

The International Comparative Legal Guide to:

Environment Law 2009

A practical insight to cross-border Environment Law



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1 Environmental Policy and its Enforcement

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

The trajectory of environmental law and policy in Colombia started with the issuance of Decree 2811 of 1974 baptised the National Code of Natural Renewable Resources and Protection of the Environment. This Decree was issued by the government to adopt the postulates of the Stockholm Declaration of 1972. The Decree incorporated into Colombian legislation a set of environmental rules which establish and set forth the obligation of both the government and the Colombian population to preserve and protect renewable resources in Colombia. Through this decree Colombia regulated its sovereign right to use its natural resources in accordance with the legal framework of sustainable development and protection of the environment. Later in 1991 the Colombian Constitution adopted, through a varied set of articles, guiding principles in order to establish environmental policies that would later be incorporated in laws, creating a nourished legal framework of environmental law. The Colombian Constitution approaches the protection of the environment from several points of views. First it creates an obligation upon the State and its nationals; second it establishes environmental law as a collective right; third, the Constitution sets forth environmental law as a determining factor in economic and social development; and fourth it establishes environmental law as a limitation to economic rights. In Colombia environmental rights contained in the constitution are viewed from two different points of view, as a right and as a duty. Colombians have the right to enjoy a safe environment, according to article 79 of the Constitution, but the protection of the environment is also a duty placed upon the authorities and the population to carry out all activities directed to its protection and preservation. Later on in 1993, again to establish and implement international directives contained in the Rio Declaration of 1992, on the environment, the Colombian Congress issued Law 99 of 1993. It was through this law that Congress began producing the necessary regulation to create a legal framework for the protection on the environment. This law is a compilation of rules which establish a hierarchical system of environmental agencies, but also this law is a set of rules which determine the fines and penalties imposed for violation of environmental laws, but more and foremost Law 99 of 1993 is the instrument which incorporates the binding principles of international environmental law to the Colombian legal system. Through this law the Ministry of the Environment and the National Environment System were created. This system is hierarchical structure of the environmental agencies in Colombia which are in charge of enforcing environmental law in their respective jurisdiction. The Ministry of the Environment is the

agency which is highest in the hierarchical structure. Among its duties are to enforce environmental law and create environmental policies at a national level. The second agencies in line are the Autonomous Regional Corporations which have the jurisdiction over the regions of Colombia which are determined by Law 99 of 1993. These Corporations also have the faculty to create a regional policy to protect the environment in their respective jurisdictions. Finally the Constitution and Law 99 grant judicial attributions on to departmental, district and municipal authorities over their territory. Notwithstanding the above, Colombian courts also have attributions to enforce environmental law in Colombia.

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

There are several approaches to the enforcement of environmental law in Colombia. First and foremost the approach is from an administrative law standpoint, which follows administrative procedural rules. As a general rule the agencies of the executive power, such as the Ministry of the Environment and the other agencies of the National Environment System bear the burden of enforcing environmental law. However the legal system in Colombia also allows for the enforcement of the law through constitutional procedures such as class and group actions, through general torts law and through criminal proceedings.

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

As a general rule the public must have free and complete access to environmental information. In this particular case, the Constitution provides that all Colombian citizens must have access to environmental information. The limits to the disclosure of information are contained in the law, and generally are limited to situations in which the confidentiality of the information must be kept to protect other rights or matters of national security.

2 Environmental Permits

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

In Colombia the need to obtain an environmental permit is determined by the activities carried out and the impact of those activities to the environment. As a general rule if the activity

carried out entails a negative impact on the environment a permit will be required. The National Code of Natural Renewable Resources and Protection of the Environment requires that anyone who wishes to use natural resources must obtain a permit. Hence, for example activities regarding the use of water need to obtain a water concession before having access to that particular resource. Decree 1220 of 2005 regulates all matters concerning environmental licences, which are authorisations required for specific activities which are determined in the decree, such as mining projects, hydrocarbon projects, constructions and operation of hydroelectric and thermoelectric plants, among others. Licences include permits for exploitation of natural resources such as atmospheric emission permits, forestry permits, water discharge permits and solid waste disposal permits.

