liability for Historical Environmental Incidents or Damage**

As explained in 4.1 Key Types of Liability, the polluter-pays principle states that only the polluter is liable for the costs of the environmental remediation of the area. The duty of environmental remediation also applies to contaminations that took place before the entry into force of the Environmental Code (4 March 2006), but even in this case the polluter must be identified on the basis of a clear factual link. For further information on this matter, see 11.1 Key Laws Governing Contaminated Land.

Furthermore, in the event of historical contamination that may still lead to soil degradation, the landowner – even if not responsible for the contamination – shall send a communication to the relevant local authorities and implement preventative measures (Article 242.1 of the Environmental Code).

**5.2 Types of Liability and Key Defences**

For administrative/regulatory liability, see 4.1 Key Types of Liability.

6. CORPORATE LIABILITY

6.1 Liability for Environmental Damage or Breaches of Environmental Law

Corporate liability that arises from environmental damage or breaches of environmental law may be of a civil, criminal or administrative nature.

Principles

Article 3 bis of the Environmental Code (Legislative Decree No 152/2006) makes express reference to the European principles that, pursuant to Article 174, paragraph 2, of the Treaty on European Union, regulate the European environmental policy. Under the “polluter pays” principle, in particular, those who produce pollution – or, more generally, deterioration of the environment – should bear the costs necessary to prevent, reduce or repair the damage. This principle applies to all companies, regardless of size and industrial processes, and should induce them to take preventative measures to minimise the risk of environmental damage and thus exposure to responsibility.

Civil Liability

In the same way as individual subjects, corporate entities are liable under tort law for the environmental damage they cause, and may be subject to claims for compensation for damage due to pollution. Liability and damage compensation obligations are governed by the general principles of law of the Civil Code.

Criminal/Administrative Liability

Legislative Decree No 231 of 8 June 2001 (the 231 Decree) regulates the corporate liability of legal persons, companies and associations for crimes committed or attempted by their directors or employees in the interest or to the advantage of the entity. Corporate liability for environmental crimes has been introduced into Italian law by Legislative Decree No 121/2011, implementing European Directive No 2008/99/EC on the protection of the environment through criminal law. In particular, it inserted Article 25 undecies into the Criminal Code and sanctioned a set of environmental crimes under Decree 231. Corporate liability for environmental crimes was further regulated by Law No 68/2015 on eco crimes, which introduced into the Criminal Code several new criminal offences, such as “environmental pollution” in Article 452 bis and “environmental disaster” in Article 452 ter, and increased the sanctions for environmental crimes carried out by criminal associations (Article 452 octies).

The liability of the entity is to be distinguished from the liability of its directors and officers. If an environmental offence is ascertained in court, the directors/officers would still be personally responsible for its commission. The criminal/administrative liability of the entity is only triggered when the offence is committed in the interest or to the advantage of the company by individuals who are part of the corporate structure. In addition, the environmental offence must be an expression of the company policy or must at least derive from an organisational failure.

The company, as clarified by case law, may be exempted from liability if it is able to prove that it had previously taken all the necessary measures to prevent the offence, also through the adoption and implementation of an Organisational Model. Adoption of the Model after the offence was committed allows a reduction of the pecuniary sanction for the corporate entity and, in certain cases, forestalls interdictory sanctions.

With specific reference to environmental crimes, the environmental management systems UNI EN ISO14001 and the Regulation (EC) No 1221/2009 (EMAS) constitute an important element of facilitation of the organisational model due to the complexity and the high level of detail of the obligations provided for by environmental law. However, the Organisational Model cannot
solely include the environmental management system, having to provide for further obligations (appointment of the Supervisory Body and adoption of a disciplinary system) to complement the management system. The purpose of the Model is, indeed, to cover in advance all the organisational aspects of the company and, at the same time, to constitute an important ex post judicial level test.

6.2 Shareholder or Parent Company Liability
In principle, under Italian law shareholders are not subject to liability for environmental damage or breaches of environmental legislation.

With regard to parent companies, case law is moving in the direction of accepting the European-derived substantive conception of a company. According to this interpretation, responsibility for offences committed by the subsidiary shall be extended to parent companies if their shares in the latter are such as to substantially exclude any decision-making autonomy of the subsidiary. In this case, in order to exclude responsibility, the parent company shall prove to have correctly managed its own site from an environmental point of view, so as to exclude a causal link between the activity carried out and the environmental damage occurred. See 9.4 Landmark Cases.

7. Personal Liability

7.1 Directors and Other Officers
According to general principles, corporate directors and other officers may be held personally liable for environmental crimes or breaches of environmental law committed by the company if they were acting in the capacity of the company’s legal representative. This responsibility has a criminal or administrative nature, depending on the relevant provision of law that is being violated.

The delegation of functions within the company may be effectively used to shield the company’s officials from criminal and administrative liability. This tool, provided for by the law with regard to workplace health and safety matters, has been extended by case law with regard to environmental issues. Companies, therefore, may delegate, through a power of attorney, powers and functions on environmental matters to specialised individuals, who will consequently take on the responsibility that would otherwise fall upon the company’s legal representatives.

In order to be effective, the delegation must have the requirements identified by case law, which can be summarised as follows:

- complete, clear and well-defined content, with specific indication of the delegated powers, so as not to leave any doubts about the scope of the delegation;
- substantial, and not merely formal, transfer of powers to the delegate – this implies attributing complete and autonomous decision-making and management autonomy and related spending capacity to the delegate, and
- the delegate shall have adequate competencies in environmental matters.

7.2 Insuring against Liability
Environmental liability may be of a civil, administrative or criminal nature.

In principle, the Italian legal system does not allow for insurance against criminal and administrative liability. Therefore, insurance policies do not cover criminal and administrative sanctions, although they may cover legal expenses for the related judicial proceedings.
With regard to civil claims, insurance does not cover environmental damage caused by intentional conduct, but may cover environmental damage caused by negligence. With regard to gross negligence, if the insurance policy does not regulate this aspect, a provision of the Civil Code will apply to exclude the coverage (Article 1900). However, this rule may be derogated and the parties concerned may agree to extend insurance cover to cases of gross negligence.

8. LENDER LIABILITY

8.1 Financial Institutions/Lender Liability
In principle, financial institutions/lenders are not liable for environmental damage or breaches of environmental law committed by the subjects they funded, provided that their role is merely financial and there is not a direct involvement of the lender in the misconduct, nor an assumption of responsibility on the part of the lender.

8.2 Lender Protection
No specific protection from environmental liability is envisaged for the lender as such. However, the lender may safeguard their loan by carrying out a due diligence procedure on the activities they invested in (for more detail, see 16. Transactions).

9. CIVIL LIABILITY

9.1 Civil Claims
Pursuant to the general principles of tort law, which also apply to environmental damage, civil claims may be brought whenever damage is caused (Articles 2043 and 2740 of the Civil Code).

If environmental damage arises as a consequence of a crime, civil claims for damages may be exercised either before a civil court or, alternatively, before a criminal court within the same criminal proceedings concerning the environmental crime.

Specific action for compensation of environmental damages is granted to the Ministry of Ecological Transition by Article 311 of Legislative Decree No 152/2006. Such legal action may be filed to obtain the recovery of the original environmental conditions (compensation in kind) or, alternatively, to recover the costs of the remediation activities (monetary compensation).

9.2 Exemplary or Punitive Damages
The institution of punitive damages does not generally find much recognition in the Italian legal system. With reference to environmental matters, there appears to be no ruling in which a civil judge has awarded punitive damages.

Under the general rules of tort law, damages have a compensatory (and not a punitive) nature and are quantified by the judge according to predetermined and objective criteria. If the amount of damages cannot be determined in their exact amount, they may be equitably liquidated by the court.

9.3 Class or Group Actions
In the Italian legal system, the class action is a recently introduced legal instrument (2007) that has led to rather disappointing results as it has not been widely used. Thus far, there have been no class action cases for environmental damage.

Class actions are expected to gain popularity due to more recent legislation passed on the matter (Law No 31 of 12 April 2019, whose date of entry into force, originally scheduled for 19 April 2020, was postponed to 19 November 2020 due to the COVID-19 health emergency).
9.4 Landmark Cases

Constitutional Court No 85/2013 – “ILVA Case”
The Constitutional Court is the supreme Italian judicial body and has ruled on cases relating to the ILVA steelworks, the largest steelworks in Italy, which has been seized by order of criminal courts for environmental crimes and lack of workplace safety.

More specifically, the Court stated that the law by which the legislator authorised continuous operation of the plant during the seizure was constitutional, provided that the requirements of environmental protection, workplace health and economic activity had been reasonably balanced. The presence of such balance has been recognised by the Court as the continuation of the activity has been conditioned on compliance with the new IPPC permit (see 3.2 Environmental Permits) issued for the plant.

As a general rule, the Constitutional Court has stated that all the fundamental rights protected by the Constitution must be balanced amongst themselves, since it is not possible to single any of them out as having absolute pre-eminence over the others.

European Court of Justice, 4 March 2015 – C-534/13
The European Court of Justice pronounces here on the matters of remediation and landowner’s liability. In cases where it is impossible to identify the polluter of a plot of land or to have that person adopt remedial measures, the competent authority is not permitted to require the landowner (who is not responsible for the pollution) to adopt preventative and remedial measures; the landowner is required merely to reimburse the costs relating to the measures undertaken by the competent authority within the limit of the market value of the site, as determined after those measures have been carried out.

Council of State, Plenary Meeting, No 10/2019
This recent ruling by the Council of State, relating to remediation and landowner’s liability, is of particular importance.

The court ruled that a company that is not responsible for a contamination, but that has taken over from the liable company as a result of a merger by incorporation, can nevertheless be ordered to remEDIATE the site. Furthermore, the court stated that remediation can also be ordered for activities carried out before the duty to remEDIATE environmental damage was formally introduced into the legal system (1997), on the assumption that, even before 1997, environmental contamination was a tort sanctioned by the Italian rules on non-contractual liability (Article 2043 of the Civil Code).

Council of State, 4th Section, No 2301/2020
In this ruling, the substantive concept of undertaking as set out in EU case law was applied (see 6.2 Shareholder or Parent Company Liability).

According to the court, the mere majority shareholding of a company in the capital of another is not sufficient for the identification of both as a single undertaking, since it is necessary for the subsidiary to act following the directives given by the parent company in the case at hand.

In case of a total or almost total holding in the capital of the subsidiary, however, the parent company’s control may be presumed.

10. CONTRACTUAL AGREEMENTS

10.1 Transferring or Apportioning Liability
Liability for incidental damage or breaches of environmental law may be transferred or
apportioned through contractual agreements or indemnities. Contractual clauses regulating environmental rights and duties have fully binding effects between the parties, but are not binding on the authorities or third parties.

It is common in contracts, such as those regarding a sale, company lease or company takeover, to include specific contractual clauses on environmental warranties, under which the parties provide for the seller’s indemnity for any environmental claims by third parties, or provide for representations and warranties by the seller on the conformity of the goods and the absence of any environmental-related judicial charges.

10.2 Environmental Insurance
Environmental insurance is available in Italy and consists, more precisely, of liability insurance for environmental damage. Such policies grant protection to companies from the risks of negative impacts on the environment caused by their activity. Liability policies for environmental damage may cover environmental pollution (both accidental/unexpected and gradual/progressive pollution), clean-up and remediation costs, and legal and technical consulting costs.

11. Contaminated Land

11.1 Key Laws Governing Contaminated Land
The Italian legislative regime on contaminated land is governed by EU principles, with particular reference to the “polluter pays” principle.

The relevant provisions of law are found in Title V “Remediation of contaminated sites” of Part IV of the Environmental Code (Legislative Decree No 152/06), which regulates the remediation and restoration activities of contaminated sites and defines procedures, criteria and methods to remove the sources of pollution or reduce the concentrations of pollutants, and determines the liabilities and duties of those held responsible for the contamination.

The criteria to establish whether a site is contaminated consist of threshold values of pollutants that, when exceeded, trigger the obligation to carry out a risk analysis to identify whether there is a real and actual threat to human health and the environment. Should this be the case, the subject identified as responsible shall submit to the competent authorities a project plan to eliminate the contamination and return the pollutant thresholds to the levels set out by the law.

There are two relevant sets of thresholds to ascertain the contamination (or risk of contamination) of a site and to identify the procedures of environmental remediation to be carried out as a consequence. When the concentration of one or more polluting substances, in a site exceeds the contaminating concentration thresholds (Concentrazioni Soglia di Contaminazione – CSC), a health and environmental risk analysis procedure shall be carried out to determine whether the related risk concentration thresholds (Concentrazioni Soglia di Rischio – CSR) are exceeded. In such event, the site will be subject to safety measures and environmental remediation.

12. Climate Change and Emissions Trading

12.1 Key Policies, Principles and Laws
By ratifying the Kyoto Protocol in May 2002, EU member states are committed to reducing greenhouse gas emissions. The European Union and Italy are also parties to the Paris Agreement on climate change, which entered into force in Italy on 11 December 2016.

The main instrument for achieving the CO₂ reduction goals is the European Emission Trad-

The EU ETS applies to all large greenhouse gas emitters in the industry, power and aviation sectors, and consists in a cap-and-trade mechanism; it sets out an overall cap on the emissions allowed on European territory in the sectors concerned, which corresponds to an equivalent number of allowances (each corresponding to 1 ton of CO₂) that may be traded on a specific market. The total quantity of allowances available to operators decreases over time, thus requiring a reduction in greenhouse gas emissions in the ETS sectors.

For emissions relating to sectors falling outside the scope of the ETS – which include agriculture, transport, residential, commercial, waste, and non-energy intensive industry – member states have binding national greenhouse gas emission targets under the Effort Sharing Regulation (ESR).

12.2 Targets to Reduce Greenhouse Gas Emissions
The EU targets are to reduce greenhouse gas emissions, when compared to 1990, by 20% by 2020 and by at least 40% by 2030. As a long-term target, the EU aims to reduce its emissions by 80–95% by 2050, as part of the efforts required by the developed countries as a group.

By 2020, Italy’s national target under the EU Effort Sharing Decision was to reduce emissions by 13%, compared to 2005. By 2030, Italy’s national target under the ESR will be to reduce emissions by 33%, compared to 2005.

13. ASBESTOS
13.1 Key Policies, Principles and Laws Relating to Asbestos
The impetus on regulating the matter in question was first driven by European Directive No 83/477/CEE, which established the principle of reducing and preventing pollution caused by asbestos for the protection of human health and the environment.

In Italy, the issue was addressed with Law No 257 of 27 March 1992, representing the main piece of national legislation on asbestos, which dealt with the dangerous nature of asbestos on the one hand by introducing a complete ban on asbestos on the national territory (the first country in Europe to do so), prohibiting the extraction, import, export, sale and manufacture of products containing asbestos and, on the other hand, by regulating decontamination and the environmental remediation of areas affected by asbestos pollution.

The matter is regulated in detail by secondary legislation. Ministerial Decree of 6 September 1994 should be noted as it provides technical methodologies and procedures relating to the risk assessment, supervision, maintenance and remediation of asbestos-containing materials found in buildings.

At a local level, by express provision of Law No 257/1992, each region has implemented a regional asbestos plan, which sets down in greater detail – within the framework of the principles established by state law – how asbestos shall be disposed of and removed.
The protection of workers from the risks connected with on-the-job exposure to asbestos is regulated by Legislative Decree No 81 of 9 April 2008 (Consolidated Act on health and safety at work).

As for the removal of asbestos, a close examination of buildings to detect the presence of such material is only mandatory for public buildings, while it is optional for privately owned real estate. In the latter case, should owners find the presence of asbestos, they shall notify the local health authorities only if the asbestos found is friable. If it deems it appropriate to do so, the public administration may order the removal of the asbestos at the owner’s expense.

The management of asbestos waste is regulated by Legislative Decree No 152/2006, as well as special legislation. Specific regulations apply with regard to temporary storage and waste treatment, and to companies operating in the disposal and removal of asbestos and the remediation of contaminated areas.

The Environmental Code has recently been reformed due to the transposition into national legislation of the Directives of the EU Circular Economy Package, by means of Legislative Decrees No 116, 118, 119 and 121/2020. These Decrees, which entered into force in September 2020, amended the Environmental Code as well as other existing legislation with the overall aim of progressively increasing waste recycling and significantly reducing the use of landfills.

With regard to the competences in this subject, Chapter II of Part Four of the Environmental Code is dedicated to the allocation of state, regional, provincial and municipal functions. The main regulatory authority in the waste sector is the state, but several provisions of the Environmental Code allow regions to introduce stricter protective measures.

Provisions on waste management are generally enforced through criminal and/or administrative sanctions.

In addition to the state and local authorities, the Italian Regulatory Authority for Energy, Networks and Environment (Autorità di Regolazione per Energia Reti e Ambiente – ARERA or “the Authority”) carries out regulatory and supervisory activities in several environmental sectors, such as electricity, natural gas and water services. Since January 2018, according to Law No 205 of 27 December 2017, the Authority also has regulatory and control functions over the waste cycle, including sorted and urban waste. The Authority regulates its areas of competence through binding resolutions.

14. WASTE

14.1 Key Laws and Regulatory Controls
The legislation in force in Italy on waste management is largely of EU derivation. The main piece of the regulatory framework is Legislative Decree No 152/2006 (Environmental Code), Part Four of which contains the main regulations relating to waste management. Additional laws – complementary to the Environmental Code – are adopted on specific matters, often in the implementation of EU directives governing the management of certain categories of waste. Specific types of waste of this kind include waste electrical and electronic equipment (WEEE), waste batteries and accumulators (WBA) and asbestos.
stated in Article 188 of the Environmental Code, according to which the waste producer can either directly treat waste, or hand it over to a subject who professionally deals with waste treatment activities, which can be either a public entity or a private subject registered in the National Register of Environmental Operators. Handing over the waste to said subjects, however, does not automatically exclude the consignor’s responsibility with regard to the waste treatment operations.

The above principle has been interpreted in case law so as to impose a duty on every subject of the chain, on one hand, to ascertain the conformity of the waste with what is declared by the consignor (producer or transporter) by verifying the related administrative documentation, and, on the other hand, to verify that the consignee is duly authorised to carry out the treatment operations in relation to the type of waste to be conferred.

According to Article 188, paragraph 4 of the Environmental Code, the responsibility of the producer or waste holder is excluded in case of waste delivered (i) to the public collection service and (ii) to duly authorised subjects, under the condition that the formalities required for providing documentary evidence of correct transport and/or disposal are complied with.

**14.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods**

The Environmental Code has provided for the principle of extended producer responsibility (EPR), according to which the responsibility reverts to the producer of the product. In application of the EPR principle, in certain sectors producers, importers and distributors of the products – or of their raw materials – are required to contribute to or provide for their disposal or recycling.

Specific legislation in this regard already exists – for instance, in relation to packaging, electronic equipment (WEEE) and batteries. Following the transposition of Directive No 2018/851 by means of Legislative Decree No 116/2020, more sectors are bound to be regulated under the EPR principle soon. The Environmental Code, as recently reformed, provides that the Minister for the Environment shall institute EPR schemes with regard to other products (Articles 178 bis and ter), either on its own initiative or upon the request of the interested parties.

**Environmental Labelling Requirements for Packaging**

Legislative Decree No 116, adopted on 26 September 2020, amended Article 219, paragraph 5 of the Environmental Code by introducing some specific new requirements regarding environmental labelling for packaging. In particular, it provided that:

- every packaging must carry a label indicating the material it is made of according to the Decision 129/97/UE; and
- every packaging that is destined to the B2C market must also carry indications for the consumer on how it can be properly disposed of and recycled.

Neither of these requirements is yet in force. The second one has been suspended by Article 15, paragraph 6 of Legislative Decree No 183 of 3 December 2020, until 31 December 2021; the first one – which was in force for a few months after its adoption – has also been suspended until 31 December 2021 by Law No 69 of 21 May 2021.

**Single-Use Plastic European Directive**

European Directive 904/2019 banished single-use plastic products that can be easily replaced with sustainable alternatives (eg, cotton bud sticks, cutlery, plates, straws, stirrers, and sticks
for balloons) while imposing some restrictions for other plastic products in order to limit their use and the relevant harmful consequences on the environment. Although the deadline for transposition on the member states’ part expired on 3 July 2021, Italy has not yet transposed the directive, what is likely to happen by the end of 2021.

15. ENVIRONMENTAL DISCLOSURE AND INFORMATION

15.1 Self-Reporting Requirements
According to Articles 242–245 of the Environmental Code, any individual or landowner who is aware of the occurrence of an event of potential contamination of a site must send a notification to the relevant local authorities, even if they are not responsible for the event of pollution in question. Failure to notify authorities renders an individual or landowner subject to criminal penalties.

In addition, environmental permits (see 3.2 Environmental Permits) usually require the competent authorities to be notified of any environmental incidents occurring at the plant.

15.2 Public Environmental Information
Provisions on environmental information are mainly contained in Legislative Decree No 195 of 19 August 2005, according to Article 3 of which public bodies must disclose the environmental information to anyone who requests it. The right of access to environmental information is not conditional on the proof of any specific interest on the applicant’s part. Environmental information is provided within 30 days, or within 60 days if particularly complex information is requested. However, Article 5 of the Decree lists that access to environmental information may be denied when:

- the application is clearly unreasonable;
- the information requested is too vague; or
- information disclosure may damage judicial proceedings, the secrecy of commercial or industrial information, and/or intellectual property rights.

15.3 Corporate Disclosure Requirement
Companies are not required to disclose environmental information in their annual reports. However, environmental permits often require annual reports to be submitted to the relevant public entities regarding the environmental status of the plants and compliance with the provisions included in the permit.

On 27 January 2021, the European Parliament submitted a draft directive on “Corporate due diligence and corporate accountability” to the Commission – which is currently reviewing it in view of a formal proposal. As formulated by the European Parliament, the directive will require the member states to adopt measures in order to impose to European businesses to conduct due diligence so as to prevent and address human rights and environmental risks and violations within their own operations and value chains. This means that European businesses, as well as extra-EU based businesses willing to have commercial relationships with the European Union, will have to comply – and guarantee that all their commercial partners comply – with a shared set of rules on respect of human rights, protection of the environment and good governance.

16. TRANSACTIONS

16.1 Environmental Due Diligence
According to the usual practice, environmental matters are included in the scope of due diligence conducted in M&A, and finance and property transactions. Understanding environmental issues related to a site or other company’s assets
is of great importance for potential investors, as the presence of environmental costs, liabilities or risks can have a significant impact on the value of the assets subject to the transaction.

The type of due diligence varies according to the characteristics and object of the transaction, as well as the scope of the instructions received from the investor. The possible impact of environmental issues on the activity of a company depends on a range of factors, such as the sector in which the target company operates, its size and presence in the territory, the activity carried out and the production cycle.

In general, the main areas of analysis include:

- the current and historical characteristics of the site where the target company operates and the surrounding areas;
- the activity carried out;
- the storage and use of chemical products and hazardous substances;
- waste, water and waste water management;
- electrical equipment;
- materials containing asbestos;
- emissions into the atmosphere; and
- authorisations, permits and certifications.

16.2 Disclosure of Environmental Information

In general, a seller is not required by law to disclose environmental information. The obligation of a seller to disclose environmental information, therefore, may depend upon what the parties have discussed and agreed in the acquisition agreement. Moreover, under the general principle of good faith set out in the Civil Code, a seller should inform the purchaser of any environmental issues of which they are aware, so as to avoid subsequent claims for damages.

17. TAXES

17.1 Green Taxes

Ecotaxation in Italy generates one of the highest revenues in Europe in relation to GDP (3.27% in 2018), according to the latest update to the Eurostat report published in January 2020.

Italy began to address the issue of ecotaxation with the 1998 Finance Law (Legislation No 449 of 27 December 1997), by introducing a tax on SO₂ (sulphur dioxide) and NOx (nitric oxide) emissions. Currently, there are several types of environmental taxes. Among those on emissions, the most important is carbon tax, aimed at reducing CO₂ emissions according to the obligations undertaken at an international level. It operates by taxing the units of pollutants, thus making air purification more convenient than the payment of taxes. Taxes on products are applied to discourage the production and/or consumption of goods that generate pollution during their entire life cycle (such as taxes on plastic products or on the purchase of polluting cars). Taxation on environmental services aims to compensate them for their costs, such as the TARI tax applied to finance the costs of collection and disposal of waste.
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1. REGULATORY FRAMEWORK

1.1 Key Environmental Protection Policies, Principles and Laws

Japan’s environmental laws consist of a law that provides basic principles for environmental protection (the Basic Act on Environment) and specific laws that regulate each activity.

Japan’s development of environmental law closely tracks its history of serious pollution issues that it faced from the late 1950s to the 1970s, which was during the rapid industrialisation period after the Second World War. During this period, laws to counter air pollution (the Air Pollution Act, 1968), noise (the Noise Regulation Act, 1968), and water contamination (the Water Pollution Prevention Act, 1970) were enacted. In 1971, the Environmental Agency, which was the precursor of the Ministry of Environment, was established to counter pollution issues.

The basic law that encompasses all environmental issues (the Basic Act on Environment) was enacted in 1993, and the current multi-layered structure of environmental laws and regulations is a comparatively recent development of the law.

The highest law of Japan, the Japanese Constitution, which was enacted in 1946, does not explicitly provide a right to enjoy a safe environment. Attempts were made by advocates to make such right a Constitutional right, but the Supreme Court of Japan denied that the Constitution should be interpreted to protect such right.

Basic Law
Basic Act on Environment
This Act provides the three basic principles for environmental protection, which are:

- enjoyment and future succession of a sound environment;
- creation of a sustainable society with reduced burden on environment; and
- active promotion of global environmental protection through international co-operation.

The Act requires the Japanese government to establish a Basic Environment Plan, a comprehensive plan for the promotion of environmental protection. The Act further requires the government to establish environmental standards for air, water, soil and noise, and to adopt protective measures when engaging in projects that may impact the environment. The Act also provides ground for environmental impact assessments and the adoption of economic measures (i.e., charges) to dissuade pollutive activities.

Individual Laws

Regulation of polluting activities
Examples of laws regulating polluting activities are:

- the Air Pollution Control Act;
- the Noise Regulation Act;
- the Water Pollution Prevention Act;
- the Waste Management and Public Cleansing Act; and
- the Soil Contamination Countermeasures Act.

Regulation of recycling
The laws related to recycling have a multi-layer structure, with a basic law and individual laws. The basic statutes are the Basic Act on Establishing a Sound Material-Cycle Society and the Act on the Promotion of Effective Utilisation of Resources. There are numerous individual laws, each enacted due to the needs at the time, including:

- the Act on the Promotion of Sorted Collection and Recycling of Containers and Packaging;
the Act on Recycling of Specified Kinds of Home Appliances; and
the Act on Promotion of Recycling and Related Activities for Treatment of Cyclical Food Resources.

Conservation
The laws related to conservation also have a multi-layer structure, with the Basic Act on Biodiversity on top; this was enacted in 2008 after the individual laws. Individual laws include:

• the Act on Conservation of Endangered Species of Wild Plants and Animals;
• the Act on the Protection and Management of Wild Birds and Mammals and the Proper Administration of their Hunting (as the name suggests, the law derives from an old law that regulated such hunting); and
• the Natural Parks Act.

2. ENFORCEMENT

2.1 Key Regulatory Authorities
The main governmental body that is responsible for environmental policy is the Ministry of Environment (MoE). In addition to the MoE, each of the ministries or agencies that oversee the various industries in Japan is also responsible for implementing environmental regulations. For example, the Ministry of Land, Infrastructure, Transport and Tourism (MLIT) is responsible for implementing automobile emission standards; the emissions standard is devised by the MoE pursuant to the Air Pollution Act.

In addition, authority is also delegated to local governments (prefectures and municipalities). For example, enforcement of industrial waste regulation is the responsibility of the 47 prefectures in Japan.

3. ENVIRONMENTAL INCIDENTS AND PERMITS

3.1 Investigative and Access Points
The investigative and access powers that the regulatory authorities and bodies have with respect to environmental incidents and breaches of environmental laws/regulations depend on what is being regulated. In other words, it is very law/regulation-specific, and no universally applicable rules exist. In general, local governments are responsible for monitoring compliance and enforcing environmental laws and regulations. Depending on the law, local governments may have the power to access and inspect private property with respect to environmental incidents.

In addition, law enforcement (the police) will investigate and persecute any breach of environmental regulations that constitutes a criminal offence, such as the illegal disposal of industrial waste. After the police have investigated the case, it will be further handed over to the prosecutor’s office, and the prosecutor will determine whether to prosecute the case in a criminal court.

3.2 Environmental Permits
Requirement for Permits
There is no universal rule for the requirement of environmental permits, and it is necessary to check individual environmental laws and regulations to know if an activity requires a permit. Sometimes a permit is needed to engage in a certain regulated business, such as industrial waste disposal. There is also a permit for operating certain facilities, such as power plants, and while this is not purely an environmental permit, following certain environmental protocols may be one of the factors for obtaining a permit.

Appeal/Challenge
Generally, if a permit is not granted by the government, the applicant has a right of appeal to either the regulatory body that made the de-
sion or to challenge the decision in court. Also, any party having “legal interest” may challenge a grant of a permit. A person has “legal interest” if a statute aims to protect the person (for example, a statute may allow the person to challenge the permit) or if there is a threat of harm to the life, health, or property of the person. For an example of the latter, a person residing near a nuclear power plant may challenge the permit to construct and/or operate the plant.

4. ENVIRONMENTAL LIABILITY

4.1 Key Types of Liability
The key types of liability are (i) civil liability and (ii) criminal liability. Also, depending on the type of pollution, there may also be (iii) regulatory liability.

Civil Liability
Having a “civil liability” with respect to pollution means that the polluter is liable to pay for damages caused by the pollution. The scope of damages is limited, and the polluter will only be liable for damages with a “causal link”, which is often a high hurdle for those seeking damages because causation in a pollution case is difficult to prove. In addition, the polluter needs to have been wilful or negligent, which is another hurdle to overcome, but some laws impose strict liability – for example, the Air Pollution Control Act, Noise Regulation Act and the Water Pollution Prevention Act.

Criminal Liability
A polluter may be criminally liable if the regulatory law provides criminal punishment (fines, imprisonment, etc) for violation of its rules. There are two types of criminal liability:

• a law may require that a regulatory authority (typically local government) issue an order to comply, and if the polluter fails to comply then it is punished (“order violation type”).

The police will directly investigate and prosecute direct punishment cases. However, the order violation type is more common because many environmental regulations are drafted in a way that requires local governments to monitor violations and seek to rectify the situation before imposing penalties.

Regulatory Liability
There are several types within this category. A polluter may have its permit revoked for violations of environmental laws and regulations. In other laws, the polluter may be required to clean up the pollution that it has caused – an example of this is the contamination of the water. Another type is a non-criminal penalty, which is typically payment of a non-penal fine.

5. ENVIRONMENTAL INCIDENTS AND DAMAGE

5.1 Liability for Historical Environmental Incidents or Damage
In Japan, liability for historic environmental incidents or damage only explicitly applies to soil contamination. Under the Soil Contamination Countermeasures Act, the landowner is primarily liable for clean-up, and if the soil contamination was caused by someone else, the landowner is entitled to seek compensation for the clean-up cost to such party.

5.2 Types of Liability and Key Defences
For soil contamination, the landowner is responsible for conducting a clean-up of the contaminated land under the Soil Contamination Countermeasures Act if ordered by the local government. The level of clean-up differs
depending on the purpose of use of the land and what the contaminants are. For example, if the contaminated soil is in a residential area, the required clean-up is to remove the soil and replace it with non-contaminated soil. For industrial areas, containment may be enough for non-volatile contaminants. The liability imposed for clean-up is strict liability, meaning that lack of negligence cannot be a defence. Also, it is a criminal offence for a landowner to refuse to follow a clean-up order.

For other environmental incidents, tort law (which is provided in the Civil Code) will apply. This means that for the polluter to be held liable for an environmental incident, the claimant needs to prove its negligence. However, as noted, for water and air pollution, the statutes impose strict liability on the polluter for harm caused to human life and health. However, the plaintiff still needs to prove causation, which is often challenging.

6. CORPORATE LIABILITY

6.1 Liability for Environmental Damage or Breaches of Environmental Law

Civil Liability
There are no particular rules concerning the liability of a corporate entity for environmental damage or breaches of environmental law.

Criminal Liability
In principle, only individuals (ie, natural persons) that are members of a corporate entity bear criminal liability, not the corporate entity itself. However, some laws, such as the Waste Management and Public Cleansing Act, specifically provide that the corporation is also subject to punishment in addition to its member individuals – ie, “dual (criminal) liability”. Because corporations cannot be imprisoned, the penalty imposed on the corporation is a fine.

6.2 Shareholder or Parent Company Liability
Shareholders – which includes a parent company – have “limited liability” under the Companies Act of Japan, meaning that shareholders are only liable for the investment they have promised to make in the company and not for any other liability of the company. Japanese law does not recognise a fiduciary duty of shareholders.

7. PERSONAL LIABILITY

7.1 Directors and Other Officers
Japanese law distinguishes directors and employees, and different rules apply. An “officer” may mean a director or an employee, and it is important to make the distinction.

Directors
A director is a person appointed by the shareholders to manage the company, and the relationship between and director and the company are governed by the Companies Act of Japan. The Companies Act is designed to protect the company and its shareholders. Under the Companies Act, a director bears the duty of good care and management towards the company, which is similar to a “fiduciary duty” in common law countries. Also, under the Companies Act, a director bears liability for damage caused to third parties if the director intentionally, or by gross negligence, failed to perform his or her duties towards the company. This law also applies to environmental damages. There are no laws that specifically impose personal liability on directors for environmental damages or breaches of environmental law.

Employees
As noted, an “officer” may mean a director or an employee. A corporation is liable for damages caused by its employees who acted on behalf of the corporation (ie, vicarious liability). In theory,
the victim may also seek compensation from the employee who caused the damage, but it is not typical to only sue the employee because the victim may seek full compensation from the corporation, which has a better ability to pay. The corporation may seek compensation from the employee for damages it has paid to the victim, but courts in Japan tend to restrict/limit this.

7.2 Insuring against Liability
It is typical for a listed company to purchase insurance for directors to cover personal liability because directors bear a significant risk of being sued by the company’s constituents, usually shareholders. It is not typical for the company to do the same for its employees.

8. LENDER LIABILITY

8.1 Financial Institutions/Lender Liability
Under Japanese law, there is no concept of lender liability. Therefore, a financial institution is not liable for environmental damages of breaches of environmental law caused by a company or person for which it has extended a loan.

8.2 Lender Protection
There is no lender liability under Japanese law, and the issue of lender protection is not applicable in Japan.

9. CIVIL LIABILITY

9.1 Civil Claims
Damage Claims
To claim compensation for environmental damages, the basic rule that is applicable to any claims of damages also applies – in other words, the claimant needs to prove (i) wrongful act, (ii) damage, and (iii) causation.

For an act to be wrongful, in principle, it needs to have been wilful or negligent. However, there are statutes that impose strict liability upon the polluter (meaning negligence is not a requirement for an act to be wrongful), such as for water contamination and air pollution. Also, the “legal right” of the claimant needs to have been violated. This typically applies when assets, health and life are damaged, but for pollutions caused by nuisances such as noise, foul odour and lack of sunlight, the court will decide if the nuisance was beyond what was reasonably acceptable (“junin-gendo”).

For the calculation of damages, the courts in Japan basically follow the “amount difference theory”, where compensation is calculated based on the actual loss caused by the wrongful act. For example, if the value of an asset was A before the environmental incident and the environmental incident caused the claimant’s assets to be worth B, the damages awarded will be A minus B.

This may seem reasonable at first, but assets are often depreciated and worth very little even if it was of value to the claimant, and some question the fairness of this theory. Also, value B may be difficult to calculate in environmental disasters such as the Fukushima nuclear accident, which was caused by a combination of a large-scale natural disaster (earthquake and subsequent tsunami) followed by the nuclear fallout that ensued from such disasters. Sometimes it is difficult to prove that the loss in revenue for a business was caused “only” by the nuclear fallout and not by the economic downturn caused by the preceding earthquake and tsunami. In addition, some businesses may do better after the environmental incident due to its corporate efforts, which would cause value B to be more than value A and therefore, under the “difference theory”, there would be no damages. This conclusion may punish those who made efforts.
For causation, the claimant needs to prove “causal link” which may be challenging for incidents where the link between pollution and illness is yet to be scientifically established, as was the case for the famous mercury poisoning at Minamata, or was caused by multiple polluters. Through many difficult environmental lawsuits, legal practice in Japan has established legal tools that deal with such issues, which are similar to the concept of “proximate cause” in common law.

Injunction
In addition to damage claims, which only provide a compensatory remedy, it is also possible to seek to stop the destruction of the environment by applying for an injunction. For this, the plaintiff needs to prove that the activity will cause illegal damage to assets, health and/or life, which often means that the environmental destruction will cause suffering that is beyond what is reasonably acceptable. If the issue is urgent, it is possible to also seek a preliminary injunction, but if a preliminary injunction is ordered then it will be reviewed in a normal court proceeding, and if the injunction is overturned by the court then the plaintiff may need to compensate for the damage caused to the defendant while its act was enjoined.

9.2 Exemplary or Punitive Damages
There are no exemplary or punitive damages under Japanese law for environmental damages, meaning a wrongdoer is only liable for direct damages—ie, damages which would ordinarily arise from the wrongful act except for damages which arise from any special circumstances if the party did foresee, or should have foreseen such circumstances. This rule is an adoption of English law (from Hadley v Baxendale, 1854). There are some statutes that provide something similar to punitive damages. For example, under the Labour Standards Act, the court may order an employer who failed to pay overtime to employees to pay double the amount due, but no such rule exists for environmental regulations in Japan.

9.3 Class or Group Actions
There are no class actions under Japanese law. A group action is possible as a co-plaintiff where each plaintiff has independent claims against a defendant, and there are commonalities among these independent claims, such as being caused by the same pollutive activity.

9.4 Landmark Cases
Four Major Pollution Cases
In the 1960s and the 1970s, factory-caused pollutions in Minamata (mercury poisoning), Niigata (mercury poisoning), Toyama (cadmium poisoning) and Yotsukaichi (air pollution) were litigated in court, and courts accepted the liability of the operators. These court cases are referred in Japan to as the “Yon-dai Kogai Saiban”—meaning “Four Major Pollution Cases”. The court cases led to acceptance by the courts of new theories regarding the issue of causation. These four major pollution cases also resulted in the enactment of the Basic Act on the Control of Pollution, which designated the “seven typical pollutions” (air pollution, water contamination, soil contamination, noise pollution, vibration, ground subsidence and foul odour) that need to be controlled.

Osaka Airport Case (1981)
This is the first case in which the Supreme Court of Japan recognised that activity would be wrongful if it causes suffering that is beyond what is “reasonably acceptable” (“junin-gendo”). The plaintiffs were residents near the Osaka International Airport and sought to stop night-time operations (by an injunction) and payment of damages. The Supreme Court denied the injunction but acknowledged that the noise caused by the airport was beyond what was “reasonably acceptable” and awarded damages.
Ikata Nuclear Power Plant Case (1992)
In this case, residents near the planned Ikata Nuclear Power Plant challenged the government operations permit that was awarded to a power company to construct the plant. The residents argued that the nuclear power plant was unsafe and posed a threat to their assets, health and lives. The government counter-argued that, based on the most recent science, the nuclear power plant was safe. One of the main issues was whether the court can independently verify such scientific issues. The Supreme Court judged that the permit was legal, but, in its judgment, set out the evaluation criteria for determining highly technical issues and ruled that decisions made by the government may be illegal if the process of the decision was unreasonable.

10. CONTRACTUAL AGREEMENTS

10.1 Transferring or Apportioning Liability
Under Japanese law, the parties may agree to transfer or apportion liability for environmental damages, but this is uncommon in practice. There are no regulations in Japan that restrict such transfer or apportion between private parties.

It is common, however, for a seller and buyer to agree on restricting and waiving any claims after a certain period of time following the transaction. For environmental claims, these cut-off periods tend to be set longer than other claims, such as over five years, which is beyond the usual period for statute of limitation, or even indefinite.

10.2 Environmental Insurance
Environmental insurance is available in Japan, covering damages caused by environmental accidents such as accidentally releasing hazardous substances into the water system or the soil. This is a type of liability insurance and is provided by some, although not many, insurance companies in Japan. The target customers are companies that bear environmental risks, typically companies that operate plants/factories or handle hazardous substances. There is no law or regulation in Japan that requires businesses to purchase such insurance, and it is up to the businesses to assess their own environmental risk and seek appropriate insurance.

11. CONTAMINATED LAND

11.1 Key Laws Governing Contaminated Land
In Japan, the Soil Contamination Countermeasures Act was enacted in 2002 to regulate soil contamination. The general approach is to require a landowner to survey contamination of the soil when: (i) it terminates operation of a facility (typically a plant/factory) that generates certain hazardous substances; or (ii) when the local government (the prefecture) determines that there are health hazards due to soil contamination. If soil contamination is discovered as a result of the survey, the landowner will be required to take appropriate measures, which are either containing the contamination or removing it.

One notable feature of the Soil Contamination Countermeasures Act is that the landowner will not be required to take any remedial actions unless it terminates operation of its facility, except when the local government determines such to be necessary in order to prevent health hazards. This means that in a transaction involving sales of a plant/factory, remedial actions for soil contamination will not be needed if the buyer intends to maintain the operation of the purchased plant/factory. On the other hand, the landowner is prohibited from making changes to the land while it operates facilities.
Another notable feature of the Soil Contamination Countermeasures Act is that the landowner is liable for remedial actions, not the person who caused the soil contamination. The landowner may seek compensation for the costs of remedial actions against the party who caused the soil contamination.

12. CLIMATE CHANGE AND EMISSIONS TRADING

12.1 Key Policies, Principles and Laws
In Japan, the Act on Promotion of Global Warming Countermeasures was enacted in 1998 to deal with concerns of climate change. The key feature of this Act is that it only encourages businesses to reduce greenhouse gas emissions and does not regulate them. Thus, the Act is technically not a regulation to curb greenhouse gas emissions. The Act requests each business to calculate its greenhouse gas emission and report it to the ministry or agency which oversees the business. The ministry or agency will then report the data to the MoE and MITI, and these two ministries will compile a report of greenhouse gas emissions per establishment, per industry, and per Japan as a whole, which is then disclosed to the public; however, information per establishment is only disclosed on demand. Currently, this report covers 50% of all greenhouse gas emissions in Japan.

12.2 Targets to Reduce Greenhouse Gas Emissions
Based on the Paris Accord which was adopted in 2015, and also the Intended Nationally Determined Contributions that the Japanese government submitted to the United Nations in the same year, the Japanese government has established a Global Warming Countermeasures Plan in which the government aims to cut 26% of the 2013-level greenhouse gas emissions as an intermediate goal and, as a long term goal, to cut 80% of emissions by 2050.

This was somewhat advanced in COP26, where Prime Minister Kishida announced that Japan will aim to cut 46% of its 2013-level greenhouse gas emissions by 2030, and will continue “strenuous efforts” to cut greenhouse gas emissions by 50% (but with no deadline indicated).

13. ASBESTOS

13.1 Key Policies, Principles and Laws Relating to Asbestos
Asbestos is regulated by the Air Pollution Control Act. The Act regulates the disassembly, remodelling and repair of asbestos-containing buildings or structures. A person needs to file with the local government (ie, prefecture) before conducting such work; when conducting the work, the operator needs to abide by “work standards”, which requires the operator to take certain measures to prevent the dispersal of asbestos into the immediate environment.

14. WASTE

14.1 Key Laws and Regulatory Controls
Waste disposal is regulated by the Waste Management and Public Cleansing Act. The Act distinguishes industrial waste and non-industrial (ie, household) waste. For industrial waste, the person generating the waste has the primary responsibility for its disposal; in consigning the process and disposal of waste to a third party, the generator needs to follow certain protocol (called “Consignment Standards”), such as retaining someone with a permit for industrial waste processing and disposal, entering into a contract that includes certain terms and conditions as required by the Act, and issuing a
“manifest”, which is a document for tracking the waste.

Collection and disposal of non-industrial/household waste is the responsibility of the local government (not the prefectures, but local cities and towns) and is a public service.

14.2 Retention of Environmental Liability
A producer or consigner of waste may be ordered by the local government to remedy the situation even after it was disposed of by a third-party vendor in the following circumstances:

• if the consignment did not follow the “Consignment Standards”, a set of rules that the parties need to follow under the Act;
• if the consigner did not deliver a manifest to the vendor or if the manifest contained misrepresentations;
• if the consigner knew that the vendor was illegally disposing of the waste or did not pay appropriate compensation, and the vendor became bankrupt.

14.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods
Currently, there are two regimes for this in Japan.

With respect to glass bottles, polyethylene terephthalate (PET) bottles, plastic bags and other recyclable package containers, the Act on the Promotion of Sorted Collection and Recycling of Containers and Packaging requires producers to recycle the containers. However, the collection of the containers is the role of local governments (cities and towns). Consumers are also required to follow the rules regarding disposal, such as sorting various recyclable waste.

With respect to household electric equipment (e.g., refrigerators, televisions, desktop and laptop computers), the Act on Recycling of Specified Kinds of Home Appliances requires the producer to collect used goods for recycling.

15. ENVIRONMENTAL DISCLOSURE AND INFORMATION

15.1 Self-Reporting Requirements
Some laws in Japan require the operator to report environmental incidents that have occurred in or from its facilities, such as incidents of water contamination and air pollution due to certain hazardous substances.

15.2 Public Environmental Information
Certain operators of facilities that generate certain hazardous substances (i.e., pollutants) are required to provide information on the release of pollutants (pursuant to the PRTR Act) to the government. A summary of the collected information is disclosed to the public. A person may also obtain information on release by individual establishments on demand. However, in practice, such information is disclosed to the public without individual demand.

With respect to greenhouse gas emissions, as noted, the government compiles a report of greenhouse gas emissions per establishment, per industry and per Japan as a whole, which is then disclosed to the public (the most recent disclosure in English can be found at www.env.go.jp/en/), but information per establishment is only disclosed on-demand.

15.3 Corporate Disclosure Requirement
Currently, there is no requirement for corporations to disclose environmental information in their annual reports or otherwise, although there are discussions on implementing new laws or regulations that will require this in future.
16. TRANSACTIONS

16.1 Environmental Due Diligence
Environmental due diligence is conducted for property transactions in Japan only if the transaction involves property that is susceptible to environmental issues. A typical subject of environmental due diligence is soil contamination, because the buyer will be primarily liable for remedial actions as the landowner. However, as noted, the buyer will not be required to conduct remedial measures unless it terminates use of the land for contaminant-producing facilities (e.g., plants and factories) or is ordered by the local government to do so.

For the purchase of companies with plants or factories, the buyer may also conduct due diligence on whether the facility of the seller meets various emissions standards.

16.2 Disclosure of Environmental Information
Disclosure of environmental information is a typical issue for land transactions involving soil contamination. The Soil Contamination Countermeasures Act does not regulate private transactions, and a seller is not required to disclose any environmental information (i.e., information regarding soil contamination) to a purchaser in a transaction under the Act. Instead, such information is a subject of due diligence.

17. TAXES

17.1 Green Taxes
From 2012, Japan has imposed a special tax for countering global warming on fossil fuels. There are proposals to introduce a more general tax for environment protection – a green tax – but this has yet to receive general support from the public.
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Trends and Developments

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Plastic Pollution

Act on the Promotion of Recycling of Plastics
On 11 June 2021, the Japanese legislature passed the Act on the Promotion of Recycling of Plastics. The Act aims to address the issue of plastic waste circulating in the environment, which has become a global issue. Especially, Japan felt the need to deal with marine plastic pollution, as Japan is an island nation surrounded by sea and is seen to be a major contributor to plastic waste in the Pacific Ocean.

The general aim of the law
The purpose of the Act is to “preserve the living environment” and balance “the sound development of the national economy”, which is a typical balancing language found in environmental statutes in Japan. The law requires government agencies to formulate a basic policy that aims to promote the reduction of the generation of plastic wastes and plastic by-products and to promote their collection and recycling. The law also requests businesses and consumers to contribute to the reduction of plastic waste by rationalising the use of plastic products, such as using plastic products for as long as possible and reducing excessive use of plastic products. Businesses and consumers are also requested to use recycled plastics as much as possible.

Individual policies

Plastic production guideline
The government will create a guideline for manufacturers to produce more environmentally friendly plastic products. Plastic products that were manufactured in accordance with the guideline will receive government certification. Government agencies will take the lead in purchasing certified products. The government will also grant subsidies to manufacturers to encourage the introduction of facilities so that the guidelines may be followed.

Standards for the use of plastics
The government will also create standards for retailers that use non-recycled plastic products – ie, products that are disposed of after a single-use, such as plastic straws, spoons, forks, etc; interestingly, the Japanese government calls these “one-way plastics”, which is an English-language phrase. Government agencies will issue remedial orders to businesses that fail to follow the new standards. Businesses that do not follow the order will be penalised, but not with a fine or a charge. Instead, the names of such businesses will be disclosed to the general public. This form of penalty is frequently adopted by the Japanese government, which prefers to use “soft power” instead of blunt force.

Encouragement of collection and recycling
Further, the law will introduce measures that will enhance the recycling of plastic products, such as creating systems that will make it easier for local governments to collect plastic wastes and consign them to recycling companies.

Plastic bags
In July 2021, government agencies issued an administrative order to require retail businesses to charge customers for plastic bags, which used to be given free of charge. As with the Act on the Promotion of Recycling of Plastics, this was also a response to the plastics problem, as plastic bags were disposed of indiscriminately all over Japan, often creating an ugly landscape and causing possible harm to wildlife. This new policy seems to have been generally accepted.
Developments in Renewable Energy
In June 2020, a law was passed to amend the Electricity Business Act to deal with developing issues in the promotion of renewable energy. The amendment will introduce the following changes.

Introduction of the Feed-in Premium (FIP)
In addition to the current Feed-in Tariff (FIT) system, which purchases electricity generated by renewable energy at a fixed price, a Feed-in Premium (FIP) will be introduced in which the government will purchase electricity at market price, but with a premium attached. The aim of this change is to “encourage market-conscious behaviour”. This is a move to shift to a free market system in the future.

Requirement to set up a reserve for facilities disposal
The main target is to deal with the disposal of solar power panels, which contain hazardous substances such as lead and selenium. The government’s efforts to rapidly increase renewable energy resulted in many small (and therefore unstable) enterprises participating in the renewable energy business, and mismanagement and abandonment of solar panels became an issue. The amendment will require renewable power companies to set up a reserve to pay for future disposal of electric power facilities.

Compulsory expiration of certificates
Because of the lucrative FIT system, development of renewable energy facilities because a favoured target of investment, and many renewal energy power plant projects sprung up all over Japan. However, many of these projects did not result in the actual operation of power plants but still used up the capacity to connect with the power grid, which was a limited resource. The amendment will take away certifications of non-operational power plant projects to release capacity for more solid projects.

Output limits
The amendment also aims to curb output limitation measures imposed by grid companies. This became an issue in the Kyushu area of Japan, where the grid company limited output from renewable energy sources (mostly solar power) to make way for “baseload electric power sources” (ie, nuclear, geothermal and hydraulic). Such a measure was criticised for discouraging the introduction of renewable energy, and the amendment will introduce new systems to optimally adjust outputs.

Current Notable Lawsuits and Legal Disputes involving Environmental Issues
Nuclear power plants
As of November 2021, 33 cases are pending across Japan that challenge the operation of nuclear power plants. Since 11 March 2011 (the date of the megaquake that hit northern Japan and resulted in the failure of the Fukushima No 1 Nuclear Power Plant), eight courts cases have issued judgments to order a halt of the operation of nuclear power plants. The most recent was issued on 18 March 2021, where the Mito District Court (in Ibaraki Prefecture) judged that the Tokai No 2 Nuclear Power Plant may not operate. One of the main issues was whether the nuclear power plant had taken appropriate measures to counter the risk of earthquakes. The court judged that the measures taken by the power company were insufficient.

Maglev train system
With back-up from the Japanese government, the Central Japan Railway Company, JR Tokai, is currently constructing a “maglev” (magnetic levitation) train system that will connect the...
major cities of Tokyo and Nagoya (and, in the future, Osaka). According to the plan, a tunnel will bore through the high mountain region of Yamanashi, Shizuoka and Nagano prefectures, more than 3,000 meters above sea level and including the highest and the second-highest peaks in Japan. The mountain range is popularly called the “Southern Japanese Alps” due to its superficial similarity to the European Alps, but its proper name is the Akaishi Mountains.

This has become a contentious issue because of potential adverse effects on the environment. The prefecture of Shizuoka is refusing to grant approval to proceed with construction of the tunnel within the prefecture, citing concerns that the tunnel may disrupt the water source of the Oi River, a major river system in Shizuoka. The construction of the maglev line is also being challenged by residents across the planned area due to various environmental concerns.

Deep underground construction
A statute exists in Japan that allows the development of deep underground structures – the threshold is 40 meters or below – without obtaining consent from landowners above ground (the Act on Special Measures Concerning Public Use of Deep Underground). This law was passed under the assumption that deep underground construction projects do not cause any disruption on structures above ground, and hence no consents are required from the landowners above. However, this law had come into question lately when construction of an underground tunnel for a highway in the greater Tokyo area caused the land above to subside, resulting in houses tilting and residents having to be evacuated. While there are no immediate moves by the government to review the law, the JR Tokai maglev project uses this law to construct extensive tunnels in urban areas, and residents in Tokyo have filed a lawsuit to challenge the construction permit of these tunnels.

