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Environmental Law

Peru

Payet, Rey, Cauvi, Pérez Abogados

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PERU

LAW AND PRACTICE:

p.3

Contributed by Payet, Rey, Cauvi, Pérez Abogados

The 'Law & Practice' sections provide easily accessible information on navigating the legal system when conducting business in the jurisdiction. Leading lawyers explain local law and practice at key transactional stages and for crucial aspects of doing business.

Law and Practice

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Payet, Rey, Cauvi, Pérez Abogados has a team of specialists with extensive experience in resolving clients' environmental law and social issues, and assisting them in complying with socio-environmental requirements and regulations. The firm has also successfully advised and supported numerous clients in administrative disciplinary proceedings initiated by the competent authorities on environmental issues. In recent years, the practice has been characterised by its advice to financial institutions for the identification and evaluation of social and environmental

risks in financial and stock market operations, participating in some of the most important financing operations performed in Peru. The firm's practice is focused on the following lines: due diligence and environmental audits; project-specific socio-environmental advice, whatever the stage of development (design, construction, commercial operation or closing down); and advice on the implementation of voluntary international socio-economic standards and policies (eg, Equator Principles, IFC Performance Standards, World Bank Safeguards).

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1. Regulatory Framework

1.1 Key Policies, Principles and Laws Governing Environmental Protection

The main key policies, principles and laws that govern the protection of the environment in our jurisdiction are the Law Number 28611 – The General Law of Environment, Law Number 27446 - Law of the National System of Evaluation of Environmental Impact and its regulation approved by D.S. Number 019-2009-MINAM, Law Number 26821, Organic Law for the sustainable use of Natural Resources, Law Number 28245, Framework Law of the national environmental management system and its Regulations approved by D.S. Number 008-2005-PCM, Law Number 29325, Law of the National System of Evaluation and Environmental Control, Law Number 30754, Framework Law on Climate Change and the corresponding sector regulations.

1.2 Notable Developments, Regulatory Changes, Government/Regulatory Investigations

The most important change that has occurred in recent years is the lifting of the moratorium of the sanctioning faculty of the Agency for Environmental Assessment and Enforcement ("OEFA," for its Spanish acronym), the empowerment of the National Service of Environmental Certification ("SEN-

ACE," for its Spanish acronym) and the global environmental certification.

1.3 Developments in Environmental Policy and Law

The developments in environmental policy and law expected to take place in our jurisdiction are mainly the empowerment of entities, thanks to the creation of SENACE. Additionally, the development of the policy of adaptation and mitigation to climate change with the approval of the regulation of the Framework Law on Climate Change.

1.4 Environmental NGOs or Other Environmental Organisations/Groups

NGOs dedicated to environmental issues channel their new efforts and voluntary contributions to communicate the reality of environmental problems to the population in general, in order to attract assistance and promote awareness of the risks to which we are exposed as a society from not taking effective actions for the protection of the environment. In addition, they propose law projects related to environmental and social issues (eg, indigenous people, social conflicts, etc).

2. Enforcement

2.1 Key Regulatory Authorities and Bodies

The key regulatory authorities and bodies responsible for environmental policy are mainly the Ministry of the Environment, the SENACE, the OEFA and the Ministries in charge of the regulation of each sector.

2.2 Investigative and Access Powers

At the administrative level, the environmental regulators have the power to investigate alleged environmental infractions by supervising the title holders. This power can be exercised in the following ways:

- supervising the title holders in the compliance of the environmental laws and obligations stated in their Environmental Studies or permits;
- within the framework of environmental complaints that are presented by citizens before OEFA and other environmental institutions; and
- within the framework of the Environmental Evaluation and Inspection Plan (PLANEFA) of each regulatory entity.

On the other hand, the Environmental Prosecutor's Office is empowered to execute the investigations within the framework of a criminal proceeding, being essential for its action in co-ordination with the environmental administrative authority.

2.3 Approach to Enforcement

Although the competent authorities on environmental matters are independent, and therefore they carry out the corresponding investigations in accordance with the regulations established in their scope, it is important to note the co-operation between environmental and criminal entities, in case a criminal issue arises that is related to environmental issues.

In this sense, when the infringement is proven, it's the environmental authority that encourages the criminal investigation to be carried out by issuing a report before the pronouncement of the prosecutor of the preparatory investigation of the criminal process. On the other hand, there are no negotiated agreements.

