Environment 2018

Colombia

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Gómez-Pinzón (Bogotá)

LATIN LAWYER
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1 Are there any environmental rights or protections included in your Constitution? If so, please describe the provisions and their implications.

The Colombian Political Constitution of 1991 includes several principles aimed to protect the environment and specifically matters concerning biological diversity, ethnical communities and the right of all citizens to have a healthy environment. Indeed, the Colombian Constitution has been referred to as the "green constitution" or the "ecological Constitution" because of the importance that it gave to environmental rights. That is why, since it was enacted, a wide range of environmental regulations have been issued. The following is a summary of the most important articles of the Constitution that are related to environmental protection, environmental rights, sustainable development and the use of natural resources:

Article 8	It is the obligation of the State and of individuals to protect the cultural and natural assets of the nation.
Article 49	Public health and environmental sanitation are public services for which the State is responsible. All individuals shall have access to services of promotion, protection and health rehabilitation.
Article 58	Property is a social function that implies obligations. As such, an ecological function is inherent to it. The State will protect and promote associative and collective forms of property.
Article 63	Public assets, natural parks, communal lands of ethnic groups, archaeological heritage of the nation and other property determined by law, are inalienable, unattachable and unfeasible.
Article 67	Education shall form Colombian citizens on the respect for human rights, peace, democracy, the practice of work and recreation, for cultural, scientific, technological improvement and environmental protection.
Article 79	Every individual has the right to enjoy a healthy environment. The law will guarantee the community's participation in the decisions that may affect it. It is the duty of the state to protect the diversity and integrity of the environment, to conserve the areas of special ecological importance, and to foster education for the achievement of these ends
Article 80	The State will plan the management and use of natural resources in order to guarantee their sustainable development, conservation, restoration or replacement. Additionally, it will prevent and control environmental deterioration factors, impose legal penalties and demand the repair of any damage caused. Accordingly, it will cooperate with other nations in the protection of the ecosystems located in border areas.
Article 81	The manufacture, importation, possession, and use of chemical, biological, or nuclear weapons and the introduction into the national territory of nuclear and toxic wastes is prohibited. The State will regulate the entrance and exit of genetic resources to and from the country and the use of such resources, in accordance with the national interest.

Article 88	The law will regulate popular actions for the protection of collective rights and interests related to homeland, space, public safety and health, administrative morality, the environment, free economic competition, and other areas of similar nature defined in it. It will also regulate the actions stemming from any damage caused to a large number of individuals, without excluding the appropriate individual action. Likewise, it will define cases of responsibility of a civil nature for the damage caused to collective rights and interests.
Article 95 Paragraph 8	The following are duties of every citizen: (…) 8. To protect the country's cultural and natural resources and ensure the conservation of a healthy environment.
Article 226	The State will promote the internationalisation of political, economic, social and ecological relations on the basis of fairness, reciprocity and national interest.
Article 330	Indigenous territories will be governed by the councils formed and regulated according to the uses and customs of their communities and will exercise, among others, the following functions: (i) Oversee the application of legal regulations concerning the uses of the land and settlements in their territories; (ii) design the policies, plans and programmes of economic and social development within their territory, in accordance with the National Development Plan; and (iii) oversee the conservation of natural resources.
Article 332	The State is the owner of the subsoil and of non-renewable natural resources without prejudice to the rights acquired and fulfilled in accordance with prior laws
Article 333	The law will limit the scope of economic freedom when the social interest, the environment and the cultural patrimony of the nation demand it.
Article 366	The general well-being and improvement of the population's quality of life are social purposes of the State. A basic objective of the State's activity will be to address the unfulfilled needs related to public health, education, environment and drinking water.

2 What is the environmental statutory and regulatory framework? Are environmental requirements imposed by sector or on a general basis? Please identify the primary environmental statutes and regulations and the agencies with responsibility for environmental regulation and enforcement.

The Colombian legal environmental framework is made up of a wide range of national, regional and local provisions generally organised in accordance with the natural resources that may be impacted as a result of a project or activity. Accordingly, Colombian regulations state a restricted list of projects, works and activities in different sectors of the economy (ie, hydrocarbons exploration and production, mining activities, energy generation, infrastructure projects, among others) that require an environmental licence prior to the initiation of their activities. Moreover, a permit, authorisation or concession issued by the environmental authority is required prior to the use and exploitation of renewable natural resources.