Conclusion
Japan is mindful of and endeavouring to catch up with the rest of the world regarding environmental issues, but, generally, we are not a front-runner. Nuclear power remains a contested issue in Japan due to the nuclear fallout accident at the Fukushima No 1 Nuclear Power Plant. The nuclear accident also caused rapid growth in the investment and development of renewable energy sources, especially solar power, but not without side-effects such as over-development and speculative investment, and we are now entering a phase of review. The maglev project is also a focus of environmental concerns because of its sheer size, and will likely continue to be so as its construction has only just started.
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# Law and Practice

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1. REGULATORY FRAMEWORK

1.1 Key Environmental Protection Policies, Principles and Laws

Environmental protection in Kenya is governed by a myriad of policies and laws. The key ones include those listed below.

The Constitution

Kenya has what can be described as a “green” Constitution, as it provides a strong basis for environmental protection in the country. Promulgated in 2010, the Constitution guarantees the right to a clean and healthy environment for all and places the responsibility to protect the environment on the state as well as on all persons.

In addition, the Constitution allows any person who alleges that a right to a clean and healthy environment is being or is likely to be denied, violated, infringed, or threatened, to apply to court for redress as well as pursue any other legal remedies available.

The Constitution also highlights principles such as sustainable development, participation of the people, equity, equality, and the rule of law as among the national values and principles which bind all state organs, state officers, public officers and all persons involved in law and policy-making, interpretation and implementation.

Treaties and conventions ratified by Kenya are recognised under the Constitution as forming part of Kenyan law. As such, key multilateral environmental agreements that have been ratified by Kenya form part of the nation’s environmental protection regime.

The Framework Environmental Law

The Environmental Management and Coordination Act (EMCA), 1999, is the main law on environmental management and conservation. EMCA establishes key environmental institutions, which are discussed in greater detail in 2.1 Key Regulatory Authorities. The Act provides for environmental protection through a variety of tools including:

• environmental impact assessment;
• environmental audit and monitoring; and
• environmental restoration orders, conservation orders and easements.

EMCA also highlights the significance of environmental principles in Kenya’s environmental protection regime. The Act asserts that in exercising its jurisdiction, the Environment and Land Court is to be guided by certain sustainable development principles which include public participation, the precautionary principle, the polluter-pays principle, the principle of international co-operation, and the principles of inter-generational and intragenerational equity.

Other Laws and Policies

There are also other sector-specific statutes with regulations that govern environmental management in Kenya, such as:

• the Forest Conservation and Management Act, 2016;
• the Water Act, 2016;
• the Climate Change Act, 2016;
• the Public Health Act, Cap 242;
• the Mining Act, 2016; and
• the Energy Act, 2019.

At the policy level, there exists a National Environmental Policy, sectoral policies such as the National Forest Policy, as well as policies that deal with cross-cutting issues such as climate change – for example, the National Climate Change Framework Policy and the National Policy on Climate Finance. These policies emphasise the need to integrate environmen-
tual considerations in the pursuit of sustainable development.

Kenya operates a devolved system of government; in addition to the above-mentioned national-level laws and policies on environmental protection, the 47 county governments also develop county-specific policy and legislation related to the environment.

2. **ENFORCEMENT**

2.1 **Key Regulatory Authorities**

The Ministry of Environment and Forestry is responsible for developing Kenya’s national environmental policy. Key regulatory authorities and bodies responsible for environmental enforcement include the following.

**The National Environmental Management Authority (NEMA)**

NEMA is established under the EMCA and is the main regulatory authority vested with the authority to exercise general supervision and co-ordination over all environmental matters and to implement environment-related policies on behalf of the government.

**The National Environment Tribunal (NET)**

NET is a tribunal set by the EMCA whose jurisdiction is to address certain appeals brought by parties aggrieved by the decisions of NEMA regarding issues such as the grant, refusal, revocation, variation or limitations of a licence.

**The Environment and Land Court (ELC)**

The ELC is a court with the status of a high court; it was established in 2011 after enactment of the Environment and Land Court Act, 2011. The court’s mandate is expressed in the Constitution as to deal with matters relating to the environment and the use, occupation and title to land. The court exercises appellate jurisdiction over subordinate and tribunals for matters falling within its jurisdiction.

**The National Environmental Complaints Committee (NECC)**

NECC is also vested with powers to investigate suspected cases of environmental degradation on its own motion. The investigatory powers of NECC empower it to summon persons before it for purposes of conducting an examination of matters relevant to its investigation. In fostering environmental litigation, EMCA further mandates NECC to undertake environmental public interest litigation.

**Sector-Specific Regulators**

Different environment sector specific laws have also established institutions to enforce mandates provided for under the respective statutes.

For example, the Water Act establishes a Water Resources Authority to regulate the management and use of water resources. The Act also establishes a Water Tribunal which provides an avenue for appeal to persons aggrieved by decisions relating to water. The decisions made by the Water Tribunal are not final and any person seeking further redress may appeal to the ELC.

3. **ENVIRONMENTAL INCIDENTS AND PERMITS**

3.1 **Investigative and Access Points**

The main environmental regulator – NEMA – is vested with investigative and access powers. These powers are held by environmental inspectors appointed by the Director-General of NEMA.
To this end, environmental inspectors may, at all reasonable times and without a warrant:

- enter any land, premises, vessel, motor vehicle or ox-drawn trailer and make examinations and enquiries to determine environmental compliance;
- require the production of documents including licences and registers, and inspect, examine and copy these documents;
- take samples and submit these samples for test and analysis;
- carry out period inspections; and
- seize materials, vessels or anything believed to have been used in the commission of an environmental offence.

With the Director-General’s approval, environmental inspectors may also:

- order the immediate closure of polluting or likely to pollute establishments; and
- issue an improvement notice requiring owners or operators to cease environmentally harmful activities and take appropriate remedial measures.

Environmental inspectors also have the powers to make arrests where they have arrest warrants and with the assistance of a police officer. They also have power to prosecute environmental criminal offences.

3.2 Environmental Permits

Environmental permits are required in the conduct of a wide variety of activities in Kenya, particularly those that impact on or are related to the environment.

The permits are largely differentiated based on the enabling statute under which they are issued, the issuing authority and the nature of activity the permit regulates.

Examples of environmental permits include permits for effluent discharge, air emissions, waste management, manufacture, importation and export of controlled substances, and access permits (e.g., for access to genetic resources and water). There is also a licensing regime following environmental impact assessment.

The Process of Obtaining Environmental Permits

Environmental permits are taken out before the commencement of the activity in question. In the case of a project for which an EIA licence is a requirement, no licensing authority is allowed to issue any other licence unless the applicant first produces an EIA licence.

Ordinarily, the process to obtain a permit entails the submission of an application in the form prescribed in law and with increasing digitalisation requiring the submission to be done on an online portal to the relevant authority.

The permit application is processed upon the payment of a prescribed fee to the relevant authority and submission of any other relevant information that the authority may deem necessary in making its decision.

Rights of Appeal

The specific statute which provides for the permit will often also articulate the appeal rights against a regulatory body making the permitting decision.

Generally, common grounds for appeal against an authority’s decision include the refusal for the grant of a permit, an applicant’s opposition to the conditions/limitations or restrictions imposed on an environmental permit, the revocation, suspension or variation of a permit.

Third parties to the permit process, including relevant stakeholders and affected parties who
object to the issue of a permit, also have a right to appeal the approval.

4. ENVIRONMENTAL LIABILITY

4.1 Key Types of Liability
The key types of liabilities that can be faced by project operators, polluters and landowners for environmental damage can either be criminal, civil or administrative depending on the activity, the nature of the complaint and the identity of the parties involved in the claim.

Environmental Civil Liability
Civil liability in environmental matters is underpinned in the Constitution of Kenya Article 70, which provides an avenue for redress to any person claiming that their right to a clean and healthy environment has been or is likely to be infringed, violated, denied or threatened. Compensation is listed as among the reprieves that the court can give to enforce environmental rights. In the enforcement of environmental rights, an applicant is not required to demonstrate loss or injury incurred to be eligible for compensation.

Environmental Criminal Liability
Environmental statutes outline numerous criminal offences to varying degrees for environmental offences such as failure to meet environmental standards. The EMCA, for instance, empowers environmental inspectors to institute and undertake criminal proceedings for offences committed under EMCA against any person before a court of competent jurisdiction.

Part XIII of EMCA on environmental offences carries more elaborate provisions on criminal liability in environmental matters. The offences range from failure to maintain proper records as required under EMCA, to violation of environmental standards under the Act, and for each offence there are prescribed penalties.

Sectoral laws – including the Water Act, 2016, the Forest Conservation and Management Act, 2016, the Wildlife Conservation and Management Act, 2013 – create criminal offences for various types of environmental breaches. In addition, the Penal Code also recognises certain offences regarding environmental matters.

Environmental Administrative Liability
Administrative actions may be imposed by the respective regulatory authorities. This may take the form of penalties, revocation of licences or permits, imposition of restrictions or limitations, environmental conservation, and restoration orders.

In addition, administrative liability imposed on public servants and public authorities is set out under EMCA, which provides that NEMA can be held liable to pay compensation or damages for injury caused to any person arising from the performance or failure to perform its functions.

Nonetheless, EMCA exempts the government and NEMA from any civil or criminal liability that may be imposed as a result of a project or any consequences of a project.

EMCA also outlines that employees or officers of NEMA cannot be held personally liable for any action where they perform their duties in good faith.

5. ENVIRONMENTAL INCIDENTS AND DAMAGE

5.1 Liability for Historical Environmental Incidents or Damage
The polluter-pays principle is one of the main environmental principles applicable in Kenya.
As such, a current (or purchasing) operator or landowner generally only incurs liability for environmental incidents or damage occasioned by their actions, whether carried out in the past or present.

Common law principles on vicarious liability are recognised under Kenyan law, and an operator or landowner may also be held liable for historic environmental incidents or damage caused by the operator or landowner's employee, servant or agent in circumstances where vicarious liability is deemed to arise.

In all other cases, an owner or operator who is “innocent” – i.e., not the polluting party – will generally not be held liable for historic contamination.

Remedial Action
The above notwithstanding, NEMA may issue an environment restoration order to any person in respect of any matter relating to the management of the environment.

The order may require the person to take action to prevent the continuation of pollution or environment hazard, which could be arising from historic contamination.

An operator or landowner who is subjected to a restoration order may, however, appeal this order to the NET and, if necessary, appeal NET's decision at the Environment and Land Court.

Where restoration orders are imposed on historically contaminated land, this would tie in with the Integrated National Land Use Guidelines issued by NEMA, which set out guidelines for the management of contaminated land, empowering NEMA to investigate contaminated sites and recommend remedial measures.

5.2 Types of Liability and Key Defences

Types of Liability for Environmental Incidents or Damage
As explained under 4.1 Key Types of Liability, environmental liability takes the form of civil and/or criminal or administrative liability. In addition to courts having the power to impose civil sanctions for environmental breaches, persons who commit environmental breaches under environmental laws in Kenya are subject to administrative actions as may be imposed by the respective regulatory authorities.

Examples of these administrative actions include penalties, revocation of licences or permits, imposition of restrictions or limitations, environmental conservation and restoration orders.

Where a person is aggrieved by the administrative action undertaken by a regulatory body relating to administrative liability, they are entitled under the Constitution and the Fair Administrative Act, 2015, to have the action reviewed by a court or tribunal.

Key defences include:

• force majeure – a party may rely on force majeure events or acts of God as a defence in cases where environmental breach is deemed to be as a result of actions beyond its control;
• contributing actions of affected party – an affected party who contributes to the causation of an environmental breach may in certain cases offer a defence to the party which is subject to environmental liability;
• mitigation of damage – a defence in the case of nuisance or pollution would apply where it is shown that the defendant has done what is practically reasonable to prevent and/or reduce the nuisance or pollution.
Reasonable measures that may be taken to prevent, minimise and rectify the pollution or degradation may include:

- assessing the impact on the environment;
- informing employees on environmental risks of their work and the way their tasks must be performed to avoid causing significant pollution or degradation of the environment;
- ceasing, controlling any act, activity or process causing the pollution or degradation; or
- eliminating the source of the pollution.

The Effect of an EIA Licence
The issuance of EIA licence is no defence for any civil or prosecution action, regarding the manner of execution, operation or management of a project.

6. CORPORATE LIABILITY

6.1 Liability for Environmental Damage or Breaches of Environmental Law
There are no particular rules concerning liability of corporate entities that cause environmental damage or breaches of environmental law, as the offences apply in the same way to both individuals and corporate entities although there are differences in how sentencing is meted out.

6.2 Shareholder or Parent Company Liability
Kenya recognises the principle of separate legal personality so that the company is distinct and separate from its shareholders or parent company. As such the shareholders of a company or its parent company will generally not be liable for environmental damage or breaches of environmental law by reason only of their shareholding.

Courts will generally be reluctant to impose liability upon shareholders or the parent company except in special circumstances, such as where the company that was incorporated is a façade or sham to escape liability or legal obligation.

7. PERSONAL LIABILITY

7.1 Directors and Other Officers
Under EMCA, it is possible for directors and other officers to be liable for environmental damages or breaches of environmental law committed by the company if it can be shown that they had knowledge of the commission of the offence and did nothing to ensure compliance with the law.

The penalties imposed will depend on the nature of offence committed, but upon conviction it can result in a fine, imprisonment or both.

Other legislations – such as the Climate Change Act, 2016 – also impose corporate liability on directors or officers of a corporate body who had knowledge of a commission of an offence and failed to exercise due diligence to ensure compliance with the Act. Both fines and imprisonment may be imposed on directors found liable.

7.2 Insuring against Liability
Insurance can be taken by directors to insure against the costs of environmental damage or breach proceedings or compensation to third parties, but it is unlikely to be available where the liability involves a fine imposed in criminal proceedings, or failure to comply with requirements of regulatory authority (due to public policy concerns), and it will not assist where a prison sentence is imposed.

8. LENDER LIABILITY

8.1 Financial Institutions/Lender Liability
A financial institution/lender is generally not liable for the environmental damage or breaches
of environmental law by its borrower. However, the extent of a lender’s knowledge and control of the activities leading to the breach may lead to determination of the lender’s liability, depending on the facts of the case.

8.2 Lender Protection
A lender can protect itself from environmental liability by:

• conducting due diligence to ascertain if the borrower is licensed and in compliance with the environmental law;
• requiring certain representations from the borrower that it has complied with environmental law and that there is no environmental breach and an indemnity to the lender should this turn out to be incorrect.

A lender will also need to be cautious in taking direct control of the management decisions of the borrower or taking over assets that may require remediation.

9. CIVIL LIABILITY

9.1 Civil Claims
Civil claims for compensation or other remedies can be brought in any instances where actions are brought under the law of tort – for example, for private and/or public nuisance, negligence, trespass and the rule in Rylands v Fletcher (1868).

Claims can also be brought in any case where a person alleges that the constitutionally guaranteed right to a clean and healthy environment is being or is likely to be denied, violated, infringed, or threatened.

9.2 Exemplary or Punitive Damages
Exemplary or punitive damages may be awarded in the following circumstances:

• where there is oppressive arbitrary or unconstitutional action by servants of government;
• where the defendant’s conduct is calculated to make them a profit which may well exceed the compensation payable to the plaintiff; or
• where a statute authorises the payment of exemplary damages.

9.3 Class or Group Actions
Class or group actions are possible for environment-related civil claims.

These are recognised under Kenya’s Civil Procedure Rules which allow the commencement of representative proceedings by persons with the same (common) interest in any proceedings.

Further, the Constitution of Kenya allows persons acting as a member of, or in the interest of, a group or a class of persons, to institute suits to protect their rights.

9.4 Landmark Cases
Recent landmark environmental cases in Kenya include the following.

Isaiah Luyara Odando & another v National Management Environmental Authority (NEMA) & 2 others; County Government of Nairobi & 5 others (Interested Parties) [2021] eKLR

This case involved a constitutional petition brought as a class action against the state (the “respondents”) for failure to stop pollution of the Nairobi and Athi River, and failure to prevent toxic air from emissions from the Dandora dumpsite and industries.

The court found in favour of the petitioners and directed the respondents to adopt the precautionary principle in the management of the environment. The court innovatively made specific orders for remedial action in the way of a statutory interdict (continuing orders), to ensure the court monitors compliance by seeking periodic
reports from the respondents on the progress in implementing the court orders.

KM & 9 Others v Attorney General & 7 Others [2020] eKLR
This case involved a class action constitutional petition brought by the petitioners, on behalf of residents of Owino-Uhuru Village in Mombasa County, against the state and two private corporations (the “respondents”), for the activities of a lead acid batteries recycling factory that produced toxic waste and caused lead poisoning among local residents.

In its judgment, the Environment and Land Court awarded the petitioners KES1.3 billion, one of the highest amounts of general damages in a case concerning pollution in Kenya.

The court also ordered the respondents to clean up the soil and water and remove any waste deposited within the settlement within four months (120 days) from the date of the judgment, or in default pay KES700 million to the petitioner to co-ordinate the soil/environmental clean-up exercise.

10. CONTRACTUAL AGREEMENTS

10.1 Transferring or Apportioning Liability
Parties to a contract can agree on the apportionment of liabilities between them, but these agreements do not have a binding effect or influence on third parties or regulators if they are made between private parties such as buyers and sellers. Generally, an agreement to indemnify against fines imposed by the regulator or court will not be enforceable on public policy grounds.

10.2 Environmental Insurance
Environmental insurance is available in Kenya; it will typically cover risks such as pollution clean-up costs and third-party property and environmental damage, as well as legal costs.

11. CONTAMINATED LAND

11.1 Key Laws Governing Contaminated Land
Contaminated land in Kenya is governed by the Integrated National Land Use Guidelines which provide for methods of preventing the contamination of land through ensuring compliance and enforcing licensing conditions. They provide for the maintenance of a Contaminated Land Register, which is to be made accessible to the public.

Further, the Guidelines empower NEMA and other relevant authorities to undertake site investigations of the contaminated land and evaluate the remedial reports filed by proponents. NEMA is further empowered to develop and approve site management plans for such land.

Remediation measures may include a requirement for a polluter to:

• restore the environment as near as it may be to the state it was in before the polluting or damaging action;
• stop the action which is causing or is likely to cause harm to the environment;
• compensate persons whose environment or livelihood has been harmed by the polluting or damaging action; or
• pay the clean-up costs incurred by a third party authorised to take action to restore the environment.
12. CLIMATE CHANGE AND EMISSIONS TRADING

12.1 Key Policies, Principles and Laws
Climate change is governed predominantly by the Climate Change Act, 2016, and a number of policies, plans and strategies at both the national level and county level. Counties have also enacted county-specific climate change laws, as well as County Climate Change Fund laws to deal with climate financing at the sub-national level.

Kenya’s policy approach is to pursue low-carbon climate-resilient development. Priority is towards adaptation, and the country endeavours to pursue mitigation that offers adaptation co-benefits. Climate action is also informed by the principles of sustainable development, equity and social inclusion in the allocation of effort, costs and benefits, integrity and transparency, and stakeholder participation.

The following are the key national laws, policies and plans that govern climate change in Kenya.

Key Laws
The Climate Change Act, 2016, is the main law regulating climate change in Kenya. Its provisions are aimed at developing, managing, implementing and providing a mechanism to enhance climate change resilience and low-carbon development for the sustainable development of Kenya.

Key Policies and Plans
• The National Adaptation Plan, 2015–2030, consolidates the country’s vision on adaptation and provides for adaptation actions to enhance long-term resilience and adaptive capacity.
• The National Climate Change Action Plan (NCCAP), 2018–2022, articulates mechanisms and measures to be implemented within the five-year period to achieve low-carbon climate-resilient development.
• The National Climate Change Framework Policy, 2016, which was developed based on the findings of the National Climate Change Action Plan (NCCAP, 2013-2017) to promote an integrated response to climate change, reduce vulnerability to climate change and build the country’s resilience.
• The Kenya Climate Smart Agriculture Strategy (KCSAS), 2017–2026, is one of the tools developed to implement Kenya’s Nationally Determined Contribution in the agriculture sector.
• The National Policy on Climate Finance, 2018, was developed to better position the country to access climate finance and identifies the National Treasury as the custodian of climate finance matters in Kenya.

12.2 Targets to Reduce Greenhouse Gas Emissions
Kenya’s greenhouse gas (GHG) emissions target is set out in the country’s updated Nationally Determined Contribution (NDC) which indicates a goal of reducing GHG emissions by 32% by 2030, relative to the BAU scenario of 143 MtCO₂ eq.

13. ASBESTOS

13.1 Key Policies, Principles and Laws Relating to Asbestos
Key policies and laws relating to asbestos recognise that the material has been used for roofing in Kenya in the past, and there is need to replace its use with more environmentally safe materials, hence the necessity for the safe disposal of asbestos.

The handling and disposal of asbestos is mainly governed by the following.
The Environmental Management and Coordination Act, 1999, and the Environmental Management and Coordination (Waste Management) Regulations, 2006, which provide that any waste containing asbestos in the form of dust or fibres is categorised as hazardous waste. Hazardous waste can only be disposed of in a specific manner that has been approved by NEMA.

The National Guidelines on Safe Management and Disposal of Asbestos, 2013, which aim to protect the environment and reduce risk posed to the public and workers from asbestos fibres. The Guidelines highlight precautionary measures in dealing with asbestos, including the carrying out of risk assessments, EIA, notifications, and the requirements for handling specific kinds of asbestos and requirements for safe transportation and disposal.

14. WAste

14.1 Key Laws and Regulatory Controls
Kenya has a number of laws and policies governing waste. However, the sector is in a state of flux, with law and policy-makers seeking to overhaul the current regime and replace it with a framework that is aligned to the Constitution of Kenya, 2010, and capable of meeting the challenges facing the waste sector at present. Regulations under development include on extended producer responsibility and sustainable waste management.

The current waste laws and regulations are as follows.

The Environmental Management and Coordination Act, 1999
The Act sets out one of the principles that guide waste management – the polluter-pays principle. This principle is defined to mean that the cost of cleaning up any element of the environment damaged by pollution, compensating victims of pollution, cost of beneficial uses lost as a result of an act of pollution and other costs that are connected with or incidental to the foregoing, is to be paid or borne by the person convicted of pollution under the Act or any other applicable law.

The Act also provides that every person whose activities generate wastes shall employ measures essential to minimise wastes through treatment, reclamation and recycling.

Environmental Management and Coordination (Waste Management) Regulations, 2006
The regulations provide that a waste generator shall minimise the waste generated by monitoring the product cycle from beginning to end by:

- enabling the recovery and re-use of the product where possible;
- reclamation and recycling; and
- incorporating environmental concerns in the design and disposal of a product.

The regulations further place an obligation on waste generators to segregate the waste and ensure that it is transferred to a person who is licensed to transport and dispose of such waste in a designated waste disposal facility.

Specific waste material is also managed through regulatory bans, such as bans on the use of plastic bags, as well as notices banning the use of single-use plastic in protected areas.

14.2 Retention of Environmental Liability
Currently, there are no regulations to hold a producer or consignor of waste liable after disposal by a third party.

In the case of plastic bags, however, Kenya has enforced a ban on all plastic carrier bags used as
secondary packages. Flat plastic bags used for industrial primary packaging are exempt upon receiving clearance from NEMA, so long as they meet laid-out criteria, which includes that the name of the industry and product packaged is clearly labelled.

In granting clearance, NEMA requires the responsible persons for plastic materials exempted to avoid where necessary, or take due diligence to segregate and direct all used plastics materials to recycling facilities, as opposed to being dumped with general waste. The requirement for labelling ensures that NEMA can address any dumping with the producer whose details appear on the packaging.

14.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods
A producer of goods is generally required to undertake environmentally sound practices throughout a product’s life cycle to reduce pollution. These practices include undertaking suitable product recovery and disposal measures such as product re-use, creation of take back schemes, recycling and composting.

These practices are currently being undertaken by industry voluntarily – however, the draft Environmental Management and Co-ordination (Extended Producer Responsibility) Regulations, 2021 (“proposed EPR Regulations”) set out a requirement for mandatory extended producer responsibility schemes on every producer of products listed in the First Schedule. These products include:

- packaging for non-hazardous products (plastics, papers, aluminium, composite, glass and cartons);
- hazardous products’ packaging (industrial chemicals, oil and lubricants, pharmaceuticals, agrochemicals, veterinary, paints and solvents) and agricultural films;
- electrical, electronic equipment, mercury auto switches, thermostats, batteries and accumulators;
- end-of-life motor vehicles, automobiles, aircrafts, locomotives;
- non-packaging items (plastics, glass, paper, cardboard);
- furniture (except wooden, metallic);
- rubber and tyres.

15. ENVIRONMENTAL DISCLOSURE AND INFORMATION

15.1 Self-Reporting Requirements
Self-reporting for environmental breaches is implicit under the Constitution, which mandates every person to co-operate with the state and other persons for purposes of environmental conservation. This obligation is also reiterated in the Environmental Management and Coordination Act, 1999.

More explicit requirements for self-reporting are also set out in sector-specific laws and regulations such as on air quality, energy and extractives. These requirements are also often included as licence conditions.

Where self-reporting is explicitly mandated, it will often be required within a stipulated period upon the occurrence of the event – usually 24–48 hours.

In some cases, the owner or operator of the facility that is the subject of the environmental incident or damage will also be required to describe the circumstances surrounding the event, and the corrective measures taken or planned to be taken to prevent future occurrence of the same.
15.2 Public Environmental Information

The public is constitutionally entitled to information held by the state (i.e., a government office, organ or entity), and any other person, if it is required for protection of any human right.

A member of the public will need to utilise the process set out in the Access to Information Act, 2016, in requesting the information. The request may be denied on a variety of grounds including if it is commercially sensitive, if it is the subject of legal proceedings, or for the sake of national security.

The Environmental Management and Coordination Act also entitles every person to any information needed for implementation of the Act, that may be held by NEMA or lead agencies.

A lead agency comprises any government ministry, department, parastatal, state corporation or local authority, vested by any law with a mandate to control or manage elements of the environment or natural resources.

However, certain categories of environmental information, such as EIA study reports, are required to be published and readily available for interested members of the public, without their need to make a formal request for access.

15.3 Corporate Disclosure Requirement

Corporations in Kenya do not have an obligation to disclose environmental information in their company reports, except for in the following instances where disclosure requirements exist.

Listed companies whose equity share capital is contained in the official list on a stock exchange or other regulated market in Kenya (quoted companies) are required under the Company’s Act to prepare business reviews that include information on the company’s impact on the environment.

The boards of issuers of securities to the public are also required by the Capital Markets Authority to promote integrated reporting that provides material information on an organisation’s commercial, social and environmental context within which it operates.

Institutions licensed under Kenya’s Banking Act – such as commercial banks and mortgage finance companies – are required by the Central Bank of Kenya to develop an appropriate approach to disclosing climate-related information to enhance transparency. Disclosure benchmarked to the Task Force on Climate-related Financial Disclosures Framework is set out to begin in the period from January 2023 to June 2023.

16. Transactions

16.1 Environmental Due Diligence

Environmental due diligence is an increasingly important component in M&A, finance and property transactions.

The main objective in such an exercise will typically be the ascertainment of potential liabilities and whether there exist the requisite assessments, permits, approvals and licences.

This is particularly important in the case of environmental impact assessment licences, where the transferee and transferor remain liable for all liabilities existing on the transfer date.

16.2 Disclosure of Environmental Information

In Kenya, a seller is not obligated to disclose any environmental information to a purchaser, and it is generally for the purchaser to find out everything that is important to it or that it requires to know in order to make its purchase.
A purchaser will typically ask specific questions and require that a full answer be provided and, in this process, further issues that require response may also arise.

A seller is, however, under an obligation not to make misrepresentations or fraudulent claims.

17. TAXES

17.1 Green Taxes
Green taxes in Kenya are largely in the form of incentives. These include zero rating of import duty and VAT exemptions for renewable energy products (e.g., solar and wind energy development equipment), lowered excise duty on importation of fully powered electric vehicles and exemption from withholding tax paid to a non-resident for specific services provided under a power purchase agreement, as well as exemptions for income from green bonds.

There also exists potential for more specific intervention. For example, the Forest Conservation and Management Act, 2016, makes provision for tax incentives to encourage forest conservation and management; additionally, the Climate Change Act, 2016, makes provision for the grant of incentives to persons undertaking activities that mitigate the adverse effects of climate change.
Cliffe Dekker Hofmeyr is a full-service law firm with an extensive reach across Africa, consisting of more than 350 lawyers and a track record spanning 168 years. Cliffe Dekker Hofmeyr (CDH) believes the right partnerships lead to great achievements. In April 2021, CDH joined forces with Nairobi-based boutique corporate law firm Kieti Law LLP (Kieti) in a move to bolster the capabilities of both firms in the continent’s East African economic hub and better service clients’ needs in eastern and southern Africa. With first-hand, in-depth experience, CDH offers sector-specific expertise and knowledge of regulatory nuances to provide an exceptional integrated service across Africa. The firm’s lawyers combine detailed legal knowledge of the environmental sector with commercial awareness and are frequently involved in advising on a broad range of environmental matters. CDH’s recent work includes drafting various subsidiary pieces of legislation under the Climate Change Act, 2016, and the Energy Act, 2019; and advising on the regulatory framework for payment for ecosystem services.

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Trends and Developments

Towards Low-Carbon Climate-Resilient Development

On 28 December 2020, Kenya submitted its updated Nationally Determined Contribution (NDC), which aims to abate greenhouse gas emissions by 32% by 2030, relative to the BAU scenario of 143 MtCO₂ eq.

The NDC focuses on priority sectors for mitigation, including:

• scaling up nature-based solutions;
• enhancing REDD+ activities;
• climate-smart agriculture, with an emphasis on livestock management systems;
• emphasising renewable, clean, efficient and sustainable energy technologies;
• energy and resource efficiency;
• sustainable waste management;
• low-carbon transportation; and
• initiatives in blue carbon.

On adaptation, the NDC recognises that this is the highest priority for the country and commits to enhancing adaptation ambition by bridging implementation gaps, noting that some of the adaptation action may have mitigation co-benefits.

To meet its NDC commitments, Kenya intends to participate in both market and non-market mechanisms to scale-up climate financing. To this end, Kenya plans to develop legislation and institutional frameworks to enable its utilisation of these mechanisms, as envisioned under Article 6 provisions of the Paris Agreement.

This legislation is likely to be developed in the short-to-medium term and will join ongoing regulatory development efforts in the country. Over the past few years, Kenya has been involved in legislative development to put in place subsidiary legislation to operationalise its Climate Change Act, 2016. Current draft regulations include the following.

• The Draft Climate Change (Public Participation and Access to Information) Regulations, 2021, which aim to reinforce the constitutional requirements for public participation in climate governance by outlining substantive and procedural mechanisms for public involvement and access to climate change information.
• The Draft Climate Change (Duties and Incentives) Regulations, 2021, which seek to impose climate change duties on private entities and public entities – both at national and county levels – and to incentivise public and private entities which engage in climate change initiatives.
• The Draft Climate Change (Monitoring, Reporting and Verification) Regulations, 2021, which aim to guide and impose obligations on entities for the monitoring, reporting and verification of climate actions. Once enacted as law, these regulations will apply to the monitoring, reporting and verification of greenhouse gas emissions, mitigation actions, adaptation actions and climate change enablers such as climate finance.
• The Draft Public Finance Management (Climate Change Fund) Regulations, 2018, which aim to establish the Climate Change Fund (CCF) provided for under Section 25 of the Climate Change Act, as a financing mechanism for the priority climate change actions and interventions.
Environmental fiscal incentives have also been used to drive Kenya’s quest for low-carbon climate-resilient development. In the renewable energy sector, the Finance Act, 2021, reinstated VAT exemption for specialised equipment used in the development and generation of solar and wind energy. In 2019, the Finance Act lowered the excise duty charged on importation of fully powered electric vehicles from 20% to 10%. This reduced duty, however, only applies to 100% electric four-wheel vehicles, buses and minibuses, with a seating capacity of more than 29 people.

There are also plans underway by the National Treasury of Kenya to have in place a National Policy Framework on Green Fiscal Incentives Policy Framework. This call by the government has been driven by the urge to apply a coherent approach to green fiscal incentives, which play a critical role in steering a low-carbon climate-resilient pathway. Currently, the policy, which is in draft form, contains salient proposals such as the establishment of the Kenya Green Investment Bank (KeGIB) and considers the introduction of a carbon tax.

The Move towards Environmental, Social and Governance Compliance
The past year has seen increased momentum in Kenya for environment social and governance (ESG) issues. Most recently, with the publication of the Guidance on Climate-Related Risk Management by the Central Bank in October 2021, the banking sector is now in the frontline of driving Kenya towards a low-carbon future.

The Guidance contains requirements that banking institutions should adopt to effectively integrate climate-related financial risks in their management frameworks and business decisions and activities. Under these guidelines, banks will be required to:

• entrench financial risk considerations in their governance systems;
• include climate change and environment-related financial risks into their existing financial management practices; and
• develop a disclosure approach for financial climate-related risks.

The Nairobi Securities Exchange (NSE) is also among the institutions that will impact sustainability in the financial sector through its formulation of the proposed NSE ESG Disclosure Guidance Manual, 2021. The proposed manual provides guidance to companies listed on NSE on how to incorporate ESG strategies and reporting on ESG disclosures. The insurance industry has also set up a taskforce on ESG that will drive and support readiness of the insurance sector in managing ESG risks and supporting green finance. This aligns with earlier developments, such as African insurance organisations signing the Nairobi Declaration on Sustainable Insurance on 22 April 2021.

With the increasing recognition of the need to integrate ESG in day-to-day corporate operations, it is likely that ESG disclosure and reporting requirements will soon be a mandatory requirement for more and more entities in the different sectors of the economy.

Realising the Right to Water
Kenya is slowly making progressive steps towards the realisation of the constitutional right to clean and safe water in adequate quantities. Following the promulgation of the Constitution of Kenya in 2010, Parliament enacted the Water Act in 2016 to provide for the development, regulation, and management of water resources in line with the new Constitution. Various regulations have recently been formulated to operationalise the Water Act and address pertinent issues facing the water sector that have an impact on the right to water. These include:
• the Water Services Regulations, 2021, which seeks to regulate water service provision in the country by providing guidance on the mandates of national and county governments in the realisation of the right to water;
• the Water Resources Regulations, 2021, which aim to govern the use of water resources in Kenya by articulating the type of water use activities that require authorisation from the Water Resources Authority; and
• the Water Harvesting and Storage Regulations, 2021, which govern waterworks relating to water harvesting and storage.

In regulating water use in the irrigation sector, the Cabinet Secretary for Water, Sanitation and Irrigation has also formulated the Irrigation (General) Regulations, 2021, revoking the outdated Irrigation (National Irrigation Schemes) Regulations of 1977.

The new regulations are designed to ensure sustainable development, management and financing of the irrigation sector in Kenya, and set out licensing requirements for irrigation schemes, as well as the irrigation standards and quality control measures required for persons running or developing irrigation schemes. In this regard, developments in the water sector also have a close connection with agriculture and food security in the country.

Embracing a Circular Economy
The waste sector in Kenya is mainly governed by regulations enacted in 2006. To realise the right to a clean and healthy environment, and address present-day challenges facing the sector, there have been recent attempts at developing legislation that fully embraces a circular economy.

These developments include the draft Sustainable Waste Management Bill, 2021, which seeks to establish a legal and institutional framework for sustainable waste management. Some of the highlights of the Bill include provision of incentives to increase private sector investment in recycling activities, as well as bolstering local production and importation of sustainable waste management equipment and materials. There are also draft Extended Producer Responsibility (EPR) Regulations at the final stages of development, which give producers clear-cut post-consumer waste responsibilities, thus imposing obligations on producers for the entire life of a product, unlike the current waste management regime.

Extended producer responsibility has so far been ongoing without mandatory regulation, as part of industry self-regulation. Importantly, following the ban on the use, manufacture and importation of plastic bags used for commercial and household packaging in 2017, there has been an administrative requirement on the part of producers of primary industrial plastic packaging (who are exempted from the plastics ban), to demonstrate in the course of their obtaining clearance for production how they will facilitate take-back schemes for their plastic. This requirement has further created impetus for EPR schemes in Kenya.

Fronted by the Kenya Association of Manufacturers, the past two years have seen the launch of the Kenya Plastic Action Plan, the establishment of the Kenya Extended Producer Responsibility Organization (KEPRO), and the launch of the Kenya Plastics Pact (KPP). These initiatives recognise that realisation of a circular economy requires a united front, and bring together businesses, governments, researchers, NGOs, civil society, informal waste sector players and other stakeholders across the plastics value chain to transform the linear waste economy to a circular waste economy.
Responding to the Pandemic

In response to the COVID-19 pandemic, which triggered an increase in waste such as used masks and gloves, the Ministry of Health formulated additional procedures to guide waste management in the healthcare sector, issuing both the Safe Management and Disposal of Safety Product in Prevention of Spread of COVID-19 Guidance and the Interim Infection Prevention and Control Recommendations for Coronavirus Disease 2019 (COVID-19) in Health Care Settings.

The National Environment and Management Authority also developed the National Guidelines for the Management of COVID-19 Waste. These guidelines relate to segregation of biomedical waste, securing, packaging, storage and disposal of all generated medical waste such as surgical gloves, face masks and sanitiser bottles, which pose both environmental and health risks.

At the height of the pandemic, Kenya also witnessed a raft of incentives and interventions to cushion the public from the pandemic’s adverse economic impacts. For instance, the President launched the 8-Point Economic Stimulus Programme which, inter alia, focused on mitigating the impacts of climate change and deforestation, with government setting aside: KES850 million to rehabilitate wells, water plans and underground tanks in arid and semi-arid areas; KES1 billion for flood control; and KES540 million for the Greening Kenya Campaign.

However, in tandem with this was a move to withdraw green incentives that had earlier been issued – for example, the Tax Laws (Amendment) Act No 2 of 2020, which withdrew the reduced corporate income tax rates of 15% for the first five years for companies operating plastics recycling plants. The effect of this is that such companies are now subject to the usual corporate tax rate of 30%.

Revising the Environmental Framework Law

Currently, the main law governing the environment in Kenya is the Environmental Management and Coordination Act, 1999 (EMCA). Whilst EMCA has been instrumental in providing an enabling legal and institutional environment for the management of the environment, it has been unable to ensure that the country fully addresses present-day environmental challenges in the devolved system of government which is a feature of governance in Kenya. This has prompted the Draft Environmental Management and Coordination Bill, 2021.

The Bill seeks to establish a legal and institutional framework that is appropriate for the management of the environment by improving the national capacity for environmental management. Among new institutions proposed in the Bill is the National Environment Research Institute, whose main function will be undertaking and co-ordinating environmental research.

Law-makers are currently seeking stakeholder comments on the Bill, and it is likely that there will be further amendments to it aimed at recalibrating and harmonising environmental governance in Kenya, based on stakeholder views and concerns.
Cliffe Dekker Hofmeyr is a full-service law firm with an extensive reach across Africa, consisting of more than 350 lawyers and a track record spanning 168 years. Cliffe Dekker Hofmeyr (CDH) believes the right partnerships lead to great achievements. In April 2021, CDH joined forces with Nairobi-based boutique corporate law firm Kieti Law LLP (Kieti) in a move to bolster the capabilities of both firms in the continent’s East African economic hub and better service clients’ needs in eastern and southern Africa. With first-hand, in-depth experience, CDH offers sector-specific expertise and knowledge of regulatory nuances to provide an exceptional integrated service across Africa. The firm’s lawyers combine detailed legal knowledge of the environmental sector with commercial awareness and are frequently involved in advising on a broad range of environmental matters. CDH’s recent work includes drafting various subsidiary pieces of legislation under the Climate Change Act, 2016, and the Energy Act, 2019; and advising on the regulatory framework for payment for ecosystem services.

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1. REGULATORY FRAMEWORK

1.1 Key Environmental Protection Policies, Principles and Laws
The most important principle governing environmental protection in Mexico is enshrined in Article 4 of its Constitution. Every person has a right to a healthy environment for his or her development and well-being and the government has the responsibility as well as the mandate to ensure that this right is afforded and protected.

All activities that may adversely affect the environment and public health must abide by environmental laws and regulations. Since 1988, the government has enacted many laws, regulations, directives and standards intended to ensure that air quality is satisfactory, that water and waste water are not contaminated, that wastes (hazardous or non-hazardous) are lawfully handled, recycled and disposed of, that contaminated soils are remediated and that all activities that may generate adverse environmental impacts secure the required authorisations prior to initiating.

Among the most important environmental laws in Mexico are:

- the General Ecological Balance and Environmental Protection Law (the General Law);
- the Federal Environmental Liability Law (the Liability Law);
- the General Waste Prevention and Integral Management Law (the Waste Law);
- the Wildlife Law;
- the Sustainable Forestry Development Law; and
- the Climate Change Law.

There are also specific laws regulating the oil and gas industry. In addition, all of Mexico’s 32 states have enacted their own environmental laws and regulations.

Mexico is also a party to several of the most important international environmental treaties, such as:

- the Paris Climate Agreement;
- the North American Agreement on Environmental Cooperation with the United States and Canada, the Agreement on Cooperation for the Protection and Improvement of the Environment in the Border Area (also known as the La Paz Agreement) with the USA;
- the Marpol Protocols to Prevent Pollution from Ships; and

Mexico has also developed and enacted regulations, directives and more than 100 technical standards covering a number of areas and topics, such as those that set maximum allowable limits for waste water and pollutant air emissions, standards that establish remediation action limits and also those that set criteria to determine whether wastes are hazardous.

The Liability Law contains a definition of environmental damage. According to Article 2, it is defined as “adverse and measurable loss, change deterioration, detriment, affectation or modification of habitats, ecosystems, natural resources and elements, their chemical physical or biological conditions, of their interaction as well as of the environmental services they provide”.

It is important to note that no environmental damage is deemed caused if it is reported in advance to regulators when applying for an environmental impact authorisation, or if the maximum allowable pollutant limits established
in applicable Mexican Official Standards are not exceeded.

**2. ENFORCEMENT**

**2.1 Key Regulatory Authorities**

The federal authority entrusted with overseeing environmental policy in Mexico is the Ministry of Environment and Natural Resources (SEMARNAT). There are three de-concentrated agencies within SEMARNAT that regulate environmental matters:

- the Federal Bureau of Environmental Protection (PROFEPA) which acts as SEMARNAT’s enforcement arm;
- the National Water Commission (CONAGUA) which establishes federal policy in the area of water and also regulates waste water discharges into federal water bodies or federal land (discharges into municipal sewerage systems are regulated by state or municipal agencies);
- the National Agency of Industrial Safety and Environmental Protection of the Hydrocarbons Sector (ASEA) which, as the name suggests, oversees the oil and gas industry and has a mandate to issue environmental permits and authorisations as well as to conduct inspections and impose penalties.

All of Mexico’s states have their own environmental agencies that regulate all matters that do not fall under the control of federal environmental authorities, such as waste water discharges into urban sewerage systems, stationary air emission sources under state control, and non-hazardous waste-handling and disposal.

Many municipalities also have their own environmental agencies that regulate matters that are not reserved to federal or state authorities.

**3. ENVIRONMENTAL INCIDENTS AND PERMITS**

**3.1 Investigative and Access Points**

Federal and state environmental laws provide a mandate to authorities to conduct investigations and inspections if there are any incidents that cause or may cause environmental damage or if any individual or entity files a complaint against a party that may be causing such damage. In addition, regulators may schedule inspections solely for the purpose of verifying that all laws are being complied with. However, authorities have to be diligent in how they conduct investigations, because the Mexican Constitution requires all acts of authority to be properly supported by law and no person be deprived of his or her possessions or rights without a proper order signed by an authority having a mandate to carry out an investigation or inspection.

Public complaints for environmental violations may be submitted without having to meet complicated formalities; these can even be anonymous or by telephone. Regulators may carry out investigative acts based solely on these types of complaints.

PROFEPA may act in co-ordination with Mexico’s General Prosecutor Office in investigating crimes against the environment.

**3.2 Environmental Permits**

There are different types of permits that must be secured, with the most relevant ones being the following.

**Environmental Impact**

This authorisation is required prior to carrying out any activity that may cause environmental damage. It is generally considered the most important environmental permit, because it allows regulators the opportunities to review in advance the most relevant environmental effects.
that a work or activity will produce and to order the implementation of mitigation activities.

Certain industries or activities such as hydraulic projects, federal highways, petrochemical installations, power plants, high-risk industries or tourism developments that may affect coastal ecosystems, require environmental impact authorisations from SEMARNAT or from ASEA. Activities not expressly regulated by federal agencies require environmental impact authorisations from state authorities.

**Air Emissions**
Stationary air emission sources (such as industrial facilities, power plants, petrochemical installations or steel mills) are generally required to secure operating licences. The requirements to obtain them vary from state to state. However, federally regulated air emission sources, such as petrochemical and power plants, as well as the steel, cement, paper, automotive and lime industries, must secure licences from SEMARNAT or ASEA. Stationary sources not expressly classified as federally regulated are required to obtain licences from state authorities.

**Waste Water Discharges**
If waste water is discharged into federal land or a federal water body, such as a river, lake, lagoon or into the sea, a permit must be secured from CONAGUA. If waste water is discharged into a municipal or urban sewerage system, the permit must be obtained from a state or municipal water agency, although in many states registering the discharge is sufficient.

**Hazardous Waste**
All generators of wastes classified as hazardous (corrosive, explosive, reactive, toxic, flammable or bio-infectious) are required to record their waste stream with SEMARNAT or with ASEA and to lawfully handle, contain, transport and dispose of hazardous wastes. If hazardous wastes are generated as a result of processing or using raw materials imported into Mexico on a temporary basis, they have to be exported to their country of origin, unless they are eligible to be recycled in Mexico.

**Non-hazardous Wastes**
Generators of non-hazardous wastes, as well as of wastes subject to special handling requirements, must register their waste streams with the corresponding state or municipal agencies and must also prepare and register waste management plans that may include take-back requirements.

Obtaining environmental permits involves – more often than not – submitting comprehensive applications to regulators. A permit review process generally lasts between 30 to 120 business days, depending on the complexity of the permit being sought. Once an environmental permit is issued, it may be contested by any party having legal standing on environmental matters (such as non-governmental organisations, NGOs, or persons that may be affected by the permitted activity).

### 4. ENVIRONMENTAL LIABILITY

#### 4.1 Key Types of Liability
Any party that causes environmental damage or breaches environmental laws may be subject to any of the following types of liability.

**Administrative**
This is the most common and widespread form of liability and generally involves fines, temporary shutdowns, the seizure of pollutant sources and the revocation of environmental permits. Administrative penalties may be imposed by regulatory agencies, such as PROFEPA, ASEA and/or state or municipal agencies. Under the Liability
Law, judges may impose monetary penalties that may be substantial (up to USD3 million in some cases) aside from imposing remediation requirements.

**Civil**
This is becoming more widespread in Mexico. It may stem from civil lawsuits, either in the form of collective actions or those that are based on the Liability Law, and generally result in judicial rulings ordering polluters to carry out restoration, compensation or remediation requirements, and in some cases to compensate plaintiffs in a collective action.

**Criminal**
This stems from carrying out acts that are considered environmental crimes. Criminal liability involves prison sentences that may range from three months up to 12 years, as well as fines that are calculated taking into account the yearly earnings of a person convicted of a crime. There is an entire chapter in the Federal Criminal Code devoted to environmental crimes. In instances of repeated serious crimes, judges may order the dissolution or liquidation of companies that have been involved in environmental crimes committed by their employees or legal representatives. However, this is rare.

### 5. ENVIRONMENTAL INCIDENTS AND DAMAGE

#### 5.1 Liability for Historical Environmental Incidents or Damage
Any party that causes soil contamination is legally required to remediate it and may face administrative, civil and in some cases criminal liability (if it willfully caused contamination or if acting with gross negligence).

According to the Waste Law, owners or occupants of a contaminated site are jointly liable for remediation regardless of fault, and irrespective of historic environmental contamination. They, in turn, can bring an action against the party that caused contamination. Prior to transferring title over a contaminated site, seller and buyer must agree on who will carry out remediation if the site is contaminated. Agreeing on who will remediate involves having actual knowledge of the existence of contamination and this may also involve conducting characterisation studies and finding out whether there is a remediation obligation.

To help answer the question “How clean is clean?” the government has published two standards in the area of soil contamination. One is standard NOM-138-SEMARNAT/SSA1-2012 (NOM-138) that establishes maximum allowable limits for hydrocarbons in soils, and the other is NOM-147-SEMARNAT/SSA1-2004 (NOM-147) that sets limits for heavy metals. In the absence of clear regulatory guidelines, however, human health and risk studies may have to be performed to determine if remediation must be carried out.

SEMARNAT and/or ASEA must approve the transfer of a contaminated site. However, failing to secure this authorisation will not prevent the transfer from taking effect. If a seller failed to inform a buyer that a site was contaminated and the buyer later discovers that it was, the seller will be liable for remediation.

The statute of limitations for making a claim of environmental liability is 12 years as of the moment when contamination occurs or its effects cease.

#### 5.2 Types of Liability and Key Defences
Liability for environmental damage is strict. A polluter is required to pay and, in some cases, liability is objective (such as when damage is caused by handling hazardous materials or waste). As noted above, liability may be administrative, civil or criminal. Liability for environmen-
tual incidents or damage is generally limited to carrying out restoration, remediation or compensatory activities and ordering, in some cases, the payment of fines or economic penalties (punitive damages are rare, but may be awarded – see 9.2 Exemplary or Punitive Damages).

Economic penalties may be substantially reduced by a court order, if the party at fault (i) has purchased environmental insurance, (ii) has been audited by PROFEPA and has secured a “clean industry” certificate, and (iii) has implemented an environmental management programme.

In the case of a resolution imposing administrative liability (such as a fine), it may be contested through a recourse or an annulment complaint (at a federal level) filed before an administrative court. A final defence may be in the form of an “amparo” lawsuit filed before a federal circuit court, particularly if there may be constitutional violations incurred by a regulatory agency.

A civil judgment (requiring the remediation of a contaminated site, for example) may be contested through an appeal before a superior court and also through an amparo lawsuit. A criminal judgment imposing a prison sentence may be contested through an appeal heard before a state or federal superior court and through the submittal of an amparo lawsuit.

6. CORPORATE LIABILITY

6.1 Liability for Environmental Damage or Breaches of Environmental Law

The Liability Law states that legal entities are liable for environmental damage caused by their legal representatives, directors, administrators, managers, directors, employees and by any party having functional control over their operations, including if such persons are either careless or acting in accordance with their functions.

Officers, employees and agents are generally liable for:

- negligence or misconduct when discharging their duties;
- breaches of instructions received from management;
- actions that exceed their authority; and
- allowing, within the scope of their functions, violations to the Federal Criminal Code, solely in the case of officers, legal representatives, managers or employees.

6.2 Shareholder or Parent Company Liability

In Mexico, there is no piercing of the corporate veil for environmental liability matters, therefore shareholders may not be liable. Only the legal entity (a company) may be found liable along with its legal representatives, directors, administrators, managers or employees. However, environmental agencies may summon shareholders of a particular company to the administrative procedure or judicial trial in order to negotiate an agreement on behalf of a company found to be causing environmental damage.

It is rare for parent companies to be accused of playing a role in environmental damage caused by their subsidiaries. However, collective actions on environmental matters could target parent companies if there is evidence that they may have been complicit in any action or omission that causes environmental damage.

7. PERSONAL LIABILITY

7.1 Directors and Other Officers

Under the Liability Law, directors and other officers may be ordered to pay fines of up to
50,000 times a measurement and updating unit (UMA) for each violation (equivalent to around USD210,000), aside from facing criminal liability if they wilfully caused contamination or were grossly negligent.

Criminal Law also contemplates the feasibility to directly penalise directors, officers, or any person that ordered an action that caused an environmental damage. As mentioned above, there is also a possibility that a criminal court may order the dissolution of a company if it has been proven that its directors, employees or legal representatives committed serious crimes against the environment. However, this type of court decision is rare.

7.2 Insuring against Liability
Individuals or companies may purchase environmental liability insurance or in some cases may acquire surety bonds to cover against environmental damage that may be caused due to breaching a legal obligation or an environmental permit.

In the case of large projects, such as petrochemical installations, infrastructure projects, power plants or industrial facilities that may be deemed “high-risk”, regulators will order the project owners or developers to purchase insurance to cover any type of environmental damage that may be caused. If an entity has caused contamination, penalties against it may be reduced if it is able to show that it has acquired insurance.

8. LENDER LIABILITY

8.1 Financial Institutions/Lender Liability
Employees, directors or representatives of financial institutions may be liable for environmental damage or for breaching environmental law if they have been instructed to carry out actions that are detrimental to the environment or public health. Financial institutions or lenders could be ordered to undertake site remediation activities if they own or occupy a contaminated site as a result of a financial arrangement, lien or other type of agreement.

Also, if a financial institution holds title over a contaminated site as a result of a mortgage guarantee or any other type of guarantee, it may be liable for carrying out remediation activities because of the strict liability provisions established by the Waste Law.

8.2 Lender Protection
Lenders can protect themselves by incorporating adequate indemnity and release language in credit or loan agreements, making the debtor or actual occupier of a site liable for carrying out site remediation or compensation activities and securing a release from any and all liability associated with contamination or environmental damage.