3. Environmental Impact Assessment and Permits

3.1 Requirement for an Environmental Permit

In Peru, all economic activities require an environmental certification, whether it is approved either by a national or regional entity in virtue of their competencies given by law. In this regard, various environmental permits are regulated according to the activity, the characteristics of the place where these activities are carried out, and the significance

of the impact they cause to the environment, among other considerations. However, the main permits and/or regulated licences refer to preventive environmental management instruments, which are classified in:

- detailed Environmental Impact Studies ('EIA-d', for its Spanish acronym);
- semi-detailed Environmental Impact Study ('EIA-sd', for its Spanish acronym); and
- environmental impact statement, according to the impacts generated.

3.2 Requirement for an Environmental Impact Assessment

The Environmental Impact Assessment of a particular project involves a technical-administrative procedure that aims to identify, evaluate and describe the environmental impacts that will occur during its execution. The requirement to obtain an Environmental Impact Assessment will depend on the level of impact of certain projects, the result of which will mean that the competent environmental authority may accept, reject or request modification.

3.3 Obtaining Permits and Rights to Appeal

There are procedures to obtain each of the environmental permits, which are regulated in the single text of administrative procedures that each entity has. If the permits are denied to the holder of the activities, the decision can be appealed and it will be resolved by the hierarchical superior of the institution to which the appeal is filed. In case the hierarchical superior pronounces unfavourably, the holder of the activities may appeal that decision before the civil court.

3.4 Integrated Permitting Regimes

On 21 May 2015 the Peruvian Congress approved the Global Environmental Certification which is conducted by SENACE. The Global Environmental Certification integrates into a single administrative procedure, the evaluation and approval of the EIA-d, and up to 14 technical opinions and permits that are required according to the nature of the project.

3.5 Transferring Environmental Permits

The title holder of an environmental permit can be transferred to another holder. The rules and requirements to transfer a permit are established by each of the authorities. Exceptionally, there are certain permits that cannot be transferred due to the nature of the resource involved, such as water resources licences, permits and authorisations.

3.6 Time Limits and Onerous Conditions

Depending on the type of permit, there are some whose validity is indefinite, such as water licences, subject to the payment of an annual fee. However, usually the permits have a time limit such as the one of the environmental certifica-

tions that must be renewed every five years and under specific conditions.

3.7 Penalties/Sanctions for Breach

The environmental regulations classify the infringements depending on the effects generated to the environment and human health. The sanctions can be monetary, in which case they will be imposed in tax units (one tax unit equals to USD1,256). The maximum fine to be imposed for non-compliance with environmental legislation is 30,000 tax units (USD37,693,007). In addition, the authority can impose complementary measures such as the closure of activities, seizure of temporal or definitive suspension of activities.

4. Environmental Liability

4.1 Key Types of Liability

General regulations concerning administrative liability for damages to the environment establish an objective liability on the person or entity that by using an asset that is environmentally dangerous or risky, or by performing an activity that is considered environmentally risky or dangerous, has generated the environmental damage. These general liability provisions need to be applied together with the environmental regulations that are applicable to each specific sector.

For example, in the regulations of the hydrocarbons sector, the obligation to comply with environmental obligations and the liability for remediation and compensation for environmental damages resulting from the use of hydrocarbons falls on the so-called “titleholder of the activity”. This term is not defined in the hydrocarbons regulations but is normally associated with the person or entity who has the titles (eg, the environmental certifications, regulatory licenses, etc) to operate or carry out the environmentally risky or dangerous activity.

5. Environmental Incidents and Damage

5.1 Liability for Historic Environmental Incidents or Damage

The damages caused by environmental incidents have continuous effects. However, the statute of limitations under Peruvian Law is four years from the date of the infringement. Therefore, the holder of the activity could only be sanctioned by an administrative authority during the four years after the environmental infringement occurred. Once this period has passed, the authorities cannot sanction the owner of the activity due to environmental non-compliance.

