Defensive Measure in Argentina

In Argentina, the Constitutional Reform of 1994 established the right of all inhabitants to a healthy environment, imposed on the production activity the duty to preserve the environment and established the obligation to remediate any environmental damage that may be caused.

In other words, since the year 1994, the right to a healthy environment has had constitutional status, for section 41 of our **Magna Carta** reads: *"All inhabitants are entitled to the right to a healthy and balanced environment suitable for human development in order that productive activities shall meet present needs without endangering those of future generations; and such activities shall have the duty to preserve it"*

"As a first priority, environmental damage shall bring about the obligation to repair it according to law. The authorities shall provide for the protection of this right, the rational use of natural resources, the preservation of the natural and cultural heritage and the biological diversity, and shall also provide for environmental information and education. The Nation shall regulate the minimum protection standards and the provinces shall issue all regulations necessary to reinforce them without altering their local jurisdictions. The entry into the national territory of present or potential dangerous waste, and of radioactive ones, is forbidden."

On November 6, 2002, the General Environmental Act (Act 25,675) was passed. Section 22 of said Act set forth that: "*Any individual or organization, either private or governmental, performing activities hazardous to the environment, the ecosystems and their constitutive elements, shall take out sufficient insurance coverage to ensure the financing of the redress of any damage that may be caused; in addition, according to the case and possibilities such organizations shall create an environmental remediation fund that enables the implementation of remediation actions*" .

This Section has been strongly criticized on the grounds that it is too broad, since it establishes the obligation to take out "*sufficient insurance coverage to ensure the financing of the remediation of any damage that may be caused by the contaminating event", which* makes actual compliance impossible, since no insurance coverage may be unlimited.

On the other hand, Section 27 of the Act defines environmental damage as follows: "any relevant alteration that adversely modifies the environment, its resources, the ecosystems' balance or collective goods or values". Almost anything may fall under this definition.

Section 28 sets forth that the extent of the remediation of said damage is restoration, that is, to bring things back to their former condition:

Section 28: *"anyone who causes environmental damage shall have the strict liability to restore any damaged values to its former condition. In the case this is not technically feasible; an amount by view of substitute indemnification shall be deposited in the Environmental Compensation Fund, to be administered by the regulatory authority, without prejudice to other legal remedies applicable."*

In 2007, the Environment and Sustainable Development Department began the regulatory process of section 22 of the General Environmental Act:

The regulation - prepared by the Environment and Sustainable Development Department along with the Finance Department- sets forth the following:

- The extent of the coverage is reduced from extra-broad (as set out in the provisions of section 27) to limited, covering only the damage to soil and water caused by pollution
- As to the extent of the remediation, the regulations speak of remediation based on risk, while the law speaks of restoration.

On this point, it is debatable whether or not the resolutions of the Environment and Sustainable Development Department will be valid in the event of a legal claim, since a lower norm such as a resolution cannot modify a higher-level norm, such as the General Environmental Act. On the other hand, in its Section 3, the Act establishes that the norms set forth by it are public-policy norms and that the text of the Act will prevail over any provision to the contrary. Therefore, in the event of litigation, the courts, pursuant to section 22, could set aside the resolutions establishing the operating norms related to the taking out of insurance and could force insurance companies to pay any amount necessary to repair the damage. Because of this, insurance companies have been reluctant to issue civil liability policies for collective environmental damage.

At present, "*pólizas de caución*" (surety bonds) approved by the National Insurance Supervisory Agency (SSA) are offered in the market. These policies cover this kind of damage, but risk is not transferred. Thus, companies – the potential insured- are not content with this insurance either, since the policy holder must repair the damage unless it becomes insolvent, the only case in which the insurance is activated.

In Argentina, the National Environment and Sustainable Development Department sets out a list of activities considered hazardous to the environment which entail the obligation to take out environmental insurance. This way, the universe of activities exempted from such obligation is also defined.