In Mexico, financial institutions are not legally required to adopt the “Equator Principles”. However, many of these institutions consider such regulations as a good practice when authorising different transactions. Among other things, the Equator Principles require financial institutions to comply with local environmental regulations within their activities.

9. CIVIL LIABILITY

9.1 Civil Claims
Liability in most cases is subjective, except when handling hazardous materials or waste, when carrying out high-risk activities, when operating vessels in coral reefs or when operating machinery or equipment that may cause environmental damage.
A claim may be brought by an individual or by a group of 30 or more individuals through a collective action. A judge must “qualify” the complaint to make sure that the groups has proper standing or, if it is being represented by an NGO, that it has been formed and registered to deal with environmental protection matters.

The general rule is that if it is proved that environmental damage was caused, a judge should order either restoration or compensation activities. “Restoration” implies returning a site to the state it was in prior to the damage being caused, but if this is not possible then compensation may be required.

9.2 Exemplary or Punitive Damages
Traditionally, Mexican environmental laws have not contemplated exemplary or punitive damages. These were introduced into the Mexican legal system in 2011 through a constitutional amendment. In 2016 the Supreme Court ruled that in certain cases it is permissible to award punitive damages, particularly when there is gross negligence involved. Even though this ruling was not properly an environmental case, it opened the door for civil courts to award large sums to plaintiffs that are successful in demonstrating that certain acts or omissions incurred by defendants have caused serious environmental damage.

Courts have the prerogative of awarding punitive (or moral harm) damages at their discretion and these damages may run to millions of US dollars, particularly if it is shown that environmental damage was the result of gross negligence or a wilful disregard for the environment or public health.

In 2015 a company operating a copper mine in the State of Sonora, Mexico, was fined by PROFEPA in an amount equivalent to USD1.1 million for discharging cyanide into a river. The company was also required to create a trust worth approximately USD105 million to help in environmental restoration activities and to assist the population affected by the environmental damage that was caused.

9.3 Class or Group Actions
Under the Federal Civil Procedure Code, collective actions may be brought in the case of environmental claims. A group of 30 or more individuals, along with NGOs duly registered, as well as regulatory agencies, may file a collective action against a party accused of causing environmental damage. The main purpose of a collective action is for the damage caused to the environment to be restored and, if this is not possible, for compensation activities to be ordered.

Collective actions may be brought to safeguard:
• diffuse and collective interests, defined as those that are of an indivisible nature, held by a specific or unspecified group of persons, all of them related by common factual or legal circumstances; and
• individual rights and interests, but with a collective incidence, defined as those of a divisible nature, held by individuals that are identifiable members of a group of persons, all related by legal circumstances.

The statute of limitations for filing collective actions is three years and six months from the moment when damage or injury was caused. However, in the case of damage or injury having continuous or ongoing effects, the term will run as of the last day (or more recent day) in which the damage has been caused. This contradicts the term contained in the Liability Law, which provides that the statute of limitations for demonstrating environmental damage is 12 years as of the moment contamination took place or when its effects cease. Since the Liability Law
expressly deals with environmental liability as opposed to the Federal Civil Procedure Code, the 12-year statute of limitations would apply in the case of environmental collective actions.

A federal judge may issue any of the following rulings once the procedural and probative phases have concluded in a collective action:

• in diffuse actions, a judge may only condemn a defendant to repair the damage caused to the group, consisting in restoration to the state existing prior to the damage having been caused, if at all possible – if this is not possible, a judge may impose substitute compliance (monetary compensation), taking into account the rights and interests of the group;
• in collective actions in a strict sense, as well as in homogeneous actions, a judge may order that the defendant repair the damage, by carrying out one or more actions or by requiring that each individual be compensated.

9.4 Landmark Cases
Most cases in Mexico have focused on the area of consumer protection. However, by the end of 2015, an explosion in an oil platform of PEMEX (the state-owned oil company) caused an NGO to file a collective claim against such entity, seeking that PEMEX undertake remediation or at least compensation and that fisheries be compensated for harm caused to their livelihood.

Several NGOs have announced their intention of filing public actions against the proposed Dos Bocas Refinery that the Mexican government intends to construct in the State of Veracruz, alleging that this project, worth billions of US dollars, will likely cause widespread environmental damage, will adversely affect flora and fauna and will degrade air quality. The refinery is in the early construction stage, but already there are legal challenges being filed to prevent it from being constructed.

Other NGOs are planning to file public actions against another refinery that operates in Cadereyta, State of Nuevo Leon, with the intent of forcing PEMEX to improve its air emission stacks. This is because the refinery is contributing to poor air quality in the region.

10. CONTRACTUAL AGREEMENTS

10.1 Transferring or Apportioning Liability
Indemnities and suchlike may be used to transfer or apportion liability. However, these may have very little binding effect or influence over regulators or even civil judges. For example, regulators or judges may require an owner or occupier of a contaminated site to remediate it, irrespective of a contractual arrangement with a third party. It will be up to the parties entering into the agreement – and not regulators or judges – to ensure that the contractual obligations are properly met.

For example, in the case of an environmental permit granted to an oil company for offshore drilling, that company may hire a third party to conduct the drilling and may enter into a service agreement containing a number of environmental indemnity provisions, making the contractor liable for remediation in case of an oil spill. However, in the eyes of regulators such as ASEA, if there is an oil spill the permit holder will be the liable party and may face civil or even criminal liability in the case of serious environmental harm, notwithstanding any contractual arrangement that may be in place.

When hiring a company to transport and dispose of hazardous wastes, it is very important to have a contract in place making the transporter
liable for any damage caused when the wastes are being transported to a final destination facility (which could be a landfill, a recycling yard area or a transfer station). This is because the Waste Law provides that in the absence of a contract that defines the role of the generator, the transporter and the disposal company, the waste generator would be liable if the wastes are not sent to a licensed disposal facility.

Authorising hazardous wastes to be sent to an unlicensed disposal facility is also a federal crime, punishable with prison terms that may be as high as four years.

10.2 Environmental Insurance
Environmental insurance is readily available in Mexico. There are a number of carriers that offer coverage for any of the following risks:

- personal or material damage;
- remediation costs;
- civil liability for environmental damage;
- liability for economic loss; and
- environmental liability arising from the conditions of environmental impact authorisations.

ASEA has unveiled administrative guidelines that establish the amounts that insurance must cover against losses and damages caused by parties that carry out activities relating to the hydrocarbons sector (ie, “regulated entities”).

Regulated entities must register their insurance policies with ASEA prior to carrying out any works or activities. If regulated entities have already secured a valid insurance policy as of the date of publication of the guidelines, they may register it with ASEA, and at the end of the term of the insurance policy, the corresponding adjustments must be made in accordance to the guidelines.

The guidelines state that regulated entities must purchase insurance if they carry out any of the following activities:

- natural gas compression, liquefaction, decompression and regasification, as well as transportation, storage, distribution and retail;
- transportation, storage, distribution and retail of petroleum products; and
- pipeline transportation and storage linked to petrochemical pipelines, oil refining products and natural gas processing.

Insurance limits will be set: (i) based on the results of a likely maximum loss study or (ii) based on the liability limits established the guidelines. Maximum coverage may be USD1 billion in the case of ocean tankers weighing 15,000 GT.

Most environmental impact procedures require the preparation of a technical economic study to determine the amounts of insurance to be approved.

11. CONTAMINATED LAND

11.1 Key Laws Governing Contaminated Land
The main law governing contaminated land is the Waste Law and its regulations, along with standards that establish maximum allowable pollutant limits in soils.

Regulators generally go after owners or occupiers of a contaminated site when requiring remediation activities to be carried out, because the law makes them liable for remediation regardless of fault. In some cases, they will also impose penalties against parties that are known to have caused soil or groundwater contamination.

The Waste Law defines a contaminated site as “a place, space, soil, water body, installation or any
A legal requirement for remediation may be ordered when a site characterisation study reveals that there are pollutants in the soil in quantities or concentrations exceeding the maximum allowable limits established by applicable standards or in the absence of a standard, if the conclusions contained in a human health and risk study make remediation necessary to protect the environment or human health.

As mentioned in 5.1 Liability for Historical Environmental Incidents or Damage, there are two standards that establish maximum allowable limits for pollutants in soils. One is NOM-138, that establishes maximum limits for hydrocarbons in soils; the other is NOM-147, that establishes maximum allowable limits for heavy metals. If there are other pollutants in soils that may pose a risk to human health or the environment, a human health and risk assessment may have to be carried out.

Parties liable for remediating contaminated land include:

- any party that causes soil contamination whether wilfully or by negligence – this party may also incur administrative, civil or even criminal liability if environmental damage is caused;
- owners or occupiers – if they did not cause contamination then their obligation is solely limited to remediating the site; and
- holders of a concession over federal land.

In order to be able to get a regulator or a court to force an original polluter, former landowner or any other person to remediate, the liable person will have to demonstrate that any of them caused contamination or environmental damage; in the case of the former owner, if it failed to disclose the environmental conditions of the site, prior to its transfer of ownership, it may be liable for remediation in accordance with the regulations of the Waste Law.

12. CLIMATE CHANGE AND EMISSIONS TRADING

12.1 Key Policies, Principles and Laws
The Climate Change Law states that it is in Mexico’s strategic interest to carry out actions designed to mitigate or compensate for climate change and to develop the corresponding technical, as well as economic, instruments. Also, as a signatory to the Paris Climate Agreement, Mexico has agreed to contribute to fighting climate change and reducing greenhouse gas (GHG) emissions within the country and to implement mitigation and compensation policies.

12.2 Targets to Reduce Greenhouse Gas Emissions
The Climate Change Law sets an aspirational 30% greenhouse gas reduction target by 2020, increasing to 50% by 2050 with regard to the year 2000 emissions. However, this target has not been achieved and the current government does not seem to be inclined to adopt actions to meet GHG reduction targets. According to the Climate Change Law, GHG reduction targets may be achieved if an international regime is in place that provides for financial and technological support afforded by developed countries. Currently, the government has a target for 35% of the nation’s energy output to come from renewable or “clean” sources by the year 2024.
The Mexican government requires that emitters of a minimum of 50,000 MT of GHGs a year report their emissions. This is widely seen as a prelude to a future emissions trading scheme.

There are currently no laws establishing a mandatory emissions trading scheme in Mexico. However, in August 2016, the Mexican Stock Exchange and SEMARNAT unveiled a pilot programme to develop a carbon market in Mexico so that the private sector may reduce its GHG emissions and remain competitive in a global environment. However, this pilot programme has not yet started and so at this time is only a virtual exercise among the parties involved. There is, however, a voluntary market of emissions enacted which is administered by MéxiCO₂, a company created by the Mexican stock market. This company also has a market specific for the renewable energy sector.

It is worth mentioning that according to Mexico’s REDD+ 2017–2030 Strategy published by the federal government, as well as a Bill of Law that intends to amend the Forestry Law (currently being discussed in Congress), rights over carbon credits should be bestowed exclusively to the government and not to the owners of the land where the credits are generated. This has created some controversy within indigenous communities and farming towns. It is likely that this claim by the government will be challenged in the courts.

13. ASBESTOS

13.1 Key Policies, Principles and Laws Relating to Asbestos

Asbestos fibres are considered hazardous waste once they are free from the areas or places where asbestos is affixed, present or found and must be handled, contained, transported and disposed of in compliance with federal regulations. There are no asbestos abatement regulations in Mexico. Occupational health and safety laws require workers that are exposed to asbestos fibres to wear protective equipment and to undergo medical examinations if exposed to certain quantities.

There is one Mexican Official Standard that regulates the sanitary requirements for the processing and use of asbestos: NOM-125-SSA1-2016.

It is important to add that, since 2011, the government of Mexico City has promoted preventative actions to reduce diseases caused by the use of asbestos.

There are no specific asbestos removal requirements in Mexico except when it becomes a hazardous waste, or in an emergency situation where the levels of asbestos are surpassed in specific areas.

Asbestos litigation cases are not common in Mexico. However, under Mexican employment laws, employees may terminate a labour agreement if an employer fails to provide a safe and hygienic working environment or fails to comply with applicable Mexican occupational health and safety regulations and standards.

14. WASTE

14.1 Key Laws and Regulatory Controls

The Waste Law and its regulations establish the basic legal framework regarding the generation, handling, management, containment, transportation and disposal of hazardous and non-hazardous waste in Mexico. There are also a number of standards containing criteria to determine if a waste may be hazardous, as well as on containment and disposal requirements for specific types of waste.
States have also enacted laws establishing handling, transportation and disposal requirements for non-hazardous and municipal wastes.

14.2 Retention of Environmental Liability
A producer or consignor of waste retains liability for waste only if it has hired disposal services from a party that lacks the required licences to store, transport and dispose of waste, or if it has sent waste to a location lacking a licence to receive it. Also, and as mentioned in 10.1 Transferring or Apportioning Liability, consenting to the transportation of hazardous waste to an unlicensed site is a federal crime, punishable by a prison term of one to four years.

14.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods
Certain wastes are subject to specific management (including take-back) requirements. Generators, producers or owners of these wastes must prepare and file waste management plans, specifying how these wastes are to be managed.

Producers, importers, exporters and distributors of goods that at the end of their life cycle become hazardous wastes are also required to prepare management plans.

Among the wastes that must be included in management plans are: spent oils, used organic solvents, catalytic converters, mercury or nickel-cadmium batteries and pesticides. Waste management plans must be registered with SEMARNAT, ASEA or with state or municipal agencies in the case of certain non-hazardous wastes.

15. ENVIRONMENTAL DISCLOSURE AND INFORMATION

15.1 Self-Reporting Requirements
Accidental releases of waste water, as well as of hazardous materials or wastes, must be reported to regulators, and all actions designed to reduce or minimise environmental damage must be implemented.

In the case of an accidental hazardous waste spill covering an area not exceeding 1 m³, generators or transporters must immediately carry out the necessary actions to minimise and limit its dispersion and clean up the affected area.

If the spill covers a large area, PROFEPA or ASEA must be immediately notified so that they may adopt the necessary actions to prevent damage from being caused, in co-ordination with the parties causing the spill.

15.2 Public Environmental Information
According to the General Law, and the Law of Access to Public Information, any person has the right to have SEMARNAT, ASEA, as well as other federal or state environmental agencies, put at his or her disposal any environmental information requested. Any petition must be in writing, specifying the type of information being requested and the reasons behind the request.

In some cases, regulatory agencies may deny access to information if it is deemed of a confidential nature or if its disclosure may damage third-party rights.

15.3 Corporate Disclosure Requirement
Corporates are not required by law to disclose environmental information in their annual reports. However, many companies do provide reports on their sustainability initiatives and on how they are contributing to the fight against
climate change. This is becoming more common and widespread.

16. TRANSACTIONS

16.1 Environmental Due Diligence
When purchasing or leasing land, environmental due diligence is conducted on M&A, finance and property transactions in order to determine whether there may be any type of remediation liability, because the Waste Law requires that the parties involved determine who will be responsible for remediation if a site being purchased is contaminated.

It is also customary to conduct a permit review in order to determine if the target company is in compliance with relevant permitting and compliance requirements and if it has incurred any type of environmental liability.

A buyer may incur environmental liability for historic environmental damage, because under federal law an owner or lessee of a contaminated site are jointly liable for its remediation, regardless of fault. This is why it is important to conduct proper due diligence prior to purchasing a site and, in some instances, carry out a site characterisation study that will help determine if remediation may be warranted.

16.2 Disclosure of Environmental Information
Laws do not require a seller to disclose any environmental information to a purchaser. This is more a contractual requirement. However, in the case of soil contamination, if a seller fails to disclose to a buyer the fact that a site was contaminated prior to its transfer, it will retain environmental liability for historic environmental damage if the buyer discovers that the site was contaminated and that the contamination was generated prior to the transfer. This, according to the Waste Regulations. Likewise, in the absence of an express agreement to determine which party is liable for remediation of a polluted site, the seller retains liability for such remediation.

In the interest of environmental due diligence, a purchaser may investigate to determine if a site may be contaminated, because of the remediation liability that owners or occupiers have, regardless of when contamination occurred. Typically, the purchaser requests the execution of a site characterisation study. In addition, a permitting review should also be conducted, in order to determine whether the company in question is legally authorised to operate and whether the permits are in full force and effect.

Warranties, indemnities or other provisions that may be given during a share or assets sale mainly deal with remediation obligations if a site being sold or transferred is contaminated. It is common for parties to include language on who will be contractually required to undertake remediation or who will indemnify and free the other party from any liability associated with soil or groundwater contamination.

There may also be warranties and indemnities in place if a purchased site is cited or shut down for causing environmental damage that was generated prior to the purchase date, or if regulators impose penalties for violations of environmental laws occurring prior to the deal taking place.

17. TAXES

17.1 Green Taxes
Mexico is yet to establish a comprehensive legal framework in the area of environmental or green taxes, although certain states and municipalities have attempted to impose environmental taxes at one time or another without much success as they have been deemed unconstitutional.
The most clear example of this kind of tax is the carbon fee to the fuel imposed by the federal government, which means that each litre of car fuel is affected by a carbon fee that is included in the Special Tax on Production and Services for the purpose of discouraging the use of fuels.
Baker McKenzie has an environmental practice group in Mexico comprised of six practitioners, three of whom work in the Mexico City office, one in the Tijuana office, one in Guadalajara and one in Monterrey. The Mexico team works closely with Baker McKenzie’s global environmental practice group, which spans several key jurisdictions, including the USA, Canada, Brazil, the EU and countries in the Asia-Pacific region. Its key practice areas are environmental impact permitting; risk evaluation and prevention; land use/zoning; air emissions permitting and compliance/climate law; water and waste water permitting and compliance; waste handling and disposal; site remediation; toxic, flammable and explosive substance permitting; occupational health and safety; and administrative, civil and criminal litigation.

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Trends and Developments

Contributed by:
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Water Availability: what Companies Must Consider before Investing in Mexico

Executive summary

Doing business is always challenging – several factors must be evaluated by companies before deciding to pursue business in any country. In the case of Mexico, water availability is an essential aspect to consider. Thoroughly evaluating the possibility to access water in the site or region where the endeavour will be executed has now become a “must” for national and foreign industries interested in investing in Mexico.

In 2019, the World Resources Institute (Aqueduct 3.0 Country Rankings) recognised Mexico as the second most water-stressed country in Latin America. Furthermore, of the 635 aquifers in the national territory, a total of 157 (including those of the most relevant hydrological regions of the country such as the Baja California Peninsula, Cuencas Centrales del Norte and Lerma Santiago Pacífico) are overexploited.

With this in mind, the following article has the objective of providing (i) a review of the water situation in Mexico, including the main challenges in obtaining and keeping water concession titles, (ii) an overview of the framework and authorities involved in regulating water-related activities, and (iii) the main considerations and recommendations every company should consider before doing business in Mexico from a water-availability perspective.

Overview of the water situation in Mexico

The availability of water increasingly conditions the way business is done in Mexico. The availability, geographical distribution and quality of water are becoming key factors to decide on the settlement or expansion of a business in the country.

According to data published by the National Water Commission (CONAGUA), 1.5 million cubic meters of water precipitate annually over the national territory. Most of it evaporates and returns to the atmosphere (72%) and the rest is deposited in surface water bodies (21.4%) or infiltrates and recharges aquifers (6.4%).

Only a little less than one-third of the water that precipitates in the country can be exploited without altering ecosystems and is renewed by rainfall (renewable freshwater).

The natural distribution of water in the national territory is another factor to consider. The north, centre and northeast of the country, where important industrial zones are located, including cities situated at the border with the USA – Monterrey, the Bajio region and Mexico City, among others – generate 77% of the country’s GDP, but only 33% of the country’s renewable freshwater is available there.

On the other hand, 67% of the country’s renewable freshwater is located in the southeast region, where 17% of the national GDP is generated.

Of the 13 hydrological regions into which the country is divided to manage water resources, eight present a high degree of stress. This is due to the fact that more than 40% of the renewable freshwater water available in those regions is used for consumptive uses.

Similarly, of the 653 aquifers identified in the national territory, 157 are overexploited and/or
present other problems such as saline soils and brackish water, marine intrusion, etc.

As of 15 April 2021, the National Meteorological System reported that almost 85% of the country was facing drought conditions. Additionally, it also revealed that the northwest and northeast recently moved from severe to extreme drought and that the country experienced around 20% less rainfall than normal in the first months of 2021.

In view of this situation, every year it is more common to see general agreements issued by CONAGUA to initiate states of emergency due to the occurrence of drought in hydrological basins, where there are measures in place such as the rationalisation of the exploitation and use of concession titles and decreases in the availability of the same for the authorisation of new concessions.

In addition, surface water and groundwater pollution are some of the determining factors in poor water quality, causing a reduction in the possibility of exploiting water resources.

**Main uses of water in Mexico**

By 2017, 270,917 million cubic meters of national waters were under concession in the country, distributed as follows:

- 32.5% for consumptive uses – that is, those in which the water extracted is totally or partially consumed during productive processes;
- 67.5% for non-consumptive uses, in which the water withdrawn is equal to the water discharged.

The main consumptive users in the country are:

- the agricultural sector (76%);
- public supply (14.4%);
- self-supplied industry (4.9%);
- electric power generation (4.7%).

It is worth mentioning that 90% of the water under concession is not controlled by the industrial sector, but by the agricultural sectors and public entities in charge of supplying water and sewer services to the population.

This data is also relevant since the industrial sector is obliged to pay official fees for the water used in the concession, while the agricultural sector, by the provision of law, is exempt from paying these fees, so for this sector it could constitute a negative incentive for the efficient use of water.

**Legislative framework and regulators**

The legal framework for national waters in Mexico is made up of the following laws:

- Political Constitution of the United Mexican States (“Mexican Constitution”);
- the National Waters Law;
- the Regulations of the National Waters Law;
- the Regulations for the Determination and Payment of Non-Cancellation Guarantee Fee for the Non-Expiration of Water Rights;
- diverse administrative provisions issued by CONAGUA.

CONAGUA is the governmental entity in charge of the enforcement of the legal framework for water. It is supported by Basin Organisms or Local Directions, which are empowered to administrate the hydraulic resource within each of the 13 hydrological regions into which the country is divided. It is part of the Ministry of Environment and Natural Resources (SEMARNAT) and, due to the importance of the matter, its general director is named directly by the Mexican President.

CONAGUA has extensive powers in water matters. It is entitled to design and conduct the
hydraulic policy of the country, grant permissions and concessions, collect official fees and carry out inspections to monitor compliance with regulations related to water and water pollution.

**Ruled activities**

Article 27 of the Mexican Constitution states that bodies of water located within Mexican territory (eg, seas, lakes, lagoons, rivers, underground waters, etc) are national assets and, therefore, the use and exploitation of waters can only be granted to private individuals through concessions.

In this regard, as stated by the National Water Law, the following activities require authorisation from CONAGUA:

- national waters usage, including both superficial and underground water;
- the use of national waters bodies to discharge treated waste water;
- occupancy of federal properties;
- the development of hydraulic infrastructure (ie, wells, pipelines to discharge waste waters, etc).

Hence, private entities or individuals interested in carrying out said activities must obtain concession titles or permits from CONAGUA, which are granted for periods commonly ranging from ten to 30 years.

Holders of concession titles for water exploitation must observe diverse obligations, the most relevant being the following.

- Quarterly consumption reports must be filed before CONAGUA.
- Governmental fees for water exploitation must be covered on a quarterly basis. To determine the fees to be paid, the country has been divided in four availability zones and in each of them a different fee is in force. For 2021, the fees range from USD0.11 to USD1.2 per cubic meter.
- When a concessionaire does not extract the total volume of water granted under a concession for a period of two consecutive years, a non-cancellation fee must be covered as a condition to keep under concession the volume of water that was not extracted during said period, otherwise CONAGUA has the power to cancel the concession of such volume.

Other obligations include: not to extract a higher volume than the one that was granted under concession; the instalment of measurement instruments to control the volume that is extracted; to facilitate and allow within the premises CONAGUA’s inspection visits; and not to use the water for purposes different from the ones authorised.

**Water matters companies must consider**

Water availability should be a factor to be evaluated in the short and long term when selecting the site where an industrial facility is to be located.

Currently, there are areas in the country where it is not possible to obtain a concession directly from CONAGUA due to legal restrictions caused by the scarcity of the resource. This is already happening in aquifers that supply important industrial zones such as Toluca in the State of Mexico, or Pachuca in the State of Hidalgo.

Every three years a technical study is carried out to determine the availability of water in each aquifer in the country. If the balance obtained from such study is negative, CONAGUA will be prevented from granting new concessions in that area of the country until the availability balance is positive, which may take several years.

In areas where there is no possibility of obtaining a concession directly from CONAGUA, it is pos-
sible to acquire one through an assignment of rights. In this case, a concessionaire, with prior authorisation from CONAGUA, assigns all or part of its concession title in favour of a third party.

Although this mechanism is effective and currently widely used, it is surrounded by several unregulated factual aspects that, if not properly addressed, may generate tax, regulatory and compliance contingencies for the third party acquiring the concession title.

Even companies that choose to locate within industrial parks, which often include water supply as part of their services, must evaluate the status of the titles that the industrial park uses to provide this service. Factors such as the validity of the titles, the total volume that the park has under concession, the total volume that the park has already committed to other companies, etc, should be of interest to the companies during the site evaluation stage.

Holding a concession does not guarantee the availability of the water. According to the Law, CONAGUA is not responsible if the concessionaire is not able to extract the volume under concession due to natural factors. In this sense, the implementation in the companies of alternative supply systems, as well as efficient water-use programmes, are recommended.

Acquiring the concession of large volumes of water, even when they are not used, is not necessarily a recommendable strategy. By law, concessionaires are obliged to pay fees for the water they use and, since 2011, they are also obliged to pay a special fee for the water they have in concession and do not use (ie, a non-cancellation guarantee fee). For 2021, the fees range from USD0.13 to USD1.3 per cubic meter, depending on the availability zone.

The amount of the non-cancellation guarantee fee is generally higher than the amount of fees paid for the water that is used. In this sense, keeping unused water in concession can be more expensive than using the water, which is precisely CONAGUA’s objective for discouraging water hoarding.

Companies that already have concession titles must manage them correctly, assuming that they are assets on which the viability of the business depends. Failure to comply with obligations such as timely payment of fees, timely renewal of concession titles before the end of their term, submission of periodic reports, etc, can lead to suspension and even revocation of concession titles.

In this regard, it is advisable to establish a system for monitoring and overseeing compliance with these obligations, with the participation of operational and management personnel.

Outlooks and conclusions
Mexico’s national water regulations are vast, complex and effectively enforced by the authorities. Likewise, issues related to the use of water for industrial purposes, in a country where approximately 10% of its total population (126 million people) does not have access to water services in sufficient quantity and quality, is often accompanied by strong social and media pressure.

Therefore, companies doing business or interested in doing business in Mexico must adequately evaluate multiple variables when establishing or expanding a business in the country, and implement measures to ensure, as far as possible, the success of the business from a water standpoint in the short, medium and long term. Likewise, when the time comes, they must manage their concessions properly, aware that this is an asset on which the viability of the business depends.
Basham, Ringe y Correa is a full-service law firm with strong presence in Latin America and is the Lex Mundi representative for Mexico. Basham, established in Mexico in 1912, has a wealth of experience assisting clients in doing business both at home and abroad. The firm’s clients include prominent international corporations, many of them on the Fortune 500 List, medium-sized companies, financial institutions and individuals. Many of Basham’s lawyers and other professionals have completed graduate studies at foreign universities and have worked at companies and law firms abroad. The firm’s in-depth knowledge and insight into both international and domestic markets enable it to offer fully integrated and tailored solutions to its various clients. Basham’s lawyers are well-known leaders in their respective fields of specialisation and actively participate in worldwide associations, as well as in international transactions – something that has promoted the exchange of information and experience and, in turn, improves the firm’s capacity to best serve its clients by constantly adjusting to the dynamics of the global business environment.

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Law and Practice

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1. REGULATORY FRAMEWORK

1.1 Key Environmental Protection Policies, Principles and Laws

As a small and densely populated country and a member of the European Union, the Netherlands has a comprehensive and well-established regulatory framework governing environmental protection.

The principal source of the Dutch environmental regulatory framework is the Environmental Management Act (Wet milieubeheer – EMA), which includes generally applicable regulations and minimum standards for a large variety of environmental aspects, such as air pollution, noise hindrance, emission rights and waste management, as well as a more procedural framework in respect of the issuing of permits and/or other public law consents. In addition, the EMA serves as a statutory basis for many lower environmental decrees and regulations, including the Activities (Environmental Management) Decree (Activiteitenbesluit).

In the Activities Decree, general rules are stipulated with regard to the operation of facilities in the Netherlands that cover virtually all relevant environmental aspects (eg, noise limits, air emission standards and odour limits). Under the Activities Decree, specified categories of environmentally less sensitive activities are governed by general regulations and/or require a notification to be filed with the competent authorities. Further to this notification, customised provisions (maatwerkvoorschriften) can be imposed in addition to the general regulations if this is deemed necessary by the authorities to ensure adequate protection of the environment, in light of the specific circumstances of the relevant facility.

Facilities that, in general, have a more substantial environmental impact – referred to as “Type-C facilities” – require an environmental permit for their activities. The environmental permit, if granted, will include a set of facility-specific regulations that will apply in addition to the applicable general rules under the Activities Decree. Generally speaking, facilities requiring a permit for their operations should comply with the best available techniques stipulated in the European Best Available Techniques reference documents (BREFS).

In addition to the above, various other laws provide for environmental protection regulations, such as the Water Act, which stipulates a comprehensive framework for all activities that may negatively impact the quality of surface waters. This Act includes permit requirements and conditions for waste water management and water extraction activities, whereas the framework for the protection of soil and groundwater quality is laid down in the Soil Protection Act, which includes a general duty of care pursuant to which a party causing spills or leakages is, in principle, obliged to remediate any resulting soil/groundwater pollution.

On 29 May 2019, the Dutch permit-granting process was shaken to the core, because on that day the Administrative Jurisdiction Division of the Council of State put an end to the Programme to Combat Nitrogen (Programmatische Aanpak Stikstof – PAS). The granting of permits for construction and other projects involving the release of nitrogen came to a full stop as a result of the PAS ruling. In the situation when the PAS applied, initiators could usually avail themselves of generic exclusions to the ecological permit obligation which existed under the Nature Conservation Act (Wet natuurbescherming) or could suffice with a mere reference to the inclusion of their project in the PAS. This is no longer permitted.
As a result of the PAS ruling, initiators are again required to determine in the case of each project that its nitrogen deposition would “definitely” not have significant effects for Natura 2000 areas. Where it is determined and ecologically substantiated, no ecological permit (or application for one) would be required. However, this is not possible in all cases because of the large nitrogen burden which Natura 2000 areas have to contend with in the Netherlands. This is why ecological consent is nowadays more often required, certainly in the case of extensive projects in the vicinity of a Natura 2000 area.

Since the PAS ruling, a number of regulatory changes have been implemented to ease its effects, including the Nitrogen Mitigation Emergency Act (Spoedwet aanpak stikstofproblematiek – SAS) which provided for a number of amendments of the Nature Conservation Act for the purposes of facilitating the renewed issue of permits for operations which cause limited nitrogen deposition in Natura 2000 areas.

Most recently, the Nitrogen Reduction and Nature Enhancement Act (Wet Stikstofreductie en Natuurverbetering) came into effect on 1 July 2021. Amongst other things, this Act provides for exemptions for construction, demolition and one-off installations – in short, the building exemption. As such, the permit process for the nitrogen aspect which is described above only plays a role during the operational stage of development projects. By way of supporting arguments for this measure, the legislation introduces measures to affect the source of the nitrogen emissions, which need to lead to an “irreversible and unconditional” reduction of nitrogen.

In spite of these regulatory changes, it is anticipated that the issue of nitrogen and construction will also continue to stir up strong feelings in the years ahead. From a procedural point of view, the General Environmental Permitting Act (Wet algemene bepalingen omgevingsrecht – GEPA) needs mentioning here as the overarching framework for the issuing of permits in the environmental domain. With the enactment of the GEPA in 2010, around 25 formerly separate permits were replaced with a single “all-in-one permit for physical aspects”. The Act makes it possible to integrate several aspects of one project or facility into a single permit, thereby giving applicants considerable freedom in arranging the process of requesting a permit.

Lastly, when discussing Dutch environmental law, another development that should be noted is the current legislative project aimed at fully integrating all acts, decrees and regulations that apply to the physical environment (fysieke leefomgeving) – such as the Spatial Planning Act (Wet ruimtelijke ordening), the GEPA, the Crisis and Recovery Act (Crisis- en herstelwet), the Noise Abatement Act (Wet geluidhinder), the Soil Protection Act (Wet bodembescherming – SPA), the new Nature Conservation Act (Wet natuurbescherming) and the Water Act (Waterwet) – into one all-encompassing Environmental and Planning Act (Omgevingswet).

The expectation is that this new Environmental and Planning Act will take effect in 2022. However, the law-making process has proved to be much more complicated than initially expected – being one of the single largest legislative projects in recent Dutch history – and a number of difficulties (relating to the IT infrastructure required, amongst other factors) in the implementation of the Act are still foreseen. Looking at the latest developments, it remains to be seen whether this deadline will be met, as well as how much will change compared to the current situation and how quickly such changes would take shape. In any event, the legislative developments in this respect are expected to remain a topic of debate in the coming years.
2. ENFORCEMENT

2.1 Key Regulatory Authorities
In the Netherlands, environmental policy and enforcement are applied on both a local and national level. Local governments such as municipalities, provinces and water authorities grant permits and enforce them for environmental topics such as odour, noise, environment (municipalities), nature, large facilities and soil (provinces) and water management and quality (water authorities). Municipalities and provinces may instruct regional environmental agencies (omgevingsdiensten) to carry out supervisory and enforcement-related tasks on their behalf.

Furthermore, competent authorities are appointed on a national level with respect to certain topics. The key regulatory authorities in that respect are as follows.

• The Living Environment and Transportation Inspectorate (InspectieLeefomgeving en Transport – ILT) has a supervisory role in the field of transport, waste and chemicals. In that context, the ILT is competent to decide on permits for high-risk water discharges, and to receive notifications of the transport of waste on the basis of the European Waste Shipment Regulation.

• The Dutch Emissions Authority (Nederlandse Emissie Autoriteit – NEA) has a supervisory role in the context of the climate and the reduction of CO₂. In that context, the NEA is competent to grant emission permits and to supervise the EU emissions trading scheme and renewable fuel regulations.

• Other national supervisory authorities are also active on specific topics, such as occupational safety (the Inspectie SZW, as of 1 January 2022 the Netherlands Labour Authority – NLA), mining (SODM), and pesticides and biocides (NVWA).

All national supervisory authorities operate under the name and instruction of the competent ministry.

3. ENVIRONMENTAL INCIDENTS AND PERMITS

3.1 Investigative and Access Points
The power of regulatory authorities is generally governed by the General Administrative Law Act, and in specific legislation where additional powers are granted. Supervisory authorities in the Netherlands have quite extensive investigative and access powers to carry out their tasks. In general, supervisory authorities have the following investigative powers:

• to access business locations (whether accompanied by the police or not);
• to obtain business-related data and documents (unless legally privileged);
• to obtain information, verbally or in writing; and
• to investigate objects and take samples.

Investigations may take place unannounced. Following an inspection, an inspection report or an official report is usually drafted and sent to the site operator.

The most important administrative sanctions are as follows:

• administrative fine;
• administrative enforcement order; and
• order subject to a fine.

Administrative sanctions can be divided into punitive sanctions (administrative fine) and remedial sanctions (administrative enforcement order and order subject to a fine). Where a punitive sanction is intended to add suffering to the
offender, a remedial sanction serves to end a violation and restore a lawful situation.

Most violations of environmental requirements also qualify as criminal offences under the Economic Offences Act. Therefore, the Public Prosecution Service (Openbaar Ministerie) is the main competent authority to carry out enforcement tasks from a criminal law perspective as well.

In general, there are objections to the cumulation of sanctions of a punitive nature. For example, it is not permitted to impose an administrative fine if criminal action is already being pursued for the same conduct. However, restorative and punitive sanctions may, in principle, cumulate and apply to the same conduct, although the severity of the administrative measure must be taken into account when determining the extent of the punitive sanction.

There is a legal obligation for the operator of a facility to co-operate with the investigation of a supervisory authority. Non-co-operation may result in enforcement measures, such as a fine or even criminal enforcement. The supervisory authority needs to safeguard against self-incrimination based on will-dependent material (such as explanations) if it intends to impose a punitive sanction (such as a criminal sanction or administrative fine). This only applies to the suspected violator, and not to witnesses.

Supervisory authorities may only use their investigative powers as far as is necessary to carry out their investigation. The supervision should be proportional to the scope of the investigation.

The actions of supervisory authorities are not subject to administrative objections or appeal. If a subject is of the opinion that supervisory powers are used incorrectly, this would have to be brought forward in a procedure against an actual enforcement measure.

3.2 Environmental Permits
In general, the environmental regulatory framework – as primarily stipulated in the EMA and Activities Decree – will apply to all economical or comparable human activities of any substance that are operated within certain geographical boundaries and that fall within categories as specified in Annex I to the General Environmental Permitting Decree (Besluit omgevingsrecht). Activities with a potentially more than remote environmental impact should be expected to fall within those categories. For reference: an office building will usually be subject to the environmental regulatory framework, while a retail unit will usually not be, unless, for instance, powerful technical installations would be present.

Within the categories of activities that are governed by the environmental regulatory framework, only those activities with a more substantial environmental impact are required to operate under an environmental permit. Other less environmentally sensitive activities can be operated solely under the applicable general rules under the Activities Decrees (Type-A facilities) or on the basis of an additional notification to be filed with the competent authorities that may lead to customised provisions being imposed in addition to the general rules (Type-B facilities). The activities that require an environmental permit are qualified as Type-C facilities and include IPPC facilities, as referred to in the Integrated Pollution Prevention and Control Regime laid down in EU Directive 2010/75/EU, as well as other high-impact facilities specifically designated as such in Annex I of the General Environmental Permitting Decree.

The environmental permit can pertain to the opening of a new facility or to relevant subsequent changes to the activities. In the event that the opening or change of a facility is indissoluble from certain other activities that would require a permit or government consent (eg, a building
permit and/or planning permission), the environmental permit application must be combined with the application for the other permit/consent, and will be issued as an integrated permit for the activities involved.

An environmental permit to open a new (Type-C) facility is applied for with the competent authorities. With the exception of a restricted number of certain categories in which a limited review applies (omgevingsvergunning beperkte milieu-toets), the authorities will subsequently draw up a draft decision that can either constitute the intention to issue or deny the permit that is applied for. The draft decision is published and, along with the underlying documents (eg, technical surveys and draft permit provisions), made available for public inspection for a six-week period. Within this six-week period, third parties and/or the applicant can submit a statement of view (zienswijze) with regard to the draft decision, after which the authorities will issue their final decision. A statutory decision period of six months applies, but there are no direct legal consequences attached if this period is not complied with by the authorities.

The authorities’ decision to grant or deny the permit can be appealed within six weeks at the Administrative Jurisdiction Division of the Dutch Council of State (Afdeling bestuursrechtspraak van de Raad van State) by parties with a specific vested interest. The right to appeal is, in principle, reserved to parties that had previously filed a statement of view regarding the draft decision. In practice, appeal proceedings should be expected to take between eight and 12 months.

In the event of modifications to the operation of a facility that already holds an environmental permit, the procedure to obtain the required permit will depend on the nature of the changes. If the modification falls outside the scope of the existing permit but is environmentally neutral, a permit for the change should, in principle, be issued within eight weeks of the permit application. The authorities can extend the decision period once for a maximum of six weeks; if the decision period is not complied with, the permit will be issued by operation of law. Objections against the decision to grant the permit can be filed by interested parties, within six weeks, with the regulatory authorities that have issued the permit. The decision on the objections can be followed by appeal proceedings with the Administrative District Court and the Council of State.

4. ENVIRONMENTAL LIABILITY

4.1 Key Types of Liability

Under Dutch law, environmental issues are primarily administrative matters. However, administrative liability is not the only risk following an environmental breach: potential criminal and civil liabilities must also be taken into account.

Administrative liability can lead to sanctions and measures being imposed by a Dutch regulatory authority, as a result of a violation of environmental laws or regulations. In the event of such a breach, Dutch law provides for three types of potential administrative enforcement measures: an administrative fine (administratieve boete), an order subject to a penalty (last onder dwangsom) and direct enforcement by the authorities.
In the event of a breach of environmental laws, in most cases the authority will impose an order subject to penalty. That way, the offender is given the opportunity to end the breach itself within a certain period of time in order to avoid a fine. However, this remedial sanction can be combined with a fine should the authority deem this appropriate regarding the severity of the breach.

Secondly, there is the risk of criminal liability for the company as well as the de facto manager (feitelijk leidinggever). Most environmental violations are qualified as “economic offences”, which in turn qualify as criminal infringements (overtredingen) when the offence is not committed deliberately or as a crime (misdrijf) in the event of a deliberate violation. This qualification affects the sanction that may be imposed. In short, the offender could face a fine, community punishment (taakstraf) or even imprisonment. Besides these main types of punishments, additional punishments may be imposed, such as an obligation to temporarily cease business operations.

Please note that the administrative and criminal enforcement can coincide in certain circumstances. As a result, offenders could be subject to administrative remedial sanctions and a criminal prosecution simultaneously.

Thirdly, civil liability plays a role when an environmental breach causes an unlawful act towards a third party – in the case of harmful pollution or hindrance, for example. Civil liability could lead to the obligation to pay damages to the aggrieved party. In order for a successful civil claim on the basis of an unlawful act, the unlawful act must have caused damages, and there must be a causal relation between the unlawful act and this damage. In addition, the violated provision must be designed to protect against this damage.

5. ENVIRONMENTAL INCIDENTS AND DAMAGE

5.1 Liability for Historical Environmental Incidents or Damage

Civil Liability
On the basis of Article 3:310, in conjunction with Article 6:175 of the Dutch Civil Code, the expiry date for a legal claim for compensation of damages or a contractual fine as a result of pollution of the air, water or soil is five years. This period commences the day following the day on which the aggrieved party became aware of (i) the damage or the enforceability of the claim and (ii) the identity of the party liable for the damage. Regardless of these conditions being fulfilled, the claim expires 30 years after the incident in any case.

Criminal Enforcement
The expiration of the period during which criminal enforcement is possible depends on the maximum sentence of that violation. For environmental offences/crimes, this means that the expiry period varies, but will expire 12 years after the violation at the latest.

Administrative Enforcement
The power to enforce an illegal situation does not “expire” after a specific period of time. In principle, administrative bodies will maintain their power to impose enforcement measures on an offender.

Third Parties/Legal Successors
If an order subject to penalty is imposed by an authority, that authority can decide that this measure will automatically apply to a possible legal successor if a legal basis for this approach is present (which is, for example, the case in the GEPA). As a result, the legal successor faces the risk of having to pay a penalty.
In the event of soil pollution, a party could be ordered by an authority to investigate or remediate the pollution. Generally speaking, this party will also carry the costs of the remediation. In most cases, this party is the owner of a polluted property or land, but it could also be the leaseholder. This, however, does not have to be the party that caused the pollution. Recourse against the party that did cause the pollution may be possible on the basis of civil law or in the purchase agreement.

As the new owner of real estate or land could face such enforcement measures, it is very important to perform thorough due diligence on environmental topics during the acquisition process.

5.2 Types of Liability and Key Defences
The different types of liability under Dutch law were described in 5.1 Liability for Historical Environmental Incidents or Damage. If an offender faces one of these liabilities, the key defences, limits and conditions to such liability are as follows:

• expiration periods in civil and criminal law (verjaring);
• in the case of criminal liability, an argument that the offender did not deliberately commit the offence (in light of the distinction between infringements and crimes);
• in the case of civil liability, an argument that there is no causal relation between the unlawful act and this damage; and
• in the case of administrative liability:
  (a) a challenge of the lawfulness of the manner in which the authority exercised its powers;
  (b) a challenge of the evidence of the offence or incident; or
  (c) an argument that the enforcement is disproportionate to the interests that it serves.

6. CORPORATE LIABILITY

6.1 Liability for Environmental Damage or Breaches of Environmental Law
A general civil liability is assumed for any person causing damages through a breach of environmental law. This general liability is supplemented in specific legislation related to specific topics, such as asbestos, soil contamination or hazardous substances.

No specific rules apply for corporate entities. With respect to administrative or criminal fines, the type and size of the violator can be relevant, as the proportionality of the punishment can be connected to the size/entity of a company (e.g., big corporations are subject to higher fines than a shopkeeper acting on his or her own).

6.2 Shareholder or Parent Company Liability
Shareholders or a parent company cannot generally be liable for environmental damage or breaches of environmental law of the violating company in which they have a share and/or their subsidiaries as such, unless the shareholder/parent company qualifies as “factual manager” of the violating company or in the case of unification with the violating company. This may be the case for a single or majority shareholder who is also the executive/statutory director of the violating company.

A factual manager (i.e., a natural person who does not have to be a statutory director or executive) can be held liable (next to the violating company itself) if it was responsible for a breach, where it had the means and opportunity to prevent the breach from occurring but the breach occurred nonetheless. It is a relatively high standard and is not often successfully demonstrated in court by a public prosecutor.
7. PERSONAL LIABILITY

7.1 Directors and Other Officers
Statutory directors can be held liable for the proper performance of their duties and for the general course of affairs. If a director is culpable of a serious imputable act in relation to the performance of their duties as a director, he or she can be held liable next to the company itself. It is, however, a high threshold more commonly invoked in matters relating to corporate law and statutory governance or bankruptcy.

As previously stated in 6.2 Shareholder or Parent Company Liability, a factual manager (a natural person who does not have to be a statutory director or executive) can be held liable (next to the company itself) if it was, in short, responsible for preventing the breach occurring and it occurred nonetheless, where it had the means and opportunity to prevent the breach from occurring. It is a relatively high standard and is not often successfully demonstrated in court by a public prosecutor.

The fines are not different for a specific violation, but as the “factual manager” is always a natural person, natural persons might be sanctioned differently (ie, with lower fines) than the company as violator.

7.2 Insuring against Liability
The company (or its directors and/or officers) can take out a D&O policy (directors’ and officers’ insurance) providing coverage for liabilities based on acts and omissions committed or omitted by the directors and officers. However, D&O insurance may exclude claims resulting from or based on, inter alia, the actual, alleged or threatened disposal, emission or escape of environmental contamination substances. This will depend on the insurer and the policy. Furthermore, exclusions may apply with respect to penalties for the breach of environmental law.

8. LENDER LIABILITY

8.1 Financial Institutions/Lender Liability
Generally, lenders will not be liable for the borrower’s environmental actions or property, unless factual management is present or such is explicitly agreed upon. If the lender becomes the owner of the borrower’s properties (eg, land, company), relevant liability connected to that property may be transferred, such as liability relating to soil contamination or permit compliance (for aspects of the environment, water, safety, etc).

8.2 Lender Protection
The lender should refrain from exercising control or influence in the day-to-day management decisions of environmental aspects.

9. CIVIL LIABILITY

9.1 Civil Claims
Apart from contract liability, civil claims for compensation in environmental-related cases are generally brought on the basis of an unlawful act. Typically, compensation can be awarded in the event of unlawful nuisance and violation of a permit, as well as based on a certain duty of care arising from specific environmental legislation (eg, relating to soil protection) or even an “unwritten” duty of care. For instance, in Dutch case law, it was accepted that the Dutch state has a duty of care to take adequate measures to protect its citizens from the consequences of climate change. The Dutch Civil Code further provides a basis for the civil liability of professional users and custodians of hazardous substances and dumpsite and mine work operators.
9.2 Exemplary or Punitive Damages
Under Dutch law, the concepts of exemplary or punitive damages are unknown and, hence, cannot be awarded by courts.

9.3 Class or Group Actions
The Netherlands has always been at the forefront of collective redress in Europe. Since the early 1990s, a claim organisation that represents a certain group of interests can start a class action to obtain declaratory relief. However, Dutch law did not facilitate a class action for monetary damages until 1 January 2020, when the Act on Collective Damages in Class Actions (WAMCA) entered into effect. Class actions filed after the WAMCA taking effect can relate to monetary damages (allegedly) caused by events on or after 15 November 2016.

A class action can be litigated through the competent Dutch civil court. The same rules apply for all class actions, irrespective of whether monetary relief is sought and the legal grounds for damages. As a starting point, the judgment in a class action is binding on all Dutch residents that fall within the scope of the claim organisation, with the exception of those residents that opted out.

9.4 Landmark Cases
A landmark case that is expected to set an important precedent within other countries is the Urgenda case – also known as the “Climate Case” – in which a class action was initiated by the Urgenda Foundation (on behalf of 886 Dutch citizens) against the Dutch state. Both the District Court and the Court of Appeal of The Hague held the Dutch state liable for not taking adequate measures to protect its citizens from the consequences of climate change, and ordered the Dutch state to take additional measures to further reduce the emission of greenhouse gases in the Netherlands by at least 25%, compared to 1990, before the end of 2020. On 20 December 2019, the Dutch Supreme Court confirmed that not reducing emissions accordingly will lead to a breach of the Dutch state’s duty of care towards citizens (constituting a wrongful act). As a result, the earlier order of the Court of Appeal in The Hague has now become final.

More recently, on 26 May 2021, the Hague District Court ordered Royal Dutch Shell both directly and via its group companies, to limit its CO₂ emissions by at least net 45% by the end of 2030, relative to 2019 levels. This class action was brought in 2019 by, amongst others, Friends of the Earth Netherlands (Milieufundis). The Court has come to the conclusion that Shell is obliged to ensure through the Shell group’s corporate policy that the CO₂ emissions of the Shell group, its suppliers and its customers are reduced. This follows from the unwritten standard of care applicable to Shell, which the Court has interpreted based on the facts, widespread consensus and internationally accepted standards. Shell has an “obligation of result” with respect to the Shell group’s CO₂ emissions. In regard to its suppliers and customers, Shell has a material “best-efforts obligation”, which means that Shell must use its influence through the corporate policy for the Shell group – for instance, by setting requirements on suppliers in its purchasing policy.

10. CONTRACTUAL AGREEMENTS

10.1 Transferring or Apportioning Liability
Generally, under Dutch law, civil liability for damages and breaches of law can be limited by means of indemnities and other contractual arrangements between parties, such as buyers and sellers. However, invoking a limitation of one’s liability or any other contractual arrangement causing the transfer or apportionment of
liability can be rejected if it is considered unacceptable according to the standards of reasonableness and fairness, or if it is in violation of law, public order or morals. Indemnities and other contractual arrangements between parties do not affect the parties’ liability to regulators.

10.2 Environmental Insurance
Environmental liability insurances are offered for corporate liability issues. Such insurances are additional to the general corporate liability insurance that frequently excludes or limits these types of risks.

In this jurisdiction, it is also possible to take out environmental damage insurance covering the financial risks of environmental damage such as surface water or soil contamination. Generally, such insurance provides coverage for the environmental damage on your own plot and any adjacent plot, provided that the contamination originated from your plot. Liability is not required for this coverage.

11. CONTAMINATED LAND

11.1 Key Laws Governing Contaminated Land
Dutch soil protection is governed by both soil protection legislation (SPA) and environmental legislation (EMA). Under soil protection legislation, the contaminator can be held responsible for the remediation of a contamination. In cases where the contamination was caused prior to 1987 (when the current legislation entered into force), remediation is only required when the contamination is considered severe and the remediation is considered urgent.

Remediation has to be notified to the competent authority. In a substantial remediation, the competent authority has the possibility to impose remediation orders (depending on the type, size and urgency of the remediation). Also, co-ordinated approaches are possible when a contamination covers a wider area (with multiple owners).

When the soil of an industrial area/parcel is contaminated (up to a point where remediation is required), the owner as such can also be held responsible for the remediation. Although competent authorities generally aim to have the contaminator remediate the soil, if that is no longer possible or feasible, the owner can alternatively be held responsible (at the discretion of the competent authority).

12. CLIMATE CHANGE AND EMISSIONS TRADING

12.1 Key Policies, Principles and Laws

Key Policies
The Netherlands is a member of multiple international treaties regarding climate change, including the Climate Agreement as presented at the Climate Conference of Paris in 2015. The key policies in the Netherlands regarding climate change mainly derive from the objectives as set out in the Climate Agreement of Paris, including the goal to keep anthropogenic global warming below 2°C. With respect thereto, the key national policy aims to reduce the use of energy sources in general (for instance, by making certain energy-saving measures mandatory) and to promote the use of energy derived from renewable energy resources instead of the use of energy derived from fossil resources.

Key Principles
The key principles regarding climate change have been laid down in the Climate Agreement as published by the Dutch government on 28 June 2019 and the Climate Act of 2 July 2019
(which mainly entered into force on 1 September 2019). The latter Act stipulates that, by 2030, the emission of greenhouse gases (GHGs) must be reduced by at least 49% in comparison with the emission of greenhouse gases in 1990, and that these gases must be reduced by at least 95% by 2050. However, if other countries participate, the Netherlands wants to raise the EU target to 55% less greenhouse gas emissions by 2030.