5.2 Types of Liability for Environmental Incidents or Damage

General tort liability provisions in the Civil Code are also available for individuals or groups of people who claim that they have suffered damages directly in connection with an environmental incident. Here the rule is also that the person or entity that causes those damages by means of risky activity (eg, a hydrocarbon or mining) is objectively liable to compensate them. There is some degree of interpretation from the judiciary regarding who can be rendered civilly liable for environmental-related damages. For instance, in a well-known civil case related to a mercury spill, the judiciary considered that the mining company who hired the transport company that transported the spilled mercury (who was the entity entitled to operate the transport activity) was also liable because they considered that the transport company was subordinated to the mining company.

On the other hand, the general rule for administrative liability is that whoever operates the facilities or carries out the resource or activity will be responsible to the Government for payment of fines and remediation. From a civil liability standpoint, we are advised that the general rule is that whoever has caused someone damage due to the carrying out of a risky activity (eg, hydrocarbons activity) or use of a risky good will be liable to indemnify him.

5.3 Landmark/Significant Cases

OEFA, as the national environmental authority in charge of the supervision of hydrocarbon activities, sanctioned Petrop-eru, a state-owned petroleum company, with 12,283.90 tax units (equivalent to S/ 49'749,795) for spills of crude oil, an environmental accident occurring in the Nor Peruano Pipeline in the areas of Imaza (Amazonas) and Morona (Loreto) on 25 January and 2 February 2016, respectively. The sanction imposed by OEFA is the highest fine so far imposed in the environmental regulations.

This fact configured an environmental emergency due to the fact that it compromised a large amount of oil exposed to the environment, as a consequence of the breach of the commitment established in the Programme of Environmental Adaptation and Management (PAMA) referred to carry out the maintenance actions of the pipeline, generating two spills that caused real damage to the flora, fauna and human health.

6. Corporate Liability

6.1 Liability of a Corporate Entity

In principle, the regulations of each sector would apply. However, in the case of the financial system, the regulations of the National Superintendence of Bank and Insurance establishes the minimum requirements for the management of social and environmental risk, in order to promote the

implementation of good practices and prudent risk-taking in the companies of the financial system. The regulation of said resolution establishes that non-compliance with the provisions of these regulations will lead to the imposition of sanctions.

6.2 Shareholder or Parent Company Liability

In principle, a shareholder or a parent company cannot be responsible for environmental damage or infractions of environmental legislation because it does not extend to them.

7. Personal Liability

7.1 Liability of Directors or Other Officers

In recent years, criminal action for environmental issues has increased significantly. Today there are specialised prosecutor's offices in environmental matters within the justice system. It is possible that the directors and other officials are personally responsible for damage to the environment only in criminal matters. The criminal code established that the person that performs discharges, emissions of toxic gases, emissions of noise, leaks, dumping or pollution radiations in the atmosphere, the soil, the subsoil, the terrestrial waters etc, will be repressed with custodial sentence of not less than four years and no more than six years, with one hundred to six hundred days' fine.

7.2 Insuring Against Liability

As it is a matter of environmental responsibility in criminal matters, the criminal defendant can always resort to the appeal to defend against the charges imposed against him.

8. Lender Liability

8.1 Financial Institution/Lender Liability

Although it is not possible for banks to be susceptible to environmental responsibility, companies in the financial system have voluntarily adopted evaluation and management practices for social and environmental risks of the projects and the primary suppliers to whom they grant loans. In this sense, environmental impacts significantly affect the risk profile and the profitability of projects and ultimately affect the payment capacity of the companies that execute them.

8.2 Lender Protection

Lenders are protected so that in the first place they are required to comply with all current environmental regulations. If at the time they do not comply, what the bank will do is accelerate all the outstanding debts. In this way, the lender provides an outlet that protects him from any liability risk.

9. Civil Liability

9.1 Civil Claims for Compensation

The repair of environmental damage will be determined by judges based on the environmental impacts caused by the activities of the holder.

9.2 Exemplary or Punitive Damages

Punitive damages are not applicable in Peruvian legislation.

9.3 Class or Group Actions

It is possible to file class actions regarding alleged crimes against the environment.

9.4 Landmark Cases

One landmark case within this jurisdiction was a civil case related to a mercury spill. The judiciary considered that the mining company who hired the transport company that transported the spilled mercury (who was the entity entitled to operate the transport activity) was also liable because they considered that the transport company was subordinated to the mining company.

10. Contractual

10.1 Transferring or Apportioning Liability

In principle, the holder of the project will always be responsible in front of the State. However, internally, it is possible to repeat against contractors or third parties in case there are private agreements prior to the environmental incident.