The main regulations are the Political Constitution of 1991, Decree 2811 of 1974 (Natural Resources Code), Law 99 of 1993 (by means of which the National Environmental System was established), Decree 1076 of 2015 (Unique Regulatory Decree for the Environment and Sustainable Development Sector, which compiled all environmental decrees) and Law 1333 of 2009 (that regulates the environmental punitive proceeding). These requirements are imposed on a general basis, and in some cases, there can be special requirements depending on the sector.

Likewise, there are different environmental authorities with jurisdiction on different areas of the Colombian territory and on specific matters.

Under Colombian Law the environmental authorities are the following:

- The Ministry of Environment and Sustainable Development (MADS) is the national authority of environmental matters, in charge of determining the national environmental policies and issuing the national regulations, among other powers.
- The National Authority for Environmental Licences (ANLA) is responsible for granting environmental licences and permits for projects that have a great impact on natural resources and the landscape. Events where an environmental licence is needed and must be granted by the ANLA are specifically defined in the regulation (Decree 1076 of 2015).
- Regional Environmental Authorities are authorities within specific regions of the Colombian territory, and are in charge of enforcing national environmental regulations and policies and granting environmental licences, authorisations, permits and concessions for the use and exploitation of natural resources within their jurisdiction. They may also issue stricter environmental regulations.
- Local Environmental Authorities are urban environmental authorities with jurisdiction in cities with one million inhabitants or more. Like the Regional Environmental Authorities, they are in charge of enforcing the national environmental regulations and policies, and granting environmental licences and permits, authorisation and concessions for the use and exploitation of natural resources within their jurisdiction. They may issue stricter environmental regulations within their jurisdiction.

Please bear in mind that these four levels of authorities are not organised as a hierarchy. On the contrary, the regional and local levels are autonomous within their jurisdictions and are only obligated to comply with the policies and general regulations with a national scope issued by the MADS.

3 Please identify major environmental treaties and conventions that your jurisdiction has ratified or to which it is otherwise subject?

The major environmental treaties and conventions ratified by Colombia are the Convention on Biological Diversity, the Montreal Protocol on Substances that Deplete the Ozone Layer, the Convention on International Trade of Endangered Species of Wild Fauna and Flora, the Ramsar Convention, the Vienna Convention for the Protection of the Ozone Layer, the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal, the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade, the United Nations Framework Convention on Climate Change, the Cartagena Protocol on Biosafety to the Convention on Biological Diversity, the United Nations Convention to Combat Desertification and the International Convention for the Protection of New Varieties of Plants, among others.

ILO Convention 169 was ratified by Colombia and introduced into the internal legal system by means of Law 21 of 1991. The prior consultation is considered a fundamental right of ethnical communities in Colombia and it is necessary whenever an administrative or judicial decision or a determined project or activity has the potential to affect the territories where such communities have influence. This right has been widely developed in internal regulation (ie, Decree 1066 of 2015) as well as in the rulings of the Constitutional Court.

In 2017, Colombia approved the Paris Agreement in which the country pledged to reduce its greenhouse emissions in 20 per cent by 2030.

4 What is the environmental permitting process in your jurisdiction? Are separate permits required for air, water and waste? Are permits required as a condition to commencing construction of a facility? What is the average timeline for a facility to obtain environmental permits?

Under Colombian Law, the use of any natural resource or the performance of any activity or project that has the potential to affect the environment is subject to the control of environmental authorities. Consequently, the user of the natural resource must request environmental licences, concessions, permits and/or authorisations prior to the execution of such project, work or activity.

The environmental licence is the control mechanism applicable to projects and activities that have the potential to produce severe damage to the environment or the natural resources. This licence contains all the permits, authorisations and concessions necessary for the use of natural resources during the lifetime of the project, work or activity.