The activities included in the act are as follows:

- Agriculture, hunting and forestry
- Mining and quarrying
- Manufacturing
    - Food products and beverage
    - Textiles
    - Leather goods
    - Wood and paper products
    - Coke, refined petroleum products and nuclear fuel
    - Chemicals and chemical products
    - Rubber and plastics products
    - Basic metals and fabricated metal products
    - Machinery and equipment
    - Radio television and communication equipment
    - Motor vehicles, trailers and semi-trailers
- Infrastructure construction
- Recycling
- Electricity, gas and water supply
- Transport, storage and communication
    - Land transport, transport via pipelines
    - Railways
    - Water transport

- Supporting and auxiliary transport activities, activities of travel agencies
- Cargo handling
- Storage and warehousing at ports and airports
- Gas hydrocarbons and chemical products warehousing
- Health and social work (hospitals)
- Sewage and refuse disposal sanitation and similar activities
- Funeral and related activities
- Other activities involving the production and handling of dangerous products.

The Environment and Sustainable Development Department also establishes an alternative for those who prefer to self-insure themselves or who cannot afford to take out environmental insurance policies. This agency sets out the criteria to determine the minimum amounts of coverage that will be considered sufficient pursuant to the provisions of section 22. These minimum amounts, or rather, the formula to determine them, are stipulated in resolution 1398/2008 of the Environment and Sustainable Development Department (SAyDS in its Spanish Initials).

In addition, the Environment and Sustainable Development Department created the Environmental Hazards Assessment Unit, which is a specific area within the Department which addresses and advances issues concerning environmental hazards and insurance.

In order to regulate other aspects more closely related to insurance techniques, the Environment and Sustainable Development Department worked jointly with the Finance Department, an area of the National Insurance Supervisory Agency, and created – through Joint Resolution SF 12 and SAyDS 178- the Advisory Committee on Environmental Insurance Guarantees. This Committee will determine the basic guidelines for the insurance policies covering collective environmental damage as well as the requirements, conditions and scope for self-insurance and remediation funds.

These basic guidelines were issued in late 2007 through a joint resolution 98/2007 and 1973/2007 of the Finance Department and the Environment and Sustainable Development Department. The purposes of these guidelines are: a) to guarantee the reasonable remediation/restoration of the damaged environment, so that risks levels acceptable for human health in accordance with universally accepted criteria are reached and b) to limit risk in order to diminish uncertainty and to enable the generation of reasonable offers and affordable premiums.

Resolution 1398/2008 dated September 22 2008, sets out the minimum amounts of coverage.

As to the awareness of risk and prevention, it should be noted that insurers have conducted risk awareness campaigns and that the Argentine Chamber of Environmental Risk Insurers (CAAARA in its Spanish initials) was created to defend the sector's interest.

As regards the Damages Cap, the Environment and Sustainable Development Department sets out the minimum insurable amount of sufficient magnitude. "Sufficient" means any amount sufficient to ensure redress of collective environmental damage caused by a polluting event. The insured limits in Environmental Liability programs, including Environmental bonds, must not be less than the MMES.

Regarding Franchises, Joint Resolution 98/2007 and 1973/2007 of the Finance Department and the Environment and Sustainable Development Department, sets forth

that franchises shall not exceed 5% of the MMES established by the National Environment and Sustainable Development Department.

As to coverage exclusions, joint resolution 98/2007 and 1973/2007 of the Finance Department and the Environment and Sustainable Development Department sets forth, among the basic guidelines on the contractual conditions of collective environmental damage, that the remediation shall consist in restoring the affected environment to its former condition, until risks levels acceptable for human health and enabling the self-regeneration of natural resources are reached, so the adverse alteration is no longer relevant. Insurance will only cover the damage first appearing or first being discovered after taking out the coverage. For that purpose, the Insurer may carry out an assessment of the environmental situation in order to detect pre-existing damage, which will be exclusively assumed by the person or organization performing the hazardous activity.

Increase in premiums: premiums will be increased according to the degree of complexity of the insured companies. There is a project to increase premiums in accordance with the reiteration of damage.

Policies Cancellation and Going Out of the Market of Insurance Companies in Argentina: So far, neither of these hypotheses has materialized. The first policy was approved by the National Insurance Supervisory Agency on August 26, 2008.

POLICIES CURRENTLY OFFERED IN ARGENTINA

The policies approved by the National Insurance Supervisory Agency to be offered in the market are bond insurance policies (Pólizas de Caución): Prudencia, Escudo, Nación Seguros and Testimonio. These four policies have been authorized by the National Insurance Supervisory Agency and the Environment Department.

On the one hand, TPC and Surco were given the go ahead by the National Insurance Supervisory Agency but the approval of the Environment Department has been pending since 2008.