10.2 Environmental Insurance

When an activity involves risk, such as extractive activities, it is optimal that they manage insurance against environmental damage prior to the start of their activities. For example, the regulation of the law of Integral Management of Solid Waste establishes the requirement of having an insurance policy for the import and transit of hazardous waste. For example, in private insurance, companies have made available the Environmental Civil Liability Insurance.

11. Contaminated Land

11.1 Key Laws Governing Contaminated Land

The key law governing contaminated land is the Supreme Decree Number 11-2017-MINAM, which establishes the Environmental Quality Standards ('ECA' for its Spanish acronym) for Soil. The ECA for soils are parameters of mandatory compliance for the design and application of environmental management instruments and are applicable for those parameters associated with productive, extractive and service activities.

11.2 Definition of Contaminated Land

According to the ECA regulation, a land is classified as contaminated when the ECA for soils are exceeded. We should note that the ECA constitute the indicators that measure the level of concentration of chemical parameters present in the soil in its condition of receiving body, which does not represent a significant risk to the health of people or the environment. However, if the ECA are exceeded, the title holder must remediate those lands.

11.3 Legal Requirements for Remediation

The regulatory authority may impose a legal requirement for remediation if the soil represents a risk to health and the environment. These criteria are pending publication by the government, since the regulations regarding contaminated soils changed in 2017.

11.4 Liability for Remediating Contaminated Land

The entity responsible for the remediation is the title holder of the activity. The exclusions, limits and conditions are pending publication by the government, since the regulations regarding contaminated soils changed in 2017.

11.5 Apportioning Liability

In principle, the title holder that generated the contaminated soil will be responsible before the government.

11.6 Ability to Seek Recourse from a Former Owner

Under an agreement on contractual issues a person liable for remediating contaminated land can seek recourse from the original polluter, former landowner or any other person.

11.7 Ability to Transfer Liability to a Purchaser

When a holder transfers a project, the new owner assumes all the damages generated in it, as long as they have not been reported.

12. Climate Change and Emissions Trading

12.1 Key Policies, Principles and Laws Relating to Climate Change

On 18 April 2018 the Peruvian congress approved the Climate Change Law, which established the competencies and obligations of each of the national, sectorial, regional and local authorities towards climate change. In addition, the Climate Change Law established that the Ministry of Environment will establish the guidelines to add the analysis of climate risk and vulnerability, as well as the mitigation and adaptation measures to climate change in the evaluation of investment projects subject to the National Environmental Impact Assessment System.

12.2 Targets to Reduce Greenhouse Gas Emissions

The Maximum Permissible Limits ('LMP' for its Spanish acronym) establishes the parameters that a holder of an activity should not exceed in order to reduce greenhouse gas emissions. The LMPs can vary according to the activity that will be performed.

12.3 Energy Efficiency

The Framework Law on Climate Change indicates that the State, in its three levels of government, articulates and participates in designing and implementing programmes, projects and activities aimed at reducing greenhouse gas emissions, the capture of carbon, and the increase of sinks, prioritising the protection, conservation and sustainable management of forests and reforestation; the control of the use and change of land use; sustainable transport; solid waste management; the control of gaseous and effluent emissions; the progressive change of consumption models and the energy matrix to renewable and clean energy; and energy efficiency in the various productive and extractive sectors, among others.

12.4 Emissions Trading Schemes

In Peruvian legislation, there is no form of emissions trading scheme.

13. Asbestos

13.1 Key Policies, Principles and Laws Relating to Asbestos

The asbestos regulations were established in Law Number 29662, a law that prohibits amphiboles asbestos and regulates the use of chrysotile asbestos in its regulations established by the Supreme Decree Number 28-2014-SA.

13.2 Responsibilities of the Landowner or Occupier

The asbestos regulations establish that the landowner or occupier that manages, exploits, manufactures, imports, prepares, distributes and sells any of the fiber varieties of the mineral silicates belonging to the groups of metamorphic rocks of the chrysotile or white asbestos streamers, without being authorised by the National Health Authority, may be sanctioned with a fine of up to 600 Tax Units (USD754,545).

13.3 Asbestos Litigation

The asbestos claims are common in labour law; the asbestos claims are not so common in environmental law.