As a general rule, the transfer of permits is only contained in article 29 of Decree 1220 of 2005, which sets forth the assignment of environmental licences. For this particular case licences may be assigned with the prior authorisation from the environmental authorities. Once the request to assign the licence has been made in writing the authority has 15 days to allow the individual or company to transfer the license. Other permits establish on a case-by-case basis whether or not they may be assigned or transferred, and the rules under which such transfer may be made. Usually authorities require that every transfer or assignment be previously authorised.

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

Environmental permits and licences are granted through administrative resolutions after the respective procedure is carried out. Consequently, when the procedure is completed and the authority with jurisdiction grants the permit or the licence issuing a resolution the rules concerning appeals and recourses contained in the Administrative Code are applicable. Thus appeals and recourses may be filed.

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

The obligations to carry out environmental audits are determined in the permits or licences granted. As a general rule, once the permit is granted, the authorities establish the audit obligations that must be developed, which usually are carried out on an annual basis. However, Decree 1220 of 2005 is very particular on determining that when requesting a licence the person requesting the license must establish follow up and monitoring procedures. These procedures are carried out by the authority that granted the licence. Finally it is pertinent to take into account that in order to obtain an environmental license, an Environmental Impact Study and an Environmental Management Plan must be filed which are environmental impact assessments.

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

The authorities have several enforcement powers. These are determined in accordance with article 83 and following of Law 99 of 1993. Particularly, article 85 provides that any violation of a law regarding the protection of the environment grants powers of police to the environmental authorities so they may impose sanctions. The authorities may impose sanctions or preventive measures. The

sanctions that may be imposed for any infraction of environmental regulations, according to the seriousness of the infraction, go from daily penalties of up to 300 minimum monthly salaries equivalent to COP \$ 149,070,000 (approx. USD \$55,000), to the suspension of the license and to temporary or definite suspension of the activities.

Law 99 of 1993 also allows authorities to impose preventive measures, such as, (i) verbal or written attention calls; (ii) suspension of activities in order to prevent damages from occurring; (iii) the obligation to carry out studies so as to assess the nature and characteristics of the damages; and (iv) finally the preventive foreclosure of the specimens of flora or fauna or the products with which the infraction was committed.

3 Waste

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

Decree 4741 of 2005 defines residue and waste as any object, material, substance, element or product in a solid, semisolid, liquid or gas state contained in recipients or deposits which are disposed, rejected or delivered to a third party because its properties do not allow for it to be used again or because the Law establishes so.

However the decree differentiates conventional waste from hazardous waste. The latter is defined by the decree as the residue or waste that due to its corrosive, reactive, explosive, flammable, infectious and radioactive characteristics may entail risk or damage to human health and the environment. Equally the packages and bottles in contact with the wastes are also considered hazardous. The Decree has a complete list of hazardous wastes classified by activity or procedure, the list of hazardous wastes classified by components and a description of each of the hazardous characteristics.

The Decree not only provides the main regulations for the handling of hazardous wastes but also the handling, labelling and packaging of hazardous substances, imposing obligations to generators of hazardous wastes and also to producers and importers of hazardous substances.

According to Decree 4741, all generators of hazardous wastes must comply with the following obligations, among others: (i) to maintain an updated characterisation of the hazardous wastes; (ii) to guarantee an integral and proper management of the hazardous wastes, for which purposes generators must prepare an Integral Hazardous Wastes Management Plan before December 30, 2006; (iii) guarantee their proper labelling and packing; (iv) conserve disposal certificates for a period of five years; and (vi) register before the environmental authority as generator and keep such registry updated.

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

According to Decree 4741 of 2005 the generator of hazardous wastes is allowed to store them for a maximum period of 12 months unless the generator has a justified request to extend this term. Otherwise Colombian regulation contains very stringent rules regarding the final disposal of hazardous wastes, for which purposes the generator must contract the services of an authorised entity.

Regarding the storage and disposal of conventional wastes, Decree 838 of 2005 and Decree 1713 of 2002 establish as a general rule that the disposal of solid waste must be done by specialised public utilities companies which collect the waste and transfer them to specific waste disposal sites.