Following a court decision in a civil procedure initiated by the climate foundation Urgenda against the Dutch State, the emission of greenhouse gases must be reduced by at least 25% by the end of 2020 in comparison to the emission of greenhouse gases in 1990. As Urgenda believes that the Dutch State is not doing the absolute minimum it should do in order to reduce greenhouse gases, Urgenda announced that it will again go to court and demand adherence to the judgment – on pain of a penalty. Furthermore, an alliance of interest groups and over 17,000 individual claimants, led by Milieudefensie, won a court case they had brought against Royal Dutch Shell Plc, in which the court ordered Shell to reduce its carbon emissions; see also 9.4 Landmark Cases. As a result of this ruling, Milieudefensie has indicated that it wants to get to the negotiating table as soon as possible with the major greenhouse gas emitters in the Netherlands to make firm agreements on reducing greenhouse gas emissions and, in the event of insufficient co-operation, to start further legal proceedings.

The Climate Act further stipulates that the Dutch government is obligated to make a “climate plan” that describes how the objectives as determined in the Climate Act can be met in the first ten years following the publication of the plan. This climate plan includes a description of the expected use of energy derived from renewable resources and the measures that should be taken in order to promote the use of energy derived from renewable resources.

The key policy regarding climate change in the Netherlands has also been laid down in an agreement between the Dutch government and multiple organisations – the “Energy Agreement”, as published by the Social and Economic Council in September 2013. According to this Energy Agreement, at least 16% of all energy that is produced within the Netherlands must derive from renewable resources by 2023. This agreement further contains multiple arrangements regarding energy-saving measures.

Lastly, in 2020, the Minister of Economic Affairs and Climate has proposed that the Dutch state is willing to provide a subsidy if one of the three modern coal power plants in the country will close down its business voluntary. As a result of a voluntary closure, the other coal power plants located in the Netherlands would be less restricted under the temporary legal limitation of coal power generation. It is currently unclear to what extent any of the three coal power plants will be accepting this offer.

**Key Laws**

A key national law related to climate change is the Climate Act (Bulletin of Acts and Decrees 2019/253), as discussed above. Furthermore, the Prohibition of Coal in Electricity Production Act (Wet verbod op kolen bij elektriciteitsproductie) was passed at the end of 2019, which prohibits the use of coal as a fuel within electricity-generating facilities. Pursuant to this Act, all coal-fired power plants within the Netherlands must close prior to 2030. Reference is further made to the Activities (Environmental Management) Decree (Bulletin of Acts and Decrees 2007, 415), pursuant to which the operator of a facility must implement all energy-saving measures with a payback period of five years. Reference is also made to the Royal Decree of 2 November 2018.
(Bulletin of Acts and Decrees 2018, 380), pursuant to which every office within the Netherlands that has a ground floor area larger than 100 m² must have at least the energy label “C” by 2023.

12.2 Targets to Reduce Greenhouse Gas Emissions
As indicated in 12.1 Key Policies, Principles and Laws, Dutch policy and legislation have set out the following targets to reduce greenhouse gas emissions within the Netherlands:

• by 2023, at least 16% of all energy that is produced within the Netherlands must derive from renewable resources;
• by 2030, the emission of greenhouse gases within the Netherlands must be reduced by at least 49% in comparison with the emission of greenhouse gases within the Netherlands in 1990; and
• by 2050, the emission of greenhouse gases within the Netherlands must be reduced by at least 95% in comparison with the emission of greenhouse gases within the Netherlands in 1990.

13. ASBESTOS

13.1 Key Policies, Principles and Laws Relating to Asbestos
The use of asbestos-containing materials (ACMs) for construction activities has been banned in the Netherlands since 1993. Due to the fact that ACMs were frequently used prior to that date, asbestos is still commonly present in buildings in the Netherlands, especially buildings that were constructed in the 1960s and 1970s. In relation to this ban, the regulatory framework is very much geared towards advancing human health aspects and protecting the general public from the risks associated with ACMs.

However, under Dutch law, there is no obligation to actively remove ACMs that are present in a building, provided that the presence of such ACMs does not entail health and safety risks for the users of the relevant building or to the public in general.

The removal of ACMs will be required in the event of the demolition or (partial) refurbishment of a building containing ACMs. In addition, the removal of asbestos might be required pursuant to the Soil Protection Act, as noted in 11.1 Key Laws Governing Contaminated Land. In such an event, the Asbestos Removal Decree 2005 stipulates strict rules and conditions for such remediation works, including an obligation to carry out an asbestos investigation prior to the envisaged demolition works. Depending on the amount and type (friable/non-friable) of ACMs found, removal might only be allowed by engaging a certified asbestos abatement firm. A register is in place that lists all certified asbestos abatement firms.

With respect to asbestos roofs, a legal ban was recently proposed that would have obliged owners of buildings to remove such roofs by 2024. However, this legislative proposal was defeated in the Dutch Senate in June 2019. Subsequently, an alternative approach was announced by the Minister of Infrastructure and Water Management on 14 October 2019. As part of the envisaged solution, a fund has been established by the Dutch state, provinces, municipalities and banks, aimed at allowing owners of buildings to finance asbestos remediation on favourable terms in order to stimulate the removal of asbestos roofs. So far, however, this fund is much more limited in size than initially expected, and it remains to be seen whether a more all-encompassing approach will be adopted in the near future.
Apart from the above, the production, import, possession or disposal of ACMs has been prohibited under the Asbestos (Product) Decree (Productenbesluit Asbest). The relevant decree also provides labelling and packaging requirements for products that are allowed to contain asbestos. Furthermore, strict rules for worker protection have been laid down in the Working Conditions Decree (Arbeidsomstandighedenbesluit), which also applies to the prevention of asbestos-related incidents.

The supervision and enforcement of asbestos-related regulation falls within the authority of either the Human Environment and Transport Inspectorate or the Inspectorate SZW (Inspectie SZW) in the event of worker-related potential asbestos contaminations. Non-compliance with the above-mentioned rules and regulations is subject to administrative enforcement measures, as well as penalty fines of up to EUR50,000, which may be increased in the repetition of an offence. Criminal prosecution is also possible for wilful violations resulting in, for example, the death of an employee.

In civil law cases, the statute of limitations is extended to a period of 30 years after the moment when the claimant was exposed to ACMs.

The EMA contains several prohibitions and regulations, such as a ban on the unauthorised discarding of waste and regulations pertaining to handing over, receiving, transporting and collecting hazardous waste and industrial waste. In short, waste may only be transferred by a discharger/producer to a party that is qualified (registered or permitted) to accept and/or transport waste. The minister, municipalities and provinces can grant exemptions from some of these prohibitions and regulations, if permitted by law.

Finally, the General Environmental Permitting Decree contains a list of activities that are allowed without an environmental permit. If the activity is not included in this list, an environmental permit is required.

In general, the party that disposes of the waste is responsible for the transfer to a qualified person, and for filing (and storing) the required waste transfer forms. If this is not done correctly, enforcement actions can be taken for not disposing of waste in accordance with the law.

14.2 Retention of Environmental Liability
The operator of a site or facility that disposes of waste (the producer or importer) has to comply with administrative obligations. The operator of the site or facility needs to specify the following:

• from which type of business or person he or she accepts waste, as far as is relevant for the acceptation and control;
• which requirements he or she sets for offering waste;
• how he or she inspects the waste before receipt (mostly visual); and
• how waste that deviates in an environmental hygienically relevant way that is usual for the category concerned is treated.

14. WASTE

14.1 Key Laws and Regulatory Controls
Waste legislation is based upon the implementation of the European Waste Framework Directive (2008/98/EG), which is incorporated in the EMA and elaborated in the national waste management plan. This regulatory framework defines when a product is qualified as waste – ie, “any substance or object which the holder discards or intends or is required to discard”. 

In general, the party that disposes of the waste is responsible for the transfer to a qualified person, and for filing (and storing) the required waste transfer forms. If this is not done correctly, enforcement actions can be taken for not disposing of waste in accordance with the law.

Finally, the General Environmental Permitting Decree contains a list of activities that are allowed without an environmental permit. If the activity is not included in this list, an environmental permit is required.

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• which requirements he or she sets for offering waste;
• how he or she inspects the waste before receipt (mostly visual); and
• how waste that deviates in an environmental hygienically relevant way that is usual for the category concerned is treated.
The operator of such site or facility is responsible for complying with these acceptance and control procedures. The form on which this is documented must be kept for five years.

Specific regulations apply to recycling schemes where a producer of products that will undoubtedly lead to waste (glass bottles, plastic bottles, electronics) will have to take further actions, such as imposing a fee on the consumer or attribution to a recycling system.

### 14.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

There is no general obligation to choose a specific type of waste processing (recycling, recovering or re-using) for a producer of waste. However, there are specific product-related regulations that prescribe to participation in a take-back system or recycle scheme – examples include batteries, some electronic appliances, some types of packaging and car tyres.

### 15. Environmental Disclosure and Information

#### 15.1 Self-Reporting Requirements

The EMA states that “unusual events” with “negative consequences” for the environment should be notified as soon as possible to the competent authority, and measurements must be taken to prevent and/or mitigate the negative consequences. A notification as soon as possible is interpreted rather strictly – effectively, it means right after any emergency services (such as the fire department) have been alerted. Most authorities have dedicated environmental incident “hotlines”.

There is no standard threshold regarding how negative the consequences of an incident should be before the incident should be notified. However, as the requirement to notify unusual events with negative consequences for the environment is interpreted quite strictly by the supervising authorities, it is recommended to adopt a “better safe than sorry” strategy in this respect – that is, to err on the side of caution by notifying incidents with even minor negative effects on the environment.

Information on the causes of the incident, the measures that have been taken and the hazardous substances that have been released should be provided with the notification. The obligation to notify applies to the operator of the facility.

Besides unusual events with negative consequences for the environment, energy efficiency audits should be notified on the basis of the European Energy Efficiency Directive (as implemented in the Netherlands). These audits should generally be carried out once every four years. After such audit has been carried out, an energy audit report should be provided to the competent authority.

Also, in some cases, larger facilities have the obligation to file annual environmental reports in accordance with the Pollutant Release and Transfer Register Directive, as implemented in the Netherlands.

#### 15.2 Public Environmental Information

In the Netherlands, the Freedom of Information Act (Wet openbaarheid van bestuur – Wob) regulates the right to access information from public bodies. The Wob applies to information held by public bodies (“bodies of legal persons established under public law or other persons/legal bodies with some public authority”) with respect to information concerning “administrative matters”. “Administrative matters” are interpreted broadly in Dutch case law.
In general, the information that is held by public bodies and concerns administrative matters will be provided if it is requested by a so-called Wob request, unless an exception as provided for in the Wob applies. These exceptions include that the disclosure of this information would:

- include confidential business and manufacturing data;
- infringe the private life of one or more individuals; and
- result in the disproportionate favouring of certain involved parties.

From recent case law it follows that, in the case of requests for information on the basis of the Wob, where necessary, the Wob must be applied in conformity with the Directive 2003/4/EC. When a public body refuses to provide environmental information, the grounds for refusal must be interpreted restrictively and the public interest served by disclosure must be taken into account. If the public body does not take this sufficiently into account, the decision to refuse the environmental information could be considered to be unlawful.

With respect to environmental information, a specific regime applies that ensures a wider disclosure regime compared to other information concerning administrative matters (following from the Aarhus Convention). Not all exceptions as provided for in the Wob apply to the disclosure of environmental information.

15.3 Corporate Disclosure Requirement

Article 2:391 of the Dutch Civil Code states that corporations should include an analysis concerning their non-financial performance in their annual report, such as their performance regarding the environment. This obligation is further regulated in the decree on the publication of non-financial information (Besluit bekendmaking niet-financiële informatie).

This decree states, amongst other things, that legal entities that meet certain conditions (such as having more than 500 employees) are required to publish a non-financial clarification, which includes information on the policy, the applied due care procedures and the results thereof concerning, for example, environmental matters.

If the corporation involved does not have any policies with respect to the environment, it should include a reason for not having such policies in its annual report.

16. TRANSACTIONS

16.1 Environmental Due Diligence

In transactions where shares or assets in real estate and companies are transferred, vendor due diligence is usually performed.

For real estate transactions (depending on the deal), both zoning and permit review is usual, focusing on property-related aspects such as zoning compliance, building requirements and fire safety. Depending on the asset or share transfer of the property, a different review might be performed.

For M&A transactions (and, to a lesser extent, finance deals), environmental due diligence is performed on aspects of compliance and permits for health, safety and environment aspects. An increasingly applied mechanism in M&A transaction is a warranty and indemnity insurance that also covers most of the environmental aspects (usually excluding soil aspects, however).

Depending on the target (and its environmental activities) and character of the deal (asset or share), several environmental aspects can be reviewed, such as:
• the presence of and compliance with permits and approvals;
• the enforcement actions completed, pending or announced;
• site-related aspects (zoning, soil, asbestos, occupational safety, etc); and
• production-related aspects (chemicals, product safety, reporting requirements, etc).

### 16.2 Disclosure of Environmental Information
A seller is not generally required to disclose any environmental information to a purchaser, although there might be a duty to disclose information that is specifically requested by a potential purchaser. Once a purchaser explicitly indicates it is interested in particular information (e.g., relating to the environment), the seller is obliged to provide that information (to a reasonable extent), to prevent the seller from being liable for misinforming the purchaser.

### 17. Taxes

#### 17.1 Green Taxes
In the Netherlands, several types of taxes are in place in order to meet the objectives as set out in the Dutch climate policy and legislation. These taxes generally aim to discourage the use of (energy) resources.

**Taxes on Energy**
Users of natural (compressed) gas pay energy tax for every cubic metre of natural (compressed) gas used. Users of electricity pay energy tax for every kWh used. Energy taxes are charged by the energy suppliers, who in turn pay the energy taxes to the tax authorities. It is possible to claim back energy taxes under certain conditions, such as if the natural (compressed) gas or electricity is used to generate electricity.

A tax reduction applies to the natural (compressed) gas or electricity that is necessary to fulfil the basic needs of the user. Furthermore, legal entities and natural persons who generate electricity for their own use by means of solar panels are exempted from the obligation to pay energy tax.

**Taxes on Air Pollution**
A CO₂ tax or carbon tax was introduced in the Netherlands on 1 January 2021, whereby all sites that fall under the European Emissions Trading System (EU-ETS) are subject to a carbon tax. Also, waste incineration plants and industrial businesses emitting significant volumes of nitrous oxide are affected by this tax.

In 2021, this carbon tax amounts to EUR30 per ton CO₂ minus the EU-ETS price per ton, with a minimum of 0 (zero). The amount of EUR30 will be increased annually by EUR10.73 towards an amount of EUR127 per ton of CO₂ in 2030. Therefore, depending on the EU-ETS price, the carbon tax will increase annually. The carbon tax does not apply to certain applications, such as the capture and storage of CO₂.

**Taxes on Tap Water**
In the Netherlands, taxes apply to the use of tap water. From 1 January 2015, taxes on tap water have only applied on the first 300 m³ used. These taxes are charged by the water suppliers, who in turn pay the taxes to the tax authority.

**Taxes on Waste**
Companies in the Netherlands with a waste incinerator must pay waste taxes for every 1,000 kg of incinerated waste. Companies must report the total amount of incinerated waste to the tax authorities in their yearly tax return declaration. In addition, companies transporting their waste to foreign countries to have it dumped or incinerated face taxes. In that way, an equal system applies to all waste that was produced.
in the Netherland, irrespective of where it will be processed. With these taxes the government encourages businesses to recycle materials instead of incinerating them.

**Flight Taxes**

In 2020, the Dutch government announced that, if agreements on flight taxes on a European level appeared to be unfeasible, a national law introducing flight taxes would be adopted in 2021. Since 1 January 2021, this flight tax applies to all individual passengers departing from a Dutch airport. The flight tax amounts to EUR7,845 per flight – its aim is to encourage individuals to make environment-conscious decisions, and to enhance sustainability in the aviation sector by reducing the CO₂ deposition.
Loyens & Loeff has an environmental law group that is part of a fully integrated (tax and legal) firm with home markets in the Benelux countries and Switzerland, as well as offices in all the major financial centres, such as London, New York, Paris and Hong Kong. The group advises on the full range of environmental law matters, from the development of new projects and facilities to the restructuring of complex permit situations, and from compliance audits to inspection procedures and litigation that involves the regulatory authorities. The team’s expertise includes EU and other cross-border regulations pertaining to, inter alia, waste, chemicals, emission trade and environmental liabilities. Clients come from both the private and public sectors, reflecting the team’s ability to provide knowledgeable and practical guidance in all environmental law matters.

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Sustainable Environment in the Netherlands

The last few years have seen challenging times in the Netherlands for companies in the real estate, energy and industrial sectors. Issues with soil quality, nitrogen deposition and energy transition have asked for a lot of resilience and effort from the industry. Unfortunately, the outlook for environmental players does not indicate any leniency for these parties, which will have to step up in order to be able to adapt their business and operation to the requirements of government and customers – and act responsibly towards the environment.

The main trends in the Netherlands in this respect are:

• nitrogen deposition will remain a concern for developments;
• solar and wind projects will face more community involvement;
• industrial processes will be scrutinised further; and
• there will be new legislation on zoning.

Nitrogen deposition will remain a concern for developments

When the Administrative Court of the Council of State (Afdeling bestuursrechtspraak van de Raad van State) – the highest administrative court in the Netherlands – ruled in a landmark case on the Dutch nitrogen programme being irreconcilable with the European directive on nature habitats in 2019, the rules on the maximum allowed deposition of nitrogen were substantially tightened. A lot of planned developments of real estate or amendments to industrial operations were shelved because of the uncertainty caused by the nitrogen deposition. Now, two years later, certain emergency measures have been put in place to bring the market into motion a little, but the question of nitrogen deposition remains a hot topic.

When nitrogen is emitted, it can subsequently “fall down” several miles from the source of the emission. This is called “nitrogen deposition”. Some types of nature are very sensitive to nitrogen and less sensitive types (such as grass and weeds) push out the sensitive nature. This in turn leads to birds, butterflies and other animals having less nutrition. Therefore, one of the objectives of the EU directive on natural habitats is to prevent the deterioration of such habitats – called “Natura 2000 areas” – due to nitrogen, among other factors. In the Netherlands, a programme was in place that, in short, balanced a large number of developments that caused nitrogen deposition with developments that mitigated nitrogen deposition. This programme also included a threshold value below which no permit would be required for the nitrogen deposition. However, the landmark case in 2019 ruled that this programme (or major parts of it) were irreconcilable with the EU Habitats Directive.

As such, nearly all developments that have a detrimental effect on a Natura 2000 area caused by nitrogen deposition require a permit. Nearly all development projects generate nitrogen, either by truck transport movements, by operating a mobile power unit or by combustion installations, in which case the initiator of that project will have to assess whether the nitrogen emitted will deposit on a Natura 2000 area. As the nitrogen may migrate for miles before deposition, this could easily be the case.
A lot of programmes and projects were halted due to the tightened rules on nitrogen deposition. As a result of this deadlock, the government took emergency measures by adopting new acts to provide for a new threshold that would prevent smaller development projects having to file for a nitrogen deposition permit. Also, in practice, where there is unused emission space in a permit, or where a business terminates (the emitting part of) its business, those terminated deposition rights can be balanced against new emission possibilities. As time moves on, developers and industrial parties will find their way with the facilities that can be used.

Therefore, there is now some room to operate for smaller real estate developments or small industrial expansions, but there is still a big focus on the nitrogen deposition of each project. The landmark case was sparked by an environmental organisation, which caused other environmental organisations to scrutinise new developments that may or will cause nitrogen deposition from all sides (from permit disputes to freedom of information procedures). Nonetheless, it will be valuable to assess at an early stage of a development or expansion whether nitrogen deposition can be a hindering factor.

**Solar and wind projects will face more headwinds**

In the last couple of years, dozens of wind farms and solar parks have been constructed on land in the Netherlands. These developments are now so numerous that a tipping point has been reached, where the community tolerance has dropped to a new low, and local people are becoming more and more active against new renewable energy developments in their area. As a reaction, the government intends to require developers of renewable energy projects to include the participation of neighbouring communities.

Community activism is not new in the Netherlands – which is one of the most densely populated nations in the EU – but in recent years the objections against large wind farms or solar parks have grown substantially. Almost all permit or zoning plans for developments are brought before the court by local communities or environmental organisations.

At the same time, local governments are increasingly demanding community support for the development of sustainable energy initiatives. For example, a lot of municipalities require the obligatory participation of local people, and can mandate that up to 50% of the shares/certificates in a wind farm or solar park are made available for those who live in the vicinity. Some municipalities even require local residents – gathered in an association or foundation, for example – to have a say in the operations of the wind farm or solar park.

Although the requirement for an initiator to hand over 50% of its interest to local residents has no basis in administrative law, municipalities do ask for this and even more in return for their enhanced co-operation in the permit application procedure.

Also, community anger against new wind farms has led to a landmark case on the approval of new wind farms based on the general rules of the Activities Decree. In the case, the Administrative Court of the Council of State ruled that each new wind farm must be assessed separately, as the general rules of the Activities Decree for wind farms are in violation of European environmental law. New developments of wind farms now have to be individually assessed under environmental law before they can be permitted, which extends the development time of a wind farm.

Given the above, the development of sustainable energy sources on land in the Netherlands
has become more difficult and/or less profitable. This is a development that may last a while, so a solution could be to look elsewhere, to projects where no neighbours are affected – for example, solar panels on large roofs or solar parks on water.

**Industrial processes are increasingly scrutinised**
In 2021, a new carbon tax was introduced in the Netherlands. In order to fulfil its commitment under the Paris Agreement, the Netherlands wants to bring carbon emissions down further, by levying a new tax on carbon emissions.

The carbon tax scheme is linked to the existing EU emissions trade system (EU-ETS), and companies that fall under this EU-ETS also fall under the carbon tax. The carbon tax in 2021 will be EUR30 per ton of CO₂ emitted and will then be increased annually by approximately EUR10. The price of one emission right under the EU-ETS can be deducted from this amount. As such, the carbon tax is an add-on to the price for an emission right under the EU-ETS.

Carbon dioxide that is captured and stored is exempted from the carbon tax. If an industrial site captures its emissions and transports it to a site for carbon capture and storage, then no taxes will have to be paid.

The carbon tax is not the only act of scrutiny on industrial processes: from 2030, power plants will be prohibited from using coal, and coal-fired plants will be limited in their generation. The possible closure of one more coal-fired power plant is also envisaged, as an alternative to the production limitation for all coal-fired power plants.

Additionally, additional actions are expected on the air emissions of industrial operations. Under an intergovernmental agreement, it is provided that local governments will impose stricter air emission limits on new or amended environmental permits.

With this increasing focus on the environmental effects of operations, there is an opportunity (and maybe even a requirement) for companies to make the transition to cleaner technologies and energy. Pilots and plants are currently operational for relatively new techniques such as hydrogen or geothermal energy.

**New legislation on zoning**
In the next two years, a major new act will probably enter into effect: the Environmental and Planning Act.

Under the new Environmental and Planning Act, the municipal council will still adopt zoning plans (which will be called “physical environment plans” – omgevingsplan), based on a structural vision regarding spatial planning (which will be called an “environmental strategy” – omgevingsvisie). The Environment and Planning Act, like the General Environmental Permitting Act, provides for an integrated environmental permit. With the centralisation of several Acts in the new Environment and Planning Act, this environmental permit will integrate several aspects that require a permit into a single integrated permit – for example, nature conservation.

Additionally, the new Environmental and Planning Act is aimed at facilitating further decentralisation by increasing both the breadth and width of the regulatory authority of local governments regarding a range of environmental topics. As a result, the legal effects of the new Act could, in theory, vary quite significantly, depending on how certain municipalities intend to use/experiment with newly granted room for local decision-making. Generally, however, it is expected that the effects on existing situations will be fairly limited, at least initially.
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Law and Practice

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1. REGULATORY FRAMEWORK

1.1 Key Environmental Protection Policies, Principles and Laws

General Principles of Environmental Law
The aim of environmental policy is to enforce environmental rights by promoting sustainable development. This is supported by appropriate management of the environment, in particular of ecosystems and natural resources. This contributes to the development of a low-carbon society and a “green economy”, and to rational and efficient use of natural resources, including the promotion of the circular economy, which ensures the well-being and the gradual improvement of the quality of life of citizens.

Public Action Principles
Public action in environmental matters is guided by the following principles:

- sustainable development;
- intra and inter-generational responsibility;
- prevention and precaution;
- responsibility;
- recovery;
- the user pays;
- the polluter pays.

Public Policy Principles
Public policies for the environment are guided by the following principles:

- a transversal approach and integration;
- international co-operation;
- knowledge and science;
- environmental education;
- information and participation.

Environmental Laws
The laws governing environmental protection are various and scattered, depending on their specific subject. However, the following main pieces of legislation should be taken into consideration:

- the Constitution of the Portuguese Republic;
- Law No 19/2014, which defines the bases of environmental policy;
- Law No 50/2006, which establishes the framework law for environmental administrative offences;
- Decree Law No 151-B/2013, the legal framework for environmental impact assessment;
- Decree Law No 147/2008, the legal framework of responsibility for environmental damage;
- Decree Law No 127/2013, the legal framework of industrial emissions applicable to integrated pollution prevention and control;
- Law No 58/2005, the Water Law;
- Decree Law No 102-D/2020, the general framework of waste management;
- Decree Law No 39/2018, the legal framework of prevention and control of emissions of pollutants into the air;
- Decree Law No 12/2020, the legal framework for greenhouse gas emission allowance trading;
- Decree Law No 140/99, the legal framework of the conservation of wild birds and the conservation of natural habitats and wild flora.

2. ENFORCEMENT

2.1 Key Regulatory Authorities
The key regulatory bodies with authority in environmental matters are the following: the Minister of the Environment and Climate, the Portuguese Environmental Agency (APA), the Minister of Maritime Affairs, the Inspectorate General of the Environment (IGAMAOT), the Portuguese Institute of the Sea and Atmosphere (IPMA), and the Commissions for Regional Coordination and Development, one

3. ENVIRONMENTAL INCIDENTS AND PERMITS

3.1 Investigative and Access Points

Regulatory Authorities' Investigative Powers
Some of the entities listed in 2.1 Key Regulatory Authorities have powers of control, inspection and monitoring of compliance with environmental legislation. In exercising these powers, they may request the collaboration of the police authorities. Whenever a situation of serious danger to the environment or human health is detected, they may adopt, as a preventive measure and with immediate effect, the precautionary measures that, in each case, are justified to prevent or eliminate the hazardous situation. These include: the suspension of the installation’s operation; the closure of all or part of the installation; or the seizure of all or part of the equipment. In particular, IGAMAOT has the right to free access to the operators' facilities, to request examinations, expert examinations, document collection and consultation.

In principle, IGAMAOT is also the entity responsible for bringing and deciding administrative offence proceedings. It can also carry out precautionary seizures and apply accessory penalties.

3.2 Environmental Permits

Environmental Permits

In general terms, an environmental permit is required whenever an activity may significantly affect components of the natural environmental, such as the soil, the subsoil, water resources, the sea, the air, biodiversity and the landscape.

The main environmental licences/authorisations are the following:

- Environmental Impact Statement (DIA) and Declaration of Conformity of the Execution Project (DCAPE);
- Environmental Permit;
- Greenhouse Gas Emissions Permit;
- Waste Management Operator Licence;
- Title for Use of Water Resources;
- Landfill Operating Licence;
- Installation and Operation of Integrated Centres for Recovery, Valorisation and Disposal of Hazardous Waste Licence;
- Air-Pollutant Emissions Title;
- Water Reuse Licence.

Environmental Licence Procedure

Environmental licences must be obtained prior to carrying out an activity that has environmental impacts.

Obtaining a licence implies the submission of an application on an electronic platform, SILiAmb, followed by the payment of a fee. The main environmental permits are incorporated in the Single Environmental Permit (TUA), which is an electronic title that gathers all the information about the licensing and previous administrative control acts on environmental matters to which each operator is subject.

Challenging Rights

Under the Constitution of the Portuguese Republic, any citizen – as well as associations and foundations defending the environment, regardless of whether they have a direct interest in the claim – may administratively and judicially appeal environmental licences. Local authorities also have the right to appeal such licences in relation to interests held by residents in their area of jurisdiction.
The granting of licences in environmental matters is also subject to public consultation, as a way of ensuring greater involvement of citizens in decision-making on environmental issues that concern them. As a way of enabling citizens to exercise the right to public consultation, the government has created a website, Participa, allowing the public to consult ongoing environmental licensing procedures and related documents. It also allows people to submit opinions, which must be analysed prior to the licensing decision.

4. ENVIRONMENTAL LIABILITY

4.1 Key Types of Liability
There are two main types of liability for environmental damage or breaches of environmental law. Specifically, there is punitive liability (administrative offence liability and criminal liability) and restorative liability (civil liability and environmental liability).

5. ENVIRONMENTAL INCIDENTS AND DAMAGE

5.1 Liability for Historical Environmental Incidents or Damage
Historical Environmental Incidents
The extent of liability for non-compliance with environmental standards can be analysed from two different perspectives: (i) the subjects to whom the liability might be attributed, and (ii) the period during which the liability subsists.

The liable party
The general principle on liability is that the unlawful act is attributed to the person that commits it, precisely because its subjective imputation is performed according to the person that causes the environmental damage. This means that the responsibility is attributed to the subject that caused the damage.

Indeed, environmental law is built on a logic of accountability, which determines the assumption, by polluting agents, of the consequences of their actions and omissions on natural resources.

In other words, the criterion for attributing liability is not necessarily of the current (or purchasing) operator or landowner, but rather of the subject to whom the harmful activity of the environment is attributed.

Liability limitation period
Administrative offence liability
The limitation period for administrative offences is a maximum of five years from the commission of the offence, without prejudice to the causes of interruption and suspension provided for in the law. This means that, in practice, this period might be extended up to eight years.

Civil and environmental liability (for environmental damage)
In relation to the limitation period for civil and environmental liability (for environmental damage), there is the problem of the latency period for the causes of environmental damage, since this damage can manifest itself long after the fact or facts at their origin. As a result, the applicable legislation came to establish the extension of what would be the ordinary limitation period; it determined that liability for damage caused by any emissions, events or incidents that happened more than 30 years ago is time-barred.

Moreover, this liability is not applicable to damage cause by any emissions, events or incidents prior to 1 August 2008 or to damage caused by any emissions, events or incidents that occurred after 1 August 2008 due to a specific activity performed or concluded before that date. In these cases, it will be necessary to resort to the
traditional civil liability rules of the Portuguese Civil Code. Under these rules, non-contractual civil liability expires three years from the date the injured party became aware of their right, and contractual civil liability expires in 20 years.

Civil liability
If an environmental offence causes damage to a third party, the perpetrator is liable to pay compensation intended to repair the damage caused to people and property.

Criminal liability
The statute of limitations for crimes depends on the applicable penalty and the specific crime in question. In the worst-case scenario, criminal liability expires after 15 years from the commission of the act.

5.2 Types of Liability and Key Defences

Types of Liability
The violation of legal and/or regulatory provisions in environmental matters might constitute an administrative offence, entail the civil liability or the environmental liability of the offender, or be considered an environmental crime.

Administrative offence liability
This type of liability is the most common way to punish behaviour that violates environmental legal provisions.

In fact, most breaches of environmental law, as well as of the provisions established in the permits, trigger environmental administrative offences. Administrative offence proceedings can lead to the application of fines of between EUR2,000 and EUR5 million, depending on the type of offence, its perceived seriousness and the infringer’s degree of guilt. In the case of presence or emission of one or more dangerous substances that seriously affect health, the safety of people and property, and the environment, the above range of fines can be doubled. Additionally, in the most serious situations, apart from the fines, ancillary sanctions may be applied, such as a ban on carrying out the activity or the loss of public subsidies.

Environmental liability (for environmental damage)
This type of responsibility arises from Directive No 2004/35/EC of the European Parliament and of the Council. It is designed to repair the damage caused to the environment itself, specifically, significant damage caused to protected species and natural habitats, water resources and soil. Causing an environmental damage, or an imminent danger of such damage, while pursuing any activity carried out in the context of any economic activities – regardless of its public or private nature, profitable or not – might lead to the liability of the perpetrator. Liability for environmental damage implies the obligation to implement preventive and repair measures, and to bear the associated costs.

Criminal environmental liability
The Portuguese Criminal Code includes four environmental crimes:

• damage to nature;
• pollution;
• activities that are dangerous for the environment; and
• pollution that causes a common danger.

In the worst-case scenario, environmental crimes may lead to the application of a five-year custodial sentence. In case of death or offences involving physical injury, both the minimum and maximum thresholds are increased by one-third.

For the crimes they commit, legal persons and similar entities are subject to the main penalties of a fine or of dissolution. The minimum and maximum limits of the fine applicable to legal
persons and similar entities are determined with reference to the term of imprisonment provided for natural persons. For legal persons and similar entities, one month’s imprisonment corresponds to ten days’ fine. Each day’s fine corresponds to an amount between EUR100 and EUR10,000, which the court sets according to the economic and financial situation of the convicted person and its costs regarding employees.

Limits and Conditions on Civil, Environmental and Administrative Liability

Civil liability
Civil liability is traditionally dependent on meeting five requirements, specifically:

• the fact;
• the illegality;
• the fault (in cases where the liability is not strict liability);
• the damage; and
• the causal connection between the fact and the damage.

These conditions are cumulative, so the failure to meet any one of them is sufficient for there to be no liability.

With regard to the causal connection and fault, there are some specifics in relation to the traditional civil liability rules to bear in mind. Under the general civil liability rules, proving the causal link between the fact and the damage depends on greater certainty, on adequate causality. However, in this kind of liability, the assessment of the evidence of the causal link is based on a criterion of likelihood and probability that the harmful act can cause the damage in question.

Concerning guilt, it should be noted that, for some economic activities, this type of responsibility is applicable regardless of the existence of guilt or intent. Moreover, if several persons are liable, all are jointly and severally liable for the damages, even if one or more are at fault, without prejudice to the correlative right of recourse that they may exercise reciprocally. When it is not possible to individualise the degree of participation of each of the responsible parties, they are presumed to be liable in equal shares.

Environmental liability (for environmental damage)
Environmental liability is traditionally dependent on meeting the same five requirements as listed above in ‘Civil liability’; these conditions are likewise cumulative.

With regard to causation and fault, there are some specifics in relation to the traditional civil liability rules to bear in mind. Under the general civil liability rules, proving the causal link between the fact and the damage depends on greater certainty, on adequate causality. However, in this kind of liability, the assessment of the evidence of the causal link is based on a criterion of likelihood and probability that the harmful act can cause the damage in question.

Concerning guilt, it should be noted that, for some economic activities, this type of responsibility is applicable regardless of the existence of guilt or intent. Moreover, if several persons are liable, all are jointly and severally liable for the damages, even if one or more are at fault, without prejudice to the correlative right of recourse that they may exercise reciprocally. When it is not possible to individualise the degree of participation of each of the responsible parties, they are presumed to be liable in equal shares.

Another important issue is that the operator is not obliged to pay the costs of preventive or restorative measures when it can demonstrate that there was no intention or negligence on its part and that the environmental damage was caused as a result of an event expressly permitted by the issued licences or that it was dam-
age that, at the time, given the state of scientific knowledge available, was not likely to occur.

Administrative offence liability
Administrative offence liability is based on the same five requirements as for civil liability. However, in this case, it is always necessary to establish the guilt of the perpetrator. Therefore, in this respect, the same logic that underlies civil liability applies, in the sense that the failure to meet any one of those requirements is sufficient for there to be no liability.

Administrative offences correspond to a social and administrative censure whose reason to exist is the subsidiarity of criminal law and the need to sanction illicit behaviour that is subject to a lighter social disapproval. This is the reason why the administrative offence liability framework, although with many specifics of its own, is, in a certain way, close to criminal law.

In a purely exemplary exposition, it is important to underline that only the fact described and declared to be subject to a fine by a law prior to the time it was committed is punishable as an administrative offence. Moreover, if the law in force at the time the act was committed is subsequently changed, the law that is more favourable to the defendant will apply.

The fine may be specially reduced when there are circumstances prior, subsequent to, or contemporaneous with, the commission of the administrative offence which markedly reduce the unlawfulness of the act, the culpability of the perpetrator, or the need for the fine. In these cases, the minimum and maximum limits of the fine are reduced by half.

In some circumstances, voluntary payment of the fine at the minimum amount or with a 25% reduction is allowed.

This kind of liability is also subject to a limitation period, as referred to above, regarding historic environmental incidents.

6. CORPORATE LIABILITY

6.1 Liability for Environmental Damage or Breaches of Environmental Law
Corporate Liability
Administrative offence liability
As far as administrative offences are concerned, legal persons are liable if the damaging activity is attributable to them. The general rules specifically state that legal persons or equivalent are responsible for administrative offences committed by their bodies in the performance of their duties.

Civil liability and environmental liability (for environmental damage)
Regarding civil liability and environmental liability, legal persons are liable if the damaging activity is attributable to them.

Criminal liability
Legal persons or equivalent are liable for environmental crimes when they are committed:

- on their behalf and in the collective interest by persons occupying a leadership position; or
- by whoever acts under the authority of the persons referred to in the preceding paragraph, by virtue of a breach of their duties of vigilance or control.

It is understood that the bodies and representatives of the legal entity and whoever has the authority to exercise control over its activity occupy a leadership position.

The criminal liability of legal persons and similar entities is excluded when the agent has acted
against express orders or instructions from those in charge.

This criminal responsibility of the legal person does not exclude the individual liability of the actual perpetrators, nor does it depend on their liability.

### 6.2 Shareholder or Parent Company Liability

**Administrative Offence Liability**

Given the legal provisions of the framework law for environmental administrative offences, it is not clear that this type of liability cannot also extend to shareholders.

**Civil Liability and Environmental Liability (for Environmental Damage)**

Regarding civil liability and environmental liability, if the operator is a commercial company that is in a group or control relationship, the environmental liability extends to the parent or controlling company when there is abuse of legal personality or fraud against the law.

### 7. PERSONAL LIABILITY

#### 7.1 Directors and Other Officers

**Environmental Administrative Offences**

Directors, managers and other persons who hold, even if only de facto, management position in legal entities, even if irregularly constituted, and any other similar entities, are responsible on a subsidiary level:

- for fines imposed for infractions for acts that took place during the period they held their positions, or for previous acts when it was their fault that the company’s assets or the legal person became insufficient to pay the fine;
- for fines due for previous acts when the definitive decision to apply them is notified during the term of office and the failure to pay is attributable to them;
- for the procedural costs resulting from the proceedings brought under the Framework Law for Environmental Administrative Offences.

If there are several individual persons responsible for the wrongful acts or omissions that result in the insufficiency of the assets, their responsibility is joint and several.

**Civil Liability and Liability for Environmental Damage**

When the harmful activity is attributable to a legal person, the obligations arising from the Legal Framework on Liability for Environmental Damage are jointly and severally levied on its managers, directors or persons with leading functions.

**Environmental Crimes**

Without prejudice to the right of recourse, persons occupying a leadership position are liable on a subsidiary basis for the payment of fines and compensation for which the legal person or equivalent entity is convicted, in relation to crimes:

- committed during the period they held those positions, without their express opposition;
- committed previously, when it was their fault that the assets of the legal person or equivalent entity became insufficient to pay the fine in question; or
- committed previously, when the final decision to apply them has been notified during the period they held their position and the failure to pay is imputable to them.

If there are several individual persons responsible under these terms, their responsibility is joint and several.
7.2 Insuring against Liability
Directors’ and officers’ liability insurance may include administrative, civil and environmental liability, even if this is achieved by negotiating tailor-made insurance with the insurer. Typically, such insurance covers civil liability and administrative liability. Environmental liability is not normally included in standard insurance, but it can be negotiated.

8. LENDER LIABILITY

8.1 Financial Institutions/Lender Liability
As referred to in 5.1 Liability for Historical Environmental Incidents or Damage, liability falls upon the operator to which the activity that harmed the environment is attributed. Therefore, financial institutions or lenders are not, in principle, liable for the offences the operator commits.

The Legal Framework on Liability for Environmental Damage determines that some operators (depending on the activity they carry out) are obliged to set up one or more financial guarantees of their own, which are autonomous, alternative or complementary to each other, that enable them to assume the environmental liability inherent to their activity.

Financial guarantees can be constituted by taking out insurance policies, obtaining bank guarantees, participating in environmental funds, or constituting own funds reserved for this purpose. If the financial guarantee is constituted through bank guarantees, the financial institution will be liable under the terms established in the guarantee.

8.2 Lender Protection
Any liability of the financial institutions can only be safeguarded contractually. Specifically, in the case referred to above, the limits of the financial institution’s liability will be stated in the terms of the bank guarantee.

9. CIVIL LIABILITY

9.1 Civil Claims
The injured party may bring an action for damages based on civil liability whenever someone offends their rights or interests by damaging any component of the environment. This is to say that the act committed by the agent is unlawful and, as such, gives rise to civil liability if it violates another person’s subjective right – such as the right to property – or if it violates any legal provision intended to protect the interests of others.

In these cases, the agent is obliged to repair the damage resulting from the offence.

9.2 Exemplary or Punitive Damages
The Portuguese legal system does not expressly provide for punitive damages.

Doctrine and case law have resorted to this figure in certain cases when proven useful and, for this purpose, they use the existing legal provisions in which it may be framed.

The concept of punitive or exemplary damages is imported from Anglo-Saxon law and aims to recognise that civil liability has a sanctioning or punitive purpose.

Traditional Portuguese doctrine has accepted the sanctioning purpose of civil liability, but only in an ancillary or secondary way, and always subordinated to the reparatory function. Doctrine bases this sanctioning or repressive purpose on some legal provisions of the Portuguese Civil Code, such as the one that grants the judge the right to reduce compensation equitably in the event of mere fault, considering the degree
of culpability of the agent, the economic conditions of the agent and of injured party and other circumstances of the case. Other provisions that reflect the punitive or repressive nature of civil liability are the one which determines that the distribution of burden of payment of compensation among the various persons responsible is to be in proportion to each one’s degree of fault, and the one which determines that the level of compensation, when the injured party is at fault, is to be based on the gravity of the fault of both parties.

Although Portuguese case law has not accepted the concept of punitive damages, in certain specific cases it has attributed to the compensation of non-material damage, a mixed nature of repairing the damage suffered by the injured party and reproofing or punishing the conduct of the agent. It does this by calculating the amount of the compensation for non-material damage, taking into account the degree of fault of the agent and its economic situation, and decreasing or excluding the compensation in cases of fault on the part of the injured party.

This means that, in Portugal, the courts do not exactly award exemplary or punitive damages, but they do use the legal provisions at their disposal to accentuate, depending on the circumstances of the case, the punitive or sanctioning function of civil liability. They do this, for example, by awarding higher compensation for non-pecuniary damage in cases where the degree of illegality and the degree of culpability of the agents is very high.

9.3 Class or Group Actions

Popular Actions

The Constitution of the Portuguese Republic recognises the fundamental right to bring a popular action, integrating it in the scope of the rights, liberties and guarantees of political participation. The Constitution expressly lists the preservation of the environment as an asset that can be protected by popular action. This means that, by means of popular action, any citizen, as well as certain associations and foundations can access the justice system to protect legal situations that are insusceptible of individual appropriation, as is often the case with environment-related matters. This protection can be exercised both in the judicial courts and through the administrative procedure themselves.

Institutional parties can bring popular actions and it is important to emphasise the role of NGOs (ONGAs), which have been granted broad legal standing in environmental matters. NGOs are, in principle, exempt from paying court fees and benefit from a 50% exemption from the fees due for access to environmental information.

Whether or not they have a direct interest in the legal action, NGOs have legal standing to:

- bring the legal actions necessary to prevent, correct, suspend and put an end to acts or omissions of public or private entities that constitute or may damage the environment*;
- bring, under the terms of the law, legal actions to enforce civil liability in relation to the acts and omissions referred to above*;
- take legal action against administrative acts and regulations that violate the legal provisions that protect the environment;
- lodge complaints or accusations, act as interested parties (assistentes) in criminal proceedings for crimes against the environment, and monitor administrative offence proceedings, when they so request.

9.4 Landmark Cases

In matters of noise, there is case law in Portugal deciding, in general terms, that the rights of the residents should prevail over the rights of the operators of economic activities, and this may happen even if licensing was valid and if
noise limits are not exceeded. Consequently, in such circumstances, operators may be obliged to adopt mitigation measures in order to reduce the noise produced.

Specifically, there is case law in Portugal, dated 11 September 2012, in which the Lisbon Court of Appeal (Case No 2209/08.0TBTD.L1-1) upheld the right of inhabitants living in the vicinity of a wind farm to have wind turbines removed or their operation suspended at certain time of the day, on the grounds of noise emission and/or the shadows from the wind turbines.

The Portuguese courts have taken the view that, in these situations, there is a collision of rights at issue between the right to rest, sleep and tranquillity of the residents, and the economic right of the wind farm whose wind turbines emit noise and/or shadow to operate as a business.

In the abstract, it is considered that the rights of the residents should prevail over the rights of the economic operator. However, even if the economic activity is licensed, it has been held that this assessment should be made taking into account each specific case. Therefore, the residents are required to demonstrate definitively that the location in question is their home and that they are truly affected by the noise in question.

Concerning the right to civil compensation, Law No 90/88 of 13 August 1988 specifies that the state is liable for compensating all citizens who are directly harmed by actions of Iberian wolves (Canis lupus signatus Cabrera). In this context, the Central North Administrative Court decided, on 22 February 2013 (Case No 00242/05.2BEM-DL), that when Iberian wolves kill animals owned by citizens, this damage is eligible for compensation by the state, as any emotional damage suffered by the owners. This is because the above law does not differentiate between property damage or personal injuries, although the complementary legislation in force at the time of the decision (Decree Law No 139/90) referred to damage to animals. This complementary legislation was repealed in the meantime by Decree Law No 54/20063, which now provides much more detailed rules on compensation for damage to animals.

Furthermore, a recent decision from the Central North Administrative Court of 13 March 2020 (Case No 00036/06.8BEPNF) established that the operation of a waste water treatment plant under normal conditions that is licensed for this purpose cannot be grounds to award compensation to people living nearby. The court stresses that aim of these plants is to prevent the contamination of soils and water, and that a public interest objective of this type will prevail over minor inconveniences (which are not even worthy of legal protection) that were eventually suffered by those people. As such, it does not trigger the right to a compensation.

From another perspective, in order to protect a bat colony, the Central South Administrative Court decided, in a protective order (Case No 06793/10), on 31 March 2011, that a windmill in a wind farm could only be constructed and installed at certain times of the day and in certain months of the year. Moreover, its operation could only occur at a certain speed and in specific time periods. This demonstrates that the courts decide on environmental matters regardless of the presence of other legal institutes.

10. CONTRACTUAL AGREEMENTS

10.1 Transferring or Apportioning Liability
It is possible to use indemnities or other contractual agreements to transfer liability – for exam-
These transfers of responsibility are subject to the general principles of law, such as good faith and proportionality.

These types of contracts do not have any binding effect on regulators, who will always take into consideration the party responsible for the activity that harms the environment. This follows the accountability and polluter pays principles. In other words, the regulator will always hold the perpetrator of the damage liable, regardless of what is contractually stipulated. The contracts might, however, have an influence on the regulators, especially in a scenario where there is continuation of the damaging activity and where it may be difficult to locate in time the fact that gave rise to the damage and establish a causal link with an operator.

10.2 Environmental Insurance

Environmental insurance is available in the Portuguese legal system. In fact, in some cases, for operators that carry out certain activities, it is mandatory to have a financial guarantee, which can be provided by taking out environmental responsibility insurance.

This type of insurance usually covers multiple risks arising from pollutant discharges in an environmental component and from the activity of the insured:

- costs for the investigation, removal, remediation, monitoring and elimination of contamination of soil, surface water and groundwater;
- damage to protected species and natural habitats, including all biodiversity damage, water damage and soil damage for which the insured is legally responsible, and which gives rise to repair costs;
- physical injury, illness, serious mental disturbance suffered by any person, including death resulting from this;
- physical injury to or destruction of the tangible material property of any third party;
- loss of use, without diminution in value, of tangible property of any third party;
- risks relating to transportation, including movement of cargo to the final place of delivery by the insured, including loading and unloading operations, trips to collect cargo and trips after cargo delivery;
- reasonable and necessary legal fees, costs and expenses incurred by or on behalf of the insured in the investigation, defence, settlement or appeal of any claim;
- expenses arising out of reasonable measures taken at the initiative of the insured in good faith to prevent environmental damage.

11. Contaminated Land

11.1 Key Laws Governing Contaminated Land

There are no specific laws concerning contaminated land. Although a draft law was under discussion in 2015, it ended up not being published. Nevertheless, the prevention of emissions into the soil is covered by environmental procedures, such as environmental licensing (Decree Law No 127/2013) and the environmental impact assessment (Decree Law No 151-B/2013). Moreover, Decree Law No 147/2008, determines that environmental damage, which include damage to the soil, must be communicated to the appropriate authorities within 24 hours. For further details concerning self-reporting obligations, please see Section 15. Environmental Disclosure and Information.

Under Decree Law No 102-D/2020, every operation for the remediation of the soil requires a specific licence and all prevention and remediation costs are supported by the operator.
Considering the absence of regulation on this matter, the APA recommends that, in the case of transfer of property on land where potentially polluting activities were carried on, or where there are signs of contamination, a technical quality assessment be carried out.

12. CLIMATE CHANGE AND EMISSIONS TRADING

12.1 Key Policies, Principles and Laws
The development of the key policies to combat climate change is based on fundamental principles of environmental law, particularly the principle of sustainable development, the “polluter pays” principle and the principle of intergenerational solidarity.

Specifically, to combat climate change, the goals established are a reduction in greenhouse gas emissions, a strengthening of the capacity for carbon dioxide (CO₂) sequestration and adaptation to expectable climate change impacts.

There are important planning instruments to achieve these goals, as follows:

• the European Climate Law (Regulation (EU) No 2021/1119) establishing the framework for achieving climate neutrality in the European Union by 2050, which entails a zero balance between the emissions of greenhouse gases and their removal;

• the Plano Nacional Energia e Clima 2030 (approved by Council of Ministers Resolution No 53/2020), which arose in the context of the Regulation of the Union’s Governance for Energy and Climate Action (Regulation (EU) No 2018/1999), establishes policies for decarbonisation of the economy, energy efficiency and energy transition, as well as goals by sector to reduce greenhouse gas emissions;

• the Roteiro para a Neutralidade Carbónica 2050 (published by Council of Ministers Resolution No 107/2019), which aims to reach carbon neutrality by 2050 – i.e., a neutral balance between the emissions of greenhouse gases and carbon sequestration;

• the Estratégia Nacional de Adaptação às Alterações Climáticas (approved by Council of Ministers Resolution No 56/2015, and extended until 31 December 2025 by the Council of Ministers Resolution No 53/2020), which seeks to adopt solutions to adapt various sectors to the effects of climate changes (e.g., agriculture, forests, transport);

• the Programa de Ação para a Adaptação às Alterações Climáticas (approved by Council of Ministers Resolution No 130/2019), created for the specific implementation of the adaptation measures set out in the Estratégia Nacional de Adaptação às Alterações Climáticas; and

• the Roteiro Nacional para a Adaptação 2100, still under development, which will carry out an evaluation of Portugal’s vulnerability to climate change and will define the guidelines to plan the territorial adaptation and adaptation of the different sectors to climate change.

Furthermore, there is legislation that addresses the emission of greenhouse gases and seeks to achieve the established goals, namely:

• Decree Law No 12/2020, which establishes the framework for the trading of licences for the emission of greenhouse gases, along with Decree Law No 93/2012, which provides such a framework concerning for activities;

• Decree Law No 145/2017 incorporates into Portuguese law Regulation (EU) No 517/2014, and aims to reduce the emission of greenhouse gases, by regulation – for example, of the use of equipment containing such gases.
12.2 Targets to Reduce Greenhouse Gas Emissions
The European Climate Law (Regulation (EU) No 2021/1119) defines that climate neutrality should be reached by 2050. In order to achieve this purpose, a goal is set for 2030 to reduce greenhouse gas emissions at the EU level of at least 55% (compared to the 1990 levels). This law followed the Green Deal, approved in December 2019, and is an increase to previous targets, which were to reduce greenhouse gases by at least 40% until 2030.

In line with this goal, “Fit for 55”, a package of proposals was recently published through the Communication from the Commission, dated 14 July 2021. It proposes a comprehensive set of measures to ensure that greenhouse gas emissions are reduced to at least 55% by 2030 (compared to 1990 levels). These proposals are to be inserted into legal texts, which may affect the Portuguese legislation. Other legislation is expected to be published in the meantime that will lead to changes to these goals.

In Portugal, the Plano Nacional Energia e Clima 2030 – which was approved before the new European Climate Law was enacted – establishes that the reduction of the emission of greenhouse gases has to be between 45% and 55% (by reference to 2005). It also defined the following goals by sector for the reduction of greenhouse gas emissions, by reference to 2005: 70% for services, 35% for the residential sector, 40% for transport, 11% for agriculture and 30% for the waste and industrial waste water sector.

The Roteiro para a Neutralidade Carbónica 2050 determines that carbon neutrality can only be reached by 2050, if greenhouse gas emissions are reduced between 85% and 90% (by reference to 2005), along with the creation of carbon sinks.

13. ASBESTOS

13.1 Key Policies, Principles and Laws Relating to Asbestos
Decree Law No 266/2007 determines that employers must resort to all available means to ensure the exposure of workers in the workplace to dust from asbestos or materials containing asbestos is reduced to a minimum and, in any case, is not above the exposure limit value (0.1 fibre per cm³, considering a daily period of eight hours).