Seven applications: Victoria, Federación Patronal, Nivel, Afianzadora Latinoamericana, Liderar, Provincia and Fianzas y Crédito, are still pending at the Authorization Department of the National Insurance Supervisory Agency, awaiting the decision of the Environment Department.

The application for the approval of an Environmental Policy, filed by the Meridional (a company which currently commercializes an Environmental Civil laity policy) and an application filed by ACE are also pending.

In order to obtain the pertinent authorization, the policies must be approved by the National Insurance Supervisory Agency and the Environment and Sustainable Development Department. In addition, this Department requires an agreement with the Remediation Companies Chamber (CEMA, Environment Management Chamber).

On June 15, 2010, the National Insurance Supervisory Agency set forth that henceforth it will only approve environmental policies which, pursuant to the provisions of the General Environment Act No 25675, have previously been granted the environmental approval by the Environment and Sustainable Development Department. The Resolution established that: "*any application already filed or to be filed in the future in order to obtain the approval for insurance plans, provisions and other technical contractual elements corresponding to the coverage of the risks set out in Section 22 of Act No 25675, shall comply with the terms stipulated in the Appendix of Joint Resolution 98/2007 and 1973/2007of the Finance Department and the Environment and Sustainable Development Department*". The Resolution underlines that "*obtaining the environmental approval issued by the Environment and Sustainable Development Department shall be a contingent condition and*

an essential element of the administrative act approving insurance plans, provisions and other technical contractual elements corresponding to the coverage of the risks set out in Section 22 of Act No 25675".

In November 2009, the SSA (Insurance Supervisory Agency), through decision 110,627, authorized "Sanco Seguros" to offer the Liability for Environmental Heritage Damage Insurance", but in the general provisions of the policy the company expressly represents that the policy does not comply with the obligation set forth in Section 22 of the General Environmental Act.

The policy covers the damage to the environment caused by the insured party, ensuring the necessary funds to redress or mitigate the collective environmental damage. It does not, in any event, cover the environmental liability of the insured. Although it is expressly stated that the coverage does not comply with the requirements sets forth in section 22 of Act 25675, its supplementary module 1 does comply with all the requirements set forth in the law and its regulations.

The policy has a base module, which covers any sudden and unforeseen damage occurring during the duration of the policy.

Supplementary module 1: Base module + gradual damage + generating event first appearing or first discovered within the duration of the policy.

Supplementary module 2; Base module + gradual damage first appearing or first discovered and generating event occurring within the duration of the policy

Insured amount: computed on the basis of a polynomial formula stipulated in resolution 1398/08 of the Environment Department. The mandatory uncovered amount is of 5% of the insured amount, which cannot be covered by another insurance policy.

Exclusions:

1- Any civil liability of whatever nature.

2- Intentional misconduct, gross negligence (or fault), wilful failure to comply with the laws, regulations, executive orders or resolutions of the authorities applicable to the policy holder and/or the insured.

3- Any environmental damage not included in the definition set out in the policy as the environmental damage covered by the policy

4- Claims for damage to collective assets or values that are either cultural or human creations.

5- Financial and/or monetary damage in absence of material damage and/or physical injury.

6- Material damage to oil and gas wells, even when the same are directly and indirectly caused by a covered risk.

7- Environmental liabilities, understood as any damage to the environment existing at the time of taking out the policy, whether or not known by the policy holder/insured.

8- Electromagnetic fields

Claim: claims may be filed by a third party within the duration of the policy and within a term of two years after the expiry date or the rescission of the policy.

Initial Environmental Situation: The assessment will be the responsibility of the insurer and shall be carried out by the expert(s) appointed to that end. From time to time, the insurer shall make any visits it may deem necessary. The initial risk situation will be determined on

the basis of the information collected by the experts, who will also determine the pre-existing damage at the commencement of the coverage. After being signed by the insured, the assessment will be an integral part of the policy. The cost of the assessment shall be borne by the insured.

The policies existing in Argentina which have been approved and meet the statutory requirements are *"Seguros de Caución - Daño Ambiental de Incidencia Colectiva - Garantía de Remediación Ambiental"* (Bond Insurance - Collective Environmental Damage - Environmental Guarantee and Remediation)

This coverage was designed through the joint work of the private sector (made up by the insurance companies who have created the Argentine Chamber of Environmental Risk Insurance – CAARA) and the public sector:

- The Environment and Sustainable Development Department
- The Finance Department of the National Ministry of Economy and Production and its offices.