Only the projects, works and activities listed in articles 2.2.2.3.2.2 and 2.2.2.3.2.3 of Decree 1076 of 2015 are subject to environmental licence, among which there are oil and gas projects, mining projects, construction of railways and ports and energy projects. Depending on the type of project work or activity, the licence will be granted by the competent regional or local environmental authority (Corporación Autónoma Regional and Grandes Centros Urbanos) or by the ANLA, as established in Decree 1076 of 2015.

According to Decree 1076 of 2015, the process of obtaining an environmental licence will take up to 90 business days. However, from our experience this process may present delays and take several months.

For the projects, works or activities that have an impact on environmental resources but do not require an environmental licence, it is necessary to request permits, authorisations or concessions before the competent regional or local environmental authority for the use and exploitation of renewable natural resources. The main permits, authorisations and concessions are the following:

- air emissions permit;
- permit to discharge waste waters in natural water bodies, soil or in the sewage system;
- concession for the use of underground or superficial natural sources of water;
- authorisation as a generator of hazardous wastes;
- forest use permit;
- waterbed occupancy permit; and
- permit for hunting of wild fauna and fauna collection for investigation purposes;
- lifting of a restriction, prohibition or ban on a protected flora species;
- investigation permits, to capture and study species of the biological diversity; and
- subtraction of a forest reserve.

All permits, authorisations and concessions have to be requested separately and their granting may take an average period of 90 to 120 days. However, in practice the authorities usually take longer.

5 Please explain the role of a "social licence to operate" in your jurisdiction.

The concept of "social licence to operate" is not applicable under Colombia law.

6 Is there private ownership of oil, gas and minerals in your jurisdiction? If not, how are concessions granted and what environmental considerations apply?

In general terms, and as per the enactment of the Colombian Political Constitution in 1991, the State is the owner of the subsoil and of the non-renewable natural resources such as oil, gas and minerals (except certain hydrocarbon and mineral private rights granted prior to the enactment of the Constitution).

Regarding the concession of such resources, the following considerations apply:

Hydrocarbons (oil and gas)

The National Hydrocarbons Agency (ANH) is in charge of awarding areas for the exploration and production of hydrocarbons. Interested companies wishing to participate in any competitive bidding processes, must be registered within the Proponents Registry. As a general rule, the areas are awarded by a competitive bidding process and exceptionally, by direct award with the prior authorisation of the ANH's board of directors.

The awarding process is regulated by Agreement 002 of 2017 issued by the board of directors of the ANH.

The contractor to which the area is awarded has to enter into an exploration and production (E&P) agreement with the ANH and has to demonstrate an environmental capacity, that is, the set of knowledge, qualifications and proven experience

to develop projects of exploration and production of hydrocarbons with the due protection of the environment and natural resources and the compliance of the environmental licences, permits and environmental management plans approved by the competent authority, and in general, of the relevant provisions of the E&P agreement.

According to article 2.2.2.3.2.2.of Decree 1076 of 2015, the exploration and production of hydrocarbons require to obtain an environmental licence. This licence is known as a global environmental licence, which will include all the exploitation area.

Mining

The National Mining Agency (ANM) is responsible for awarding to private entities the right of exploring and exploiting minerals in Colombia by entering into concession agreements. As a general rule, such agreements are awarded following the principle "first in time, first in right", except if the mining areas have been defined by the government as "strategic areas", in which case the awarding is done through a competitive bidding process. The awarding process is regulated by the Mining Code (Law 685 of 2001)

It is worth noting that mining rights are granted for specific minerals within the concession area. However, if the title holder finds other minerals in the exploration phase, it may request the ANM to extend the object of the agreement in order to include them.

Regarding the environmental requirements, Colombian laws have made a distinction between the exploration and the exploitation phases. During the exploration phase, the contractor within the concession agreements does not require an environmental licence. To that extent, only the specific permits for the use of natural resources would be required in that phase, as well as the filling of an environmental and mining guide. Afterwards, for carrying out the construction and exploitation activities, the contractor must obtain an environmental licence.