Furthermore, the removal of material containing asbestos – as well as the wrapping, transportation and management of the corresponding construction and demolition waste – are subject to specific rules (Ministerial Order No 40/2014) and may only be performed by duly licensed waste-management operators.

14. WASTE

14.1 Key Laws and Regulatory Controls
Decree Law No 102-D/2020, which entered into force on 1 July 2021, is one of the key laws governing waste in Portugal, setting out the general rules on waste management. It also establishes the main principles and rules on the attribution of liability for waste management, sets out the applicable economic and financial framework, and details the planning for prevention and management of waste. This legislation also covers waste transport and establishes rules on urban waste, construction and demolition waste, and dangerous waste. Finally, it sets out the main provisions on the licensing procedures for waste management operators.

In connection with this legislation, Decree Law No 152-D/2017 provides the framework for the management of the following specific waste flows:
• packages placed on the market and their waste;
• certain types of oil placed on the market and their waste;
• tires placed on the market and their waste;
• electric and electronic equipment placed on the market and its waste;
• batteries and accumulators placed on the market and their waste;
• vehicles and end-of-life vehicles.

This Decree Law establishes that liability for the management of the waste produced by these products falls upon the product’s producer, the packager and the supplier of service packages, which must resort to an individual or integrated system in order to ensure proper management.

14.2 Retention of Environmental Liability

When a producer or a consignor of waste delivers it to a third party, notably to a waste management operator, to an entity responsible for the systems for the management of specific waste flows, or to a municipal/multi-municipal waste management system, liability for waste management is extinguished. However, if it is delivered to a waste management operator, the producer or consignor must make sure that this operator is duly licensed to treat the specific waste and to perform the applicable waste management operations. If it is not, it can be considered that the producer or consignor has committed an environmental offence, punishable with fines and ancillary sanctions.

Evidence on the proper management and circulation of waste can be found in the documents that waste producers, transporters and final recipients are obliged to fill in, such as electronic waste notes, which must accompany all waste transport operations and set out information on the above players and the waste. Likewise, waste producers must fill in and submit annual waste tables (Mapa Integrado de Registo de Resíduos) to inform APA about the waste produced and to whom it was delivered for transport and treatment.

14.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

Concerning goods in general, producers must assure that the owners of the goods can obtain the necessary information about the possibility of reusing the goods and their components and about their dismantling, as well as information on substances of high concern.

On the other hand, the management of the specific waste flows listed in 14.1 Key Laws and Regulatory Controls is subject to the legal principle of the enlarged liability of the producer of goods. This means that the producers are liable in respect of the management of the waste arising from the goods they produce. Specifically, in order to take on such liability, they must sign up to a system created for the management of such waste flows, in which they transfer their liability to the manager of the system by paying a financial contribution. Instead, they can adopt an individual system by carrying out the waste management operations themselves, subject to the prior approval of the APA.

In this context, the production of certain goods is subject to legal requirements. For instance, secondary raw materials obtained from the recycling of packages must be incorporated, whenever possible, into the production of packages, and electrical and electronic equipment must be designed to ease its dismantling and the recovery of its waste, components and materials. The producers of this equipment must also do so bearing in mind the goals of resources efficiency, the reduction of dangerous chemicals products and the durability of the products. The producers of batteries and accumulators must also, among
other requirements, design them in order to progressively contain less dangerous substances (by replacing, for instance, heavy metals such as mercury, cadmium and lead).

Regarding take-back, if the producer of the tires or of the electrical and electronic equipment is simultaneously the seller to the final user, it is obliged, in some circumstances, to take back the waste arising from such goods, at no cost. If the producer is not the seller to the final user, it must provide for the creation and implementation of a collection grid and pay the corresponding costs.

15. ENVIRONMENTAL DISCLOSURE AND INFORMATION

15.1 Self-Reporting Requirements
When it comes to the self-reporting of environmental incidents or damage to regulators, Decree Law No 147/2008 determines that, in the case of an imminent threat of environmental damage, operators are obliged to immediately inform the competent authorities about the occurrence. They must also provide information about the mandatory prevention measures that were adopted. Furthermore, if environmental damage occurs, this fact must be communicated within 24 hours to the competent authorities. In fact, it is usual for environmental licences to mention these communication obligations, which are preferably sent by electronic means. All prevention and remediation costs are paid by the operator.

Concerning information to the public, the competent authorities must inform health authorities about any imminent threats of environmental damage that could affect public health, but no general warnings to the public are required, unless it is considered a necessary prevention measure.

15.2 Public Environmental Information
The public can obtain environmental information from public authorities and bodies. Law No 26/2016 provides that all people have the right to access administrative documents (including environmental documents) by consulting, reproducing or being informed of the existence and content of any such documents. Applicants do not have to provide a specific interest to exercise this right. However, in the case of documents containing the company’s identification, access can only be provided if public interest reasons prevail and only if the desired information concerns emissions into the environment.

Entities Obliged to Disclose Environmental Information
This legal framework applies to all public entities. It also applies to private associations or foundations in which public entities exercise powers of management control or appoint, directly or indirectly, the majority of the members of the administrative, management or supervisory body. Furthermore, it applies to entities responsible for managing public archives and entities actually performing an administrative role or exercising public powers. This includes entities holding concessions or delegations of public services. It also covers documents held or produced by any entities with legal personality that have been created to satisfy in a specific manner needs of general interest, provided they are not industrial or commercial in character, and their activity is mainly financed by any of the entities already mentioned and they are managed by any of the entities referred to so far, whose administrative, management or supervisory bodies are composed, as to more than half, by members appointed by any of the above-mentioned entities.
Moreover, this framework applies to any natural or legal person, of a public or private nature, that belongs to the indirect administration of the organs or entities referred to and has attributions or powers, exercising public administrative functions or providing public services relating to the environment. This includes public corporate entities, invested companies ("empresas participadas") and concessionary companies. It also includes any natural or legal person that holds or materially maintains environmental information on behalf or on the account of any of the bodies or entities referred to. Finally, even though they no longer fall within its subjective scope of application, this law still applies to entities that meet the requirements referred to at an earlier time, in relation to the documents corresponding to that period.

The public can also be informed of environmental issues (and participate) during the public consultation periods – please refer to 3.2 Environmental Permits.

15.3 Corporate Disclosure Requirement

Environmental Information from Companies

If companies are subject to environmental rules, they may be obliged to disclose environmental information in three different ways, as follows.

- To the general public, by making information available on their websites or in their premises. For instance, the legislation on the prevention of major accidents (Decree Law No 150/2015) obliges operators to do this.
- To public bodies, which will analyse it and provide conclusions to the company only. In this regard, Decree Law No 39/2018 requires that operators causing air emissions have to monitor them (usually twice a year) and, subsequently, send the corresponding results to the APA or the CCDR for them to ascertain whether operators are in compliance with the limits for air emissions (and other legal requirements). Similar obligations to report the results of self-monitoring are established in the Water Law Regulation, Decree Law No 226-A/2007.
- To public entities that are obliged to, subsequently, make the information available to the general public. For example, following the requests to obtain an environmental licence (Decree Law No 127/2013 of 30 August 2013) or the ones within the environmental impact assessment procedure (Decree Law No 151-B/2013), the competent entity must disclose information on it through its website.

Specifically on annual reports, if companies engage in activities under Decree Law No 127/2013, they are required to send an annual environmental report to the APA, which must first be confirmed by a certified entity, to demonstrate compliance with all conditions set by the environmental licence.

The management report that companies must prepare under corporate legislation must include, as far as necessary to understand the evolution of the business, the company’s performance or position, non-financial information, including environmental matters. In fact, for large companies, which, by the closing of the balance sheet, employ an average number exceeding 500 workers during the financial year, this is mandatory (Decree Law No 262/86).

16. TRANSACTIONS

16.1 Environmental Due Diligence

It is very common to now include an analysis of environmental matters in the scope of the due diligence exercises that precede M&A, finance and property transactions. Moreover, it is also usual to complement the legal due diligence with a technical due diligence.
Some of the environmental issues analysed during a due diligence are:

- environmental impact assessment;
- environmental licence;
- environmental liability;
- waste management;
- specific waste flows;
- contamination of soils and water lines;
- equipment containing ozone-depleting substances;
- equipment containing greenhouse gases;
- water supply;
- waste water.

16.2 Disclosure of Environmental Information
There is no express legal requirement that requires a seller to disclose environmental information to a purchaser. However, this obligation arises from compliance with the principle of good faith in the pre-contractual phase, which imposes duties of information that bind the parties to provide all the clarifications necessary for the honest conclusion of the contract.

17. Taxes

17.1 Green Taxes
The aim of green taxation is to penalise pollution and damage to the environment, reduce energy dependence from abroad, and encourage more sustainable production and consumption patterns. In doing so, green taxation reinforces the freedom and liability of citizens and companies, and promotes efficiency in the use of resources.

From a taxation perspective, there are several ways to pursue environmental sustainability:

- taxes to promote environmental sustainability;
- exemptions for certain persons or entities; and
- incorporation of environmental components in the calculation of tax.

Below is a purely illustrative list of some of these cases, that are currently in force.

Taxes that Promote Environmental Sustainability
- Waste Management Fee, which aims to encourage the reduction of waste production, stimulate compliance with national waste management targets and improve the performance of the sector.
- Water Resources Management Fee, which aims to compensate the environmental cost inherent in activities likely to have a significant impact on water resources.
- Carbon Tax, which is levied on sectors not included in the European Emissions Trading Scheme. This tax is indexed to the price of carbon in the ETS sector.
- Road Vehicle Tax (IUC) and Excise Duty (IEC), which seek to burden the taxpayers in proportion to the environmental cost they cause.
- Tax on light plastic bags.
- Tax on less energy-efficient light bulbs.

Exemptions
- Corporate Income Tax exemption for entities managing integrated systems for to manage specific waste flows, during the entire licensing period for the results which, during this period, are reinvested or used for the purposes legally attributed to them.
- Exemption of Property Transfer Tax and Stamp Duty on acquisitions for value of properties that fall within forest intervention areas.
- Vehicle Purchase Tax exclusion for non-motorised vehicles and exclusively electric vehicles or those powered by non-combustible renewable energies.
- Exemption from Road Vehicle Tax for non-motorised, exclusively electric vehicles or
those powered by non-combustible renewable energies.

Consideration of Environmental Components in the Calculation
• Consideration of energy efficiency and of the insertion in areas of urban regeneration in the calculation of Municipal Property Tax.
• A 50% reduction in the Municipal Property Tax rate when the property is exclusively used in the production of energy from renewable sources.
• Consideration of the particle emission level in the calculation of the Road Vehicle Tax.
• Deductible expenses in higher proportion to their nominal value, such as expenses of car-sharing and bike-sharing systems, with the acquisition of fleets of bicycles, with electricity and vehicular natural gas for vehicle supply, etc.
• The Road Vehicle Tax rates increase on petrol and diesel vehicles, according to CO₂ emissions.
PLMJ is a law firm based in Portugal that combines a full service with bespoke legal craftsmanship. For more than 50 years, the firm has taken an innovative and creative approach to produce tailor-made solutions to effectively defend the interests of its clients. The firm supports its clients in all areas of the law, often with multidisciplinary teams, and always acting as a business partner in the most strategic decision-making processes. With the aim of being close to its clients, the firm created PLMJ Colab, its collaborative network of law firms spread across Portugal and other countries with which it has cultural and strategic ties. PLMJ Colab makes the best use of resources and provides a concerted response to the international challenges of its clients, wherever they are. International collaboration is ensured through firms specialising in the legal systems and local cultures of Angola, China/Macao, Guinea-Bissau, Mozambique, São Tome and Príncipe and Timor-Leste.

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Law and Practice

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1. REGULATORY FRAMEWORK

1.1 Key Environmental Protection Policies, Principles and Laws

Key policies governing environmental protection in Serbia are contained in strategic documents such as the National Strategy of Sustainable Use of Natural Resources, the National Programme of Environmental Protection (expired, with a new one expected), the Waste Management Strategy (expired, with a new one expected), the Strategy for Water Management on the Territory of the Republic of Serbia until 2034 and the National Strategy of Sustainable Development, as well as provincial and municipal plans and programmes.

Key principles in the environmental area are the following.

- Integration – authorities are to secure integration of environmental protection and development into all sectoral policies.
- Prevention and precaution – each activity needs to be planned and implemented so that it: causes least changes in the environment, and people’s health; reduces the burden on the space and consumption of raw materials and energy, includes the recycling option; prevents or limits impact on the environment at the source (this principle is implemented through environmental impact assessments); uses best available techniques, technology and equipment.
- Preserving natural resources – using natural resources (air, water, soil, geological resources, flora and fauna) so as to secure preservation of geodiversity, biodiversity, protected natural assets and areas.
- Sustainable development – a coherent system of technical-technological, economic and social activities in the overall development, aimed at preserving and enhancing the quality of the environment for the current and future generations.
- Liability of the polluter and its successor – an entity that causes pollution of the environment through illegal or wrongful actions is liable for it, and is obliged to eliminate the cause of pollution and consequences of direct or indirect pollution.
- “Polluter pays” – the polluter is to pay a fee for polluting the environment if its activities cause or may cause burden on the environment (ie, if it produces, uses or places on the market raw materials, semi-products or products that contain environmentally harmful substances).
- “User pays” – each person using natural resources has to pay a realistic price for such use and for recultivation of the area.
- Subsidiary liability – state bodies are obliged to, within their financial capabilities, eliminate the consequences of environmental pollution and reduce damages if the perpetrator is unknown or if the source of pollution is outside of the Republic of Serbia.
- Applying incentives – authorities take measures of preservation and sustainable management of environmental capacities, in particular by reducing use of raw materials and energy and prevention or reduction of environmental pollution, via economic instruments and other measures, choosing best available techniques, plants and equipment that do not require excessive costs, etc.
- Informing the public and public participation – as part of enjoying the right to a healthy environment, everyone is entitled to be informed on the state of the environment and to participate in the decision-making process where the decisions could have an impact on the environment.
- Protection of the right to a healthy environment and access to justice – citizens or groups of citizens, their associations, professional or other organisations enforce their
rights to healthy environment before competent authorities (ie, courts), in accordance with the law.

A key piece of legislation governing this area is the Environmental Protection Act (Zakon o zaštiti životne sredine, “Sl. glasnik RS”, No 135/2004, as amended and supplemented). In addition to this, there are numerous laws governing particular areas, such as the Air Protection Act, the Nature Protection Act, the Act on Protection from Noise in the Environment, the Soil Protection Act, the Climate Change Act, the Waste Management Act, the Package and Package Waste Act, the Water Act, the IPPC Act, the Environmental Impact Assessment Act, the Strategic Impact Assessment Act, the Act on Protection from Non-Ionising Radiation, the Act on Radiation and Nuclear Security and Safety, the Chemicals Act and the Act on National Parks.

Serbia is also party to a number of international treaties governing the environmental area, including all three Rio conventions (the Convention on Biological Diversity, UNFCCC, the United Nations Convention to Combat Desertification), the Paris Agreement, the Kyoto Protocol, the Vienna Convention for the Protection of the Ozone Layer, the Stockholm Convention, the Aarhus Convention, the Espoo Convention and the Basel Convention. International treaties are hierarchically above national laws.

Serbian authorities are currently working on the draft of a new law on liability for damages to the environment, with the aim to harmonise Serbian law with EU Directive 2004/35/EC and introduce an efficient system of compensation for environmental damages, based on the principle “polluter pays”.

2. ENFORCEMENT

2.1 Key Regulatory Authorities

The key regulatory authorities responsible for environmental policy and enforcement in Serbia are the Ministry of Environmental Protection (MEP) (including environmental inspection, as its part) and the Agency for Environmental Protection. Provincial and municipal secretariats and inspections also play an important role in law enforcement within the competences of an autonomous province (ie, municipality).

3. ENVIRONMENTAL INCIDENTS AND PERMITS

3.1 Investigative and Access Points

Environmental inspection is the most common form of procedure the market players face in the realm of environmental compliance checks. When it comes to investigative powers and authorities, these may differ, depending on the specificities of incidents and breaches. By way of example, the powers and authorities of environmental inspection may include:

- ordering that the irregularities in implementing measures on protection, recultivation and remediation be eliminated;
- prohibiting use of natural resources without, or contrary to, approval of environmental protection and remediation design, and ordering remediation or other measures prescribed by law;
- prohibiting development and use of facilities or complexes and performing activities if the requirements and norms regarding emissions and thresholds of pollutants are not complied with, if the adequate and functional equipment and appliances to eliminate or reduce emissions of pollutants or energy are missing, or if other measures and conditions for environmental protection are not taken;
• prohibiting emission of pollutants and hazardous substances, waste waters or energy into air, water and soil in the manner and in quantities or concentrations or levels exceeding the prescribed ones;
• prohibiting operation or use of technology or technological process or use of products, semi-products or raw materials, prohibited by law;
• prohibiting the work of a Seveso facility (ie, facility that may contain hazardous substances above prescribed thresholds – this concept is introduced into Serbian legal system as part of its on-going harmonisation attempts related to EU acquis on the control of major-accident hazards involving dangerous substances);
• if the relevant measures are not being (adequately) implemented;
• ordering proper monitoring;
• ordering implementing environmental protection measures set by law;
• blocking bank accounts (based on enforcement order);
• taking samples of soil, water, waste, air (via licensed organisation).

While performing the inspection, the inspector can temporarily take away the items, goods or appliances the use of which is not permitted, or which originate from, or were utilised to perform, illegal activities.

Each of the separate environmental laws sets numerous further authorities of environmental inspectors, which may include: prohibition of performing works and activities without approved environmental impact assessment (where applicable); prohibition of using building – ie, operating facility and performing activities before an IPPC permit is issued (if applicable); prohibiting operation of stationary source of pollution or other activity performed contrary to law; and prohibiting waste treatment contrary to a waste management permit.

In addition, the environmental inspectors have all the powers and authorities that are available to them under general inspection legislation. For instance, a fact-finding mission entitles the inspector to, under conditions and limitations set by law:

• inspect and copy public documents and registries;
• check personal or other ID document of relevant persons;
• take statements from inspected persons;
• order that books, corporate documents, databases, contracts and other relevant documents be provided for inspection;
• perform physical inspection of location, land, buildings, business and other non-residential area, facilities, equipment, tools, vehicles, other means of work, products, items placed on the market, goods in circulation and other relevant items – note that inspection of residential space has special rules, and in principle requires a court order (if the resident does not voluntarily allow inspection);
• take relevant samples;
• take photos and videos of the area where it is performing inspection and items that are being inspected;
• secure evidence.

In case of the most serious violations, criminal prosecution is possible; in such cases, standard criminal investigation powers are at the disposal of public prosecutors and other investigative authorities.

### 3.2 Environmental Permits

For certain projects in the area of industry, mining, energy, transportation, tourism, agriculture, forestry, water management waste management, communal activities, and projects planned
in protected natural assets or the surroundings of immovable cultural assets, the project developer has to obtain an approval to the environmental impact assessment study (EIAS) it had prepared, or (if applicable) a decision that such study is not required.

Depending on the specificities of the project, the approval is to be obtained from national, provincial or municipal authority in charge for environmental affairs. The process may have two or three stages, depending on the features of the project:

• deciding on whether the EIAS is required (applicable only to projects that are listed as those where the authorities may choose whether to require EIAS);
• deciding on the content and scope of the EIAS; and
• deciding on the approval of the EIAS.

The first two stages entitle the applicant and interested public to appeal to the second instance authorities, and eventually to file administrative suit. The decision on approval of the EIAS is not appealable in administrative procedure, but may be challenged before administrative court.

Certain facilities and activities that may have negative impact on people’s health, environment or material goods need to obtain integrated pollution prevention and control (IPPC) permit. Depending on the specificities of the project, the approval is to be obtained from national, provincial or municipal authority in charge for environmental affairs. The decision on IPPC is not appealable in administrative procedure, but may be challenged before administrative court.

Apart from the aforementioned permits, certain activities may also require permits. These include, for example, waste management activities (collecting, transporting and treating waste). Such permit is not required for activities covered by an IPPC permit (although, before the IPPC permit is issued, the operators are likely to need a temporary waste management permit in order to be able to start their operations whilst waiting for the IPPC permit to be issued), and certain other exceptions where a waste management permit is not required. The waste management permit is issued by the MEP, competent provincial authority or municipality, depending on the type of waste and other features of waste management operations. An unsatisfied party is entitled to lodge an appeal to the second instance authority.

Further, according to the new Climate Change Act, operators of facilities emitting greenhouse gases (GHG) will need to have a permit issued by the MEP before they start operations; the government is yet to define the kinds of operators that will need to apply for this permit, but it is anticipated that at least 137 current operators will fall under this permitting requirement. This permitting requirement is still not operational, and is not expected to become functional before mid-2022. This permit is to be issued by the MEP; it will not be appealable in administrative procedure, but will be challengeable before an administrative court.

4. ENVIRONMENTAL LIABILITY

4.1 Key Types of Liability

Environmental damage and breaches of environmental laws may, depending on the particularities of the case, result in penal and/or civil liability. In case of penal liability, the most serious violations trigger criminal liability, while the less serious ones trigger liability for economic offences (privredni prestupi), and the less serious from those result in liability for misdemeanours (prekršaji).
5. ENVIRONMENTAL INCIDENTS AND DAMAGE

5.1 Liability for Historical Environmental Incidents or Damage

One of the key principles of Serbian environmental law is the liability of the polluter and its successor. According to this principle, the polluter or its legal successor is obliged to eliminate the cause of pollution and the consequences of direct or indirect environmental pollution. Although the law is not crystal-clear on this matter, it implies that the liability extends also to the successor in title. This means that the current owner will be liable to third parties for historical damages.

5.2 Types of Liability and Key Defences

The most serious violations trigger criminal liability – for example, polluting the environment contrary to law to a greater extent or on a wider area, failure to take environmental protection measures or to act upon instructions of authorities to take such measures – which may result even in imprisonment.

Companies may also be subject to criminal prosecution if (i) their responsible person (director) commits a crime within his or her affairs/authorisations with the aim to gain benefit for the company, or (ii) the lack of supervision or control by the responsible person (director) enabled committing of a crime in favour of the company by a physical person acting under the supervision/control; sanctions and some other criminal law aspects related to a company’s criminal liability are somewhat specific, when compared to natural persons.

Given that the criminal code, in some cases, contains vague provisions (for example, it does not define what is considered as pollution of greater extent or pollution of a wider area), the defendants tend to prove that the thresholds for applying the criminal code are not met. Further, intentional pollution is not the dominant form of pollution, nor is such intent easy to prove, so many defendants aim to prove that there was no intent. Nevertheless, for some crimes, the law stipulates criminal prosecution also for negligence; in such cases, however, the sanctions are less severe. Finally, given that Serbian courts are notorious for their slowness, the statute of limitation may even be used as defence in some cases.

Apart from criminal liability, various environmental regulations impose liability for economic offences and misdemeanours, the former being aimed at more serious violations. Both are usually sanctioned with monetary fines, but may also result in other sanctions, such as prohibition of performing certain activities to the liable company (ie, prohibition of performing certain duties to its director). Defence on the economic offence could be based on the lack of social wrongfulness of the act in question. However, the applicability of this defence depends on the particularities of the case.

When it comes to the misdemeanour proceedings, due to the notorious slowness of Serbian courts as previously mentioned, the statute of limitation could often be invoked as the defence, since the statute of limitations terms are shorter in misdemeanour proceedings (compared to the criminal and economic offence proceedings statute of limitations). Also, depending on the circumstances, the defence could often be based on the request for release from punishment. This can be applied if, after the misdemeanour has been committed, and before the accused has learned that he or she has been prosecuted, the accused person has removed the consequences of the act or compensated the damage caused by the misdemeanour.
In case of any damages, the perpetrator is exposed also to civil liability. There is a general rule that if a company or individual causes damages, it is obliged to compensate it, unless it can prove that the damages occurred without its fault. This means that the defendant has the burden of proof. Further, if the damages originate from dangerous items or dangerous activities, the liability exists regardless of the fault. Polluters are by laws liable for the pollution they cause based on strict (objective) liability (ie, liability regardless of their fault), meaning that they have less defences available. However, the law does foresee several defences against strict liability – for example, if the damages were caused by the damaged person or third person and the defendant was not able to foresee the damages or to overcome their consequences, or if the damages originate from a cause outside the dangerous item, the effects of which were not foreseeable, nor could have been avoided or overcome, or if the dangerous item was illegally taken away from the owner.

Damages include both actual damages and lost profit. Damage compensation as priority requires reinstatement (returning things to the state before damages), and, if this is not possible, or does not completely eliminate damages (or, in certain other cases, monetary compensation). Key defences against civil liability naturally depend on the facts of the case, and may include contesting the causality link between activities of the defendant and the damages, and the contribution of the plaintiff to the damages. Statute of limitations is also a possible defence, but for environmental damage claims such defence is less plausible, because the statute of limitation term is longer in case of environmental damages than the statute of limitation for standard damages; the subjective term is the same – three years from learning of the damages and the tortfeasor – but the objective term is much longer – 20 years, compared to five.

Further, as a general rule, each person is entitled to request from another to eliminate the source of damages that threatens to cause greater damages to him or her or to an unspecified number of people, and to refrain from activities that cause nuisance or risk from damages, if the appearance of nuisance or damages cannot be prevented with adequate measures.

6. Corporate Liability

6.1 Liability for Environmental Damage or Breaches of Environmental Law
There is no separate set of rules for liability of a corporate entity for environmental damage or breaches of environmental laws, but there may be some differences in terms of liabilities (eg, natural persons cannot be liable for economic offences whereas companies can, and companies are only criminally liable if certain conditions are met) and sanctions (eg, fines for natural persons and entrepreneurs are usually smaller than for companies, and the list of law breaches may differ). However, such differences are not specific for the environmental sector.

6.2 Shareholder or Parent Company Liability
As a general rule, shareholders or a parent company are legally not considered liable for environmental damage or breaches of environmental law, except in case of piercing the corporate veil.

7. Personal Liability

7.1 Directors and Other Officers
The directors are liable for the legality of the entire business in a company, including for breaches of environmental laws. In addition to the exposure to liability for criminal acts, economic offences and misdemeanours, under certain conditions they are also exposed to civil liability. A director
may delegate its responsibilities to another person, which may, under certain conditions, shift the liability onto such person. Nevertheless, the director is always bound to employ due care, proper supervision and other duties imposed onto him or her by company law.

Penalties for breach of environmental laws are set in numerous laws and can take the form of sanctions for misdemeanour, economic offence or, in the most severe cases, criminal liability. Also, as previously stated, in addition to the sanctions, additional measures can be imposed on the directors, such as prohibition of performing certain duties.

7.2 Insuring against Liability
There is no legal prohibition to insure against potential environmental damages caused by directors, although one does not see those often in practice. The insurance per se does not exclude the director’s liability for fines or other penalties.

8. LENDER LIABILITY

8.1 Financial Institutions/Lender Liability
In principle, financial institutions/lenders are not liable for environmental damage or breaches of environmental law, assuming that the financial institutions/lenders are not involved in decision making, directing actions of the perpetrator, inducing damages or breaches, or taking similar actions.

8.2 Lender Protection
Financial documents for projects including environmental risks usually contain obligations of the debtor to comply with certain environmental standards (eg, IFC standards), as well to take out adequate insurances and assign them in favour of the financing parties.

9. CIVIL LIABILITY

9.1 Civil Claims
In general, whenever there are damages, or risk of danger, civil claims can be brought. See also 5.2 Types of Liability and Key Defences.

9.2 Exemplary or Punitive Damages
The general position of Serbian civil law is that damages are aimed to compensate the claimant for the sustained damages, and not to penalise the tortfeasor; monetary fines and other sanctions are the subject matter of penal codes, and these codes contain refined set of provisions on measuring sanctions. There are certain minor deviations from this principle – for example, if an item was intentionally damaged or destroyed by criminal act, the court may set the value of compensation based on the value the item had for the damaged person.

9.3 Class or Group Actions
Class actions are not available under Serbian procedural laws. Group actions could theoretically be filed if the claimants in the group meet the conditions for active co-litigants, as prescribed by the Civil Procedure Act.

9.4 Landmark Cases
While there are numerous environmental litigations and criminal prosecutions, not many judgments have caught public attention. There is, however, a pending litigation which is promising to become a landmark case. A suit was initiated by a local NGO against the Serbian state-owned power company due to exceeding permitted thresholds for sulphur dioxide (SO₂) emissions from thermal power plants, alleging danger to people’s health. Serbia and its power company are notorious for air pollution from thermal power plants, so the decision in this litigation will for sure to play a valuable role in setting the trends in the enforcement of pollution protection laws.
10. CONTRACTUAL AGREEMENTS

10.1 Transferring or Apportioning Liability
Liability before authorities or towards third parties cannot be transferred or apportioned via contract. However, although the liability vis-à-vis third parties (or Serbian authorities) cannot be modified or excluded via contract, it is possible to contractually regulate the indemnification/reimbursement in favour of the party which had to indemnify the third party (or was fined by authorities) for damages caused by the other party. It is even possible to contractually expand the liability of the other contracting party for the cases for which it is generally not liable, but such expansion would not be enforceable if it is contrary to good faith.

10.2 Environmental Insurance
Although available on the market, environmental insurance is not often used in Serbia. However, there is a statutory requirement to hold a third-party liability insurance for polluters whose production plant or business activity poses a high risk to people’s health and the environment. This statutory requirement is under-regulated and, to some extent, vague, so its reach is not as wide as one would have expected.

In addition, a company can obtain an environmental insurance as an additional risk covered by a general liability insurance. Such insurance usually covers third-party claims for damages due to a sudden, unexpected adverse event that causes air, land or water pollution (i.e., an environmental accident), provided that personal injury or property damage occurs as a result of such event. Environmental insurance policies typically cover damages caused by sudden and unexpected events such as environmental accidents, but not a long-term negative impact that a polluter may have on the environment.

11. CONTAMINATED LAND

11.1 Key Laws Governing Contaminated Land
Key laws governing contaminated land are the Environmental Protection Act and the Soil Protection Act (Zakon o zaštiti zemljišta, “Sl. glasnik RS”, No 112/2015). The general principle is that a person who contaminated the land needs to perform remediation at its own cost. To that end, it has to prepare a remediation design, to be approved by the MEP. If such a person is unknown, unavailable or does not comply with an inspection order, the remediation is to be taken by municipality, province or the state in accordance with its budget and via a licensed company. Upon completion of remediation, the investor needs to submit a report to the MEP. Environmental inspection is authorised to order remediation (and preparation of the relevant design). Failure to perform remediation represents an economic offence of the liable company, punishable with a fine of up to approximately EUR25,000 (plus EUR1,700 for the director).

12. CLIMATE CHANGE AND EMISSIONS TRADING

12.1 Key Policies, Principles and Laws
The Climate Change Act (Zakon o klimatskim promenama, “Sl. glasnik RS”, No 26/2021) was enacted in Serbia in March 2021. This law establishes the main policies and principles related to climate change, with the aim to establish a system that leads to the reduction of greenhouse gas emissions, in order to avoid the dangers and negative effects of global climate change. The law foresees adoption of the following policies:

- a low-carbon development strategy;
- an action plan for the implementation of the strategy; and
- a climate change adaptation programme.
The strategy is to be adopted by the government for a ten-year period, and it is to define the necessary measures and public policies to limit greenhouse gas emissions, as well as to establish a transparent and accurate system to monitor the achievement of these goals. The action plan for the implementation of the strategy is to be adopted for a period of at least five years. The climate change adaptation programme is to be adopted by the government in order to identify the impact of climate change and determine climate change adaptation measures for the sectors in which adverse impact needs to be reduced. Given that the law has just been enacted, these strategic and policy-related instruments are yet to be adopted.

12.2 Targets to Reduce Greenhouse Gas Emissions
Based on the above-mentioned strategy and action plan, the government will determine acceptable greenhouse gas (GHG) emission levels from sources at the national level, production and other plants, aviation activities, fossil fuel combustion, industrial processes and product use, agriculture and greenhouse gas emissions from waste.

For the time being, since the strategy and the action plan are still not available, the Act on Air Protection contains the mechanism for preventing and reducing air pollution which affects climate change, by stipulating measures aimed to reduce the GHG emissions, and monitoring of GHG emissions. Further, certain fluorinated GHG enjoy a special legal regime (in terms of production, maintenance, disposal, etc).

Serbia is a non-Annex I party to the Kyoto Protocol, meaning that it has not taken quantitative emission reduction commitments. Thus, it is no wonder that the Act on Air Protection does not prescribe specific thresholds applicable specifically to GHG. However, there are certain thresholds for nitrous oxide (N₂O) for certain activities specified in the by-laws that set the thresholds for air pollutants; nitrous oxide is generally considered as a GHG, although the by-law that has, for certain activities, set a threshold for nitrous oxide, is not particularly aimed at GHG, but more generally at air pollution. As part of its efforts under the Paris Agreement, Serbia pledged to reduce GHG emissions by 9.8% by 2030, compared to 1990 (the base year). Further, the fact that the country is a party to the Energy Community Treaty and an EU candidate will surely induce Serbia to take further efforts in limiting the GHG emissions.

13. Asbestos

13.1 Key Policies, Principles and Laws Relating to Asbestos
Asbestos is primarily regulated from the aspect of chemicals management, health, health and safety at work, transportation and waste management.

Serbia has, via the Chemicals Act and its by-laws, prohibited production, placement on the market and use of asbestos fibres, as well as placement on the market and general use of asbestos as a substance, and use of asbestos as an ingredient or part of a mixture (above certain thresholds).

In respect of work safety, Serbia has ratified the ILO Asbestos Convention, aimed to increase safety in use of asbestos. Serbian by-laws regulate in detail the asbestos-related concerns in relation to health and safety at work. These by-laws heavily restrict activities related to asbestos: they prohibit performance of activities in which the employees are exposed to asbestos fibres during asbestos exploitation or producing and processing products made of asbestos.
or products to which asbestos was intentionally added (except processing and disposal of products resulting from demolition and removal of asbestos).

In respect of waste management, asbestos is considered as a special waste stream. According to the Waste Management Act, waste containing asbestos is to be collected, packaged, stored and landfilled at a clearly marked place intended for disposal of waste containing asbestos. The producer or owner/holder of waste containing asbestos has to apply measures to prevent spreading asbestos fibres and dust into the environment. The owner/holder of such waste has to maintain records on the quantities of waste it stores or landfills, and deliver the relevant data to the Agency for Environmental Protection.

14. WAste

14.1 Key Laws and Regulatory Controls

Key authorities related to waste management are the MEP and the Agency for Environmental Protection, as well as various secretariats and administrative bodies within the autonomous province and municipalities.

14.2 Retention of Environmental Liability
This matter has not been clearly defined under the waste management regulations. On the one hand, according to the principle of liability, there is a rather generalised requirement that the producers, importers, distributors and sellers of products that lead to the increase of waste quantities are liable for the waste caused by their activities, with the producer bearing the greatest liability due to its influence on the content and features of the products and their packaging. Thus, producers are obliged to take care to reduce additional waste, develop recyclable products, and develop a market for re-use and recycling of their products.

On the other hand, the owner/possessor (including indirect possessor) of waste is explicitly held liable for all costs of waste management (ownership/possession is transferred when the next owner/possessor takes over the waste and receives the waste movement document). Waste disposal (landfilling) costs are to be borne by the owner/possessor who directly supplies the waste to the entity collecting the waste or to the waste management facility, and/or the former owner/possessor, or the producer of products. This implies that producers can remain liable (consignors are not regulated in this respect), although it is not clear how the liability for the costs is allocated between the product producer and other entities liable for costs, and whether this liability remains with the product producer only if it retained the liability contractually.

14.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods
The duties of a producer of goods in terms of taking back and similar obligations are prescribed for several cases, including the following.

• The producer (or importer) of products which, after use, become hazardous waste is obliged to take back such waste after use, free of charge, and manage such waste in accordance with the law; the producer/importer may authorise a third party to take back waste after use in its name and on its behalf.
Producers (as well as importers/packers/fillers and suppliers) are obliged to, at the end-user’s request and free of charge, take back waste from secondary (group) packaging or tertiary (transport) packaging, and to take back packaging waste which is not communal waste and originates from primary packaging (unless such packaging falls under a different regulatory regime).

15. Environmental Disclosure and Information

15.1 Self-Reporting Requirements
In certain cases, there does exist an obligation of reporting incidents to the authorities; informing the public, on the other hand, is primarily the obligation of the authorities. For instance, Sever-so facility operators (see 3.1 Investigative and Access Points) are obliged to notify the MEP, municipality and other competent authorities on chemical accidents. IPPC facility operators, landfill operators and waste treatment facility operators are also obliged to notify the authorities on accidents.

15.2 Public Environmental Information
Public authorities (including state, provincial and municipal bodies, licensed or other organisations) are obliged to regularly, timely and objectively inform the public on the status of the environmental events that are being tracked (as part of monitoring the polluting substances and emissions), as well as on the warning measures or development of pollution that could cause danger to life and health of people.

Access to information on the environment is enforced via regulations on free access to information of public importance.

Public authorities have the duty to regularly update and publish/disseminate environmental information, including international treaties and domestic regulations on environment, strategies, plans, programmes and other environmental documents, as well as the reports on implementing the foregoing, data from monitoring activities that may affect the environment, environmental reports, permits and licenses in respect of performing activities with significant environmental impact, contracts aimed at environmental protection, environmental impact assessment studies and decisions related thereto.

In the event of danger to life and people’s health, the environment or material goods – regardless of whether it was caused by human activities or by nature – public authorities are obliged to inform the public without delay via public media; failure to do so may expose the authorities to damage claims.

15.3 Corporate Disclosure Requirement
Accounting legislation contains a general obligation for companies (which fall under the duty to publish annual business reports) to publish environmental information, including on investments into environmental protection; micro and small companies are generally exempt from such duty. Certain large companies are also obliged to publish reports on non-financial issues, which should also contain information on the effects of their business on the environment.

Further, under certain environmental laws, companies engaged into certain lines of business have reporting duties – for instance, annual reporting in relation to waste management.
16. TRANSACTIONS

16.1 Environmental Due Diligence
Whether an environmental due diligence will be conducted depends on the business of the target. If such business causes environmental concerns, then a prudent buyer would perform an environmental due diligence. The scope of the environmental due diligence also depends on the business of the target and on the target’s history. Soil testing, waste management, waste water treatment, handling chemicals, and compliance checks with laws, permits and environmental impact assessment studies (if applicable) are some of the typical environmental due diligence exercises.

16.2 Disclosure of Environmental Information
Under general rules of law, each party needs to act bona fide in a legal transaction. Withholding of important environmental information would be a breach of such rule. A purchaser in an asset deal would be able to invoke provisions on material defects, and even if the liability for material defects was excluded by contract, such exclusion would be null and void if the defect was known to the seller and the seller failed to disclose it to the purchaser. In share deals, however, the purchasers of shares do not have the benefit of such liability – since they are not purchasing (defective) assets, but shares in a company owning the assets – so they need to protect themselves via contractual representations and warranties.

17. TAXES

17.1 Green Taxes
The Republic of Serbia decided to focus primarily on public fees (parafiscal tax) as the primary form of environmental taxation. There are eight such public fees, all laid down in the Act on Fees for Use of Public Goods (Zakon o naknadama za korišćenje javnih dobara, Sl.glasnik RS Nos 95/2018, 49/2019, 86/2019, 156/2020, 15/2021):

- for use of fishery area;
- for use of protected area;
- for collecting, using and trade of species of wild flora, fauna and mushrooms;
- for pollution;
- for protection and improvement of the environment;
- for products which become special waste streams after use;
- for packaging or packed product which after use becomes packaging waste;
- for water pollution.

The law and its by-laws set the details on the trigger for payment of the fee, who is considered as tax payer, tax basis, tax rate and exemptions.
BDK Advokati is a full-service commercial law firm for corporate, institutional and HNW clients with multiple specialisations and with offices in Serbia, Montenegro, and Bosnia and Herzegovina. The firm advises clients on deals, supports and represents them in contentious situations and provides legal advice in relation to their business. The firm’s focus is on high-level expert work and complex cross-border deals, but it is also able to work on bread-and-butter matters in an efficient manner due to its institutionalised know-how and well-organised processes. BDK Advokati’s environmental practice assembles lawyers with a range of relevant expertise, who have advised leading multinational companies on the environmental aspects of their projects. Present and former clients include Rio Tinto, Urbaser, Halliburton and Azvi.

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Recent Trends

Management of protected lands

The most discussed issue in the area of environmental protection is reform of the management of Slovak national parks. The Ministry of Environment seeks to consolidate their management with the management of publicly owned lands within the parks and neighbouring lands, and to make a clear distinction between non-intervention zones and commercial forestry areas. Currently, the competences are divided between the entities under the umbrella of the Ministry of Environment and the Ministry of Agriculture. The Ministry of Environment seeks to transfer management of protected lands to the Nature Protection Authorities, and to delineate remediation zones between these lands and commercially used forests. This would affect the total area of non-intervention zones and how strict the rules for different protected areas are, as well the output of allowed commercial forestry.

Quality of air

The Ministry of Environment is preparing wide-reaching reform to address the quality of air. In February 2021, Slovakia was referred to the European Court of Justice over its poor air quality due to high levels of particulate matter (PM10). New and stricter obligations on state authorities, municipalities and pollutants are anticipated.

Contaminated sites

Legislation ensuring that the state can recover remediation costs expended on privately owned contaminated sites is being passed through the Slovak Parliament. Private owners would be obliged to reimburse the costs of publicly funded remediation measures, to the extent of the difference in the market price of such land before and after the remediation, up to the efficiently incurred costs of geological survey and remediation measures.

Should the legislation be adopted, owners will be obliged to either remedy the costs within 30 days upon request or agree to a 30-year contractual lien on the land. Otherwise, competent state authorities should initiate court proceedings. The statute of limitation for claim recovery is set to ten years. A new administrative procedure is also proposed, one in which the Ministry of Environment would adopt a decision placing a lien on the contaminated land subject to the remediation, to be lifted once the remediation costs are fully reimbursed.

This legislation seeks to address, in particular, the situation of old industrial sites with unclear environmental burden liability. In most cases, the identity or responsibility of the originator (ie, the entity or person whose activities caused the contamination) cannot be sufficiently established or proved. Some environmental burdens remain unremedied many years after the transfer of ownership of the industrial complex from the state to private owners. Also, unknown or unacknowledged contamination, or the extent of contamination on established sites, is still being discovered. The proposed cost-recovery mechanism seeks to allow the state to remedy these sites, using the public funds, recovering the costs and ensuring that these sites no long-
er present risks to the environment and public health.

**Indirect emission costs state aid scheme**
The Ministry of Environment is working on new legislation, meant to make more transparent the state aid scheme for manufacturers in sectors which are exposed to a genuine risk of carbon leakage due to significant indirect costs incurred from greenhouse gas emission costs that are passed on in electricity prices. The change should affect the conditions for granting the aid, as well as the use of emission sale revenues. Use of revenues should refocus on reduction of greenhouse gas emissions, inter alia by promoting low-emission forms of transport and reforestation.

**Energy recovery and reprocessing**
Public authorities are working to build relationships with local producers to ensure they reprocess locally produced waste to the maximum capacity. As a result, local cement manufacturers are committed to use as much locally produced waste as fuel in their productions as possible. So far, only 20% of waste used in cement manufacturing in Slovakia is produced locally, while the rest is imported.

**New Developments**

**Radioactive waste**
Import of radioactive waste to the Slovak Republic for incineration is being limited to contracts concluded before the end of 2021. These cannot be amended to increase the mass or level of activity or to change the type of radioactive waste. No new contracts can be concluded after 1 January 2022. The final products of radioactive waste imported after the end of 2021 for treatment or conditioning must be returned to the country of origin.

**Municipal waste sorting and recycling**
The focus is on separate collection, material recovery and a significant decrease in landfilling. In line with the EU objectives, Slovakia's aim is to recycle at least 55% of the municipal waste by 2025, while ensuring that at least 60% of it is subject to separation. Businesses can no longer deliver separately collected municipal waste from packaging and non-packaged products to local collection facilities without charge. A ban on landfill disposal of biodegradable waste from wholesale, retail premises and distribution will be introduced from 1 January 2023. Municipal sorting of textiles will be obligatory from 1 January 2025.

An obligation to have all municipal waste collection vehicles equipped with waste-weighing scales, starting from 1 January 2023, has been reconsidered. Entities collecting municipal mixed waste or carrying out separate collection of waste from packaging and non-packaged products will be required to do so only if requested by the respective municipalities. Reporting duties remain unchanged – waste collection entities will be obliged to report the amounts of collected waste to respective municipalities on a monthly basis as of 2023.

**Single-use plastic (SUP) products**
Directive (EU) 2019/904 is being transposed from 15 November 2021. Single-use plastic (SUP) producers of sanitary towels, tampons and tampon applicators, personal care and domestic wet wipes and tobacco products with filters and tobacco filters are required to mark the packaging or the product itself in line with EU regulations, including information on the presence of plastics in the product and the resulting negative impact of littering or other inappropriate means of waste disposal of the product on the environment.
Use of SUPs will be banned in public canteens and fast-food establishments. SUP cutlery may not be used during public events. SUP food and beverage take-away containers will be provided only for a charge, and are to be presented as a less desirable alternative to reusable or biodegradable containers. Starting from 1 January 2022, state authorities may not buy or use beverages sold in single-use containers.

**Renewable energy sources**
Direct subsidy for production of electricity from renewable energy sources has been extended to 20 years following the initial commencement of production. This concerns installations using (i) hydropower, solar energy, biomass, landfill gas or sewage treatment plant gas, with an installed capacity up to 500 kW; and (ii) electricity produced by high-efficiency co-generation in installations using co-generation processes with an installed capacity up to 1 MW, which use at least 60% of generated heat to supply centralised heat supply systems and guarantee primary energy savings at the level of at least 10%.

Extension of subsidy payments is accompanied with a decrease in the electricity prices of concerned electricity producers which were set when they started the production. Subsidies in the form of electricity feed-ins by electricity buyers for feed-in tariff prices and assuming responsibility for imbalances by electricity buyers were also extended up to the end of 2033.

**Promotion of clean road transport vehicles**
New legislation sets forth minimum procurement targets for clean-duty and heavy-duty vehicles which are subject to harmonised EU procurement rules, and in procurement of public interest services in personal public transport. It concerns procurements commenced after August 2021.

The legislation transposes Directive (EU) 2019/1161, which is part of measures aiming to reduce greenhouse gas emissions by at least 40% by 2030, as compared to 1990 levels, and to increase the proportion of renewable energy consumed to at least 27%, to make energy savings of at least 27%.

The restriction applies to contracts for the purchase, lease, rent or hire-purchase of road transport vehicles awarded by certain contracting authorities or entities which are subject to public procurement rules, as well as public service contracts. It concerns all M1, M2, M3, N1, N2, N3 vehicles as well as trolley-buses, except for those explicitly exempted.

Agricultural and forestry vehicles, two-wheel or three-wheel vehicles and quadricycles, track-laying vehicles and certain self-propelled vehicles are not covered by the legislation. Slovakia used the allowed exemptions to the fullest. Minimum procurement and public service-use targets do not apply to vehicles designed or adapted for use solely by the armed services, vehicles for use on construction sites or in quarries, port or airport facilities, vehicles designed or adapted for use by civil protection, fire services and police forces, nor armoured vehicles, ambulances, hearses, wheelchair-accessible vehicles and mobile cranes.

When concluding public contracts for purchase, lease, rent or hire-purchase of light-duty vehicles, until the end of 2030, at least 22% of procured vehicles must meet the criteria for clean vehicles; the target for procurement of trucks is 8% and 34% for buses/trolley-buses, until the end of 2025. Minimum procurement targets for procurement of clean buses/trolley-buses should increase to 48% in the period from 2026 to 2030.

The fines for non-compliance are significant – up to EUR1 million in case of buses/trolley-buses,
up to EUR500,000 in case of light-duty vehicles and EUR300,000 in case of heavy-duty vehicles.

**Genetically modified organisms**
Slovakia transposed Directive (EU) 2015/412EU, allowing the restriction or prohibition of the cultivation of genetically modified organisms (GMOs) in the Slovak Republic. The competence to restrict or prohibit such cultivation is granted to the government, which can adopt such measures if justified by, for example, its environmental policy objective, agricultural policy objective or public policy. If adopted, a restriction or prohibition would be applicable from the beginning of the next marketing year.

**Conclusion**
Despite the public health and economic challenges of the past year, Slovak public authorities have been active in enforcing environmental laws and proposing necessary legislative changes, including bringing into force laws transposing EU legislation. This trend is expected to continue, with increased focus on enforcement of environmental laws. The ongoing debate on the reform of public administration system is likely to also bring proposals affecting the competences and organisation of the environmental agencies.
**TRENDS AND DEVELOPMENTS**  **SLOVAKIA**

*Contributed by: Peter Vrábel and Viktória Draškaba, LEGATE, s.r.o.*

**LEGATE, s.r.o.** is a medium-sized law firm, which has been operating in Bratislava since 2004. It provides professional legal services for four companies ranked among the top 20 non-financial companies in Slovakia, not only in the Slovak language but also in English, German, Russian and French. Its client portfolio includes important energy companies, international industrial groups and public sector entities. Lawyers associated with the LEGATE brand have special licences to strengthen the quality of legal services, such as a broker's licence for securities trading, a certificate of a person professionally qualified for public sector procurement or the managing of restructuring and insolvency proceedings, and the registration of a mediator, as well as experience in negotiating international agreements. The firm is an exclusive member not only of the Globalaw network for the Slovak Republic but also of the European Aviation Law Association, the International Bar Association, the Civil Aviation Committee and the Construction Law Committee.

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1. REGULATORY FRAMEWORK

1.1 Key Environmental Protection Policies, Principles and Laws

Constitution of the Republic of Slovenia

The Constitution of the Republic of Slovenia contains several provisions which directly or indirectly provide for the basic legal framework of environmental protection. Article 5 of the Constitution thus already introduces the principle of sustainable development by providing that “the state shall provide for the preservation of the natural wealth and cultural heritage and create opportunities for the harmonious development of society and culture in Slovenia”. Further, most relevant constitutional principles in the field of environmental laws are implemented through the following:

• the principle of limitation of (private) property (i) with its ecological function (Article 67) and (ii) by means of expropriation in public interest (Article 69);
• the provisions regarding (i) the right to use of public good and exploitation of natural resources (Article 70) and (ii) restrictions of use of land and protection of agricultural land (Article 71);
• the right to (i) a healthy living environment (Article 72) and to (ii) drinking water and provision thereof on a non-profit basis (Article 70a); and
• the obligation of (i) the general public to protect the natural sites of special interest and rarities and of (ii) the state and local communities to promote and preserve the natural heritage (Article 73).

Key Statutes

The above principles are implemented by the Environmental Protection Act as the framework act in the field, which is supplemented with several sectoral laws and regulations, such as:

• the Nature Conservation Act and Water Act and implementing measures in the field of nature preservation (as well as some specific acts governing designated natural parks);
• several acts and regulations in the field of waste treatment and management;
• acts and regulations in the field of pollution prevention and quality and protection of air, soil and water;
• the Spatial Planning Act and the Construction Code in the field of spatial management; and
• the Animal Protection Act.

The key statutory principles of environmental protection are:

• the principle of sustainable development;
• the principle of comprehensiveness;
• the principle of co-operation;
• the principles of prevention, precaution and encouragement;
• the polluter pays principle;
• the principle of subsidiary liability; and
• the principle of permissibility.

Policy

The most relevant policy-level document is the National Environment Protection Action Programme, adopted in 2020, which defines the long-term goals, guidelines and competencies in the field, with programmes of measures until 2030.

Based on the Programme, the government shall prepare implementation monitoring reports every four years and various operative programmes shall be adopted to implement the Programme and binding international treaties and conventions, strategies and applicable acquis communautaire. Local communities shall adopt local environment protection plans and action plans which shall be in line with the national Programme.
The Programme is in the process of being supplemented with relevant sections addressing the due development, establishment and governance of public services in the field of environmental protection.

In July 2021, a Resolution on Slovenia’s Long-Term Climate Strategy Until 2050 was adopted.

2. ENFORCEMENT

2.1 Key Regulatory Authorities

Regulation and Enforcement

In Slovenia, regulatory and enforcement competencies related to environmental issues on the national level are rather centralised; the main governmental body in charge of environment is the Ministry of the Environment and Spatial Planning. Its goal is to provide a healthy living environment for all inhabitants of the Republic of Slovenia and to promote and co-ordinate efforts towards sustainable development based on the efficient and economical use of natural resources and ensuring social well-being.

On the local level, the local communities and municipalities play a relevant role specifically in the area of spatial planning, monitoring, nature preservation and informing the public.

There is no specific independent regulator established in the field of environment, but there are several bodies within the Ministry of the Environment and Spatial Planning in charge of various tasks, such as the following.

- The Slovenian Environment Agency which performs the environmental monitoring and expert services as well as leading administrative proceedings in the field (eg, environment impact assessment).
- Most of the heavy lifting in overseeing the implementation of the environmental laws is done by the Inspectorate for the Environment and Spatial Planning. It supervises the implementation of regulations in the field of housing and surveying as well as in the fields of environmental protection and nature conservation, water management, industrial pollution and genetically modified organisms. It also performs administrative and expert tasks in the field of cross-border shipment of waste, with the exception of radioactive waste. The inspectorate is internally divided into two operational units – the Environment and Nature Inspection Service and the Construction, Surveying and Housing Inspection Service.
- The Slovenian Water Agency, which is in charge of water management.
- The Slovenian Nuclear Safety Administration which performs professional, administrative, supervisory and development tasks in the areas of radiation and nuclear safety, radiation practices and the use of radiation sources, protection of the environment against ionising radiation, physical protection of nuclear material and facilities, non-proliferation of nuclear weapons, and protection of nuclear goods.
- The Surveying and Mapping Authority which is a national land-surveying service and is responsible for conducting administrative procedures and deciding in administrative cases at the first instance, issuing data from geodetic databases, and other administrative services and tasks of a land-surveying service.