In this kind of policy:

The policy holder is the entity engaged in hazardous activities.

The insured is the State (on other public entities, such as a Province or a City)

The insurer is the company issuing the policy.

This kind of policy shall ensure the remediation of the collective environmental damage included in the coverage. "Collective environmental damage" is defined as any damage resulting in a negative and significant alteration of the environment and its resources and in unacceptable damage for human health or the deterioration of a natural resource to such extent that it limits its regeneration capacity.

In the policies there is a Remediation Guarantee

The insurer guarantees:

1) ***the collection of sufficient funds -up to the insured amount – to remediate collective damage promptly***
2) ***the performance of remediation work***

The guarantee is valid independently from the sudden or gradual appearance of the damage, i.e., upon the policyholders' failure to comply, the insurer shall pay the damage remediation costs up to the insured amounts.

Pursuant to the statutes and the regulations issued by the pertinent enforcement agencies, the insured amounts are calculated on the basis of a polynomial formula used to compute the level of complexity and the environmental risk corresponding to each case.

The requirements include financial classification of the policy holder and an Assessment of the Initial Environmental Situation (SAI in its Spanish initials) which constitutes a diagnosis at the time of issuing the coverage.

The policy also includes a risk prevention programme as well as follow-up procedures as well as the procedures applicable at the time of learning of an event. In order to meet the obligation to perform the remediation of the environment, the Act and the pertinent regulations include the definition of hazardous and pathogenic waste operators, who are either individuals or companies authorized by the competent agency to carry out corrective actions to restore the environmental conditions to the Initial Environmental Situation.

The remediation activities are as follows:

- Remediation and clean-up
- Elimination of contaminating material
- Monitoring and control of contaminated natural means
- In-situ treatment and disposal needed for the restoration and elimination of residual contaminated material

In relation to the measures taken by insurers to protect themselves from excessive exposure to this kind of losses, it is interesting to outline the steps taken by Insurance Company when an Environmental Remediation Guarantee insurance policy is taken out. The requirements set by one of the insurance company include the following:

First stage:

- ✓ Copy of the last three balance sheets
- ✓ Copy of the by-laws/articles of incorporation
- ✓ Credit report (Nosis, Veraz, or the like)
- ✓ Statement of the company's categorization

After the Financial information is analyzed, an environmental inspection is arranged with the Environmental Risk Operation Centre (CORA, in its Spanish initials) in order to establish the Initial Environmental Situation (SAI) and to define the Environmental Complexity Level (NCA)

The cost of the SAI is borne by the policyholder, who must agree such cost with the CORA. If the operation is approved, the cost will be deducted from the policy.

Second Stage. Documents required:

- ✓ Copy of the last Environmental Suitability certificate
- ✓ Copy of the last Environmental Situation report
- ✓ Initial Environmental Situation and Inspection report to be carried out by the remediation companies and paid by the client
- ✓ Copy of the industry's plans

The need of external sureties is defined on the basis of these elements.

In the third stage, after the operations are approved, the following documentation must be filed:

- ✓ An application for environmental remediation guarantee
- ✓ Sureties (when required)
- ✓ Statement of assets and net worth (when required)

After completion of the third stage, the policy is issued, delivered and charged.

In this kind of policies, the policyholder is not released from its responsibility of bearing the cost of redressing the damage stipulated in the policy. In other words, the risk is not transferred as in a Civil Liability Insurance. In these bond policies (*pólizas de caución*) currently offered in the market, the insurance company is only liable for the remediation of the collective environmental damage if the policyholder fails to fulfil its duty to remediate. Because of this, most of the companies which have to take out the Statutory Environmental Insurance are reluctant to take out this kind of policy.

Another much debated question is whether or not the requirement to take out this kind of bond is legal, since the Act sets out a kind of insurance that is later modified by the regulations.