7 What is the regulatory environment for renewable and alternative sources of energy and fuels?

Law 1715 of 2014 establishes the legal framework and mechanisms to promote non-conventional renewable energy generation sources in Colombia and regulates its integration to the national energy system. Under this law, non-conventional energy sources are divided in non-renewable sources (ie, nuclear and atomic energy) and renewable sources, also known as FNCER (ie, tidal energy, solar energy, biomass energy, geothermal energy, wind energy and small hydro generation projects). This law addresses tax incentives such as (i) income tax exemption for up to 50 per cent of the initial investment in non-conventional energy projects, (ii) accelerated depreciation of assets related to non-conventional projects, (iii) VAT exemption on assets and services related to the investment in non-conventional energy projects and (iv) importation duties exemption on raw materials and components for the development of non-conventional energy projects.

Non-connected areas (ZNI) also benefit from Law 1715 of 2014, as well as self-generators, which through non-conventional energy projects are now able to sell their energy generation surpluses to the system.

This law is still pending to be regulated and more widely developed by the Colombian government.

Moreover, Decree 1076 of 2015 includes the obligation to obtain an environmental licence for any energy generation project with an installed capacity of over 10MW, including those that operate with FNCER. The environmental licence for projects with an installed capacity between 10MW and 100MW will be granted by regional environmental authorities. If the installed capacity is greater than 100MW, the licence will have to be requested to and granted by the National Authority of Environmental Licences (ANLA).

As a general rule, generation projects with an installed capacity below 10MW do not require an environmental licence. However, for small hydro generation projects under 10MW an environmental licence will have to be obtained before a regional environmental authority, unless the project is located within a non-interconnected zone.

Pursuant to Resolutions 520 of 2007, 638 of 2007 and 143 of 2016 issued by the Mining and Energy Planning Unit (UPME), all FNCER generation projects must be registered before this entity, which will keep a record on such projects and its stage of development.

8 How are environmental laws and regulations enforced in your jurisdiction? Describe the approach to enforcement and the roles of the authorities responsible for enforcement.

In Colombia, environmental law is enforced by the Ministry of Environment and Sustainable Development, the ANLA and the regional and local environmental authorities. Law 1333 of 2009 rules the environmental administrative proceeding and defines the types of penalties that may be imposed by the environmental authorities owing to infractions to the environmental regulations, non-compliance with obligations set forth by the environmental authorities and damages caused to the environment. The different types of environmental penalties are the following:

- daily fines up to 5,000 minimum monthly wages, equivalent to 3,906 million pesos;
- temporary or definitive closing of the facilities;
- cancellation of licences, permits or authorisations;
- demolition of buildings; and
- community work.

The penalties are not mutually exclusive and can be jointly imposed by the environmental authority.

The criteria for imposing any of the penalties has been defined by the MADS based on the damage caused, the economic capacity of the offender, the recurrence of the breach of environmental obligations, the benefit obtained and the negligence or wilful misconduct in causing the damage or the breach of obligations, among other considerations.

In addition to the penalties, environmental authorities are allowed to impose injunctive relief measures to prevent ongoing contamination events or any situation considered to be threatening to the environment or natural resources These penalties are applied without prejudice to the prosecution of applicable civil (against the company) and criminal (against the legal representatives) actions. In this regard, the failures listed above may result in the filing of class actions (for violation of the collective right to enjoy a healthy environment) and by groups claiming for damages and affected by the same cause.

9 What types of administrative, civil and criminal penalties can be imposed for violations of environmental laws?

Administrative, civil and criminal liability may arise from the infraction of environmental regulation or for causing any environmental damage. The administrative liability and the penalties that can be imposed by the environmental authorities are the ones described in question 8.

Regarding the civil liability derived from environmental breaches, general principles of law are applicable, which implies that there may be contractual liability and tort liability. In the two cases, the liability must be assumed by the individual responsible for causing the environmental damage and may be obligated to indemnify the claimant within the civil proceeding.

Likewise, a criminal procedure may be initiated against any individual that commits one or more of the crimes described in articles 328 to 339B of the Colombian Criminal Code, which can be summarised as follows:

- illegal use of renewable natural resources;
- violation of national frontiers for the use of natural resources;
- illegal use and manipulation of genetically modified organisms and microorganisms;
- illegal manipulation of exotic species;
- damage on the natural resources;
- environmental contamination;
- environmental contamination caused by solid hazardous wastes;
- environmental contamination caused by the exploitation of hydrocarbons;
- illegal experimentation with species, biological material or biochemical material;
- illegal fishing;
- invasion of protected areas;
- illegal exploitation of mines;
- illegal hunting; and
- animal abuse.