Criminal Liability

In addition to administrative inspection proceedings and fines imposed in misdemeanour proceedings, certain acts and activities affecting the environment can qualify as a criminal offence as prescribed by the Slovenian Criminal Code. Such are prosecuted by the state prosecutor’s office and are conducted by courts of general jurisdiction. The Slovenian Criminal Code pro-
vides for 15 different criminal offences in the field, with imprisonment sentences ranging from six months to five years, or even eight years if the offence results in human casualties.

Under the Liability of Legal Persons for Criminal Offences Act, companies and other legal entities can also be held liable for criminal offences in this respect and can face material sentences. Please see 6.1 Liability for Environmental Damage or Breaches of Environmental Law for more information on this.

3. ENVIRONMENTAL INCIDENTS AND PERMITS

3.1 Investigative and Access Points
In case of environmental incidents and breaches of law or permits, the supervising authority – ie, the competent inspectorate – when performing inspection proceedings have, among others, the following investigative and access rights:

- the right to enter business premises of natural and legal persons and to inspect the device or plant in which the source of environmental pollution is located, as well as to inspect other documents, goods, business books, contracts, etc;
- the right to interrogate parties and witnesses;
- the right to examine, reproduce and seize documents or other objects;
- the right to obtain and use personal and other data from official records and other databases;
- the right to take samples of the goods, materials and equipment and carry out examinations of the samples taken;
- the right to photograph or record the persons, premises, facilities, installations, etc; and
- the right to obtain other documents and perform other actions necessary to determine the level of environmental pollution or other infringements of the law.

In certain cases, the inspection authorities even have a right to make a fictitious purchase in order to establish the infringement or to collect data on the infringing party.

In case of plants and devices that can cause large-scale environmental harm (ie, pollution), the inspectorate can also prepare an inspection plan beforehand which includes the ordinary and extraordinary measures, procedures and other specifics in respect of performing control and inspections over these plants and devices.

3.2 Environmental Permits
Types of Environmental Permits and Consents in the Republic of Slovenia
According to the Slovenian Environmental Protection Act, an environmental permit (*okoljevarstveno dovoljenje*) is required for operation of the following facilities:

- A device or installation in which an activity that can cause large-scale pollution will be performed (eg, oil refinery, cement plants, metal foundries, certain chemical plants). The types of activities and installations that can cause large-scale environmental pollution, measures to prevent such pollution and other specifics are determined in the decree on activities and installations causing large-scale environmental pollution.
- A device or installation other than those defined under the first point above. These are devices and installations that cause emissions to air, water or soil above the prescribed emission limits. Detailed specifics are provided in the decree on the emission of substances into the atmosphere from stationary sources of pollution.
- A plant (or making any change in a plant) that uses or holds certain harmful materials and
substances as per the decree on the prevention of major accidents and mitigation of their consequences.

Prior to starting any activity (eg, construction) that is likely to have a significant impact on the environment, an environmental impact assessment procedure must be carried out in which the Ministry of the Environment and Spatial Planning grants the environmental consent (okoljevarstveno soglasje) and determines the condition for carrying out such activity.

4. ENVIRONMENTAL LIABILITY

4.1 Key Types of Liability

Under Slovenian law there are three main types of liability that can be imposed in relation to environmental damage and breaches of environmental law.

Administrative liability under the Environmental Protection Act is primarily intended to return the environment into its original state. Under the administrative liability, the inspectorate authorities shall have the possibility to impose certain measures to ensure compliance with environmental protection rules and impose fines for acts defined as misdemeanours. The polluter pays principle is applicable in respect of certain types of activities and requires the polluter to undertake all measures to prevent the occurrence of environmental damage or rehabilitate the environment.

Civil liability according to the general rules of the Code of Obligations may be imposed where the environmental burden causes lawfully recognised damage to a third party who then has the right to demand damages in a litigation procedure.
Criminal liability is prescribed in the Criminal Code for 15 criminal acts against the environment and natural resources, with imprisonment sentences ranging from six months to five years, or even eight years if the offence results in human casualties. Under the Liability of Legal Persons for Criminal Offences Act, companies and other legal entities can also be held liable for criminal offences in this respect and can face material sentences, including monetary fines and even termination of the company.

5. ENVIRONMENTAL INCIDENTS AND DAMAGE

5.1 Liability for Historical Environmental Incidents or Damage
Under the polluter pays principle implemented in the Slovenian environment protection legislation, the operator or landowner who is responsible for the incident shall be responsible to undertake the measures which are necessary and imposed for the rehabilitation of the environment. Therefore, the current operator or owner is not liable for incidents which occurred while the relevant assets were still operated or owned by another person. Nonetheless, the law provides that where there is more than one person responsible for the damage and the exact liability of each person cannot be established, those persons shall be jointly and severally liable.

5.2 Types of Liability and Key Defences
Different types of liability applicable to environmental incidents under Slovenian law are described in 4.1 Key Types of Liability. In respect of those liabilities the following defences, limits and conditions should be considered:

- expiration of limitation periods in respect of administrative, civil and criminal liability;
- administrative liability may be imposed only in respect of performance of certain types of activities, specifically enumerated in the law when the environmental damage is not caused intentionally or due to gross negligence;
- in case of civil liability all four elements of civil liability will have to be established:
  (a) there is harm;
  (b) the harm shall arise from an unlawful act or omission;
  (c) there is a causal link between the harm that has occurred and the unlawful act or omission; and
  (d) the responsibility of the person who caused the damage must be established;
- criminal liability for certain criminal acts will only be established if the damage to the environment was caused by violation of the applicable rules;
- a legal entity’s responsibility for a criminal act will only be possible under the conditions described under 6.1 Liability for Environmental Damage or Breaches of Environmental Law.

6. CORPORATE LIABILITY

6.1 Liability for Environmental Damage or Breaches of Environmental Law
In respect of administrative and civil liability as described under 4.1 Key Types of Liability, the responsibility of a corporate entity shall not differ from the liability of an individual.

However, special conditions apply for the criminal liability of a legal entity. In particular, under the Liability of Legal Persons for Criminal Offences Act, the individual who committed the criminal act will have to be convicted and will have to commit the act in the name, on behalf or for the benefit of the legal entity. Additionally, one of the following conditions will have to be met:
6.2 Shareholder or Parent Company Liability
Slovenian provisions for protection of environment do not provide for liability of the shareholders or a parent company for environmental damage or breaches of environmental law committed by a legal entity they own or control. However, under Slovenian corporate law there is a so-called “principle of mandatory instructions”; according to this principle, the parent company may be liable to its subsidiary for the instructions given by the parent company to the subsidiary and which ultimately cause harm to the subsidiary.

7. PERSONAL LIABILITY

7.1 Directors and Other Officers
The Environmental Protection Act also foresees monetary fines for breaches of rules for protection of the environment which can be imposed on the responsible individual within the legal entity.

Such individuals may also be held liable under criminal law, in which case they may be subject to a monetary fine or even imprisonment ranging from six months to five years, or even eight years if the offence results in human casualties.

Additionally, a third party who incurs harm may also bring a civil claim against the directors or other officers of a legal entity. In such event, general rules for civil liability as laid down in the Code of Obligations shall apply and the four elements of civil liability described under 5.2 Types of Liability and Key Defences will have to be established also in relation to the relevant director or officer.

7.2 Insuring against Liability
Insurance against personal liability of directors and other officers is available under the directors’ and officers’ (D&O) insurance policies.

8. LENDER LIABILITY

8.1 Financial Institutions/Lender Liability
Slovenian environmental law does not foresee specific liability of financial institutions or lenders aimed at financing of projects that result in environmental damage or breaches of environmental law caused by their creditors.

8.2 Lender Protection
Lenders do not need to protect themselves from liability risk as there are no bases which would allow to establish their responsibility for environmental damage or breaches of environmental law caused by their creditors.

9. CIVIL LIABILITY

9.1 Civil Claims
While it remains to be determined by court practice to what extent private persons can directly enforce the constitutionally guaranteed rights and, since the Environmental Protection Act does not provide for specific civil law liability, claims for compensation and certain other rem-
Edies can be brought under the generally applicable civil law rules.

Under the general civil liability rule provided in the Code of Obligations, any person causing damage to another shall compensate the damages unless they can prove that the damages were caused without their guilt. Objective (no-guilt) liability is provided for in instances where damages are caused from objects or activities which represent a greater damage risk or in certain other narrowly specified cases.

Property laws separately provide legal basis for nuisance claims, as the Law of Property Code provides that an owner of real property shall refrain from any actions and shall remedy any causes stemming from its property and cause detriment to the use of neighbouring properties if this is excessive, given the nature and purpose of real estate and local customs, or if it causes substantial damage.

9.2 Exemplary or Punitive Damages
In principle, exemplary or punitive damages are not in line with the general rules of damage liability in Slovenia which require a full (but fair) compensation for damages. Exemptions to these rules are rare and do not allow for grave disproportion from the above.

It is likely that excessive exemplary or punitive damages would be considered contrary to the Slovenian public order in the event a foreign judgment was being enforced in Slovenia.

9.3 Class or Group Actions
As of 2108, when the Collective Actions Act was implemented, class actions are specifically governed in Slovenia and are permitted in a limited list of situations, including enforcing damage liability due to environmental incidents (accidents) as defined in the Environmental Protection Act. Since the legislation has only been in place for two years, no relevant class actions have been initiated in relation to environmental incidents, although there have been some cases where the media have reported this being discussed.

9.4 Landmark Cases
There have been very few high-impact cases relating to civil liability related to environmental damages in recent Slovenian legal history.

In relation to certain brownfield or heavily polluted areas, or to some larger polluters or hazardous activities (related to air pollution or asbestos, for example), damaged parties have filed individual or joint claims against the polluters, but no case has really set a benchmark for future claimants.

As already mentioned, Slovenian law does not recognise exemplary or punitive damages and shall only consider excessive nuisance (or even pollution) as legally relevant. In addition, Slovenian courts are generally not claimant-friendly in terms of awarding high damages in life-and-limb cases, and court proceedings are lengthy.

In this environment, private parties are not encouraged to claim damages against large polluters, but there have been some cases where claims have been successful – however, some of these have involved an extremely long litigation process.

10. CONTRACTUAL AGREEMENTS

10.1 Transferring or Apportioning Liability
Slovenian legislation does not foresee the possibility of contractually transferring the liability for damages (whether direct, consequential or incidental) or liability arising out of breaches of
law from the party to be held liable under the law to another party. Nonetheless, conclusion of an agreement on the transfer of such liabilities shall not be prohibited, but the agreement shall only have effect between the parties to such agreement.

In particular, the Slovenian courts have established that the person to be held liable under the law cannot evade its responsibility for liabilities arising out of statutory provisions by contractually transferring such responsibility to a third party. Consequently, an agreement on transfer of liability for environmental damages or fines imposed in respect of breaches of environmental protection provisions shall only have effect between the parties to such agreement (e.g., the seller and the buyer of a land plot), but the regulators or the courts will not consider it in imposing any fines or liability for damages.

10.2 Environmental Insurance
Most insurance companies in Slovenia offer also environmental insurance as part of their general liability insurance and D&O insurance offers. Typically, environmental insurance will cover (i) civil liability for damages caused to third parties due to environmental events on the side of the insured party and (ii) costs related to the monitoring, discovery and removal of environmental damage. However, according to the data analysed by the insurance companies, the level of environmental insurances held by Slovenian companies is still relatively low as companies seem to underestimate their potential exposure to environmental liabilities.

11. CONTAMINATED LAND
11.1 Key Laws Governing Contaminated Land
Under the Environmental Protection Act, land is defined as the top layer of the earth’s crust between rocks and the surface made up of mineral particles, organic matter, water, air and living organisms. It is also determined that contamination of the environment is a direct or indirect introduction of substance or energy into the air, land or water or generation of waste. Here, our focus will be on contamination of land, which can happen by pollution or by inappropriate waste disposal.

Key Laws Governing Contaminated Land
General rules regarding land contamination are included in the Environmental Protection Act and the Nature Conservation Act. Slovenia has also adopted a National Environment Protection Programme with a schedule of measures until 2030; these measures will determine the current state of the land in Slovenia and the biggest challenges faced, together with the goals, guidelines and measures to achieve land protection objectives. According to the programme, the biggest problems are covering the land with various impermeable materials (such as asphalt) and compacting of the land during construction.

Specifically, in regard to land contamination, the biggest issue is proper waste disposal. In order to deal with this issue, Slovenia adopted a decree on waste landfills that determines that disposal of waste is only allowed on certified landfills. The decree also includes the requirements that landfills need to fulfil in order to ensure proper protection of land.

Other major factors that contribute to land contamination are agriculture and industry, especially by releasing various substances into the land. This is why Slovenia also adopted a decree on limit values, alert thresholds and critical levels of dangerous substances into the soil.

The aim of the recently adopted Resolution on Slovenia’s Long-Term Climate Strategy Until 2050 is to promote management methods and
good practices which will ensure protection of forests, agricultural land and other ecosystems.

**Remediation Requirements**
Under the Environmental Protection Act, there is a requirement to monitor the state of the environment and environmental pollution. In case of contamination of land, remedial measures must be performed with an aim to remove, control or reduce pollutants in such a way that this land is no longer causing risks to human health. Further requirements are set forth with a decree on the types of measures for remediation of environmental damage. In addition to the measures aimed to improve the physical state of land, the Slovenian environmental protection legislation also includes an obligation of the polluter who caused the relevant contamination to pay a remuneration in form of environmental taxes for environmental pollution.

**12. CLIMATE CHANGE AND EMISSIONS TRADING**

**12.1 Key Policies, Principles and Laws**
The key policy instruments relating to climate change in Slovenia are the establishment of the so-called “Climate Change Fund” and regulation of the greenhouse gas emission allowance trading scheme, whereas key legislation acts/policies are in addition to the Slovenian Environmental Protection Act, the Paris Agreement, the Energy Concept of Slovenia and the Integrated National Energy and Climate Plan.

The greenhouse gas emission allowance trading scheme allows for trading with emission coupons. All operators of devices and plants that must obtain a permit to emit greenhouse gases in accordance with the Slovenian Environmental Protection Act, as well as aircraft operators, are included in this trading scheme. The scheme currently includes 53 installation operators – ie, all thermal power plants, steel plants, and producers of steel, glass, ceramic, cement, lime, paper and similar. In 2020, the installation operators were handed out 1,611,271 emission rights and they handed over 6,095,593 emission rights.

Based on the Slovenian Environmental Protection Act, there is also a special item of the state budget – a Climate Change Fund. The purpose of this fund is to provide co-financing of measures and actions aimed at mitigating the consequences of climate change, adaptations to these consequences and development of renewables. The fund is managed by the Ministry of the Environment and Spatial Planning and financed through the income achieved by emissions trading. Spending of the funds is determined by governmental decree.

The Environmental Protection Act determines protection of the environment from pollution as the key condition for sustainable development, thereby determining fundamental principles of environment protection, measures for environment protection, monitoring of environment and environmental information, economic and financial instruments of environment protection, environment protection public services and other issues related to protection of the environment. On the basis of the Environmental Protection Act, an extensive amount of secondary legislation was passed which further regulates environment protection and climate change regulation.

The Ministry of the Environment and Spatial Planning has also prepared a draft of the Law on Climate Policy of Slovenia which foresees that the country shall adopt a long-term climate strategy which would determine the objectives of climate policies in respect of individual sectors. However, the law and the strategy have not been adopted so far.
Slovenia signed the Paris Agreement, together with all other EU member states, on 22 April 2016. The Paris Agreement was ratified by Slovenia on 17 November 2016 with the Act Ratifying the Paris Agreement which entered into force on 3 December 2016. As part of the EU’s and its member states’ commitment to reduce greenhouse gases emissions by at least 40% by 2030 as compared to 1990, Slovenia shall reduce its greenhouse gases emissions by at least 15% by 2030 as compared to 2005.

In addition to the Paris Agreement, the Energy Concept of Slovenia is the basic strategic national energy programme. According to the Slovenian Energy Act, the Energy Concept of Slovenia shall determine – on the basis of projections for economic, environmental and social development of Slovenia and on the basis of international commitments – the goals for achieving reliable, sustainable and competitive energy supply for the next 20 years, with an outlook to the next 40 years. The Ministry of Infrastructure is preparing the Energy Concept of Slovenia which shall determine Slovenia’s goals in different fields of energy policy until 2030, with an outlook to 2050.

This strategic document is for guidance and consequently will not determine individual projects, but will rather lay down directions to be followed until 2030 (with frameworks until 2050). Thereby, the Energy Concept of Slovenia shall determine the baseline for future decisions in respect of provision of reliable energy supply in a sustainable and competitive way.

Finally, in July 2021 the Slovenian national assembly adopted the Resolution on Slovenia’s Long-Term Climate Strategy Until 2050. According to the Resolution, Slovenia’s plan to transition to a low-carbon circular economy will only be possible by making some radical changes, the focus of which are sustainable consumption and production, among which, the following measures have been highlighted:

- gradual transition to consumption of food of plant origin;
- supply of energy from mostly renewable energy sources by 2050;
- more efficient use of energy;
- promotion of multi-purpose use of facilities, support of research and monitoring of the impact of climate changes; and
- support of management of endangered natural and cultural heritage.

### 12.2 Targets to Reduce Greenhouse Gas Emissions

In connection to the subject of reducing the greenhouse gas emissions, the Slovenian government has adopted on 27 February 2020 the Integrated National Energy and Climate Plan (which was also submitted to the European Commission, according to the EU Regulation 2018/1999 on the Governance of the Energy Union and Climate Action). This plan determines the goals, policies and measures for the period until 2030 (with an outlook to 2040) on all five dimensions of the Energy Union:

- energy security;
- the internal energy market;
- energy efficiency;
- decarbonisation; and
- research, innovation and competitiveness.

The plan foresees that, by 2030, the total greenhouse gas emissions shall decrease by a total of 36% as compared to 2005 (and 40% as compared to 1990).

Under the Resolution on the National Environmental Action Programme 2020–2030 Slovenia has set to establish an efficient public transport network, the core of which should be a modern railway network that will enable fast and
frequent transport between cities. Slovenia will also strive to make cycling and walking more prevalent among the population. Vehicles will be mostly powered by electricity, supplemented by renewable or synthetic gases. By 2050, passenger transport should be electrified.

13. ASBESTOS

13.1 Key Policies, Principles and Laws Relating to Asbestos
Asbestos is a natural mineral that was commonly used as a building material in the previous century as it is an excellent electrical insulator and is highly heat-resistant. However, it was later found that asbestos can lead to various deadly diseases, such as asbestosis and cancer, which is why the prohibition of its use in the mainstream construction was prescribed in the developed world. Within the EU, this was achieved with the Directive 1999/77/EU that was implemented into Slovenian legislation with a decree prohibiting and restricting production, trade and use of asbestos and asbestos products from 1 January 2003 forward.

Even though it is no longer allowed to use asbestos for new constructions, it is still present in older buildings. Therefore, the Slovenian legislator also determined the measures on how to deal with these materials and how to dispose of them.

Disposal of Materials Containing Asbestos in the Demolition, Reconstruction or Maintenance of Buildings
In accordance with the Decree on the conditions for the disposal of materials containing asbestos in the demolition, reconstruction or maintenance of buildings and in the maintenance and decommissioning of plants prior to designing the reconstruction or removal of the facility, the investor must determine whether the workers will be exposed to any materials containing asbestos.

If so, these works can only be performed by a person who has obtained an environmental permit from the Ministry of the Environment and Spatial Planning. When handling these materials containing asbestos, the decree provides that such materials must be sprayed with water before their removal or treatment in order to prevent the release of asbestos fibres. The materials containing asbestos must be packaged in a way that prevents the release of asbestos fibres.

Disposal of Waste Containing Asbestos
In addition to the legislation regulating waste management, landfills and incineration of waste, the main act regulating the asbestos waste is the decree on management of waste containing asbestos. Asbestos and waste to which asbestos fibres are adhered to must be (i) treated by asbestos fibre hardening or destruction processes or (ii) bagged in a way that prevents the release of asbestos fibres. Containers and bags containing asbestos waste must be clearly and visibly marked with the inscription “asbestos waste”. Moreover, it is not allowed to mix the waste containing asbestos or transport it unless the appropriate safety measures are ensured. It is important to note that only a person who has obtained an environmental permit can perform asbestos waste recovery and disposal.

Current Situation
As emissions of asbestos still exist, either during reconstruction, waste disposal or similar, they need to be properly regulated. This is achieved through the decree on the emission of asbestos into the atmosphere and in the discharge of waste water from installations using asbestos. This decree determines the maximum-allowed values of asbestos emissions. Slovenia also adopted the Act Concerning Remedying the Consequences of Work with Asbestos that
determines occupational diseases incurred due to asbestos exposure, assessment and payment of compensation and more favourable conditions for gaining the right to disability pension for people diagnosed with the asbestos-related occupational disease.

14. WASTE

14.1 Key Laws and Regulatory Controls

In the field of waste management, the Environmental Protection Act provides key principles of waste treatment and management. A more detailed regulation is provided in the decree on waste, which provides a more detailed set of rules on waste treatment and management and other conditions to prevent or reduce the adverse effects of waste generation, to reduce the overall impact of the use of natural resources and to improve the efficiency of the use of natural resources. This decree is applicable to all types of waste and is complemented by specific regulations that deal with:

- individual types of waste (e.g., hazardous and radioactive waste, packaging, batteries, motor vehicles, electronic devices, asbestos);
- operation of waste management facilities (i.e., waste disposal and incineration); and
- international movements of waste.

14.2 Retention of Environmental Liability

Under Slovenian law the extended responsibility of the producer or consignor of waste is established for – among others – the following mass waste streams:

- packaging materials;
- used motor vehicles;
- used tyres, used (vehicle) batteries;
- pharmaceuticals;
- grave candles;
- plant protection products containing hazardous substances.

In respect of packaging materials, the extended liability applies to all waste generated in industry, crafts, trade, services and other activities, households or elsewhere, regardless of the materials used for packaging. An exception is provided for those manufacturers that place less than 15 tonnes of packaging materials on the market per year. There are proposals to lower this threshold to 1 tonne of packaging materials per year, but this proposal has not been adopted yet. Irrespective of the quantity of packaging materials placed on the market, an exception to the extended liability also applies to returnable packaging.

14.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

The obligations of the producers of goods to design, take back, recover, recycle or dispose of the goods once they become waste differ depending on the type of waste.

For example, the producer of the packaging materials must ensure the collection and processing of the packaging materials as well as to ensure financing for these actions. If the producer or the purchaser of the packaged goods does not fulfil these obligations, they must be fulfilled by the person who supplies the goods to the distributor.

Vehicle manufacturers must, in addition to the obligations relating to the design of the vehicles (i.e., restriction of use of hazardous materials and planning for the dismantling, re-use and recycling), also set up and finance the collection of end-of-life vehicles and the disposal and recycling of these.
The tyre manufacturers must ensure all used tyres in a calendar year are collected and appropriately processed.

15. ENVIRONMENTAL DISCLOSURE AND INFORMATION

15.1 Self-Reporting Requirements
In case of an environmental incident, the person who caused it must immediately notify the Administration of the Republic of Slovenia for Civil Protection and Disaster Relief and perform the urgent measures that reduce the harmful consequences to the environment. An environmental incident is defined in the Environmental Protection Act as an uncontrolled or unforeseen event caused by an intervention in the environment and which sooner or later results in a direct or indirect threat to human life or health or the quality of the environment. According to the regulations on protection against natural and other disasters, an ecological disaster (ie, naturally occurring) also counts as an environmental incident.

If the environmental incident also caused environmental damage that requires remedial measures in order to be eliminated or reduced, the polluter must adopt and implement all the necessary measures to prevent the occurrence of environmental damage or its remediation. In case the polluter is unknown, cannot be determined or the incident is the result of a natural phenomenon, such measures are prepared and implemented by the Ministry of the Environment and Spatial Planning.

Additionally, the Environmental Protection Act also establishes the polluter pays principle and, among others, stipulates that the polluter shall cover all costs of remedial measures in case of an environmental damage.

15.2 Public Environmental Information
All the data related to the environment and its protection shall be publicly accessible, which is also one of the provisions of the current Environmental Protection Act that implements the principle of publicity. According to this principle, all environmental data shall be public and everyone shall have access to said data in accordance with the law. In addition to accessing the data obtained through environmental monitoring (ie, the data on the state and trends of the environment), the general public can also access proposals and any new applicable environmental regulations.

The Ministry of the Environment and Spatial Planning must, together with other ministries, prepare an environmental report at least every four years. The same rule applies also to the municipalities and/or other self-governing local communities. Such environmental report must include the information on the state of the environment, pollution, biodiversity, endangered and protected areas, long-term trends and changes in the environment and similar. All the above information shall also be accessible via the internet.

15.3 Corporate Disclosure Requirement
In Slovenia there is no general requirement for all corporate entities to disclose environmental information in their annual reports; however, this obligation does apply to certain entities – for example, entities with more than 500 employees.

In practice, many companies – especially those whose shares are traded on the public stock exchange – do share their environmental information with the public, as environmental friendliness is an important factor for many people when deciding which products to buy or who to do business with.
16. TRANSACTIONS

16.1 Environmental Due Diligence
In Slovenian M&A, real estate property transaction and financing practice, there is no clear and unique approach on environmental due diligence, although awareness of the importance of understanding the environmental issues related to the target assets or site is increasing.

In M&A, it is common that the legal review incorporates a review of regulatory (including environmental) permits and reporting on any formal incompliances and pending inspection processes or environment-related legal disputes, but it is not a standard to perform a full-scope screening and expert evaluation of environmental impact; of course, this does not apply in the industrial and energy sector where environmental due diligence is generally a key element and is performed by expert organisations in the field.

In real estate transactions, the approach of the investor depends on the particular situation. In greenfield projects, test screening might be performed or not, but it is more common in brownfield deals, depending on the exposure, past use of the land, intended project and also scope of reliance on seller’s warranties.

We highly recommend that the approach to the environmental aspect of the deal is discussed earlier in the project, as it is typically hard to draft in strong environmental warranties late in the negotiation process.

In financing transactions, environmental due diligence is rare – save for very specific case with high exposure or if financing is performed by international financial institutions (EBRD, for example), this is not a standard.

16.2 Disclosure of Environmental Information
There are no explicit rules in environmental laws and regulations which would force the seller to disclose environmental information to a purchaser.

The generally agreed disclosure rules as agreed between the parties to the transaction shall typically apply. However, under the Code of Obligations, the seller shall have a greater liability if it was aware of a defect or the subject of sale, but did not reveal it. The general principles of civil law – such as the principle of good faith and fair dealing – will also require the seller to a certain level of disclosure.

17. TAXES

17.1 Green Taxes
Based on the basic polluter pays principle, the Environmental Protection Act provides that environmental taxes can be introduced due to pollution or due to content of hazardous substances in raw materials, semi-finished products and finished products.

Deriving from the above, the environmental taxes are prescribed depending on:

- the type, quantity or properties of the emissions from the individual source;
- the type, quantity or properties of waste; and/or
- the contents of the hazardous substances.

The main obligations of the liable persons are to:

- report to the relevant activities;
- keep records of the underlying circumstances;
- file returns to the locally competent authorities; and
Environmental taxes are currently payable in Slovenia within this framework for eight types of pollutions/pollutants:

- carbon dioxide (CO₂) emissions;
- use of lubricating oils and fluids;
- waste packaging;
- waste electronic and electrical equipment;
- used tyres;
- volatile organic compounds;
- waste water discharge; and
- waste disposal.

On the other side of the coin, the Environmental Protection Act provides for certain exemptions, reductions and refunds of paid taxes in the amount of invested funds intended for adaptation to prescribed limit values and for adoption of other measures that contribute to the reduction of pollution below the prescribed values. A liable person shall have the right to claim a reduction or exemption if they are the polluter and they have entered into an agreement with the state on additional pollution reduction, or if they are a person who is included into the fulfilment of internationally binding pollution reduction obligations of the state. Certain restrictions on state aid apply.

In this respect, the Corporate Income Tax Act and Personal Income Tax Act provide for certain benefits, such as:

- tax relief for environmental donations;
- tax relief for R&D or for investment funding (eg, into hybrid vehicles); and
- de minimis exemptions.
Odvetniki Šelih & partnerji, o.p., d.o.o. is a full-service business law firm that continues the tradition of a partnership established in 1961. With an unwavering focus on its clients’ business objectives, professional know-how, firm-wide dedication, responsiveness and hard work, it offers top-tier legal advice in Slovenia. The firm’s energy and environmental law department advises on all aspects of environmental law, including zoning permits and due diligence, and assists its clients with the environmental aspects of commercial transactions. The firm’s lawyers advise companies facing difficulties as a result of environmental violations and represent clients before the respective administrative bodies and courts. In advising on the entire spectrum of environmental, energy, natural resources and infrastructure law, its lawyers combine their specific knowledge of these areas with a broader understanding of company law, M&A, real estate law, as well as finance and civil law.

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1. REGULATORY FRAMEWORK

1.1 Key Environmental Protection Policies, Principles and Laws
Laws Regulating Environmental Management and Protection
Various laws regulate the protection of the environment in South Africa.

The Constitution of the Republic of South Africa, 1996 (Constitution), which is the supreme law, enshrines the right of all South Africans to an environment that is not harmful to health or well-being and to have this right protected, for the benefit of present and future generations through reasonable legislative and other measures.

Various national, provincial and local level laws reflect these legislative measures. The national framework environmental legislation is the National Environmental Management Act, 1998 (NEMA) which must be read together with the “specific environmental management acts” (SEMAs), namely:

• the National Environmental Management – Air Quality Act, 2004 (NEMAQA);
• the National Environmental Management Biodiversity Act, 2004 (NEMBA);
• the National Environmental Management – Integrated Coastal Management Act, 2008 (ICMA);
• the National Environmental Management – Protected Areas Act, 2003 (NEMPAA);
• the National Environmental Management – Waste Act, 2008 (NEMWA); and
• the National Water Act, 1998 (NWA).

Environmental and heritage resources protections are also found in the following:

• the Mineral and Petroleum Resources Development Act, 2002;
• the National Forests Act, 1998 (National Forests Act); and
• the National Heritage Resources Act, 1999.

Principles Governing Environmental Management
Many of the key principles governing the regulation of the environment are aligned with international environmental legal principles. These principles, which are incorporated into Section 2 of NEMA, apply to the actions of all organs of state that may significantly affect the environment and serve as guidelines by reference to which any organ of state must exercise any function when taking any decision in terms of NEMA or any other statutory provision concerning the protection of the environment.

The NEMA Section 2 principles require that:

• environmental management must place people and their needs at the forefront of its concern, and serve their physical, psychological, developmental, cultural and social interests equitably;
• development must be socially, environmentally and economically sustainable;
• sustainable development requires the consideration of all relevant factors;
• environmental management must be integrated and the best practicable environmental option for development must be selected in decision making;
• there must be equitable access to environmental resources, benefits and services to meet basic human needs and ensure human well-being; and
• the participation of interested and affected parties in decision making must be promoted.
2. ENFORCEMENT

2.1 Key Regulatory Authorities

Environmental matters are a concurrent competence of national and provincial government, which means that both these tiers of government may make law. However, air pollution, water and sanitation limited to potable water supply systems and domestic waste water and sewage disposal systems are areas also regulated at local government level. This means that local municipalities may publish local by-laws relating to these matters.

At a national level, the key regulatory bodies responsible for enforcement of environmental laws include:

- the Department of Forestry, Fisheries and Environment (DFFE);
- the Department of Mineral Resources and Energy (DMRE);
- the Department of Water and Sanitation (DWS);
- the Environmental Management Inspectorate, comprised of officials designated as Environmental Management Inspectors (EMIs) by either the Minister of Forestry, Fisheries and Environment the Minister of Water and Sanitation, or (in the case of mining) the Minister of Mineral Resources and Energy – provincially, a member of the Provincial Executive Council to whom the Premier has assigned responsibility for environmental affairs may also designate EMIs;
- the South African Heritage Resources Agency (SAHRA);
- the Department of Agriculture, Land Reform and Development; and

As environmental matters are a concurrent national and provincial competence, provincial departments of environment are also established for each of the nine provinces.

Mining and water are areas of exclusive national competence; at a provincial level, the functions of these departments are carried out by regional offices.

3. ENVIRONMENTAL INCIDENTS AND PERMITS

3.1 Investigative and Access Points

Compliance and Enforcement Powers under NEMA

NEMA, as the framework legislation, establishes the powers and functions of the EMIs. Depending on their appointments and mandates, EMIs may take enforcement action in relation to matters regulated under NEMA and the SEMAs.

Powers of EMIs in Relation to Breaches of Environmental Laws or Permits and Environmental Incidents

Under NEMA, and depending on their grade and designation, EMIs are vested with the power to:

- monitor and enforce compliance with NEMA and SEMAs, including through issuing compliance notices;
- conduct routine inspections without a warrant, including the power to enter and inspect any building, land or premises;
- investigate any act or omission where there is a reasonable suspicion that it might constitute a breach of or offence under NEMA and the SEMAs, or a breach of any term or condition of a permit issued under those laws;
- inspect sites and records in relation to an investigation;
- question persons in relation to an investigation;
- take samples;
Members of the SAPS have all the powers of EMIs in relation to offences under NEMA and the SEMAs (excluding the powers to conduct routine inspections and issue and enforce compliance notices).

Administrative Notices
A Grade 1 EMI (ie, an EMI with the highest designation) may issue compliance notices if the EMI has reasonable grounds for believing a person has not complied with a law or authorisation issued under that law. An EMI may also issue directives to take certain measures, including investigating environmental impacts or ceasing certain activities if a person has caused or may cause significant pollution or degradation. Generally, a person will be issued a pre-compliance notice or pre-directive and afforded an opportunity to make representations before the notice or directive is issued in final form.

Offences
It is an offence not only to hinder or interfere with an EMI in the execution of their duties, but also to furnish false or misleading information to an EMI.

3.2 Environmental Permits
Depending on the nature of a project, environmental permits, authorisations, licences, etc, may be required under NEMA and the SEMAs. Typically, these will be required prior to commencement of any activities, including vegetation clearance.

The most common authorisations are those required under NEMA, NEMWA, NEMQA and the NWA.

Environmental Authorisations
Under NEMA, environmental authorisations (EAs) must be issued by the competent authority (either national or provincial) prior to the commencement of any activities listed under that Act. Examples of activities listed under NEMA which trigger the need for an EA include:

- indigenous vegetation clearance beyond certain thresholds;
- construction of facilities:
  - (a) for the storage and handling of dangerous goods beyond certain thresholds, or
  - (b) within close proximity to a watercourse; and
- mining, prospecting or other extractive activities.

Applications for EAs must generally be made to the provincial departments of environment, save for those specified instances for which these applications have been reserved for the Minister of Forestry, Fisheries and Environment – in which case the application will be submitted to the national department. In addition, the DMRE, and not the DFFE (or its provincial counterpart), is the competent authority for applications for EAs relating to the prospecting or mining activities.

Process to Obtain an EA
Applications for EAs are regulated under NEMA as read with the Environmental Impact Assessment Regulations, 2014 (EIA Regulations) and Listing Notices published thereunder. Three Listing Notices have been published which identify activities that require an EA. Depending on which listed activities a project will trigger, an applicant for an EA must either follow a shorter basic assessment report process (BAR) or a longer scoping and environmental impact assessment report process (S&EIA).
The shorter BAR usually applies to those activities which are likely to have a lesser environmental impact. From application to decision, the maximum prescribed timeframe for a BAR, which includes one 30-day public participation period, is 337 days.

The longer S&EIA applies to activities that are considered likely to have a greater environmental impact. From application to decision, the maximum regulated timeframe for an S&EIA, including decision making, is 456 days. This includes provision for two 30-day public participation periods.

Significantly, the EIA Regulations provide that an application lapses if an applicant fails to meet any of the prescribed timeframes unless an extension has been granted to it in writing.

Water Use Licences
Water use licences (WULs) or other forms of entitlements to use water (in the form of the registration of a Generation Authorisation or existing lawful use) are required for water uses listed under Section 21 of the NWA. To reduce the licensing burden, for less significant uses, it may be possible to use water for certain reasonable domestic uses or under a registered General Authorisation water use.

Listed water uses include: abstractive water use, storing water; impeding or diverting the flow of water in a watercourse; altering the bed, banks, course or characteristics of a watercourse; and disposing of waste in a manner which may detrimentally impact on a water resource.

Applications must be made to the DWS.

Process to Obtain a WUL
The application process to obtain a WUL is regulated under Part 7 of the NWA or, for integrated WULs, the Water Use Licence Application and Appeals Regulations, 2017 published under the NWA. Public participation is required.

Under the Water Use Licence Application and Appeals Regulations, 2017, integrated WUL applications must be decided in 300 days. Recent commitments have been made by the President of South Africa to shorten this period to 90 days. This has not yet been made law, however.

Other Environmental Permits
Similar to EAs under NEMA, a waste management licence (WML) must be obtained prior to undertaking any activities listed under NEMWA. Frequently, an application for a WML will be made simultaneously with an application for an EA. Under NEMWA, therefore, the application processes must as far as possible be integrated with the EA application.

The process to obtain a WML, whether it be BAR or S&EIA, will depend on the waste management activities triggered by a project.

Atmospheric emission licences (AEL) – which will be preceded by provisional AELs for new activities – are issued by district or local licensing authorities and must be obtained prior to commissioning the activity for which the licence is obtained. The requirement to obtain an AEL is a listed activity which requires an EA under NEMA. The EA and AEL must therefore be obtained prior to commencing the activity. Applicants must, immediately after the submission of the AEL application to the licensing authority, take appropriate steps to bring the application to the attention of relevant organs of state, interested persons and the public. Ordinarily, this is done by way of an advertisement in an appropriate newspaper.

Other environmental permits may also be required depending on the location and nature of
a project. These include potential permits under NEMBA, licences under the National Forests Act or permission under NEMPAA. Additional permits may also be required under provincial or local by-laws.

**Right to Appeal Decisions of the Competent Authority in Relation to Environmental Permits**

Any person may appeal a decision taken under NEMA or any SEMA by a person to whom a power has been delegated by the Minister of Forestry, Fisheries and Environment. Because of the specific provisions relating to EAs for prospecting and mining-related activities, appeals against decisions taken by the DMRE are appealable to the Minister of Forestry, Fisheries and Environment.

The appeal process is prescribed in the National Appeal Regulations, 2014, published under NEMA. Importantly, appeals must be lodged within 20 days of a decision having been communicated to an applicant or to interested and affected parties. Appeals under these Regulations are available in relation to decisions taken under, amongst others, NEMA, NEMWA and NEMBA.

Significantly, an appeal submitted under NEMA suspends an environmental authorisation, exemption, directive or any other decision. There is provision for certain parts or provisions of a directive not to be suspended, however.

There are two separate appeal processes available under the NWA – both require that an appeal must be lodged within 30 days. For integrated WULs, an appeal is available under the Water Use Licence Application and Appeals Regulations, 2017, to persons who objected to an application and who are aggrieved by a decision of the responsible authority.

Separately, an appeal is available to the Water Tribunal under the NWA in relation to, amongst others, directives or a decision to issue a WUL. Again, an appeal is only available to a person who had timeously lodged a written objection to the application. Appeals to the Water Tribunal suspend the decision which is the subject of the appeal.

Unless it is a decision taken by the Minister of Forestry, Fisheries and Environment (or his or her delegate) appeals against AELs must under the Municipal Systems Act, 2000.

Finally, there is a right to take a decision on judicial review (ordinarily once all internal remedies, including appeals, have been exhausted) under the Promotion of Administrative Justice Act, 2000.

**4. ENVIRONMENTAL LIABILITY**

**4.1 Key Types of Liability**

Civil, criminal and administrative liability may be imposed on various persons, including operators, polluters, landowners or others for environmental damage or breaches of environmental law. Individual liability is possible.

**Criminal Liability**

Specific criminal offences are listed under NEMA and the other SEMAs. Over and above offences relating to, amongst others, a failure to obtain or comply with authorisations, it is an offence to unlawfully or negligently commit any act or omission which causes significant pollution or degradation of the environment. The equivalent offence under the NWA relates to the pollution of water resources (rather than significant pollution).
Criminal offences are ordinarily prosecuted by the National Prosecuting Authority. However, NEMA also makes provision for private prosecutions in the public interest or the interest of the protection of the environment.

The penalties for conviction of offences under NEMA and its SEMAs range from the imposition of fines (which may be up to ZAR10 million in the case of first offences) and/or imprisonment for up to ten years (in some instances).

Civil Liability
NEMA specifically provides that any person or group of persons may seek appropriate relief in respect of any breach or threatened breach of a provision of NEMA (or a SEMA or provision of law concerned with the protection of the environment):

• in their own interest;
• in the interests of a person who is unable to institute the proceedings;
• in the interests of a group or class of persons;
• in the public interest; and
• in the interest of protecting the environment.

It is also worth mentioning that, upon conviction of a Schedule 3 offence, a court may summarily enquire into damages caused to any person and order that such damages be paid to that person as if it were in a civil action.

In addition, under South African laws of delict (tort), operators, polluters, landowners and other persons whose conduct/omission results in harm to a third party may be held civilly liable for the damages arising from that harm.

Administrative Liability
As discussed above, an EMI may issue an administrative enforcement notice in the form of a compliance notice to a party who has (or is suspected of) contravening NEMA or a SEMA (including an authorisation issued thereunder). Similarly, an EMI may issue a directive to a party who has or is reasonably suspected of causing significant pollution or degradation of the environment. In both instances, a party will be given an opportunity to make representations prior to the issue of the final notice or directive unless circumstances justify otherwise. It is an offence to fail to comply with a compliance notice or directive.

In addition, to address situations where there has been a failure to obtain authorisation prior to commencement of activities, it is possible to make application for those authorisations retrospectively. Section 24G of NEMA therefore allows a person who has conducted an activity without an EA or WML to apply to rectify the non-compliance. Similar provision is included under Section 22A of NEMAQA in relation to AELs and provisional AELs.

Where a rectification application is submitted, the competent authorities are mandated to impose administrative fines for the failure to comply with the relevant Act, up to a maximum of ZAR5 million. An application of this nature does not, however, prevent criminal proceedings.

5. ENVIRONMENTAL INCIDENTS AND DAMAGE

5.1 Liability for Historical Environmental Incidents or Damage
New landowners may be held liable for the remediation costs associated with historical contamination.

Liability for Environmental Degradation or Pollution
Under Section 28 of NEMA, any person who causes (or may cause) significant environmental pollution or degradation of the environment must
take reasonable measures to prevent such pollution or degradation from occurring, continuing or recurring.

The primary duty to take these measures ordinarily falls on the party that causes (or may cause) that damage, but NEMA also specifically includes:

• the owner of the land;
• a person in control of land; or
• a person who has the right to use the land (responsible person).

NEMA was amended in 2009 to specifically incorporate provision for retrospective liability. Therefore the duty contained in Section 28 of NEMA will apply to significant pollution or degradation that occurred before the commencement of the Act, arises or is likely to arise at a different time from the actual activity that caused the contamination, or arises through an act or activity of a person that results in a change to pre-existing contamination.

**Directives to Take Reasonable Measures**

If a responsible person fails to take reasonable measures to prevent, mitigate or remediate significant environmental pollution or degradation, a competent authority may issue a directive requiring that person to take those measures. If the directive is not complied with, the competent authority may undertake the required remediation and recover the costs of such from, among others:

• the person responsible for the pollution or degradation; and
• the owner of the land at the time of the incident or that owner’s successor-in-title.

Costs may also be recovered proportionally from any other person who benefited from the remedial measures taken by the competent authorities. This could include a current or purchasing landowner.

Similar provisions exist in the NWA in relation to pollution of a water resource.

It is not possible to contract out of statutory liability. Ordinarily, a seller will indemnify a purchaser for any claims by the competent authority from the purchaser in relation to remediation, for example.

**Emergency Incidents**

Separate provisions regulate emergency incidents. For purposes of those provisions, responsible persons include persons responsible for the incident, a person who owns any hazardous substance involved in the incident or a person who was in control of any hazardous substance involved in the incident. The provisions require reporting and clean-up.

**5.2 Types of Liability and Key Defences**

**Criminal Liability**

It is an offence to unlawfully and intentionally or negligently commit any act or omission which causes or is likely to cause significant pollution to – or which detrimentally affects or may detrimentally affect – the environment. A similar offence is provided under the NWA in relation to polluting water resources, although there is no significance threshold.

Where an employer fails to take reasonable steps to prevent an act or omission by its agent, manager or employees, criminal liability may be imposed on that employer.

A manager, agent or employee may also be personally liable for certain offences where it was that person’s responsibility to act, or refrain from acting to the extent that their action or omission resulted in an offence by the employer.
Directors may also be criminally liable for offences conducted by the company where that director failed to take all reasonable steps necessary in the circumstances to prevent the commission of the offence by the company. There is a presumption of director liability inasmuch as proof of an offence by a company will constitute prima facie evidence that the director is guilty.

Civil Liability
See 4.1 Key Types of Liability.

It is also noteworthy that under NEMA’s provisions regulating an environmental management programme, the directors of a company or members of a close corporation may be jointly and severally liable for any negative impact on the environment, whether advertently or inadvertently caused.

Possible Defences to Criminal and Civil Liability
Provided the relevant statute does not impose strict liability, the ordinary defences which may be available under criminal law will apply. In addition, NEMA specifically provides that it is defence to a criminal charge to show that an unauthorised activity was commenced or continued in response to an incident or emergency situation so as to protect human life, property or the environment. It will need to be demonstrated that the response was proportionate in the circumstances.

6. Corporate Liability

6.1 Liability for Environmental Damage or Breaches of Environmental Law
Corporate entities are considered “persons” under NEMA and the SEMAs. Thus, they are equally “persons” for purposes of enforcement action.

However, as mentioned in 5.2 Types of Liability and Key Defences, the corporate veil may be pierced in certain circumstances, inasmuch as NEMA provides for director liability in certain circumstances.

6.2 Shareholder or Parent Company Liability
Although it is yet to be definitively confirmed by the South African courts, the provisions of NEMA are considered broad enough to incorporate shareholder liability. This is because NEMA provides for the recovery of remedial costs incurred by an authority from, amongst others, persons who indirectly contributed to the pollution or degradation, persons in control of land or persons who benefitted from the measures taken. Similar provisions are included in the NWA.

7. Personal Liability

7.1 Directors and Other Officers
As discussed in 5.2 Types of Liability and Key Defences, directors of an entity may be held liable for the Schedule 3 offences conducted by that entity where the director failed to take reasonable steps to prevent that offence occurring. Schedule 3 offences include all offences under NEMA and the more serious offences under the SEMAs. There is a presumption of director liability, inasmuch as proof of an offence by a company will constitute prima facie evidence that the director is guilty.

It is also noteworthy that under NEMA’s provisions regulating an environmental management programme, the directors of a company or members of a close corporation may be jointly and severally liable for any negative impact on the environment, whether advertently or inadvertently caused.
7.2 Insuring against Liability
It is generally not possible to insure against regulatory fines and penalties in South Africa, as this would be regarded as being contrary to public policy.

Broader environmental insurance is discussed in 10.2 Environmental Insurance.

8. LENDER LIABILITY

8.1 Financial Institutions/Lender Liability
South Africa does not have legislation akin to the Comprehensive Environmental Response, Compensation and Liability Act as exists in the USA. As is the case with shareholder liability, the potential for lender liability exists under NEMA, but this has not yet been definitively confirmed by the South African courts. Liability may arise as a consequence of foreclosure (and associated ownership of property) and in scenarios where an authority takes remedial measures, in circumstances where costs are recovered from parties who had direct or indirect control or who benefitted from measures taken. The risk may, for example, be greater in scenarios where a lender takes equity.

8.2 Lender Protection
As indicated in 8.1 Financial Institutions/Lender Liability, there is no equivalent protection afforded to lenders as is the case in the USA.

Lender protections will largely depend on ensuring adequate protections are incorporated into transactional and financing documents.

9. CIVIL LIABILITY

9.1 Civil Claims
As set out in 4.1 Key Types of Liability, civil claims may be instituted in relation to environmental damage caused by breaches of environmental laws. Such claims may be brought under the South African law of delict (tort). Upon conviction of a Schedule 3 offence, a court may also summarily inquire into damages caused to the environment and make a civil order in relation thereto.

In addition, NEMA provides locus standi to persons seeking appropriate relief in respect of a breach or threatened breach of a provision of NEMA (or a SEMA or provision of law concerned with the protection of the environment). In this regard, persons may act: in their own interest; in the interests of a person who is unable to institute the proceedings; in the interests of a group or class of persons; in the public interest; and in the interest of protecting the environment.

9.2 Exemplary or Punitive Damages
As a general proposition, South African courts do not grant exemplary or punitive damages against a defendant as this is considered to be against public policy. A court will only award a plaintiff damages for the loss that he or she has proved that they have suffered.

However, on conviction of a Schedule 3 offence, a court may summarily enquire and assess the monetary value of any advantage gained or likely to be gained by a person as a consequence of the offence and in addition to any other penalty, order damages or compensation or a fine equal to the amount so assessed. This is aligned with the provisions of the Prevention of Organised Crime Act, 1998.
9.3 Class or Group Actions
Section 38(C) of the Constitution permits anyone acting as a member of, or in the interests of, a group or class of persons to approach a competent court in order to seek the appropriate relief. By way of example, an agreement to compensate former gold miners suffering from lung-related diseases was recently reached following a class action.

In addition, as mentioned in 4.1 Key Types of Liability and 9.1 Civil Claims, NEMA specifically provides for a person or group of persons to institute action (among others) on behalf of a class or persons seeking appropriate relief in respect of any breach or threatened breach of a provision of NEMA (or a SEMA or provision of law concerned with the protection of the environment).

9.4 Landmark Cases
South Africa’s courts have played an active role in entrenching the Constitutional right to an environment that is not harmful to health or well-being and there are therefore multiple useful precedent-setting judgments. These include the following.

- Fuel Retailers Association of Southern Africa v Director-General: Environmental Management, Department of Agriculture, Conservation and Environment, Mpumalanga Province and Others 2007 (10) BCLR 1059 (CC) – in this decision, the Constitutional Court confirmed the interrelationship between the protection of the environment and socio-economic development. Specifically, it confirmed that sustainable development requires a balance between environmental protection and socio-economic development.
- High Change Investments (Pty) Limited v Cape Produce Co (Pty) Limited trading as Pelts Products and others 2004 (2) SA 393 (EDC) – in this decision, the court confirmed that the significance threshold (when assessing a breach of the NEMA duty of care) requires a “considerable measure of subjective import”.

10. Contractual Agreements

10.1 Transferring or Apportioning Liability
Contractual indemnities are often used between parties to transfer or apportion liability for environmental incidents or breaches of environmental laws. However, these arrangements are not binding on regulators and statutory liability cannot be excluded.

10.2 Environmental Insurance
Environmental insurance is available in South Africa, although it is not widely used. Among others, the following insurance is available:

- remediation insurance in relation to the insured’s property or other land, water and biodiversity;
- sudden and accidental and gradual pollution; and
products pollution liability.

In relation to prospecting and mining activities, financial guarantees must be in place prior to the award of a prospecting or mining right. This provides a “quasi-insurance” to the state which aims to ensure that any rehabilitation or remediation which is not carried out by the licensee after the closure of an operation is funded and, if necessary, may be conducted by the state. The Financial Provisioning Regulations, 2015, published under NEMA are currently subject to amendment. It is also noted that NEMA does make provision for regulations to be published in relation to other activities although this has not yet been done.

11. CONTAMINATED LAND

11.1 Key Laws Governing Contaminated Land

Under Part 8 of NEMWA, an owner of land that is significantly contaminated, or a person who undertakes an activity that causes the land to be significantly contaminated, must notify the DFFE as soon as that person becomes aware of the contamination.

In addition, the authorities (being the Minister of Environment, Forestry and Fisheries or a provincial member of the Executive Council) may, after consultation with the Minister of Water and Sanitation and any other organ of state concerned, identify investigation areas where:

- a high-risk activity is taking or has taken place that is likely to result in contamination; or
- the authority has reasonable grounds to believe is contaminated.

Site Assessments

Following notification by the owner, or after land has been declared an investigation site, the authorities may:

- cause a site assessment to be conducted; or
- direct the owner of the investigation site or person conducting the high-risk activity to cause an independent site assessment to be conducted at that person’s cost and submit that report to the authorities.

After considering a site assessment the authorities may, in consultation with the Minister of Water and Sanitation and any other concerned organ of state, decide whether the investigation site is contaminated or not. If the land is considered to be contaminated, the authorities may determine that:

- the site must be remediated urgently or within a specific period and declare the site a remediation site, in which case a remediation order will be issued; or
- measures to monitor and manage any risks at an investigation site must be implemented, in which case a monitoring order will be issued.

Remediation sites are listed on the contaminated land register.