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

Decree 4741 of 2005 establishes a traditional cradle-to-grave regulatory regime for hazardous wastes. The integral liability of generators subsists until the waste is used as a by-product or until is finally disposed off, even if the transportation and disposal is handled by third parties.

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

Decree 4741 of 2005 establishes the obligation to present a Take-Back and Recovery of Post consumption products Management Plan in order for the used, expired or retired products, to return to the commercialisation, import, distribution, or production chain. This obligation is currently only applicable to used medicines, pesticides and their containers and used lead-acid batteries and further regulation is pending; however, the Ministry of Environment has the power to include other products under such obligation.

4 Liabilities

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

The first type of liability is the administrative liability which generally results from administrative acts issued by environmental authorities, such as permits, licences and authorisations, which establish obligations, that in turn may result in other administrative acts initiating investigations and imposing sanctions in case of non-compliance. The sanctions are imposed when there is a breach of an environmental law and not necessarily if there is damage. In matters regarding administrative liability the most common defences are compliance or partial compliance with the law or efforts to reduce sanctions due to inexistence of infractions in the past.

Civil liability is regulated by the Colombian Civil Code according to the general rules concerning liability. In case damages are caused, the victim must prove the occurrence of the damage and the connection of the damage to the material fact causing such damage. In this case the defences are those that are usually argued in civil liability, such as the act of a third party, *force majeure*, or the negligent act of the victim.

Criminal liability is also applicable. In Colombia the principle of *nulla poena sine legem* applies, therefore in Colombia for there to be criminal liability a punishable conduct must be established in the Criminal Code. This code includes a complete chapter of punishable criminal conducts regarding the environment such as contamination. In matters concerning criminal liability, the best defence is to argue reasonable doubt in favour of the prosecuted as the burden of proof is placed on the prosecution.

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

Yes, criminal liability, civil liability and the filing of collective or group actions may arise even if the activities which caused damages

were carried out within the framework of a permit. However, damages caused within the framework of the permit do not give rise to administrative liability.

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

Yes. Recently the Superintendence of Corporations in Colombia issued an opinion establishing that officers who have administrative powers may be liable for environmental damages. This liability is established when administrators carry out activities that do not comply with environmental regulations. Consequently an administrator will be personally liable for damages caused to the environment when negligence in their actions is proved. Furthermore, administrators must obtain all necessary permits for the Company to operate.

These sets of rules are part of the liability regime contained in Law 222 of 1995 concerning the responsibility of administrators. According to the standards set forth in the mentioned law, the partners/shareholders of a Company, third parties or even the Superintendence of Corporations may initiate proceedings against the administrators when negligent actions are proven, including actions which are adverse to the environment.

Administrators are also criminally liable in cases when a criminal fault is caused developing activities of the company they direct. In Colombia the criminal liability of Corporations is placed upon their administrators more specifically in the legal representative.

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

From the perspective of a share sale, environmental liability entails the transfer of the liabilities of the Company. Hence a partner/shareholder who recently acquired shares in a company with environmental liabilities, will inherit the environmental liabilities of the company derived from an operation of the business or sites of the company as a whole. Regarding environmental liability arising from the purchase of assets, the liability is restricted to the assets themselves. This implies that the purchaser of the assets will not be liable for the failure of another entity to comply with the environmental law standards.

The liabilities concerning the purchase of assets are regulated by civil law which allows the purchaser to file a claim against the seller of the asset in case there is a hidden or non disclosed environmental liability.

Please note that liability between parties under the contract may not prevent tort liability from a third party against either the seller or the buyer.

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

In Colombia there are no particular rules regarding the liability of the lenders for environmental wrongdoing and/or remediation costs. However, if a lender has control over the company or the asset, regarding control as the ability to take decisions concerning said company or asset, it may be sued for environmental damages caused. Such is the case for example in which a lender forecloses the collateral and becomes the owner of an asset, in this case the lender inherits the environmental liabilities tied up to the asset.

5 Contaminated Land

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

Contamination of soil and ground water is treated under the same parameters of any other contamination issue. For this particular case the applicable liabilities are those already mentioned, (i.e. administrative, civil and criminal) both administrative authorities and courts have the possibility to sanction those that contaminate and demand remediate actions of the damages arising from said contamination.