If within the criminal procedure the defendant is found responsible for the charges it will be charged with the penalties described in the Criminal Code, including imprisonment and fines.

10 How and under what authority are air emissions regulated in your jurisdiction?

Under Colombian law, the emission of any substance to the air must be made within the permissible limits established in Decree 1076 of 2015 and Resolutions 909 of 2008, 910 of 2008, 619 of 1997 and 2254 of 2017 issued by the Ministry of Environment and Sustainable Development.

However, if the specific emissions of a generator are subject to any legal restriction (such is the case of emissions coming from industrial chimneys or incinerators, emissions of toxic substances, emissions of offensive odours, among others) it will be necessary to request an air emissions permit before the regional or local environmental authority with jurisdiction over the location where the emissions are being generated.

11 Who is liable for environmental contamination of soil, surface water and groundwater, and is the liability based on fault or on status? What reporting and notification obligations apply in the event of a spill or release or upon discovery of historical contamination?

Under Colombian law, it is presumed that any alleged offender of the environmental regulations acted with negligence or wilful misconduct. To that extent, the offender is the one that has the duty to rebut such presumption in order to avoid the imposition of a penalty by the environmental authority. For this purpose, the alleged offender will be entitled to use any available evidence and present it within the environmental punitive process.

The contamination of soil, surface water and groundwater is generally ruled by the "polluter pays" principle, which means that the individual or entity whose activities generated the damage on the environment will be liable for any contamination event . Notwithstanding, in the events of soil contamination the owner of the property is presumed as liable for the contamination event and can be subject to administrative penalties, including remediation activities, if the environmental authority has notice of the contamination. For that reason, it is recommendable for any purchaser to carry out a phase one study in order to determine the quality of the soil that he or she is about to acquire and to allocate the liability in case of pre acquisition existing contamination

General obligations of report and notify spills or releases are mandatory only for individuals or entities that hold an environmental licence or an environmental management plan. To that effect, article 2.2.2.3.9.3 of Decree 1076 of 2015 establishes that the holder of the environmental licence must report to the competent environmental authority any fire, spill, release, irregular discharge or any other environmental contingency that may have taken place in the operation of the project works or activities subject to the licence or management plan, within 24 hours of the occurrence of the contingency.

Likewise, according to article 2.2.1.1.18.7 properties' owners are obligated to inform the competent environmental authorities about any damage to natural resources derived from natural or third parties causes within their property or the neighbouring properties.

12 What is the law governing the remediation of contaminated property? What standards are applied to determine clean up levels?

In Colombia there is currently a lack of a specific regulation for the methods and parameters to achieve the remediation of contaminated property. According to article 2.2.6.1.1.3 of Decree 1706 of 2015, the purpose of the remediation is to reduce or eliminate the contaminants up to a level that is secure for the health and the environment and to prevent its spreading into the environment. Moreover, article 2.2.6.1.3.9 states that the person responsible for the contamination of a property due to the incorrect management of hazardous waste will be forced to diagnose, remediate and repair the damage caused to the health and environment.

The clean-up levels are determined on a case-by-case basis by the environmental authority with jurisdiction over the place where the contaminated soil is located. Usually, references from countries like the United States (EPA) are taken into consideration. Accordingly, in Colombia there is a risk-based approach, since the levels and concentration that need to be achieved with the remediation will be based on the specific risks that the

contamination puts on health and the environment, depending on the land use.

13 What is the nature of liability for damage to natural resources and who can enforce and recover for such damages?

From an administrative standpoint, liability for damages to the environment is generally and initially enforced by the environmental authority with jurisdiction over the location where the damage took place.

Additionally, as mentioned before, the administrative liability does not exclude (i) civil liability (that may be contractual or tort liability) derived from legal actions or claims related with the compensation for damages and profits lost and; (ii) criminal liability for having committed an environmental crime under the Colombian Criminal Code ;and (iii) constitutional liability derived from the breach of collective rights such as the right to healthy environment.