Transfer of Contaminated Land and Remediation Sites

No person may transfer contaminated land without informing the person to whom that land is transferred that it is contaminated. In the case of remediation sites, the Minister of Forestry, Fisheries and Environment must also be notified of the transfer.
12. CLIMATE CHANGE AND EMISSIONS TRADING

12.1 Key Policies, Principles and Laws

International Commitments
In 2011, South Africa published the National Climate Change Response Policy which confirms its commitment to make a fair contribution to the global effort to stabilise greenhouse gas concentrations in the atmosphere.

Having been a signatory to the Kyoto Protocol previously, on 1 November 2016, South Africa ratified the Paris Agreement. As required by Article 4 of the Paris Agreement, South Africa submitted its Low Emission Development Strategy 2050 in February 2020.

National Measures
The Carbon Tax Act came into effect on 1 June 2019. Informed by the “polluter pays” principle, the Act imposes a tax on the carbon dioxide (CO₂) equivalent of greenhouse gas emissions. Initially, it applies only to Scope 1 emissions, but the Act provides for various emission allowances.

The draft National Climate Change Bill, which was first published for comment on 8 June 2018, has yet to be formally promulgated. However, in September 2021, South Africa’s cabinet approved submission of the Bill to Parliament. In essence, the bill aims to support an effective climate change response and to enable a just transition to a climate resilient and lower carbon economy in the context of an environmentally sustainable development framework.

Pending finalisation of the bill, NEMAQA is being used as a mechanism to require greenhouse gas related reporting under the National Greenhouse Gas Emission Reporting Regulations (as amended) and emission reduction (or pollution prevention) plans from heavy emitting industries under the National Pollution Prevention Plan Regulations, both published under that Act.

Following the decision in Earthlife Africa Johannesburg v Minister of Environmental Affairs and Others [2017] 2 All SA 519 (GP), the Minister of Forestry, Fisheries and Environment has published a draft guideline which requires that climate change impact assessments must be conducted for EA, WML and AEL applications, where appropriate.

12.2 Targets to Reduce Greenhouse Gas Emissions

Ahead of COP26, South Africa approved the revised NDC target range for submission to the UNFCCC in September 2021. The range has been revised for 2025 to 398 from 510, and for 2030 to 350-420 metric tonnes of CO₂ equivalent.

In addition, pending finalisation of the Climate Change Bill which will require sectoral emission targets and, at a company level, carbon budgets, companies are required to submit reduction plans under the Pollution Prevention Plan Regulations.

13. ASBESTOS

13.1 Key Policies, Principles and Laws Relating to Asbestos

Asbestos is regulated primarily regulated under:

- the Regulations for the Prohibition of the Use, Manufacturing, Import and Export of Asbestos and Asbestos Containing Materials, 2008, published under the Environment Conservation Act, 1989, which has largely been replaced by NEMA (Asbestos Prohibition Regulations); and
- the Asbestos Abatement Regulations, 2020, published under the Occupational Health
and Safety Act, 1993 (Asbestos Abatement Regulations).

Asbestos Prohibition Regulations
The Asbestos Prohibition Regulations prohibit the acquisition, processing, packaging and repackaging of asbestos or asbestos-containing materials. These Regulations also prohibit the import or export of asbestos or asbestos containing material (including waste) subject to certain exceptions (eg, it is possible to import asbestos or asbestos-containing material from a state which is a member of the Southern African Development Community for safe disposal).

Asbestos Abatement Regulations
The Asbestos Abatement Regulations apply to every employer who may expose persons to asbestos dust in the workplace. Among other things, these regulations require an employer to:

• ensure, as far as reasonably practicable, that all asbestos-containing material at a workplace is identified and that an inventory of such material is maintained;
• conduct asbestos risk assessments and prepare an asbestos management plan if asbestos-containing material is identified at a workplace.

The Asbestos Abatement Regulations also:

• set out the obligations of persons exposed to asbestos;
• require the Chief Director of Provincial Operations to be notified of work involving asbestos or asbestos-containing materials;
• require air monitoring of the concentration of airborne fibres if certain work is carried out (eg, repair or encapsulation of asbestos in cement products where surface preparation is or is not required); and
• require the establishment and maintenance of a system of medical surveillance in certain instances.

14. WASTE

14.1 Key Laws and Regulatory Controls
NEMWA is the key national legislation governing general and hazardous waste in South Africa. The objectives of NEMWA include:

• minimising the consumption of natural resources;
• avoiding and minimising the generation of waste;
• reducing, re-using and recycling and recovering waste;
• treating and safely disposing of waste (as a last resort); and
• preventing pollution and ecological degradation.

There are three categories of listed waste management activities under NEMWA. Persons conducting activities listed under Category A (such as treatment of general waste subject to a maximum of 100 tonnes) and Category B (such as disposal of any quantity of hazardous waste to land) of NEMWA must obtain WML prior to commencing those activities; these are discussed in 3.2 Environmental Permits. Category C activities, which have less significant impacts, do not trigger the need for a WML – however, persons conducting Category C activities (such as storage of general waste up to 100m³ and hazardous waste up to 80m³) must comply with national norms and standards published by the Minister of Forestry, Fisheries and Environment.

Radioactive waste is regulated under the Hazardous Substances Act, 1973, the National Nuclear Regulator Act, 1999 and the Nuclear
Energy Act, 1999. In addition, NEMWA specifically excludes explosives waste from its ambit.

A number of norms and standards regulations have been published under NEMWA to give effect to its objects. These include the National Norms and Standards for Disposal of Waste to Landfill which imposed timeframes to phase out the disposal of certain waste to landfill (such as liquid waste) and National Norms and Standards for Organic Waste Composting.

### 14.2 Retention of Environmental Liability

NEMWA specifically provides for extended producer responsibility (EPR) and empowers the Minister of Forestry, Fisheries and Environment to identify a product or class of product to which EPR applies. Mandatory EPR currently applies to:

- certain electrical and electronic equipment (GN 1185, GG 43880);
- certain lighting (GN 1186, GG 43881); and
- certain paper, packaging and some single-use products (GN 1187, GG 43882).

The Extended Producer Responsibly Regulations, 2020, published under NEMWA came into effect on 5 May 2021. Their stated purpose is, amongst others, to provide a framework for the development and associated implementation of extended producer schemes.

The EPR Regulations require producers to:

- collect, record and submit data to the South African Waste Information System (SAWIS);
- conduct a life cycle assessment of its products, in terms of the applicable standards, within three years of the implementation of the EPR Scheme;
- consider changes in the production process of a product to bring about more environmentally friendly products, the prevention of waste and a reduction in toxicity in the post-consumer stage;
- keep records of the quantity of the products on the market, their generated waste, and the collection, sorting, recycling and recovery of the waste arising from the products; and
- implement mandatory take-back of its products at the end of the life cycle.

### 14.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods

Under the notices published under the Extended Producer Regulations for lighting and electrical and electronic equipment sectors, mandatory take back will be required within one year of the date of implementation or of joining an extended producer responsibility scheme.

In addition, under Section 59 of the Consumer Protection Act, 2008, where national legislation prohibits the disposal of goods into a common waste collection system (e.g., as general waste), suppliers, producers, importers and distributors of those goods must accept the return of those goods for safe disposal.

### 15. ENVIRONMENTAL DISCLOSURE AND INFORMATION

#### 15.1 Self-Reporting Requirements

**Environmental Incidents**

**NEMA**

Section 30 of NEMA obliges a responsible person, or his or her employer, to report an environmental incident “forthwith after knowledge of the incident” to the competent authorities (including the SAPS and fire prevention service) and all persons whose health may be affected by the incident.
An “incident” refers to an “unexpected, sudden and uncontrolled release of a hazardous substance, including from a major emission, fire or explosion, that causes, has caused or may cause significant harm to the environment, human life or property”.

A “responsible person” is defined to include the person:

• responsible for the incident;
• who owns any hazardous substance involved in the incident; and
• who was in control of any hazardous substances involved in the incident.

The DFFE published the Guidelines on the Administration of Incidents on 1 April 2020.

NWA
Similar reporting provisions are included under Section 20 of the NWA, although they are somewhat broader. Responsible persons also include any other person involved in the incident or with knowledge of the incident. An “incident” under the NWA, however, refers to any event or accident in which a substance pollutes or has the potential to pollute a water resource or has, or is like to have, a detrimental effect on a water resource.

A responsible person must report an incident to the relevant authorities as soon as reasonably practicable after becoming aware of the incident.

Other reporting obligations
Licences and authorisations such as AELs, WMLs and EAs often also include conditions which require that incidents are reported.

Contaminated land
As discussed in 11.1 Key Laws Governing Contaminated Land, an owner of land that is significantly contaminated, or a person undertaking activities which caused land to be significantly contaminated is obliged to report that contamination to the relevant authorities upon becoming aware of the contamination.

15.2 Public Environmental Information
The right to access to information is protected under the Constitution. This right is given effect under the Promotion of Access to Information Act, 2000 (PAIA). Under PAIA, a member of the public (requestor) must be given access to environmental information held by a public authority or body if the following applies.

• The requestor complies with the procedural requirements under PAIA.
• Access is not refused on any basis set out under PAIA (eg, if the disclosure will result in unreasonable disclosure of personal information about a third party or if the record contains trade secrets). The mandatory protections against disclosures may not apply in circumstances where the information relates to the results of any products or environmental testing that would reveal a serious public safety or environmental risk.

A requester does not ordinarily need to provide reasons for a request for information from a public body.

NEMA specifically identifies that to achieve sustainable development (a principle regulating environmental protection – see 1.1 Key Environmental Protection Policies and Laws) access to information must be provided in accordance with the law.

Specifically, Section 46 of PAIA provides that an information officer of a public body must grant access to a public record, the disclosure of which would reveal an imminent and serious public safety or environmental risk.
15.3 Corporate Disclosure Requirement
There are no specific statutory obligations under NEMA or the SEMAs on corporations to disclose environmental information in annual reports, although there is significant civil society pressure on corporations to do so. Increasingly, it is also expected that listed companies disclose information in their reports to shareholders.

Reporting is required under the National Greenhouse Gas Emission Reporting Regulations, the National Atmospheric Emission Reporting Regulations and the National Waste Information Regulations.

Specific disclosures are required in certain circumstances, such as in relation to environmental incidents under NEMA (see 15.1 Self-Reporting Requirements) and the identification – and transfer – of contaminated land under NEMWA (see 11.1 Key Laws Governing Contaminated Land).

In addition, holders of environmental permits may be required to submit annual reports to the competent authorities on compliance with certain aspects of their licences.

16. TRANSACTIONS

16.1 Environmental Due Diligence
Both technical and legal environmental due diligence exercises are typically conducted on M&A, finance and property transactions in South Africa.

Environmental due diligence exercises are common in both sale and purchase of share and asset transactions. These are ordinarily conducted so that investors may ascertain whether:

- to proceed with the transaction on the basis of the level of environmental risk;
- any indemnities and warranties must be included in the transaction documents; or
- an adjustment in the purchase price is required.

Often, environmental due diligence begins as a desktop assessment which considers reports, audits, correspondence with competent authorities and interviews with employees.

If significant or material concerns or risks arise from the initial due diligence, further studies may be recommended to be conducted by technical specialists, including site investigations, to assess the identified risks in greater detail.

16.2 Disclosure of Environmental Information
There is no general obligation under either NEMA or the specific environmental management Acts for a seller to disclose general environmental information.

However, as mentioned in 11.1 Key Laws Governing Contaminated Land, in transactions that involve the transfer of contaminated land, the purchaser must be notified that the land is contaminated.

17. TAXES

17.1 Green Taxes
A number of environmental taxes and levies have been introduced over the years. These are administered under the Customs and Excise Act, 1964, and include:

- plastic bag levies;
- electricity generation levies;
- tyre levies;
- environmental level on electric filament lamps;
- motor vehicle CO₂ emission levy; and
In addition, there are certain environmental allowances which act as incentives. These are incorporated into the Income Tax Act and include accelerated depreciation allowances for equipment used in the production of renewable energy and deductions relating to energy-efficiency savings.
Herbert Smith Freehills has an unrivalled understanding of the African market derived from a deep track record acting on matters in Africa for over 40 years across all practice groups and industry sectors. Its offering in Africa is serviced by more than 180 partners from across its global network of offices located in, amongst others, London, Dubai, Mainland China, Melbourne, Hong Kong and Moscow, including its 40-lawyer Johannesburg office. HSF has worked on matters in all 54 countries of Africa and on over 990 matters in the past 12 months. The firm advises numerous sectors, including banking and other financial institutions, energy, infrastructure, mining, real estate, and government and public sector. The Johannesburg environmental team provides legal support and services in relation to all aspects of environmental law from commercial and transactional assistance to administrative processes. Since environmental law so often impacts on broader projects, the team often works alongside lawyers from other disciplines.

AUTHORS

Justine Sweet joined the team as a consultant in the South African environmental law practice in 2019. She was admitted as an attorney in 2005 and has over 15 years’ post-admission experience. Owing to her experience as an in-house legal specialist (including at Sasol, South Africa) and also as external counsel, she has an excellent understanding of the interrelationship between law and other corporate disciplines and has hands-on experience and insight into various industries, including petrochemical and mining, paper and pulp, renewable energy, waste, agriculture and general manufacturing. Her experience includes transactional work ranging from drafting and due diligence exercises to administrative and enforcement action and litigation. Recent publications include “Africa's journey to COP26”.

Mandy Hattingh joined the team as an associate in the South African environmental law practice in September 2019. She was admitted as an attorney and notary in 2017. Together with Justine Sweet, Mandy has overseen the operation of the Johannesburg environmental team. Mandy’s main focus is environmental law. She has experience considering the full range of environmental laws and is also significantly experienced in advising clients in relation to environmental and natural-resources regulation, providing due diligence and transactional advice, and representing her clients in judicial review proceedings, internal appeals and high court litigation.
**Introduction**

South Africa has a complex, command and control-oriented approach to environmental governance, with myriad statues and regulations spanning a wide range of environmental media from air quality to waste, protected areas to biodiversity. This article will consider two novel regulatory areas – namely, climate change mitigation focusing on carbon budgets and extended producer responsibility.

**Climate Change Mitigation and Carbon Budgets**

**Climate Change Act**

South Africa is a developing country party to the United Nations Framework Convention on Climate Change (UNFCCC), the Kyoto Protocol and the Paris Agreement. Under the guidance of the national Department of Forestry, Fisheries and the Environment (DFFE) the country’s domestic climate change response has perennially tracked international dynamics and produced a large volume of policy, legal and technical documentation.

Given the prominence of climate change in the international and national discourses, it is heartening to see South Africa about to take the final step towards legislating for climate change in the form of the anticipated Climate Change Act. Initially gazetted as the Climate Change Bill in June 2018, this draft statute has seen three years of negotiation between government, business and labour under the auspices of the National Economic Development and Labour Council (NEDLAC) and was republished, in amended form, in October 2021 for urgent entry into the parliamentary process.

Cynics might perceive an obvious climate change negotiation strategy given the timing of the publication so close to the commencement of COP26, the 2021 United Nations Climate Change Conference. The objectives of the Climate Change Bill include enabling a low-carbon economy, however, and it is likely that the Bill’s firm expression of national regulatory ambition contributed to the COP26 announcement of South Africa securing USD8.5 billion in developed country support for the shift away from fossil fuel dependence. The step is nonetheless significant for a developing country that is the 12th-biggest global greenhouse gas (GHG) emitter (per capita), with a carbon emissions intensity rivalling that of most developed economies. The impetus provided by COP26 suggests the likelihood that South Africa will enact a Climate Change Act before the end of 2021.

**Nationally Determined Contribution (NDC)**

While a future Climate Change Act will regulate both mitigation and adaptation, business and industry will be most concerned with the former, and it is worth considering the DFFE-administered South African Post-2020 Mitigation System – the basis for which is still the (now outdated) National Climate Change Response Policy (NCCRP) of 2011. The NCCRP describes a Peak, Plateau and Decline (PPD) GHG emissions trajectory range with the objective of peaking emissions between 2020 and 2025, allowing for emissions to plateau for approximately the following decade before declining in absolute terms thereafter.

The first iteration of the PDD expressed in South Africa’s First Nationally Determined Contribution (NDC) submitted to the UNFCCC in 2015...
was roundly criticised as lacking serious mitigation ambition, but the PPD's GHG emissions reduction parameters were recently revised in the Cabinet-approved September 2021 NDC update. By comparison with the 2015 expression of the PPD, the updated NDC represents a progression, with the upper-end of the mitigation target range having been reduced by 17% for 2025 and by 32% for 2030, equating to a narrowing of the range from 216 million tonnes of carbon dioxide equivalent (Mt/CO₂e) to 112 Mt/CO₂e in 2025.

**Post-2020 Mitigation System**
Achieving the NDC mitigation targets will require implementation of a range of policies and measures, including the power sector investment described in the 2019 Integrated Resource Plan and the Low Emissions Development Strategy (LEDS) which provides a longer-term perspective on low emissions development. The Post-2020 Mitigation System nestles among the policy interventions as the regulatory core of the national mitigation approach, and comprises the following six components which are anticipated to be fully operational over the period spanning 2022 and 2023.

**National GHG Emissions Trajectory**
This addresses national GHG emissions under the DFFE-administered Climate Change Act.

**Sectoral Emissions Targets (SETs)**
The SETs address emissions from specified sectors and sub-sectors which will be subject to targets determined by the DFFE Minister in terms of the Climate Change Act.

**Monitoring and evaluation**
GHG emitting installations conducting listed reportable activities are required to monitor and report their emissions to the DFFE in terms of the National GHG Emissions Reporting Regulations (as amended) made under the National Environmental Management: Air Quality Act 39 of 2004 (NEMAQA). The Reporting Regulations have been operational since April 2017, and it is anticipated that their administrative locus will be moved from NEMAQA to the Climate Change Act, upon promulgation of that statute.

**Carbon budgets**
Persons conducting GHG emitting activities that are listed under the Climate Change Act will be allocated carbon budgets that will operate as regulatory caps on such GHG emissions in a system administered by the DFFE in terms of the Climate Change Act.

**Pollution Prevention Plans**
Installations emitting those GHGs declared as priority pollutants are subject to the Pollution Prevention Plan Regulations made under NEMAQA which, since 2017, have required the preparation and implementation of Pollution Prevention Plans specifying GHG mitigation actions for individual installations and GHGs. It is anticipated that the administrative locus of the Pollution Prevention Plan Regulations will be moved from NEMAQA to the Climate Change Act, upon promulgation of that statute, at which point Pollution Prevention Plans will be renamed as Greenhouse Gas Mitigation Plans.

**Carbon tax**
Emitting installations conducting listed taxable activities in terms of Schedule 2 to the Carbon Tax Act, No 15 of 2019 (as amended) are subject to carbon tax on their GHG emissions as reported to the DFFE (the set of listed taxable emissions is congruent with the set of listed reportable emissions), with the system of taxation being administered by the South African Revenue Services (SARS) under the Customs and Excise Act, No 91 of 1964 (as amended) and the SARS Administrative Rules.
Carbon budgets
The wisdom of and mechanism for carbon budgeting has been hotly debated in South Africa for some years. The Climate Change Act makes clear that the DFFE intends to allocate facility-level carbon budgets to persons conducting listed GHG emitting activities, for no fewer than three successive five-year periods. The underlying legal basis for budgets will be the listing by the DFFE Minister of activities which emit GHGs that the Minister reasonably believes cause or are likely to cause or exacerbate climate change and the allocation of carbon budgets specifying the maximum amount of GHG emissions to any person conducting the listed activities.

It is currently unclear precisely who will be allocated carbon budgets (because the required listing of GHGs and emitting activities is contingent on promulgation of the Climate Change Act) and what range factors will inform levels of allocation, but it is anticipated that budgets will be allocated at an aggregated entity level, taking into account GHG emissions per emitting activity at each facility operated or owned by the aggregated entity, and that allocation levels will be based on a facility’s grandfathered (historical) emissions.

Phase 1 and Phase 2 carbon budgets
To commence with early allocations – given that it does not currently have authority to allocate carbon budgets in terms of existing legislation and regulation – the DFFE has adopted a voluntary carbon approach which assigns facility-level carbon budgets to various entities reporting under the Reporting Regulations. The DFFE terms voluntary carbon budgets as Phase 1, and such budgets are assigned by reference to a facility’s grandfathered GHG emissions. As mentioned above, it is anticipated that grandfathering will continue to be the approach adopted for the regulated allocation of carbon budgets under the Climate Change Act.

While this DFFE-driven process is deliberately framed as “voluntary”, facilities can benefit from co-operating with the DFFE should they also be carbon tax liable entities. This is because the carbon tax legal regime permits carbon taxpayers who participate in the DFFE’s voluntary carbon budget processes an allowance to reduce their carbon tax liability. Consequently, early progress towards voluntary carbon budget compliance (Phase 1 compliance) will prepare facilities – both financially and operationally – for the moment when budgets become obligatory under the Climate Change Act.

Until recently, the DFFE was dealing with Phase 1 outcomes which encompasses performance reviews of the 2016–20 voluntary carbon budgets and Pollution Prevention Plans, driven by GHG reporting, and submission of applications for extensions to Phase 1 carbon budgets, which were due by 30 October 2021.

The DFFE is currently working towards an allocation methodology for Phase 2 carbon budgets, including the following three proposed approaches, each of which is sub-divided into various technical options:

- fixed reduction (budgets are sector-wide fixed reductions);
- mitigation potential (budget is underpinned by the mitigation potential assessed in the national mitigation model); and
- benchmarking (budget is a benchmarked intensity determined at a company level and underpinning by performance data at facility level.

Alignment of carbon budgets and carbon tax
As is clear from the components of the Post-2020 Mitigation System, the DFFE and the Treasury are considering simultaneous implementation of carbon budgets and carbon taxation, with
the latter also operating as the compliance legal mechanism for the former.

Of all the legal instruments developed or proposed by the DFFE, the marriage between carbon budgets and the carbon tax has aroused the most controversy. Specifically, there is concern that the carbon budget legal regime and the carbon tax legal regime will represent an overlapping and dual-compliance regime that requires unprecedented levels of co-operative governance (between the DFFE, the Treasury and SARS) and which imposes both a fiscal disincentive (in the form of the tax), and regulatory penalties (a fine and/or imprisonment) on the same volumes of GHGs.

Whilst each instrument has its merits, economic theory suggests that there could be risks associated with applying both instruments simultaneously to the same emissions. At present the Carbon Tax Act gives a nod to the DFFE by providing that carbon taxpayers will receive a 5% allowance for participating in the DFFE-driven voluntary carbon budgeting process, as confirmed in writing by the DFFE.

Regarding the future alignment of carbon budgets and taxation, it is the DFFE’s and the National Treasury’s currently understood intention that the carbon tax will be applicable to an allocated carbon budget, as follows:

• the usual rate of carbon tax will apply to GHG emissions allocated within a carbon budget (which means that budgets will be taxed), and the permissible allowances and deductions will be utilisable in reducing carbon tax exposure;
• where an allocated carbon budget is exceeded, the person to whom the budget is allocated will be subject to a carbon tax rate higher than the usual rate (anticipated to be at punitive levels) and none of the allowances and deductions will apply.

The above-mentioned arrangement indicates that the regulatory intention is for carbon budgets to constitute emissions thresholds that determine base or punitive tax rates. The DFFE has elaborated on this notion by indicating that the carbon tax and carbon budgets will formally be aligned in the second phase of the carbon tax, with effect from 2023, “when carbon budgets become mandatory”.

According to the DFFE’s current view, alignment between budgets and taxation will mean that carbon budgets will need to be expressed as an annual percentage per reportable activity, and GHG emissions within a carbon budget will attract a lower rate of carbon tax (the base rate), while the set of allowances provided for in Carbon Tax Act will be permitted to reduce tax liability up to the extent of a carbon budget, with the exception of the carbon budget allowance, which will fall away once carbon budget allocations commence.

Self-evidently, the DFFE has no authority to regulate carbon taxation, and the Carbon Tax Act does not currently provide for variable rates of carbon tax differentiated according to whether the amount of listed taxable emissions is above or below a (still notional) carbon budget. These views on alignment between budgets and taxation are inherently confusing, because implementing the DFFE’s apparent intentions, including differentiation in carbon tax rates based on levels of emission relative to allocated carbon budgets, can only be achieved through the National Treasury’s effecting appropriate amendments to the Carbon Tax Act. The National Treasury has yet to confirm its own intentions; consequently, alignment between carbon budgets and carbon tax remains fraught, and is an area requiring regulatory and practical clarification.
Extended Producer Responsibility
In 2020, the DFFE invoked its powers under Section 18 of the National Environmental Management Waste Act 59 of 2008 (Waste Act) to introduce Extended Producer Responsibility (EPR) for certain identified waste streams.

EPR is a regulatory intervention that holds producers responsible for their product at the post-consumer use (waste disposal) stage of its life cycle, and the Waste Act empowers the DFFE Minister to impose EPR requirements on products that have been identified as subject to EPR by notice in the Government Gazette. Such notices were published in June 2020 for the electrical and electronic equipment sector, the lighting sector and the paper, packaging and plastics sectors (EPR Notices), together with regulations governing the EPR requirements for these sectors (EPR Regulations). Taken together, these laws seek to impose upon producers financial and physical responsibility for their products, including responsibility to promote the waste hierarchy within these identified sectors and to take measures to reduce, recycle and recover.

Specifically, the EPR Regulations require individual producers of the products to register with the DFFE, and to either develop their own Product Responsibility Organisation (PRO) or to join an existing PRO. Producers are required to comply with the EPR scheme developed by the PRO, and to pay fees to the relevant PRO to fund the implementation of the EPR Scheme.

The EPR Regulations also contain a detailed and extensive list of producer and PRO requirements, including:

- auditing requirements;
- data management;
- life cycle assessment requirements;
- a duty incorporate changes into the design, composition or production process of a product to reduce its impact;
- duties regarding outsourcing and the integration of the informal sector;
- the development of secondary markets for recycled content;
- transforming the representativity of the sector to include persons of colour and vulnerable groups;
- mandatory take-back requirements; and
- environmental labels and declarations for the identified products in accordance with local labelling standards.

The EPR Notices further prescribe various percentage targets for product design, reuse, collection and recycling for the identified products subject to EPR, and PROs are required to report against these targets in addition to other detailed reporting requirements.

Contravening provisions of the EPR Regulations is an offence, which, upon conviction, may result in an “appropriate fine” and/or imprisonment of up to 15 years. By default, this means that the financial penalty may only be a maximum jurisdictional value of the Regional Court, namely ZAR600,000, while a further penalty is revocation of the producer’s registration under the Regulations and thus its ability to lawfully operate.

The EPR Regulations are a major step forward in the South African national drive towards a circular economy, curtailing the waste management burden of local government, reducing the amount of waste to landfill, and encouraging recycling. Notwithstanding clarifying amendments made in May 2021, a lack of clear drafting continues to create legal uncertainty and challenges with interpretation of the Regulations. Affected industries are still grappling to understand the scope of the regulations, and how responsibility is allocated along the prod-
uct value chain. Furthermore, considerable work still needs to be done on how to incorporate and work with the large and vibrant informal waste collection sector that is the backbone of South Africa’s current recycling industry.
Climate Legal is a boutique legal consultancy, based in South Africa, with deep specialisation in climate change and environmental law. It services clients across the African continent, including national governments, multilateral organisations and donor agencies, providing specialised advice and guidance that is underpinned by its extensive experience in multidisciplinary private legal practice. The firm’s professional legal practitioners have been responsible for some of the most significant climate and carbon legal work in South Africa and the Southern and East African sub-regions, including drafting/advising on national climate change legislation (South Africa, Zimbabwe, Thailand, the SADC and the Seychelles); the analysis of and advice on emerging climate change and energy policy and legal frameworks; the provision of support and capacity building to national delegations participating in international climate change negotiations; and the provision of climate change legal advice in related regulatory fields, such as water and energy laws.

**AUTHORS**

**Andrew Gilder** is a director of Climate Legal. He has more than two decades’ legal practice experience specialising in climate change (mitigation and adaptation), climate finance and development, carbon markets, carbon tax, environmental and energy law, policy and governance. His practical experience includes advising government, businesses and industries on climate change policy development and its implications, including climate change business risks and opportunities, assessing commercial relationships against evolving climate change policy and regulation and relevant contractual considerations, as well as advising on negotiating and drafting of commercial contracts required to secure financial and logistical positions in the carbon market. Andrew has considerable expertise in all areas of environmental legal practice and his experience extends to advising on authorisations required for the implementation of greenhouse gas mitigation projects and providing process advice for obtaining and managing the set of authorisations required for operational projects.

**Olivia Rumble** is a director of Climate Legal. She has more than ten years of legal practice experience specialising in environmental law, energy law policy and governance, climate change (mitigation and adaptation), climate finance and development, and carbon tax. Olivia has extensive experience in the broad suite of South Africa’s environmental laws, including the statutes regulating waste, water (including transboundary water regulation), atmospheric emissions, hazardous substances, as well as energy and mining law. She has considerable experience in the provision of environmental regulatory advice for new-build renewable energy facilities as part of the Renewable Energy Independent Power Procurement Programme. Olivia has advised the Zambezi Watercourse Commission on the integration of regional laws and policies of eight riparian states of the Zambezi river, and has advised the Permanent Okavango River Basin Water Commission on the review of the 1994 Permanent Okavango River Basin Agreement. Olivia is a member of the drafting team of the IPCC’s Sixth Assessment Report, writing on climate change legislative developments.
# UGANDA

## Law and Practice

*Contributed by:* Alexander Kibandama, Caroline Mbabazi and Evelyn Zawedde

*Ortus Advocates see p.375*

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1. REGULATORY FRAMEWORK

1.1 Key Environmental Protection Policies, Principles and Laws

Environmental law in Uganda draws on all the formal sources of law, which include the constitutional and legal framework – that is, the Acts of Parliament and subsidiary legislation, common law, customary law and international law.

The Environmental Legislative Framework

The Constitution of Uganda, 1995

Article 123 of the Constitution provides that the President may make treaties, conventions, agreements or other arrangements between Uganda and any international organisations in respect of any matter.

Article 39 provides for the right to a clean and healthy environment.

The National Environment Act, 1995

The National Environment Act 1995 is the framework law on environment in Uganda.

It provides for sustainable management of the environment and established the principal government agency mandated to manage the environment, the National Environment Management Authority (NEMA).

Section 106 of the National Environment Act provides for ratification of any convention or treaty concerning the environment.

International Environmental Law

Uganda recognises the need to participate in international environmental law agreements, etc, and has ratified a number of conventions, as listed below:

- Convention Concerning the Protection of the World Cultural and Natural Heritage, 1972, signed and ratified in 1987;
- the Vienna Convention on the Protection of the Ozone Layer, 1985;
- the Montreal Protocol on Substances that Deplete the Ozone Layer (the Montreal Protocol, 1987);
- the United National Framework Convention on Climate Change (UNFCCC), 1992;
- the Kyoto Protocol to the United Nations Framework Convention on Climate Change, adopted on 11 December 1997;
- the United Nations Convention to Combat Desertification (UNCCD), 1994;
- the Convention on Biological Diversity of (Rio Earth Summit), 1992;
- the Cartagena Protocol on Biosafety, 2000;
- the Convention on International Trade in Endangered Species (CITES), 1973;
- the Convention on the Conservation of Migratory Species of Wild Animals (Bonn Convention), 1979;
- the Convention on Wetlands of International Importance especially as Water Fowl Habitat (RAMSAR Convention), 1971, which came into force in December 1975;
- the Basel Convention on Control of Transboundary Movement of Hazardous Wastes and their Disposal, 1989;
- the Bamako Convention on the Ban of Import into Africa and the Control of the Trans Boundary Movement and Management of Hazardous Wastes within Africa, 1991;
**Common Law Principles in Environmental Law**

Common law became applicable in Uganda through the 1889, 1902 and 1911 Orders in Council.

Thus, Section 14 of the Judicature Act confers upon the High Court, subject to the Constitution, unlimited original jurisdiction in all matters and such appellate and other jurisdiction as may be conferred on it by the Constitution or any other law.

There are many common law causes of action that can occasionally be useful to prevent or obtain damages for environmental wrongs. These wrongs in environmental law can be regarded as environmental torts.

There are five causes of action in environmental torts, namely:

- nuisance;
- riparian rights;
- trespass;
- strict liability; and
- negligence.

**The Environmental Policy Framework**

The National Environmental Action Plan (NEAP), 1991 to 1994, provided a framework for addressing gaps in environment management and integrating environment into the national socio-economic development.

The National Environment Management Policy (NEMP), 1994, set the overall goal to establish sustainable social and economic development, which maintains or enhances environmental quality and resource productivity on a long-term basis; this aims to meet the needs of the present generation without compromising the ability of future generations to meet their own needs.

To address specific environmental sectors, the policy formulated sectorial policies, as listed below.

- The National Policy for Conservation and Management of Wetland Resources, 1995, the overall aim of which is to promote the conservation of Uganda’s wetlands in order to sustain their ecological and socio-economic functions for the present and future well-being of the people.
- The National Water Policy, 1995, the overall objective of which is to manage and develop the water resources of Uganda in an integrated and sustainable manner, so as to secure and provide water of adequate quantity and quality for all the social and economic needs of the present and future generations with the full participation of the stakeholders.
- The Wildlife Policy, 1999, the overall aim of which is to promote long-term conservation of wildlife and biodiversity in a cost-effective manner that maximises the benefits of wildlife resources to people.
- The Uganda Forestry Policy, 2001, which provides for the protection of Permanent Forest Estate (PRE) under government trusteeship and the development and sustainable management of natural forest on private land. This is aimed at promoting profitable and productive forests.

2. ENFORCEMENT

2.1 Key Regulatory Authorities

The key regulatory authorities and bodies responsible for environmental policy and enforcements in Uganda include those listed below.

**National Environment Management Authority (NEMA)**

This is the principal agency charged with the responsibility of co-ordinating, monitoring, regu-
iating and supervising environmental management in Uganda.

Section 9 of the National Environment Act lays out the functions of NEMA, which include advising on the formulation and implementation of environmental and climate change policies, plans and programmes.

Uganda Wildlife Authority (UWA)
UWA is a semi-autonomous Ugandan government agency that aims to conserve, manage and regulate the country’s wildlife. It is important to note that half of the world’s mountain gorillas are found in Uganda’s Bwindi Impenetrable National Park, and the conservation and management of such special species is a preserve of the Uganda Wildlife Authority.

UWA is mandated to ensure sustainable management of wildlife resources and supervise wildlife activities both within and outside the protected areas.

National Forestry Authority (NFA)
Section 52 of the National Forestry and Tree Planting Act provides for the formation of the NFA.

The NFA has the mandate of managing Central Forest Reserves on a sustainable basis, and supplying high-quality forestry-related products and services to government, local communities and the private sector.

National Water and Sewerage Corporation (NWSC)
The company has the authority to operate and provide water and sewerage services in areas entrusted to it on a sound commercial and viable basis.

Kampala City Council Authority (KCCA)
This is a legal entity, established by the Ugandan Parliament, and is responsible for the operations of the capital city of Kampala.

The KCCA operates through the Environment Management Unit under the Directorate of Public Health and Environment.

Its primary role is to oversee planning, co-ordinating and compliance monitoring, and to give technical guidance and enforcement for purposes of ensuring sustainable infrastructure, spatial planning and socio-economic development which enhances environmental quality throughout the city.

Directorate of Water Development (DWD)
The DWD is the lead government agency under the Ministry of Water and Environment. The agency is responsible for providing overall technical oversight for the planning, implementation and supervision of the delivery of urban, rural water and sanitation services.

3. ENVIRONMENTAL INCIDENTS AND PERMITS

3.1 Investigative and Access Points
The different sectoral statutes confer different investigative and access powers to the different authorities in respect of the different sectors of environmental law.

The general powers of the authorities that cut across all the sectors include:

• issuance of permits;
• authorisation of activities that may impact the environment;
• licensing of entities or individuals engaging in activity that may impact the environment;
• carrying out periodic inspection of facilities and other establishments;
• taking possible measures to prevent or minimise damage and destruction to the environment or natural resources;
• in conjunction with other regulatory authorities, controlling and monitoring activities that may impact the environment with the view of preserving the environment and protecting the different natural resources;
• any sector-specific powers conferred by the sectoral legal framework of the different authorities.

In the event of any breaches of law or permits, the regulatory authorities are empowered by law to take proceedings at law against any person in violation of the law.

3.2 Environmental Permits

Circumstances Warranting Grant of an Environmental Permit

A person or entity desirous of carrying out a project or activity that may impact the environment may be required to obtain certain permits/licenses/authorisation from the different govern- ing environmental authorities in Uganda – for example:

• if a person intends to export prohibited chemicals;
• in case of emission of noise in excess of established standards for such activities as fireworks, demolitions, firing ranges and specific heavy industry, on such terms and conditions as the authority may determine.

The National Environmental Management Authority

In Uganda, the National Environmental Management Authority has the mandate to issue permits. The necessary steps are as follows.

• The applicant must complete and submit the application form obtained from the NEMA office.
• The licensing officer arranges with the applicant to inspect the polluted land, water or air that is or may be in excess of the standards or guidelines prescribed or issued according to the inspection checklist.
• In the event that the polluted land, water or air does not meet the licensing requirements, the inspection automatically terminates, which means the applicant will have to make fresh arrangements for another inspection.
• Upon making a fresh application for re-inspection, the licensing officer will follow the same procedure as the first inspection. The applicant will proceed to the next stage of the process after the polluted land, water or air passes inspection.
• The licensing officer will submit the application form for approval by the senior officer and then the licence will be taken to the Environmental Monitoring Committee for authorisation. The Environmental Monitoring Committee does the following:
  (a) within 30 days, notify persons who may be affected by the proposed activity of the applicant and invite them to make representations;
  (b) consider representations made by the relevant lead agency;
  (c) consider the application having regard to all the representations received by the Technical Committee;
  (d) if convinced by the applicant’s docu- ments, the Environmental Monitoring Committee can grant or reject the application;
  (e) the licence is then stamped with the departmental licensing stamp;
  (f) copies of the licence are subsequently made and attached with the application and inspection forms for filing;
(g) payment of an appropriate application fee is made.

After confirmation and authorisation from the Environmental Monitoring Committee and other authorities, the licence is issued.

Right to Appeal
An aggrieved party can file a case with the High Court of Uganda if they feel the Environment Monitoring Committee did not follow the right steps or procedures while considering their application for a licence.

4. ENVIRONMENTAL LIABILITY

4.1 Key Types of Liability
In Uganda, an environmental offence is any deliberate act or omission leading to degradation of the environment and resulting into harmful effects on human beings, the environment and natural resources.

Such liability may be criminal liability or tortious liability (civil claims).

Criminal Liability
Environmental crimes include all violations of environmental laws attracting criminal sanctions.

The Penal Code Act provides for a number of environment-related offences which relate to nuisances and offences against health and convenience, offences endangering life or health, negligent acts likely to spread infection of disease, adulteration of food or drink, fouling water and air.

The common types of environmental crimes include doing the following in contravention of the law or without a permit, as the case may be:

- setting up and operating a project without an EIA;
- discharging from an establishment without a permit;
- offences relating to environment inspectors and inspections;
- failure to comply with requirements of a restoration or improvement order;
- maintaining and operating a facility that emits noise without a permit or beyond the set standards;
- discharging harmful or polluting substances or waste substances into water systems contrary to the law;
- disposing, storing and treating or transporting of hazardous waste without a permit;
- all the degrading prohibitions relating to wetlands, river banks and lake shores (using wetlands, river banks and lake shores without a permit, area-related prohibitions, protected zones);
- exporting genetic resources or derivatives without a permit;
- all the degrading prohibitions relating to fragile soils protection, hilly and mountainous areas.

Tortious Liability (Civil Claims)

Nuisance
This is an unlawful interference with the person’s use or enjoyment of land. Despite that, whether a nuisance is actionable or not will depend on a variety of considerations, especially the character of the defendant’s conduct and the balancing of conflicting interests. There are two types of nuisances – public and private.

Riparian rights
These are rights to the use of water in a stream, river or lake that stem from a person’s property interest in or possession of the land bordering on the water. An interest in the land gives that person a right to continued flow of the water
in its natural quantity and quality, undiminished and unpolluted.

Riparian rights also depend upon reasonable use, as it relates to other riparian owners, to ensure that the rights of one riparian owner are weighed fairly and equitably with the rights of the adjacent riparian owners.

Nevertheless, there is some protection for the groundwater quality and quantity. Any pollution of ground water is a nuisance. Moreover, it is illegal to pump out substantial quantities of water without a permit from the Directorate of Water Development.

**Trespass**
Trespass to land occurs where a person directly enters upon another’s land without permission, or remains upon the land, or places or projects any object upon the land. An intentional trespass creates liability for damages for the mere fact of intruding, even if no tangible or ascertainable damage is done.

**Strict liability**
The notion of strict liability for harm caused by escape of dangerous substances arises from the historic English decision of Rylands v Fletcher (1868), where it was established that: “A person who for his purpose brings on his land anything likely to do mischief if it escapes must keep it at his peril; and if it does so is prima-facie answerable for all the damage which is a natural consequence of its escape. He can excuse himself by showing that the escape was owing to the native’s default, or, perhaps was the act of God.”

**Negligence**
Negligence arises where there is a duty of care, such duty is breached and, as a result of that breach, damage is suffered.

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**5. ENVIRONMENTAL INCIDENTS AND DAMAGE**

**5.1 Liability for Historical Environmental Incidents or Damage**
Liability for historical environmental incidents or damage is provided for under the Uganda Wildlife Act, which creates a number of offences in the conservation areas.

Liability for historical environmental incidents can be imposed when any person who, in any wildlife conservation area, unlawfully takes, destroys, damages or defaces any object of geomorphologic, archaeological, historical, cultural or scientific interest, or any structure lawfully placed or constructed and thereby commits an offence.

**5.2 Types of Liability and Key Defences**
Please refer to 4.1 Key Types of Liability.

**Tortious Liability (Civil Claim)**
**Trespass**
The defences are:

- licence;
- rights of entry;
- acquiescence or adverse possession.

**Strict liability**
The defences are:

- consent;
- common benefit;
- act of a stranger;
- statutory authority;
- act of God;
- default of the claimant;

**Negligence**
The conditions are:

- existence of a duty of care;
• breach of the duty of care;
• damage (the plaintiff must have suffered injury).

6. CORPORATE LIABILITY

6.1 Liability for Environmental Damage or Breaches of Environmental Law
Liability of a corporate entity for environmental damage or breaches of environmental law is provided for under the National Environment Act.

The Act states that where an offence committed by a body corporate is proved to have been committed with the consent or connivance of, or to be attributable to any neglect on the part of a director, manager, secretary or other similar officer of the body corporate or any person who was purporting to act in any such capacity, such person – as well as the body corporate – commits that offence.

6.2 Shareholder or Parent Company Liability
Please refer to 6.1 Liability for Environmental Damage or Breaches of Environmental Law.

7. PERSONAL LIABILITY

7.1 Directors and Other Officers
Please refer to 6.1 Liability for Environmental Damage or Breaches of Environmental Law.

The National Environment Act provides that a person who commits an offence under a corporate body is liable, on conviction, to a fine or imprisonment prescribed by the relevant section.

7.2 Insuring against Liability
Directors and other officers are only relieved of liability where the act is done in the ordinary course of business of the company and within the authority conferred on them by the company. Where such act is done on an individual basis outside the mandate of the company, the individual cannot insure against such legal liability.

8. LENDER LIABILITY

8.1 Financial Institutions/Lender Liability
Financial institutions/lenders can be held liable for environmental damage or breaches of environmental law where they engage in an activity that can negatively impact the environment.

8.2 Lender Protection
Lenders can protect themselves from such liability by acquiring licences and authorisations for any activities that may impact the environment.

The National Environment Act also provides for the option of taking out financial security for a project or activity likely to have deleterious effect on human health or the environment. The form of financial security referred to may include:

• on-demand bank guarantees;
• performance bonds;
• escrow agreements;
• trust funds;
• insurance; and
• any other financial security, as the National Environment Management Authority (NEMA) may determine.

The purpose of the financial security is to enable NEMA to access the security in the event that environmental liability is not covered in general liability policies.
9. CIVIL LIABILITY

9.1 Civil Claims

Please refer to 4.1 Key Types of Liability.

9.2 Exemplary or Punitive Damages

Damages can be either: exemplary, to act as an example or a deterrent to the would-be criminals; or punitive, to act as a punishment to the perpetrator – for instance, where the court considers that their conduct was grossly unreasonable or deliberate.

9.3 Class or Group Actions

Class or group actions are possible for environmental-related civil claims.

Section 71(2) of the National Environment Act provides that it shall not be necessary for someone to show that they have a right of interest in the property, in the environment or in land alleged to have been harmed.

The implications of this Section are that a person can apply to court for an order even though they have not suffered harm directly, and this will definitely cover public interest litigants.

Therefore, the affected parties can be represented by someone else who is not necessarily affected directly.

9.4 Landmark Cases

There have been a number of landmark cases. The most prominent was the case of Godfrey Nyakana v National Environment Management Authority (NEMA) and Others (Constitutional Appeal No 5 of 2011), where the appellant had been issued a lease, obtained planning permission and had begun building a residence in a wetland. In 2004, NEMA issued a restoration order to the appellant, directing him to demolish his house within 21 days.

Under the National Environment Act, NEMA is empowered to act to preserve wetlands by, among other measures, issuing restoration orders to offenders directing them to restore the environmental conditions found before their encroachment. Previous efforts to stop the appellant from construction in the wetland had been unsuccessful.

NEMA enforced the restoration order and demolished the house. The appellant petitioned the Constitutional Court, alleging that the powers of NEMA were unconstitutional in so much as it resulted in him being condemned unheard. The petition was dismissed, hence the appeal.

The Supreme Court upheld the decision of the Constitutional Court, finding that the National Environment Act had built-in processes to allow a recipient of a restoration order an opportunity to be heard.

The Supreme Court also wrote into Uganda’s jurisprudence the fundamental environmental law principles of “polluter pays” (ie, that a polluter must pay for damage done to the environment and to the victims of the pollution) and the “precautionary principle” (ie, that lack of scientific certainty should not be used to postpone action to protect the environment).

The rights of NEMA to protect the environment were firmly asserted over the appellant’s uncontested property rights. The Court made clear that NEMA had power to restrict the use of a wetland regardless of title to the land.
10. CONTRACTUAL AGREEMENTS

10.1 Transferring or Apportioning Liability
In Uganda, it is not possible to transfer or apportion liability for incidental damage or breaches of law.

10.2 Environmental Insurance
Environmental insurance is provided for under the National Environment Act as follows:

- NEMA may require a developer to take out financial security for a project or activity likely to have a deleterious effect on human health or the environment;
- NEMA may require a person who generates hazardous waste, or an applicant to be granted a licence under this part, to subscribe to an insurance policy;
- the insurance policy required covers environmental risks likely to arise out of the waste management operations, including harm caused to human health or the environment and damage to a third party’s property caused by operations of the waste management activity.

11. CONTAMINATED LAND

11.1 Key Laws Governing Contaminated Land
There are no specific laws governing contaminated land in Uganda.

12. CLIMATE CHANGE AND EMISSIONS TRADING

12.1 Key Policies, Principles and Laws
Key Policies
Uganda has developed a comprehensive climate change policy, as detailed below.

The National Climate Change Policy (NCCP)
The goal of the policy is to ensure a harmonised and co-ordinated approach towards a climate-resilient and low-carbon development path for sustainable development in Uganda.

The National Adaptation Programme of Action (NAPA)
This is regarded as the first national policy that was fully dedicated to climate change adaptation. The NAPA prioritised nine adaptation projects:

- community tree growing;
- land degradation management;
- strengthening meteorological services;
- community water and sanitation;
- water for production;
- drought adaptation;
- vectors, pests and disease control;
- indigenous knowledge and natural resources management; and
- climate change and development planning

The Nationally Determined Contribution (NDC)
This includes both adaptation and mitigation actions, with a goal of achieving its contribution by 2030.

The National Adaptation Plan for the Agriculture Sector (NAP-AG), 2018
The overall objective is to increase the resilience of Uganda’s agricultural sector to the impacts of climate change, through co-ordinated interventions that enhance sustainable agriculture, food
and nutritional security, livelihood improvement and sustainable development.

**Key Sectoral Policies**

This serves as the single most powerful guide for investment planning, budget allocation and social interventions in the country. All government programmes are linked to the NDP II within the existing policy, legal, planning, monitoring and reporting systems.

**Meteorology policy**
The country’s meteorology policy seeks to monitor weather and climate, maintain a climate database, provide regular advice on the state of weather and climate, and provide accurate and timely climate and weather information to the general public.

The policy provided for passing of the Uganda Meteorology Act (2012) led to the creation of the Uganda National Meteorological Authority (UNMA).

**The Disaster Preparedness and Management Policy (DPM Policy), 2010**
The policy goal is to establish institutions and mechanisms that will reduce the vulnerability of people, livestock, plants and wildlife to environmental disasters in Uganda.

**The National Environment Management Policy (NEMP), 1994**
The overall goal of the policy is to establish sustainable social and economic development, which maintains or enhances environmental quality and resource productivity on a long-term basis.

There are a number of laws governing climate change in Uganda, as follows.

**The Constitution of the Republic of Uganda, 1995**
Under Article 237 (2) (b), the government or (where appropriate local government) is required to hold in trust for the people and protect natural forest reserves and any land to be reserved for ecological and tourism purposes for the common good of all citizens.

**The National Climate Change Act, 2021**
The Act governs Uganda’s national response to climate change. One of the stated purposes of the Act is to give effect to the UN Framework Convention on Climate Change, the Kyoto Protocol and the Paris Agreement.

The Act further mandates the creation of a Framework Strategy on Climate Change, as well as a National Climate Action Plan and District Climate Action Plans.

**The National Environment Act, 2019**
This Act sets out the overriding principles of the environment management.

**The National Forestry and Tree Planting Act, 2003**
This is the main legislation dealing with forestry resources management in Uganda. The objective of this Act is to promote the conservation, sustainable management and development of forests for the benefit of the people of Uganda.

**The Land Act, 1998**
The Act provides for the tenure, ownership and management of land. Section 44 of the Act reiterates the constitutional provision creating a trust over environmentally sensitive areas, as stipulated in Article 237(2) of the Constitution.

**The Uganda National Meteorological Authority Act, 2012**
This law establishes the UNMA and gives effect to the Convention on the World Meteorological
Organization and the UNFCC and other related Conventions, protocols and Memoranda of Understanding to which Uganda is a party. Its main objective is to provide for the control and development of technically sound and scientific meteorological services.

*The Water Act, 1997*
This Act provides for the use, protection and management of water resources and supply, the constitution of water and sewage authorities, and the devolution of water supply and sewerage undertakings.

The objectives of the Act include promoting the rational management and use of the waters of Uganda through progressive introduction and application of appropriate standards and techniques for the investigation, use, control, protection, management and administration of water resources.

It co-ordinates all public and private activities which may influence the quality, quantity, distribution, use or management of water resources; it also allocates/delegate responsibilities among ministers and public authorities for the investigation, use, control, protection, management or administration of water resources.

12.2 Targets to Reduce Greenhouse Gas Emissions
The policy and legal targets to reduce greenhouse gas emissions in Uganda are contained in The National Climate Change Act, 2021, which regulates the emission of greenhouse gases in Uganda.

Further, Uganda is a signatory to the United National Framework Convention on Climate Change (UNFCCC) as of 1993, and the Kyoto Protocol to the United Nations Framework Convention on Climate Change as of 2002, so is committed to stabilising greenhouse gas concentrations in the atmosphere and to limiting and reducing greenhouse gas emissions.

13. ASBESTOS

13.1 Key Policies, Principles and Laws Relating to Asbestos
There are currently no specific laws concerning asbestos in Uganda. However, a number of people and institutions have expressed concern about asbestos and have appealed to the government to come up with a plan purposed to protect the public and the environment.

14. WASTE

14.1 Key Laws and Regulatory Controls
The key laws and regulatory controls governing waste in Uganda include the following.

- The National Environmental Act 5, Part VIII, which provides for management of waste. A person who generates or handles waste shall be responsible for its proper management in accordance with this Act. The person responsible shall take reasonable steps necessary to prevent environmental pollution arising from such waste management. The Act also prohibits littering.
- The Water Act Chapter 152 defines “waste” to include sewage, any other matter or thing, whether wholly or partly in solid, gaseous state, which if added to water may cause pollution. Section 31 prohibits any person from allowing waste to come into contact with any water, or discharging waste directly or indirectly into water and polluting water.
14.2 Retention of Environmental Liability
The producer is absolved of liability if the disposal of the waste is as a result of a third party.

14.3 Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods
A person who manufactures or imports plastics or plastic products shall, as a precondition for continued operation, ensure that recycling is part of their active operations, and put in place a mechanism that is satisfactory to the Minister of the Environment to buy back or remove from the environment plastic and plastic products.

Further, The National Environment Act puts in place a number of measures which should be adopted by a person who develops, manufactures or processes any product, including:

- improvement of production processes;
- monitoring the product cycle from beginning to end; and
- incorporating measures and technologies that deliver the best overall environmental outcome in the design and disposal of a product.

15. ENVIRONMENTAL DISCLOSURE AND INFORMATION

15.1 Self-Reporting Requirements
There is no specific requirement for self-reporting. However, in the event an incident occurs that may impact the environment, it is good practice to notify the relevant authorities for proper management.

15.2 Public Environmental Information
Every person has a right of access to environmental information under the National Environment Act, subject to the Constitution and the Access to Information Act, 2005.