There are no particular laws which regulate historical contamination. The general rule is that the sanctioned individual will be the one that, after proved so, caused the damage. There is however a position adopted by some courts regarding statute of limitations of certain contaminating actions in the sense that some actions may never prescribe if there is continuous damage.

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

This particular subject is established in a general civil liability regime. If damage is caused and the authorities or the court are not able to determine the specific liability of each individual they will be jointly and severally liable. The individuals may later seek repayment from one another once the degree of their liability is determined, some times under a contract, so as to establish the amount that is to be repaid.

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

The authorities may require additional works if it deems so under any remediation or even as a general rule. In Colombia authorities have an obligation to audit all projects which may affect the environment; in that sense, if during any of those audits they deem it necessary to require additional works they may do so. In the particular case of remediation under paragraph 1 of article 85 of Law 99 of 1993, the authorities may demand actions which imply remedies to the environment and natural resources.

The cases in which a third party can challenge an 'agreed' remediation are very specific. The agreement that gives rise to a remediation will be an administrative act issued by a governmental authority. Taking this into account, the law, particularly the Contentious Administrative Code establishes that every person can ask the administrative courts to declare the administrative act null and void.

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

In Colombia civil law allows the purchaser to seek compensation for damages caused and allows the purchaser to initiate a redhibitory action. This is only possible if the purchaser is able to prove that the seller had previous knowledge or should have known about the contamination of the land.

A seller may save his liability in regards with contamination and transfer the risk of contaminated land to a purchaser by virtue of an agreement executed between them. However the execution of these agreements does not save the sellers' liability from third parties or the government.

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

Yes. As a general rule the government may seek monetary damages from polluters. From the particular standpoint of aesthetic harms to public assets government has not only the right, but the duty to protect and in case it deems necessary seek damages from polluters.

6 Powers of Regulators

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

Before granting any permit or licence, the environmental authorities must visit the sites. These visits are usually carried out by special technicians assigned by the authorities which are obliged to take samples, examine the area where the project is to be carried out and once all the necessary information is collected, they must present, to the officer in charge of studying the request for a license, a technical concept containing social, geographic and biological information. Based on this technical concept the authorities decide to grant the license or not.

7 Reporting / Disclosure Obligations

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

Yes. Decree 1594 of 1984 establishes that any sanction procedure may be initiated by any government official or as a consequence of a complaint of any individual.

Even from a criminal standpoint Colombian citizens have the obligation to inform any criminal activities to the authorities. Hence there is an obligation to inform when an environmental crime is being committed. Not informing the authorities a crime has been or is being committed, constitutes a crime itself.

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

In Colombia the affirmative obligation is not a particular one to investigate land contamination but it is rather an obligation to inform the authorities. As previously mentioned, the law allows persons and some times imposes the obligation to inform the authorities of contaminating events that cause damages, whether or not they find themselves affected by them.

When these events are informed to the environmental authorities they have an obligation to investigate, initiate the necessary procedures, and impose the pertinent sanctions, if applicable.

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

Regarding environmental problems, the obligation to disclose does not respond to particular obligations. However, Colombia's civil code stipulates that a seller that had the opportunity and should have been aware of hidden defects does not report them to the buyer allows the buyer to a redhibitory action plus compensation damages arising from the failure to report.

8 General

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

Viewed from an environmental stand point there are no environmental rules which establish the possibility to limit environment - related liabilities. However, if they wish parties may, through an agreement, regulate to limit exposure to the liability. Regarding these agreements several points must be kept in mind. First is that these clauses are limited by law as parties may not agree to limit gross negligence or criminal liabilities; second administrative authorities and third parties are not bound by these agreements and enforceability is limited to the parties entering the agreement. Thus paying an indemnity in respect of matters like remediation does not discharge the indemnifier's potential liability against the government or third parties.

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

Decree 2649 of 1993 establishes the general accounting rules. Under this Decree companies have the obligation to include in their balance sheets contingencies including those arising from environmental liabilities. The only way to shelter environmental liabilities of balance sheet is to transfer the assets with the liability to a new company, in which case tax implications should be taken into account.