On the one hand, in the case "Men*doza Beatriz Silvia v National State et al on Damages*" (damage resulting from the pollution of the Matanza Riachuelo River) in June 2006, the Federal Supreme Court, in order to ensure prompt decisions and the effective jurisdictional control, delegated the execution of the sentence on the Federal First Instance Court of Quilmes, Luis Armella, Judge. Among the duties entrusted to the First Instance Court was that of "requesting the defendants to inform whether or not they have taken out insurance in accordance with the provisions of section 22 of Act 25675". At that time, the defendants could not meet this requirement because there were not such policies in the market. The first policy was approved on August 26, 2008."

In June 2009, CAARA informed the Supreme Court, the Federal Ombudsman and the First Instance Court of Quilmes that in spite of the fact that policies covering the damage remediation costs pursuant to the regulations were already available in the market, and that, therefore, its was then possible to satisfy the statutory requirements, most of the companies continued being reluctant to take out an insurance covering environmental damage remediation.

At the same time, Judge Armella ordered the Matanza Riachuelo Authority (ACUMAR) to promptly include in its bylaws the terms set forth in section 22 of Act 25675 in order to enforce the requirement to take out an Environmental Insurance Policy or to create an environmental remediation fund imposed on anyone obliged by the above mentioned Act within its jurisdiction.

ACUMAR is an inter-jurisdictional entity with jurisdiction over the city of Buenos Aires and 14 departments of the Great Buenos Aires area and which has regulatory, control and fostering power on industrial activities, public utility companies and any other activity having environmental impact on the basin, as well as the obligation to submit to the Federal Congress an annual report on all the initiatives, actions and programmes carried out.

Resolution 165/10 of the Provincial Agency for Sustainable Development of the province of Buenos Aires set forth that the industries must take out an environmental insurance within the province of Buenos Aires.

In addition, ACUMAR established the mandatory registration of all the industries of the Matanza Riachuelo Basin (Resolution 07/09). By means of an affidavit, the companies must inform whether or not they have taken out the SAO. Failure to register or to submit the affidavit timely, may lead to the sanctions stipulated in ACUMAR resolution 110/10.

In spite of the existence of the bond policies currently offered in the Argentine insurance market, it should be noted that on August 21, 2009, the Federal Environmental Council

(COFEMA in its Spanish initials) Resolution 175/09, set out that "*the current bond policy is not considered enough to ensure the coverage of all the pertinent subjects. Thus, the regulatory process should be continued in order to foster the creation of a wider and more diversified offer of financial guarantees.*"

The Quilmes Court had issued a similar opinion in June 2009, stating that "*at present, there is no sufficient regulatory frame to ensure compliance with the requirement set forth in Act 25675 concerning environmental insurance and remediation fund.*"

Conclusion:

In my opinion, in spite of the big efforts made by the National Environment and Sustainable Development Department to regulate the Mandatory Environmental Insurance required by the General Environment Act, the provisions of the aforementioned Act 25675 should be modified, since the same set forth that its norms are public policy and that they will be used to construe and apply any specific legislation on the matter and will be in force as long as they are not contrary to the principles and provisions contained in this Act. Therefore, it is essential that any amendment to any section of this Act be passed by the Argentine Federal Congress, since any regulation or executive order will not be sufficient because, in the event of a court claim, the courts may find that the regulations modifying the Act do not respect the spirit thereof, or are *ultra vires*, since as I have mentioned before, a lesser norm such as a Resolution may not modify a higher norm such as the General Environmental Act.

The new law is likely to heighten awareness of environmental exposures and lead to an increase in environmental claims. All multinationals operating in Argentina are urged to review their environmental risk management procedures. Willis can provide assistance in this area. We can also assist in completing the environmental surveys required by the law.

RECENT DEVELOPMENTS

In April this year, the Secretary of Environment and Sustainable Development of the Nation, Juan José Mussi, announced a modification of the requirement to take out an environmental insurance for industrial activities.

The General Environmental Act, passed in 2003, set out three levels of complexity, and assigned a number of points to each level, based on factors related to residual waste, environmental manage system, especially hazardous substances, industrial activity and size of company.

The text modified the number of points corresponding to the lowest level of complexity. As a result, the requirement to take out environmental insurance will no longer apply to companies that, in spite of not being engaged in any types of activities having medium- or high-complexity from the environmental point of view, had been included in the second level because of reasons (industry, size, location) not based on strictly environmental criteria.

This modification will benefit many small and medium-sized companies.

Without this modification, it would be impossible for many companies to afford environmental insurance.

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