A person desiring information shall request NEMA or a lead agency, in writing, for the information and may be granted access on payment of the prescribed fee.

However, the right to access to environmental information under the said provision shall not extend to proprietary or confidential information.

NEMA has an official website. However, not all information can be accessed through the website – hence the need for making a formal request in the event that further, specific information is required.

15.3 Corporate Disclosure Requirement
Corporations are required to disclose environmental information in annual reports.

The National Environment Act provides that a person engaged in an activity listed in Schedules 4, 5 or 10 of the Act shall submit to NEMA an annual report, as may be prescribed by NEMA.

The annual report should contain information on:

- discharges and emissions;
- incidents resulting in environmental impact;
- resource use, including chemicals, water and natural biomass;
- environmental monitoring;
- waste management, including types and quantities of waste generated;
- compliance with the Act and non-compliance and corrective action taken; and
- any other environmental concern NEMA deems necessary.

NEMA may use the annual report submitted for monitoring purpose, and as a basis for the prep-
16. TRANSACTIONS

16.1 Environmental Due Diligence

Purchasers and lenders should conduct a legal and technical environmental due diligence in M&A/property/financing transactions to enable them to ascertain and ensure that there is compliance with all the requisite permits and licence requirements. This is to deter any potential liabilities and ensure legal compliance with the environmental laws governing the land.

NEMA has provided for the requirement of carrying out environmental and social assessments to ascertain the impact of a project on the environment before certain licences can be issued.

The purpose of environmental and social assessments is to evaluate environmental and social impacts, risks or other concerns of a given project or activity, taking into account the environmental principles.

16.2 Disclosure of Environmental Information

In Uganda, a seller is required to disclose any environmental information to a purchaser.

17. TAXES

17.1 Green Taxes

Green taxes in Uganda are largely based on market goods that are related to emissions, as opposed to direct taxation of emissions.

The second schedule to the Finance Act contains typical environmental taxation provisions, as follows:

- an environmental levy of 20% of cost, insurance and freight (CIF) value is imposed on motor vehicles (excluding goods vehicles) which are at least eight years old;
- a defined sum of UGX50,000 levied on cookers;
- a defined sum of UGX50,000 levied on radios;
- a defined sum of UGX50,000 levied on other household appliances;
- 20% of CIF value on used motorcycles, scooters, mopeds, bicycles and used spare parts of motor vehicles or of any of the aforementioned items;
- 20% of CIF value on used clothing, used shoes and other used articles.
Ortus Advocates is a full-service firm established in 2019 by the coming together of like-minded, passionate, dynamic and globally astute lawyers, all experts in different fields of specialisation, with a team of over 20 practitioners. The firm positions itself as the largest independent full-services law firm in Uganda. It offers specialist legal knowledge in banking and finance; corporate and commercial; dispute resolution; insolvency and debt recovery; project finance; procurement and disposal; technology, media and telecommunications; employment and labour. Ortus Advocates is able to advise clients from all sectors and industries with confidence. The firm is playing an active role in engaging with governmental parties to contribute to and influence legislation. Ortus Advocates is at the forefront of legislation in Uganda, and its in-depth knowledge of the region is invaluable in getting the deal done.

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Climate Change: Introduction

Uganda is located on the East African plateau and lies almost completely within the Nile basin. It occupies 241,038 square kilometres, of which open water and swamps constitute 43,941 square kilometres. Situated close to the equator, it has diverse climate patterns due to the country’s unique bio-physical characteristics influenced by several large rivers, bodies of water, and mountain ranges to the east and west.

In Uganda, as for the rest of the world, there are likely to be changes in the frequency or severity of extreme climate events, such as heatwaves, droughts, floods and storms. Uganda, like the rest of the world – and, more particularly, the least developed countries with the least capacity to adapt – is vulnerable to the negative impacts of climate change. It is a threat to its fragile ecosystems, people’s livelihoods and, ultimately, the national economic development efforts.

Uganda has mostly a tropical climate characterised by stable rainfall patterns. However, the effects of climate change have turned the seasons around, with the country experiencing shorter or longer rains and harsher droughts – especially in the eastern and north-eastern parts of the country.

Uganda is largely an agrarian economy, with the agriculture sector accounting for 25.2% of total GDP and over 76% of the value of total exports, whilst the livestock and fisheries sub-sectors contribute around 13% and 11% of GDP respectively.

Human-induced climate change in the coming century has the potential to halt or reverse the country’s development trajectory. In particular, climate change is likely to mean:

- increased food insecurity;
- shifts in the spread of diseases such as malaria;
- soil erosion and land degradation;
- flood damage to infrastructure and settlements; and
- shifts in the productivity of agricultural and natural resources.

It will be the poor and vulnerable who feel these impacts the hardest. However, climate change has serious implications for the nation’s economy as a whole – for example, a shift in the viability of coffee-growing areas would potentially wipe out USD265.8 million, which is 40% of export revenue. Exacerbating poverty and triggering migration, as well as heightening competition over strategic water resources, climate change could lead to regional insecurity.

The economy of Uganda is highly vulnerable to climate change due to its impacts on key sectors such as agriculture, fisheries, water resources, forestry, energy, health, infrastructure and settlements. The effect of climate change on this key sector hampers efforts to reduce poverty and to improve people’s well-being and household incomes. This has necessitated policy actions to build climate change resilience and climate-compatible development through climate change adaptation and mitigation.
Climate Change Policy Framework in Uganda
The main policy is the National Climate Change Policy (NCCP) and its accompanying costed Implementation Strategy. The goal of the policy is to ensure a harmonised and co-ordinated approach towards a climate-resilient and low-carbon development path for sustainable development in Uganda.

Uganda’s National Adaptation Programme of Action (NAPA)
The United Nations Framework Convention on Climate Change (1994) initiated development of the National Adaptation Programmes of Action (NAPA) as a platform for “least developed countries” (LDCs) to identify and prioritise adaptation activities that respond to their needs to adapt to climate change.

The NAPA is regarded as the first national policy that was fully dedicated to climate change adaptation. Following the NAPA, the government of Uganda took steps to integrate climate change into the National Development Plan, as well as in sectoral policies, plans and programmes, and has produced climate change mainstreaming guidelines. Specific activities were developed on the ground to increase resilience, in regard to agriculture, water and urban planning, among others.

Uganda National Climate Change Policy, 2015
The government of Uganda developed the National Climate Change Policy (NCCP) and its costed Implementation Strategy to integrate climate change in its development planning, as required by the UNFCCC. The main objective of the Policy is to ensure that all stakeholders address climate change impacts and their causes through appropriate measures, while promoting sustainable development and a green economy.

At the core of the NCCP is the recognition that climate change is fundamentally a multi-sectoral issue, and that all sectors and categories of stakeholders must therefore be actively involved during the implementation of the policy.

Institutional Framework for Climate Change Policy
The Climate Change Unit within the Ministry of Water and Environment (MWE) was transformed into the Climate Change Department. These institutions are also similarly recognised within the National Environment Act (NEA). The key statutory institutions are discussed below.

Policy Committee on Environment
The NEA in Section 6 establishes the Policy Committee on Environment (PCE), which is responsible for strategic policy guidance on the environment in Uganda. The PCE is a ministerial committee chaired by the Prime Minister. It is composed of ministers responsible for different sectors concerning the environment.

The key functions of the PCE include provision of guidance in the formulation and implementation of environmental and climate change policies, plans and programmes. The PCE also provides guidance on harmonisation of government policies with respect to the environment, natural resources, water and climate change.

National Environment Management Authority (NEMA)
NEMA is mandated as the principal agency in Uganda for regulating, monitoring, supervising and co-ordinating all activities relating to the environment. Its functions include advising on the formulation and implementation of environmental and climate change policies, plans and programmes.
Climate Change Department (CCD)
The Climate Change Department (CCD) is the lead agency for climate change in Uganda, and is recognised under the NCCP. The main objective of the CCD is to strengthen implementation of the UNFCCC and the Kyoto Protocol.

Transforming Policy into Legislation
Uganda has developed a number of laws that protect the environment from abuse and degradation. These laws also regulate aspects that have implications for climate change mitigation. The key laws that impact on climate change in Uganda are briefly discussed below.

The National Climate Change Act, 2021
The National Climate Change Act, 2021, was passed in April and assented to by the President on 14 August 2021; it is the latest development in the law concerning climate change in Uganda.

The Act is Uganda’s most ambitious legislative step to regulate climate change. It providing an overarching legal framework for enforcing climate change adaptation actions, through which Uganda will be able to make adjustments in natural or human systems in response to actual or expected impacts of climate change. One the key objectives is to enable Uganda to pursue its voluntary mitigation targets of reducing national greenhouse gas emissions.

As a stand-alone climate change law, it facilitates direction, co-ordination, policy setting and high-level political prioritisation in order to mainstream climate change across government functions.

The Act summarily provides for:

- a framework to enhance the resilience of human and ecological systems to the impacts of climate change, taking into consideration the Constitution of the Republic of Uganda;
- mainstreaming the principle of sustainable development in the planning and making of decisions on climate change;
- a contribution towards the global efforts of combating climate change and facilitates approaches that support low carbon climate resilient development; and
- a framework for the governance, co-ordination and financing of climate change at all levels.

The Act establishes a National Climate Change Advisory Committee with various functions, including:

- advising the Climate Change Department on climate and strategic policy;
- identifying obstacles to climate change policy implementation and making proposals for the resolution of such obstacles; and
- performing any function that may be assigned to the Committee by the Minister of Water and Environment.

The Constitution of Uganda is the country’s supreme law, and provides that it is the duty of Parliament to enact laws that protect and preserve the environment from abuse, pollution and degradation and also to promote measures intended to manage the environment for sustainable development and to promote environmental awareness. The Constitution further provides that the state has the duty to protect important resources, including land, water, wetlands, oil, minerals, fauna and flora on behalf of the people of Uganda.
The National Environment Act, 2019
The National Environment Act 2019, sets out the overriding principles of environmental management. One of the key principles set out in Section 5(2)(s) is “ensuring that in the implementation of public and private projects, approaches that increase both the environment and people’s resilience to impacts of climate change are prioritised”.

The Act also provides for the management of the climate change impacts on ecosystems and that the lead agency shall, within its mandate and in consultation with NEMA:

• take measures and issue guidelines to address the impacts of climate change, including measures for mitigating and adaptation to the effects of climate change; and
• liaise with other lead agencies to put in place strategies and action plans to address climate change and its effects.

Sectoral Laws
Sector policies such as the National Climate Change Policy (2015) provide for formulation of standalone law, in addition to a series of sectoral legislative and regulatory reviews reforms. Uganda has established laws cutting across sectors of energy, water, agriculture, infrastructure, forestry and aviation that impact on climate change. A few of the key laws are highlighted below.

The National Forestry and Tree Planting Act, 2003
The objective of this Act is to promote the conservation, sustainable management and development of forests for the benefit of the people of Uganda.

The Land Act, 1998
The Land Act (Chapter 227) provides for the tenure, ownership and management of land. Under the Act, land is to be utilised in accordance with the various laws listed in Section 43, including the Uganda Wildlife Act, the Water Act and the National Environment Act.

The Local Governments Act, 1997
This Act (Chapter 243) provides that it is the responsibility of the local government to protect and preserve the resources from abuse, pollution and degradation, and to manage the resources for sustainable development within the district.

The Water Act, 1997
This Water Act provides for the use, protection and management of water resources and supply, the constitution of water and sewage authorities, and the devolution of water supply and sewage undertakings.

Conclusion
In conclusion, Uganda’s social and economic well-being is highly dependent on climate change. With the new law specifically tackling climate change issues, we believe that this will go a long way towards preserving and protecting the environment.
Ortus Advocates is a full-service firm established in 2019 by the coming together of like-minded, passionate, dynamic and globally astute lawyers, all experts in different fields of specialisation, with a team of over 20 practitioners. The firm positions itself as the largest independent full-services law firm in Uganda. It offers specialist legal knowledge in banking and finance; corporate and commercial; dispute resolution; insolvency and debt recovery; project finance; procurement and disposal; technology, media and telecommunications; employment; and labour. Ortus Advocates is able to advise clients from all sectors and industries with confidence. The firm is playing an active role in engaging with governmental parties to contribute to and influence legislation. Ortus Advocates is at the forefront of legislation in Uganda, and its in-depth knowledge of the region is invaluable in getting the deal done.

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1. REGULATORY FRAMEWORK

1.1 Key Environmental Protection Policies, Principles and Laws
New Jersey’s core environmental principles and laws have remained largely constant over the past 50 years. Protection of human health and the environment is the driving philosophy behind federal and state environmental regulations. The core principles of New Jersey environmental law broadly fall into the following distinct categories:

- liability for hazardous substances and historical discharges;
- preservation of wetlands and the coastal zone – and now natural resource damages;
- redevelopment/M&A, which arise typically from sale of a facility or change in ownership/control;
- regulatory compliance and permitting;
- global warming and environmental justice, which have recently come to the fore.

In each of these areas, New Jersey’s focus is upon protecting human health and the environment. Realistically, human health exposures have always been the primary concern in “the Garden State”.

Remediation of Hazardous Waste Is a Huge Driver of New Jersey Environmental Law
New Jersey adopted the Spill Compensation and Control Act (Spill Act), NJSA 58 (2011) and the Industrial Site Recovery Act, NJSA 13:1K and NJAC 7:26B – the two primary state laws addressing historical hazardous wastes and site remediation. Although the state’s goal is to protect human health and the environment, the state and local governments are typically looking to facilitate the success of corporate operations and will normally work with companies on site remediation so long as the remedial plan is reasonable.

New Jersey Is Small, but It Is Preserving what Remains Natural
New Jersey is a major pharmaceutical manufacturer and is densely populated compared to rest of the country. In light of this mixture of manufacturing and dense population, the state acted early on to preserve open space and natural resources such as wetlands. In 1979 New Jersey created the Pinelands Protection Act and, in 2004, the Highlands Protection Act (governing large parts of seven counties in northern New Jersey). The New Jersey State Constitution specifically authorises the legislature to give municipalities zoning power.

Green Growth Has Been a New Jersey Goal for 40 Years
Green growth and preserving open land from development has been a significant goal in New Jersey for over 40 years. More recently, New Jersey has extended its focus beyond brownfields and is proactively pursuing financial incentives to reduce greenhouse gas (GHG) emissions and, critically, to make environmental justice an integral part of all environmental permits and transactions. To support more brownfields development, Governor Murphy signed the New Jersey Economic Recovery Act on 7 January 2021. This Act makes awards of up to USD50 million in tax credits for six years for certain redevelopment projects.

Natural Resource Damages –Boom and Bust
New Jersey has also pursued natural resource damages (NRDs), but the enforcement in that area, as well as the state’s achievements, have been very mixed. Currently, the state is pursuing a few high-profile NRD matters but is not routinely pursuing NRD claims at all remedial sites.

New Jersey Has Fully Embraced Environmental Justice with Its First EJ Law
Governor Murphy recently (8 September 2020) signed S-232, which limits new pollution in “over-
burdened communities”. This law is the first in the country to require mandatory permit denials if an environmental justice analysis determines that a new facility disproportionately impacts an overburdened community. In October 2021, the NJDEP announced seven environmental enforcement actions arising from this new law. It is unclear what these lawsuits achieve other than to compel compliance with remedial obligations that are already in place. Nonetheless, environmental justice in yet undefined areas of New Jersey will be subject to detailed environmental justice review.

2. ENFORCEMENT

2.1 Key Regulatory Authorities
The United States Environmental Protection Agency (USEPA) and the New Jersey Department of Environmental Protection (NJDEP) are the primary authorities. For energy matters, the Board of Public Utilities (BPU) typically works in concert with the NJDEP. New Jersey has a long and somewhat delicate coastline, which is protected under the Coastal Zone Management Act (CZMA), Coastal Area Facility Review Act (CAFRA), Flood Hazard Act (FLHA), Coastal Barrier Resources Act (CBRA) and other statutes. The United States Army Corps of Engineers plays a significant role regarding construction affecting bulkheads and development along the seashore.

Enforcement in Court Is not Typically Undertaken by the NJDEP or USEPA
Neither the NJDEP nor the BPU typically act to enforce their own rules in court, rather such enforcement is undertaken by the New Jersey Attorney General, or a law firm retained by the state to act on its behalf. Notably, as early as 1974, the state adopted the Environmental Rights Act, NJSA 2A:35A-1 et seq. This law permits a citizen to obtain injunctive relief compelling a defendant to comply with New Jersey’s environmental laws. Nuisance and trespass claims, as well as declaratory actions for environmental insurance coverage, are normally maintained in state court. Some actions, such as CERCLA claims, may be pursued only and solely in federal court.

New Jersey Has a Strong and Broad Citizen’s Suit Provision
Although the NJDEP had been primarily responsible for insuring compliance with environmental laws, on 7 May 2012 New Jersey adopted the Licensed Site Remedial Professional (LSRP) programme. Under this programme, a licensed remedial professional hired by the regulated party (typically, a landowner or operator of a facility) conducts the investigation and remediation of the site. As a result of the LSRP programme, the State of New Jersey infrequently goes to any facilities to investigate, but rather the NJDEP bases much of its decision on the completeness of both the site investigation and remediation upon records provided to the state by the LSRP. Because the state is no longer travelling to the sites and verifying the accuracy of the site investigation (other than by a desktop review), site remediations in New Jersey are conducted much more quickly than prior to 2012.

3. ENVIRONMENTAL INCIDENTS AND PERMITS

3.1 Investigative and Access Points
Both the USEPA and the NJDEP have broad authority because every manufacturing facility is required to be permitted and the government has the right to enforce permit conditions. The State Attorney General, as well as local police, also have the right to investigate if there is an incident at a regulated facility. The Occupational Safety and Health Administration (OSHA), as well as the New Jersey State Health Department,
have the right to protect workers from the risk of exposure due to environmental discharges. Both the Constitution of the United States and the New Jersey State Constitution recognise a right to privacy, but the courts have routinely found that the state has a right to investigate while ensuring compliance with environmental permits.

3.2 Environmental Permits
All media (air emissions, water emissions, solid waste disposal, stormwater runoff, chemical handling) are regulated and require permits. This includes permits ranging from emissions from nuclear power plants and sewage treatment facilities and biogas plants, to scrap metal yards; in shore, it includes any activity that may pollute air, water or land. Permits (or the denial of a permit) can be appealed through the Administrative Procedures Act at the state level. Similarly, a petitioner can appeal for a federal permit to the Environmental Appeals Board. Most permits are handled at the state (NJDEP) level.

Some permits, such as construction affecting the coastline or a pier, may require not only state approval but also approval from the Corps of Engineers. Most permits are obtained from the NJDEP, although some facilities, such as biogas plants, require permits not only from the NJDEP but also approval from the BPU. In many circumstances, the state environmental authority has been granted permission to issue permits from the USEPA.

Under the Water Pollution Control Act (WPCA), the most common permit is a New Jersey Pollution Discharge Elimination System (NJPDES) permit. Related permits typically include stormwater permits. For air emissions, New Jersey follows the federal Clean Air Act paradigm and recognises “minor sources” and “major sources”. New Jersey has specific air emissions regulations regarding sulphur compounds, volatile organic compounds, toxic substances, oxides of nitrogen and mercury.

4. ENVIRONMENTAL LIABILITY

4.1 Key Types of Liability
Until 2021, the typical environmental liabilities were: historical hazardous waste discharges or releases (addressed under the State Spill Act or under the federal Comprehensive Environmental Response, Compensation, and Liability Act); destruction or impairment of wetlands; injury to the shoreline or dunes (Coastal Zone Management Act); waste water discharge regulations; and, critically, the responsibility for the owner of the property to assure remediation of a manufacturing facility. Civil penalties under the Water Pollution Control Act (WPCA) can be as high as USD50,000. Criminal penalties can include fines up to USD1 million and jail time.

Air emissions are regulated and periodically give rise to liability, but this is far less frequent than claims arising under other media in New Jersey. A potentially responsible party can face risks ranging from a mere compliance order to civil penalties and fines. For those rare cases of intentionally, recklessly, or wilfully releasing causing serious harm or risk, criminal penalties (including jail) have been imposed.

5. ENVIRONMENTAL INCIDENTS AND DAMAGE

5.1 Liability for Historical Environmental Incidents or Damage
Under federal (CERCLA) and state Law (Spill Act), a property owner is by definition a liable party for historical discharges. However, there is a defence for innocent purchasers if they have engaged in “all appropriate inquiry”. This
defence does not relieve the owner if there is a discharge during their tenure on the property in question. A current property owner will have a cause of action against a predecessor owner, but typically must demonstrate that the discharge or release occurred during the prior owner’s possession or operation of the facility. Beyond statutory law, New Jersey common law holds a party that engages in abnormally or ultra-hazardous activities strictly liable for injury associated with those actions.

Insurance Claims Are Recognised for Historical Risk
New Jersey has a strong policy of policyholder protection and has recognised the right to recover for historical liabilities against Comprehensive General Liability Insurance Policies. Unlike New York, which has a more insurance company-friendly perspective, New Jersey protects policyholders for historical contamination. In evaluating liability for historical risk, it is important to engage in insurance archaeology and determine whether there is insurance coverage that may respond to such historical risk.

5.2 Types of Liability and Key Defences
Defences and exemptions to Superfund liability are limited to: (i) an act of God, (ii) acts of war, and (iii) an act/omission of a trespasser or other third party with whom the PRP has no contractual relationship, or the acts of a state or local government. Similarly, the New Jersey Spill Compensation and Control Act recognises the defence of act of God, act of war, sabotage (but does not deem state or other governmental action a defence).

Unless protected by an innocent purchaser defence arising from “all appropriate inquiry”, there are few true defences for a property owner if the property they own or acquire has been the subject of a hazardous substance discharge. Rather, the focus of such incidents is upon allocation with other potentially responsible parties (PRPs). Both the federal and state law in New Jersey are well developed in allocating questions of relative toxicity, culpability, “time on the risk”, volume of material discharged, etc. New Jersey law has squarely adopted the principle stated in Rylands v Fletcher, 1 L.R. Exch. 265 (1866) – namely, that one who creates an ultrahazardous condition is strictly liable for the results of their action or inaction.

Allocation of Liability – Misery Loves Company
Although there are few defences to liability for the discharge of hazardous substances, one well-honed aspect of defence is allocating the risk among multiple parties. If there are multiple dischargers facing the same risk (such as the Passaic River Superfund Site, which has a USD1.2 billion remedial estimate), one significant defence is allocating the risk among other dischargers, including the state and the US government. New Jersey’s federal and state courts have demonstrated repeatedly that they will hold the US, state, county and municipal governments financially responsible for their contribution to remedial obligations. Where there are multiple potentially responsible parties (PRS), the typical argument is based upon relative volume, toxicity, culpability, and whether one waste stream is driving the remedial action. Ability to pay is a secondary factor, but a significant one.

6. Corporate Liability
6.1 Liability for Environmental Damage or Breaches of Environmental Law
Both the USA and the NJDEP have a penalty matrix, which looks at degree of harm, prior environmental non-compliance, good faith efforts to ameliorate risk, as well as other factors. There are different penalty matrices for each media (air, water, soil, as well as human and animal expo-
6.2 Shareholder or Parent Company Liability

Corporate shareholders, directors and officers are normally not at risk of being held responsible for environmental harm. Typically, New Jersey corporate law would protect directors, officers, and shareholders from such risk - unless those individuals were directly involved in or controlled the waste-handling decisions. Holding shareholders liable for breaches of environmental law is extremely rare because New Jersey law recognises the corporate shield. There are a handful of matters where the corporate form was abused and the owner was directly involved in illegal waste-handling decisions.

7. PERSONAL LIABILITY

7.1 Directors and Other Officers

Because New Jersey recognises the corporate shield, it is extremely rare for a director or officer to be held liable for an environmental discharge. In order to pierce the corporate veil and be held liable, the director or officer would have had to be directly involved in the illegal decision and, further, there would likely need to be some strong evidence that the illegal discharge was a wilful or reckless action.

New Jersey law recognises that a person can incorporate, but a small corporation necessarily places the shareholders, directors and officers in the position where they often have direct knowledge of or involvement in waste-handling decisions. If the discharge or release is found to be merely negligent or unknowing, then the penalty or fine will be commensurate with the risk posed by release. If the discharge or release is found to be reckless or intentional, criminal charges – including jail time – are a real possibility.

7.2 Insuring against Liability

New Jersey has historically been one of the friendliest states to policyholders, and has been a leader in the USA in recognising policyholder rights. New Jersey has recognised coverage for historical discharges, cost cap overrun coverage, and even for punitive damages so long as the claim was not based upon intentional behaviour.

8. LENDER LIABILITY

8.1 Financial Institutions/Lender Liability

New Jersey has recognised a “safe harbour” for lenders that do not participate in the management of a facility. That said, the state will look closely at “indicia of ownership”, such as a security interest, mortgages, deeds of trust, liens, surety bonds, legal or equitable title and pledges. The safe harbour is focused upon historical discharges and is less protective from liability for any discharge or release that occurred during the period in which the owner had a legal interest in the property.

8.2 Lender Protection

Lenders protect themselves by following the requirements under the safe harbour rule – and, in short, avoiding management or control of the operations. Under both federal and state law, controlling operations (especially waste handling and disposal) is the shortest route to being held liable for environmental discharges and releases at a facility. A lender can also protect themselves by having recourse to assets other than real estate assets or the operation being financed.
(eg, personal guaranty, stocks, bonds, other property).

9. CIVIL LIABILITY

9.1 Civil Claims
The NJDEP, USEPA and any private citizen (under the Environmental Rights Act, as well as under common law) has the right to pursue a claim for civil liability in the event of a discharge or release to the environment. Under state law, the state owns all groundwater percolating through the soil. Civil claims can be brought for injunctive relief to compel remedial activity and to compel that such discharges cease. Civil claims for monetary compensation typically include a reimbursement component to satisfy costs incurred by the USEPA or NJDEP.

In state court, however, the standard is applied much more loosely and, in essence, boils down to whether the plaintiffs’ counsel can establish that a class is superior to other available methods for adjudication of the matter. Although commonality and typicality apply to the state court’s analysis whether to grant a class, in reality the state courts are much more likely to grant a class action than the federal court.

9.2 Exemplary or Punitive Damages
Punitive or exemplary damages are typically brought if there is demonstrated past neglect (failure to report a discharge to the state or USEPA) or if there is a significant breach of an existing Administrative Consent Order. Both the USEPA and the NJDEP have demonstrated that they will use exemplary or punitive damages to fund other goals, such as environmental justice.

9.3 Class or Group Actions
Class actions are possible and typically will arise if there is a significant population-affected down-gradient from a discharge or release. Asbestos exposure claims are typically addressed on a class basis as well. The New Jersey federal courts recently recognised a significant class action claim for asbestos exposure due to talc that contained asbestos; Kimberlee Williams v BASF, Cahill Gordon, 765 F.3d 306 (2014).

The federal courts are more restrictive in interpreting the elements of a class action than state courts. Under federal law, a claimant must demonstrate that there is numerosity (ie, that there are more plaintiffs than the court will want to address individually), commonality (that these plaintiffs have claims in common as opposed to individualised claims), and that the named plaintiffs are typical (meaning that the named plaintiffs have a complaint that is representative of other members of the class). These elements are enforced and evaluated strictly in federal court.

9.4 Landmark Cases
New Jersey’s Supreme Court has been a national leader in defining the scope of environmental liability. NJDEP v Ventron, 94 N.J. 473 (1983) is a landmark decision (“those who poison the land must pay for its cure” and following Rylands v Fletcher).

Among many other ground-breaking decisions, New Jersey has led the USA in environmental insurance claims with cases such as Morton International v General Accident Insurance, 134 N.J. 1 (1993) (voiding the pollution exclusion due to regulatory estoppel). For policyholders, Morton was a huge victory because the insurers had promised in 1971 that the pollution exclusion was merely a clarification of the existing terms in a CGL Insurance policy. Years later, the carriers – using standard form Insurance Services Offices (ISO) coverage – argued that the pollution exclusion was a significant change in the scope of coverage for historical environmental risk. The New Jersey Supreme Court in Morton ruled that the insurers, having previously said that the
pollution exclusion was merely a clarification, were held estopped from now arguing that the pollution exclusion was a significant change in coverage – and so the pollution exclusion was eliminated in New Jersey. (After several years, the insurers then adopted the Absolute Pollution Exclusion, which Morton did not address.)

10. CONTRACTUAL AGREEMENTS

10.1 Transferring or Apportioning Liability
New Jersey will recognise both the duty to indemnify for environmental liability and for contractual assumption of such liability. That said, the party that owned the property at the time of a discharge or release remains ultimately liable if such indemnity or guaranty is not honoured.

10.2 Environmental Insurance
New Jersey corporations have access to the full array of environmental risk insurance products covering risks such as new pollution coverage, cost cap coverage, environmental investigation coverage among others. Under New Jersey law, occurrence-based policies, such as a CGL policy, will typically be found to cover any discharge or release going back to 1941 (when the first “all risks” policies were issued).

11. CONTAMINATED LAND

11.1 Key Laws Governing Contaminated Land
The most critical state law is the Industrial Site Recovery Act (NJSA 13:1K and NJAC 7:26B), which requires the remediation of certain business operations as a critical component of a sale or transfer. For historical discharges and releases, the key statute is the New Jersey Spill Compensation and Control Act, NJSA 58:10-23.11.

The federal CERCLA statute is premised upon New Jersey’s Spill Act. Currently, environmental justice is a heavy area of focus for the State of New Jersey.

12. CLIMATE CHANGE AND EMISSIONS TRADING

12.1 Key Policies, Principles and Laws
New Jersey adopted the Global Warming Response Act (GWRA) in 2007 and updated the law in 2019. The NJDEP is responsible for assessing the state’s greenhouse gas emissions and, in collaboration with other state agencies, presenting recommendations for reducing emissions by 20% below 2006 levels by 2020 and 80% by 2050. Governor Murphy’s goal is for the state to use 100% clean energy by that date as well.

12.2 Targets to Reduce Greenhouse Gas Emissions
The state’s goal is to have an 80% reduction in greenhouse emissions by 2050. This is a daunting goal for New Jersey, which is the most densely populated state in the nation.

13. ASBESTOS

13.1 Key Policies, Principles and Laws Relating to Asbestos
Asbestos risk arises primarily in two areas: (i) inside buildings, where the risk requires encapsulation to avoid exposure or removal before demolition; and (ii) exposure to workers or consumers from products that contain friable asbestos. The federal Occupational Safety and Health Administration (OSHA) governs most works’ employees. New Jersey has detailed laws, NJSA 34:5A-32 et seq and NJAC 12:120 et seq, which govern training and safety requirements for asbestos-removal professionals.
14. **WASTE**

14.1 **Key Laws and Regulatory Controls**
The Solid Waste Management Act at N.J.S.A. 13:1E-99.16(b) mandates that each municipality adopts an ordinance that requires generators of municipal solid waste to source-separate. All waste must be source-separated at the point of generation, unless specifically exempted by the local recycling co-ordinator.

14.2 **Retention of Environmental Liability**
Under federal and state law, a generator of hazardous waste is strictly liable for environmental injury caused by that waste. For solid waste that does not contain any component hazardous waste, New Jersey law will recognise a licensed solid waste hauler as responsible for handling waste, pursuant to its contractual and legal requirements.

14.3 **Requirements to Design, Take Back, Recover, Recycle or Dispose of Goods**
The issue of a manufacturer's duty to reclaim, recover or recycle goods typically arises under products liability law in New Jersey. If the product is abnormally dangerous (even if it was not considered so at the time of disposal) then either the NJDEP or a successor owner or a private citizen can later compel remedial action. We are unable to find any case law supporting that the manufacturer is required under environmental laws (as opposed to products recall) to recover, recycle or redesign its goods.

15. **ENVIRONMENTAL DISCLOSURE AND INFORMATION**

15.1 **Self-Reporting Requirements**
New Jersey's Spill Act, NJSA 58:10-23 requires disclosure of discharge or release of a hazardous substance. The Clean Water Act and the Clean Air Act both require that emissions and discharges be self-monitored pursuant to the permit granted to the facility. For all media, self-reporting – as opposed to having a discharge discovered during a routine NJDEP/USEPA audit – is a significant factor in determining any penalties or fines. Self-reporting will be considered at the penalty-reduction phase.

15.2 **Public Environmental Information**
In brief, all environmental information is available to the public through the federal Freedom of Information Act (FOIA) or the under New Jersey's Right to Know Act. There are limited exceptions for national security and proprietary materials. “Public authorities” is defined broadly to include any municipal, county or state entity.

15.3 **Corporate Disclosure Requirement**
The BPU requires that electricity suppliers/providers disclose the environmental characteristics of the electricity purchased by customers (NJAC 14:8-3.1). Federal law (the Securities and Exchange Commission) requires disclosure for any publicly traded company of a penalty of USD100,000 or more (17 CFR 229.103). New Jersey has no specific requirement for environmental disclosure in annual reports.

16. **TRANSACTIONS**

16.1 **Environmental Due Diligence**
Environmental due diligence is typical in M&A, property transfers and any significant refinancing. In May 1993, the American Society for Test-
ing and Materials (ASTM) issued its Environmental Site Assessment standard. New Jersey promptly adopted the ASTM standard.

However, in New Jersey, performance of an environmental site assessment in accordance with the ASTM standard will not be sufficient to satisfy the requirements of the Spill Acts innocent landowner defence. Rather, both the Spill Act and the Industrial Site Recovery Act require the more stringent “all appropriate inquiry” standard. This typically commences with a Phase I, which is a desktop exercise based upon written records. Parties can also engage in a transaction screen assessment (TSA), which is a watered-down Phase I, but it is also not as protective of the seller. If any environmental conditions of concern are found, a Phase II (sampling) will typically be required.

Triggers for environmental due diligence are normally:

• the sale of the property in question;
• change in ownership/control; or
• significant refinancing of the enterprise.

In short, the NJDEP wants to know who is in control of the operation in question. If the contemplated transaction affects control or operational responsibility, it is a fair assumption that environmental due diligence will be required.

16.2 Disclosure of Environmental Information

New Jersey has a strong policy requiring a property owner to disclose all known and suspected environmental risk; Strawn v Canuso, 140 N.J. 43 (1995). Failure to disclose even an environmental condition (if the seller knows of that condition) on a nearby property may be considered a material omission.

17. TAXES

17.1 Green Taxes

Since 1974, with the Green Acres Tax Exemption Program – which provides property owners with tax incentives if they open private land for public use and conservation purposes – New Jersey has led the country in this area. New Jersey has long had sales tax exemption for zero-emissions vehicles (NJSA 54:32B-8.55). Similarly, New Jersey has tax exemptions for environmental opportunity zones: NJSA 54:4-3.150; Offshore Wind Economic Development, NJSA 34: B-209.4; Recycling Equipment, NJSA 54:10-5.3; Remediation, 54:10A-5.33; Brownfield Sites, NJSA 58:10B-1.1

On 7 January 2021, Governor Murphy signed into law the New Jersey Economic Recovery Act of 2020, which enables the New Jersey Economic Development Authority to grant awards of up to USD50 million in tax credits annually for six years for redevelopment projects in order to address environmental contamination and asbestos, among other contaminants.
Fox Rothschild LLP has nearly 1,000 lawyers in 27 locations spanning the USA. Its footprint extends from Seattle, Washington, to Miami, Florida, and from Los Angeles, California, to New York City. It is a true nationwide environmental practice. The firm’s environmental practice works as one team, with environmental lawyers experienced in environmental real estate transactions, hazardous waste litigation, permitting, green growth development, site remediation, toxic torts, biogas facilities, brownfields and, in short, the full array of environmental law. Environmental justice is now a required consideration in many environmental matters and the firm’s team has broad experience helping its clients navigate this evolving area.

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A Change of Administration
The Trump Administration was focused on rolling back many Obama-era environmental regulations and policies. President Biden is clearly intent on returning the favour. On the day of his inauguration, President Biden signed Executive Order 13990 which, among other things, states that the policy of his Administration includes reducing greenhouse gas emissions and prioritising environmental justice. The Executive Order also directed federal agencies to immediately review and take action to address the promulgation of federal regulations and other actions during the Trump years that conflict with these objectives and “immediately commence work to confront the climate crisis”. Several of these changes and other developments are discussed below.

Climate Change and Alternative Energy
President Biden has referred to climate change as an “existential threat” and has pledged to remake much of the US economy to address reducing the greenhouse gases introduced into the atmosphere by anthropogenic activities. A narrowly divided Congress continues to squabble over what legislation addressing the President’s plans should look like, and – as of publication – no major sea-shifting piece of legislation has been approved.

The pending “Build Back Better” plan includes proposed funding to help reach the country’s goal of reducing economy-wide emissions to net-zero by 2050, invest in green infrastructure, and fund investment in historically marginalised communities. Biden has also issued a number of executive actions aimed at curbing the development of fossil fuels and spurring development of alternative energy, including an order that the USA will rejoin the Paris Accords. Some of this agenda is already facing judicial challenges in the courts: Biden’s “pause” on new federal oil and gas leases has been enjoined by a federal district court. Louisiana v Biden, 2021 U.S. Dist. LEXIS 112316 (W.D. La. 15 June 2021).

Meanwhile, industry continues to develop mitigated or curative projections that are technology-forcing, such as: geo-engineering (eg, solar radiation modification, stratospheric aerosol injection, carbon capture and storage – CCS); the United Nations’ 2018 Intergovernmental Panel on Climate Change; and the push for renewables, green buildings and electric vehicles.

Some states are moving ahead with renewable portfolio standards (RPS), also known as renewable electricity standards. Although there is currently no RPS programmes at the national level, some 29 states and the District of Columbia have such policies in effect. These policies are updated and require or encourage electric producers to supply a minimum share of electricity from renewable resources.

Wind, solar, geothermal, biomass, hydroelectricity, landfill gas, municipal solid waste and tidal energy are among the resources to be utilised. Between mandated standards and voluntary goals, the state programmes have variable structures, CO₂ trading systems, rules and enforcement, sizes, and interim target percentages. They include minimum targets for particular renewables that are locally preferred, along
with “escape clauses” if renewal costs of generators are too high. Meanwhile, some argue that embedded material and energy costs negate anything being 100% renewable.

Environmental Justice
In 1994, President Clinton incorporated the concept of environmental justice into federal policy through Executive Order 12898. The Executive Order required each major federal agencies to make achieving environmental justice part of its mission by identifying and addressing “disproportionately high and adverse human health and environmental effects of its programs, policies, and activities on minority populations and low-income populations”. It also directed the agencies to develop their own environmental justice strategies, and created an interagency Federal Working Group on Environmental Justice to, among other things, provide guidance to agencies on criteria for identifying such effects.

Shortly after taking office, President Biden expanded upon President Clinton’s actions and made it clear that environmental justice is one of his Administration’s highest priorities. His Executive Order 14008 requires federal agencies to “make achieving environmental justice part of their missions by developing programs, policies, and activities to address the disproportionately high and adverse human health, environmental, climate-related and other cumulative impacts on disadvantaged communities, as well as the accompanying economic challenges of such impacts”. It also states the Administration’s policy is “to secure environmental justice and spur economic opportunity for disadvantaged communities that have been historically marginalized and overburdened by pollution and underinvestment in housing, transportation, water and wastewater infrastructure, and health care”.

Regulatory and Enforcement Changes under Biden
Revocation of Keystone XL pipeline permit
In March 2019, President Trump granted the developer of the Keystone XL pipeline a Presidential permit to construct, connect, operate and maintain pipeline facilities at the international border of the USA and Canada. This was a controversial pipeline for the transport of oil from tar sands in Canada to refineries in the USA. On his first day in office, President Biden revoked the Presidential permit, finding that it would be inconsistent with the nation’s prioritising of the development of a clean energy economy and would hurt its credibility and influence in urging other countries to take ambitious climate action. The pipeline developer has since abandoned the project.

Navigable Waters Protection Rule
The Trump-era Navigable Waters Protection Rule (NWPR) was published by the EPA and the
US Army Corps of Engineers (COE) and became effective in 2020. It applied the Clean Water Act (CWA) more narrowly than the 2015 rule promulgated under Obama, which had been previously repealed. In June 2021, the Biden EPA and COE stated that the NWPR has resulted in a significant reduction in the waters protected under the CWA and announced their intent to revise the definition of “waters of the United States”. On 30 August 2021, a US district court vacated and remanded the NWPR back to the EPA and the COE for reconsideration; Pasqua Yaqui Tribe v EPA, 2021 U.S. Dist. LEXIS 163921, at *16 (D. Ariz. 30 August 2021). In the meantime, the agencies have halted implementing the NWPR and are interpreting “waters of the United States” consistent with the pre-2015 regulatory regime until further notice.

**Water Quality Certification Rule**

Section 401 of the CWA prohibits federal agencies from issuing a permit to conduct any activity that may result in any discharge into waters of the USA unless a Section 401 water quality certification is issued, verifying compliance with water quality requirements, or certification is waived. States and authorised tribes where the discharge would originate are generally responsible for issuing water quality certifications.

In June 2020, the Trump EPA finalised the Water Quality Certification Rule (WQC Rule) (84 FR 42210) which restricts the ability of states and tribes to deny water quality certifications for reasons other than water quality concerns, and clarifies the timeline within which states and tribes must make a decision on a water quality certification application. On 2 June 2021, the Biden EPA published its intent to reconsider and revise the WQC Rule consistent with the principles outlined in the EO 13999 (86 FR 29541). It is expected that the upcoming rule revision will reverse many of the changes made in the WQC Rule.

**Migratory Bird Treaty Act**

On 4 October 2021 the US Fish and Wildlife Service (FWS) published a final rule (86 FR 54642) revoking a 7 January 2021 rule published in the final weeks of President Trump’s term that de-criminalised unintentional takings under the Migratory Bird Treaty Act (MBTA). That same day, the FWS also published an advanced notice of proposed rulemaking (86 FR 54667) to authorise incidental taking under certain conditions consistent with the MBTA, and posted Director’s Order No 225 wherein it acknowledges pursuing enforcement for all activities where the incidental taking of migratory birds occurs, but states that the FWS will focus its enforcement efforts on activities where incidental takes are both foreseeable and where the proponent fails to implement known beneficial practices to avoid or minimise such incidental takes.

**Endangered Species Act**

The Trump FWS and the National Marine Fisheries Service (NMFS) finalised several rules under the Endangered Species Act, which focused on:

- when federal agencies are required to consult with FWS and the NMFS (known as a “Section 7 consultation”) (84 FR 44976);
- the procedure to follow when agencies are considering excluding areas from critical habitat designation (85 FR 82376);
- the definition of “habitat” (85 FR 81411);
- retracting the blanket default rule that extends the same protections for endangered species to threatened species where the agency has not adopted a specific rule (84 FR 44753); and
- the economic impacts of a listing determination that must be considered by the agency (84 FR 45020).

On 4 June 2021, the Biden FWS and NMFS announced that they would initiate rulemaking
proposing to essentially undo the five rules finalised under Trump.

**National Environmental Policy Act**

The National Environmental Policy Act (NEPA), 42 USC § 4321, et seq, requires a federal agency to take a “hard look” at the environmental consequences of any federal action – including federal permit decisions – “significantly affecting the quality of the human environment”.

In July 2020, the Council on Environmental Quality (CEQ) under Trump issued a rule intended to streamline the NEPA process and make it more predictable. Among other things, the rule removed language referring to “indirect” and “cumulative” effects, instead focusing on whether the environmental consequences of a project are causally related and reasonably foreseeable, and limited the length and time period for issuance of environmental assessments and environmental impact statement.

On 7 October 2021, the CEQ under Biden published a proposed rule to modify certain procedural provisions of NEPA and to “generally restore regulatory provisions that were in effect for decades before being modified in 2020” (86 FR 55757). The revisions will be made in a two-phase approach. Phase 1 will be to restore the definition of “effects”, “purpose and need” and the agency procedures in implementing the NEPA regulations. Phase 2 revisions are to be announced in November 2021.

Until the revisions are in place, there is uncertainty as to how the agencies will implement the 2020 NEPA rule. For example, in April 2021, the Secretary of the Department of the Interior issued Secretarial Order No 3399 which states that “Bureaus/Offices will not apply the 2020 Rule in a manner that would change the application or level of NEPA that would have been applied to a proposed action before the 2020 Rule went into effect on September 14, 2020”.

**Methane Rule**

The Trump EPA sought to roll back New Source Performance Standards (NSPSs) that regulated VOC and methane emissions from certain segments of the oil and gas sectors. The so-called Review Rule in the most noteworthy in that it eliminated the transmission and storage segment from regulation under the NSPSs, and therefore removed the VOC and methane emission limitations for new and existing sources under this segment. It also rescinded methane standards for the production and processing segments and required the EPA make a separate finding that the pollutant from the specific source category “significantly” contributes to air pollution which may reasonably be anticipated to endanger public health or welfare before it can regulate a pollutant from a source category under 42 U.S.C. § 7411(b)(1). On 30 June 2021, President Biden signed a Congressional Review Act resolution that revoked the Review Rule. As a result, Obama-era NSPSs for this segment are once again effective.

**Supplemental Environmental Projects**

The Environmental & Natural Resources Division (ENRD) of the Department of Justice (DOJ) under Trump issued various memoranda eliminating the use of Supplemental Environmental Projects (SEPs) in civil environmental enforcement settlements. SEPs are environmental projects that a defendant in an enforcement action can perform and apply as a credit against the assessed civil penalty. On 4 February 2021, however, the ENRD under Biden issued a memo withdrawing the prior directives of the Trump DOJ. Following suit, in April 2021, the EPA Acting Assistant Administrator Larry Starfield issued a memorandum encouraging the use of SEPs.
Notable Cases

Affordable Clean Energy Rule litigation
In June 2019, the EPA under President Trump issued the Affordable Clean Energy (ACE) rule which established emission guidelines for states to use in their development of unit-specific standards of performance that address greenhouse gas emissions at existing coal-fired electric utility generating units (84 FR 32520). The ACE rule was finalised along with two related but independent rulemaking actions that repealed the Obama-era Clean Power Plan (CPP Repeal Rule) and revised the implementing regulations for ACE.

On 21 January 2021, the U.S. Court of Appeals for the D.C. Circuit in Am. Lung Ass’n v EPA, 985 F.3d 914 (D.C. Cir. 2021) vacated the CCP Repeal Rule and remanded to the EPA for further proceedings consistent with its opinion. Due to the uncertainty of the impacts of the vacatur, on 12 February 2021, the EPA issued a memorandum indicating that the vacatur did not reinstate, and the states are not expected to develop and submit state plans under the Clean Power Plan.

On 22 February 2021, the court granted the EPA’s request for a partial stay of vacatur of the CCP Repeal Rule, which clarified that currently no rules are in place under Section 111(d) of the Clean Air Act (CAA) governing greenhouse gas emissions from existing electric generating units. EPA has yet to propose new regulations under 111(d). However, in the background, there are three writs of certiorari asking the Supreme Court to decide whether EPA can regulate greenhouse gases from existing power plants under 111(d).

Permit requirements for discharges to groundwater
A period of 16 months after the US Supreme Court issued its opinion that discharges that travel through groundwater before reaching navigable waters may require CWA permits if the end result is the “functional equivalent of a discharge” (Cty. of Maui v Haw. Wildlife Fund, 140 S. Ct. 1462, 1476 (23 April 2020)), the litigants that lent their names to the decision received the district court’s opinion on remand (Haw. Wildlife Fund et al. v Cty. of Maui, 2021 U.S. Dist. LEXIS 131803 15 July 2021, as amended 26 July 2021)). The Supreme Court case handed down seven factors that should be used in determining when an indirect groundwater discharge should be regulated under a NPDES permit, while acknowledging that the lack of a bright line rule could lead to difficulties in application of the test – namely, “it does not, on its own, clearly explain how to deal with middle instances”.

The facts involved Maui’s underground injection of partially treated waste water located a half a mile from the Pacific Ocean. Many thousands of gallons of their waste water seeped into the ocean. The waste water twisted, migrated, dispersed, diluted, underwent microbial and chemical transformation, and attenuated through one-and-a-half miles of groundwater, subsurface volcanic rock, loam, limestone, lava basalt, and upstream groundwater before entering the ocean.

Plaintiffs traced the waste water to the Maui facility through various dye studies. Maui disputed the amounts, distance and time involved in their groundwater seeps. The district court handled the case through summary judgment, even though there were some disputed facts. The court found these facts were not material and could not be resolved by a trial. It followed the Supreme Court’s seven factors in resolving the dispute.

1. Time elapse – plaintiffs and defendants disputed between a few months and over a year before the facility seepage reached the ocean. The court found that, regardless, “many years” were not involved in the discharge, per Supreme
Court dicta. The court in dicta also compared a speedier theoretical time of flow through a pipe and slowly through groundwater but did not use that time differential in its decision.

2. Distance – again relying on Supreme Court dicta, the court found that “many years” were not involved in the discharge, whether it was half a mile or one-and-a-half miles from the Maui water recycling facility in question. A distance of 50 miles, again high court dicta, seemed key as being too far.

3. Nature of subsurface solid material – the court agreed that the waste water materially attenuated through its subsurface voyage to the sea.

4. Dilution – again dilution occurred. The court noted the possibility of irrigation drainage commingling into the facility’s waste water, but still found pollutants entered the ocean from the facility.

5. Amount – even if only 2% of pollutants from the facility entered the ocean, the amount was significant because even a small percentage could reach millions of gallons over months. (The court compared it to COVID-19 affecting a small percentage of people, which could still amount to millions in large populations.)

6. Manner or area of entrance – the court found this to be irrelevant.

7. Identity – the court found that dye tests still traced the facility’s discharges, despite possible commingling with irrigation water discharges.

The district court did not consider the EPA’s eighth factor of facility design. It concluded on balance of the factors with the ecosystem concerns, that factors 1, 2, and 5 strongly favoured comparability with a point source discharge from the facility requiring an NPDES water discharge permit, and held that Maui is required to have such a permit. It is presently unknown if Maui will appeal again or settle with a recycling system to supply irrigation water costing millions of dollars.

The court gave deference to time, distance and volume. It did not consider EPA’s facility design factor that could attenuate groundwater pollution in another case that may not be so close to a waterway. The Maui decision may open the door to multiple new permit requirements for landfills, industries, etc, whose groundwater is presently unregulated.

Environmental, Social and Governance Policies

In the past several years, stakeholders have demanded more sustainability from corporations. Environmental, social and governance (ESG) policies have emerged as a way to hold companies accountable for their operations and a way that environmentally and socially conscious investors can screen potential investments. ESG policies had their origins in the UN-supported Principles for Responsible Investment (2006). On the environmental front, climate change is a major focus when it comes to ESG policies.

In September 2021, the US Securities and Exchange Commission (SEC) issued an “illustrative letter” that the Division of Corporation Finance may send to companies to “monitor and enhance” compliance with climate-related disclosure requirements. The letter signals the SEC’s growing focus on a company’s social responsibility and sustainability policies and climate risk factors. For example, the SEC may request information from companies related to operational or financial impacts from the physical effects of climate change, including increased severe weather.
Companies both large and small should be mindful of these issues and develop ESG policies that take the causes and effects of climate change into consideration.

**COVID-19 Impacts on US Environmental Law**

The COVID-19 pandemic has had a number of impacts on environmental law. First, the US EPA instituted a temporary enforcement discretion policy for non-compliance due to COVID-19 from March 2020 to August 2020. Generally, under the policy, the EPA would not expect to seek penalties for non-compliance with routine monitoring and reporting obligations that are the result of the COVID-19 pandemic. This policy drew criticism and resulted in uneventful lawsuits from several states and environmental groups.

Second, the EPA instituted a number of enforcement actions in the 2020 financial year based upon violations of the Federal Insecticide, Fungicide, and Rodenticide Act (FIFRA) against companies allegedly making false claims that their disinfectants work against COVID-19. This included 447 civil enforcement stop sale, use or removal orders, import refusals, opening 60 criminal cases and providing compliance information to consumers.

Third, because of the respiratory and other health effects of contracting COVID-19, concerns have been raised that the pandemic has increased the health risks of air pollution, challenging the existing assumptions and risk analyses embedded in laws such as the CAA. Some have asserted that if COVID-19 leaves populations sicker than they were prior to the pandemic, pre-COVID-19 risk assessments and previously “tolerable” levels of air pollution under existing environmental regulations may lead to disproportionate harm.

Finally, during the first several months of the pandemic there was considerable attention paid to the noticeably lower air and water pollution levels resulting from work-from-home policies, reduced travel and reduced industrial activities. It is apparent that these changes will likely not be as long-lasting or quite as impactful as once thought. However, for climate change activists, this experiment demonstrated that serious and urgent lifestyle change to reduce climate change impacts is not impossible.
Jones Walker LLP offers a full range of environmental counselling, litigation, transactional and regulatory services throughout the USA, with its main practice in the south-eastern region of the country, including in Texas, Louisiana, Mississippi, Alabama, Georgia, Florida and the waters of the Gulf of Mexico. For many years, the firm has successfully represented energy companies, property owners, financial institutions, refineries, waste disposal facilities, chemical companies, manufacturing companies, railroads, real estate developers, and other businesses and their employees in environment-related disputes and transactions. Members of the environmental team have backgrounds in engineering, environmental management systems and industrial management, and have served as federal prosecutors, agency regulators, military officers, in-house counsel and law professors. The environmental team has significant experience in negotiating agreements and resolutions to environmental agency enforcement actions, including complex and technical multimedia approaches in administrative, civil, and criminal environmental proceedings and litigation and environmental issues in transactions.

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