13.4 Establishing a Claim for Damages

The physical harm or injury will have to be proven in a claim.

13.5 Significant Cases on Asbestos Liability

There are no significant cases on asbestos liability in our jurisdiction.

14. Waste

14.1 Key Laws and Regulatory Controls Governing Waste

The key laws and regulatory controls governing waste in our jurisdiction are the law Number 28611 - General Law of the Environment, the law Number 27446 - Law of the National System of Evaluation of the Environmental Impact and its regulation approved by D.S. Number 019-2009-MINAM, D.L. Number 1278 - Law of Integral Management of Solid Waste and its regulation approved by D.S. Number 014-2017-MINAM.

14.2 Retention of Liability After Disposal by a Third Party

The law regulates the principle of Extended Producer Responsibility ('REP'), which implies a strategy of environmental protection that aims to achieve a reduced environmental impact for each product by making the producer responsible for the entire life cycle of the product, especially in the stage of collection, recycling and final disposal of the product.

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

The law regulates manufacturers, importers, distributors and marketers who manufacture or use products or packaging with eco-efficiency criteria that minimises the generation of waste and facilitates its recovery, taking advantage of resources in a sustainable manner and minimising the impacts on the environment.

15. Environmental Disclosure and Information

15.1 Requirement to Self-Report Environmental Incidents or Damage

According to the Regulation of the Environmental Emergencies Report of the activities under the competence of the OEFA, the administrator must report within 24 hours of the occurrence of the environmental emergency in the format approved by OEFA and must present the final report within ten business days of the occurrence of said emergency, using the final report of environmental emergencies provided by this same regulation.

15.2 Public Access to Environmental Information

Through the law of transparency and access to public information, Law Number 27806, anyone can obtain information understood as public that is in the possession of the government. Citizens can request that information through the completion of a specific form that will be processed by the entity in seven business days from its presentation.

15.3 Disclose Environmental Information in Their Annual Reports

Companies are required to make annual environmental reports, monitoring reports to the respective public institution, which anyone can access by requesting access to public information to the respective public institution.

16. Transactions

16.1 Environmental Due Diligence on M&A, Finance and Property Transactions

Due to the recent enhancement in environmental regulations in Peru, it is not only reasonable but legally binding to evaluate the correspondent status of all environmental permits when conducting or closing any corporate operation. Moreover, it is now common for potential buyers and banking corporations to request a detailed report on environmental issues.

16.2 Environmental Liability for Historic Environmental Damage

In accordance with our environmental legal framework, the potential buyer or new owner of the selling company's environmental permits, acquired from the closing of the purchase, is legally responsible in front of any Peruvian authority. Since most environmental permits are transferable, the responsibility lies within the potential buyer to verify that the selling company isn't leaving any environmental liability.

16.3 Retention of Environmental Liability by Seller

Since our environmental framework does not regulate the permanent responsibility of a seller after the purchase is complete, it would be possible for both parties to regulate such an alternative by the subscription of an internal document (contract).

16.4 Environmental Due Diligence by a Purchaser of Shares/Assets

The environmental due diligence will be based on the review of the legal compliance of the environmental obligations of the owner of the activity, as well as the verification of compliance with obligations established in their respective Environmental Studies.

16.5 Requirement for Seller to Disclose Environmental Information to the Purchaser

It is vital that the potential buyer be granted the complete information regarding every environment issue, not only the confirmation of the approved permits but also of any contingencies regarding administrative sanctioning procedures or recent supervision from the correspondent authority. Under such circumstances, it is required for the seller to disclose all information to a potential purchaser.

16.6 Environmental Warranties, Indemnities or Similar Provisions

It is always possible for the purchaser to negotiate the provision of environmental warranties through a contractual document. Nevertheless, it is important to notice that every project, from a medium to large scale, requires to submit an environmental warranty to the correspondent sectorial authority to operate (excluding a closure of mines guarantee).

16.7 Insolvency Rules

There are no insolvency rules specifically concerning environmental matters.

17. Taxes

17.1 Green Taxes

There are no ecological taxes in general in Peru, and there is no tax aimed at environmental damage.

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The logo consists of the names 'Payet', 'Rey', 'Cauvi', and 'Pérez' stacked vertically in a bold, black, sans-serif font. The text is centered within a light beige rectangular background.