Companies may be dissolved if there is a potential threat of an environmental claim, however, according to article 207 of Law 222 of 1995, if the assets of the wound up company are not enough to cover all external liabilities of the company and it has demonstrated that the shareholders used the company to defraud creditors, shareholders will be liable for covering the uncovered liabilities. Additionally, liquidators are responsible before third parties for negligence in complying with their duties. Finally, if shareholders received as part of the liquidation any asset with a potential environmental liability, they as new owners, will inherit such liability.

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

As a general rule in Colombia, shareholders are liable for the company's liabilities up to the amount of their capital contributions. However, under very limited circumstances in which the corporate

veil is lifted according to article 148 and 207 of Law 222, 1995, shareholders may be held liable for a company's liabilities. According to article 148, when an insolvency proceeding is produced by actions of the parent company or controlling shareholder, in their benefit or in the benefit of any other company of the group, against the insolvent company, (which is presumed) the parent or controlling company will have subordinated liability to the one of the company itself.

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

Regarding environmental violations there are no laws that protect "whistle-blowers" who report environmental violations.

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

Yes. In Colombia there are both group and class actions available in order to pursue environmental claims. However the damages that may be claimed in these actions are those which are claimed in civil actions. There are no exemplary or penal damages available under Colombian legislation.

9 Emissions Trading and Climate Change

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

In Colombia the emission trading schemes are those contained in the Clean Development Mechanism contained in the Kyoto Protocol and under the Chicago Climate Exchange. Currently there are 124 CDM projects on a national portfolio with a potential portfolio of 14,931,843 annual tonnes of Certified Emission Reductions. Of those 124 projects 29 have been approved by the Ministry of the Environment of which 14 have been registered before the United Nations. Five projects have emitted CER's with a potential income of USD \$139,527,095. The income for sold CER's in Colombia is USD \$55,800. At the moment Colombia has the fifth largest number of projects registered in the UN.

10 Asbestos

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

In Colombia, the experience regarding asbestos litigation is very limited. Rarely are there claims filed before Colombian courts regarding asbestos litigation.

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

Regulation regarding this particular matter is limited to what is established in Decree 4741 of 2005 which regulates hazardous wastes and substances. The duties of owners regarding asbestos on site are the same of those demanded from producers and importers of other hazardous wastes and substances.

11 Environmental Insurance Liabilities

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

In Colombia insurance policies for environmental risks are fairly new. However there are insurance policies for civil liability particularly to cover the risks related to hazardous wastes including the transport of these materials, water pollution and any contaminating event.

Law 491 of 1999 establishes that in cases where the project demands the authority to authorise it through an environmental license an environmental insurance must be obtained. This particular insurance is destined particularly for damages to natural resources or to damages to the environment.

To grant concessions of mining projects the constitution of a mining-environmental insurance policy is mandatory.

11.2 What is the environmental insurance claims experience in Colombia?

As we mentioned, insurance policies are new, hence there is not much experience regarding claims. However it must be kept in mind that in order to enforce an insurance policy for environmental liability, the rules applicable are those applicable to civil liability insurance. Hence the victim must demonstrate the occurrence of the casualty and the quantification of the damages. In Colombia the victim may present the claims directly to the insurance company and not necessarily to the insured company. Finally in civil responsibility the statute of limitations has an extraordinary term of five years, which implies that the victim has a term of five years to initiate a claim before the insurance company after the occurrence of the casualty.

12 Updates

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

In Colombia the most notable trends are in regulatory matters. Currently there is a bill which establishes a new sanction procedure which is particular to environmental matters. There are several innovative matters: introducing strict liability to environmental matters, increasing the amounts of the fines, and including, as a sanction, community work. Also this particular bill opened the discussion concerning the statute of limitations regarding environmental matters. Currently the statute of limitations regarding the initiation of administrative actions is the same as any administrative action, which is three years while this bill wants to establish a statute of limitations of 20 years.

Also regarding atmospheric emissions, regulation has become more stringent since standards have been modified.

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GÓMEZ-PINZÓN ZULETA

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The firm is recognised as one of Colombia's leading international law firms. It has assembled a knowledgeable and experienced team of 14 partners and 60 Lawyers that simplify all legal matters related to business activities in Colombia and abroad.

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