14 How are environmental issues typically addressed in property transfers or mergers and acquisitions? Are there any specific laws that govern environmental aspects of such transactions?

Colombia does not have a specific set of regulations on environmental matters related to these transactions. However, the only laws applicable to transactions of property transfer or mergers and acquisitions are those related to the assignment of environmental licences, permits, authorisations and concessions. Accordingly, when the transaction involves the transfer of assets, all the environmental licences, permits, concessions and authorisations need to be assigned to the new owner. This assignment will require a previous authorisation by the competent environmental authority, either the ANLA or the regional and local environmental authorities. In these events, the new holder of such permits and licences will be responsible and liable for their compliance. Typically, indemnity clauses are usually included in these agreements to ensure that any liability from events prior to the transfer of property or merger or acquisition will not be assumed by the buyer.

On the other hand, regarding stock transactions, liabilities remain at the company level and the company will continue in charge of the activities and being the holder of the environmental permits, licences and authorisations.

15 What environmental laws apply to the shut down or sale of a facility?

Under Colombian law, if a facility to be shut down or sold requires an environmental licence, the environmental management plan included in said licence contemplates a plan for the closing and abandonment of the facility. This plan includes the final use of soil as well as the main management, restoration and morphological reconfiguration measures needed to recover as much as possible the land and natural resources in the area where the facility is located. Moreover, when a project, work or activity is required to shut down, the holder of the environmental licence will present to the environmental authority at least three months in advance a study including the existing environmental impacts, the plan for the closing and abandonment of the facility, the obligations imposed by the environmental authority and evidence of their compliance, as well as the implementation costs of the plan.

Regarding the sale of the facility, if this facility is subject to an environmental licence or permits, the seller will transfer them prior written authorisation of the environmental authority. After the assignment is completed, the buyer of the facility will be the holder of the environmental licence and permits and accountable for the compliance of the corresponding obligations.

Another special consideration has to be made regarding hazardous wastes. Pursuant to Decree 1076 of 2015, if hazardous wastes are stored in the facility, the owner or generator of the hazardous waste has to assume all the preventive measures prior to the shutdown of the facility in order to avoid any pollution episode.

Additionally, this Decree states that the generator of hazardous waste will be liable for any contamination generated by its waste and will have the obligation to remediate the impacts caused to natural resources.

16 Does your jurisdiction regulate or provide incentives to conduct environmental audits or assessments? If so, please describe.

Colombian regulations do not provide incentives to conduct environmental audits or assessments. However, in some events those audits and assessments are mandatory, in order to ensure the compliance of the environmental regulations imposing maximum limits on water discharges or air emissions, especially when an environmental permit, authorisation, concession or licence is required for the use and exploitation of renewable natural resources. Accordingly, the environmental authority will include in the administrative act granting the environmental permit, authorisation, concession or licence, the type of environmental audit or assessment required and its frequency.

Moreover, in some specific projects where an environmental licence is needed prior to the execution of a project, work or activity, an environmental impact study will be needed. This point will be developed in detail in the following questions.

17 Are there any requirements for the conduct of environmental assessments or environmental impact assessments, such as a condition to obtaining a permit or in connection with a transfer of real property? If so, describe.

In Colombia, conducting environmental assessments in connection with the transfer of real property is not an obligation. Notwithstanding, undertaking environmental studies prior to the transfer of real property has become more common, especially in plots where, due to the activities performed, there is a chance of finding contaminated soils or water. These studies or assessments are used to determine liability in the remediation of the property.

Moreover, Colombian regulations define a list of projects, works or activities that due to their impact to the environment or their capacity to impact the landscape require an environmental licence. In order to obtain the environmental licence, the person interested in the projects, works or activities must conduct an environmental impact study. This is considered as the basic instrument to evaluate the projects that require an environmental licence considering it includes all the information on the project, evaluation of impacts as well as the environmental management plan that will identity all the impacts of the process and the measures needed to mitigate them.

Additionally, to obtain some permits such as the water

discharge permit, the interested party is required to file an environmental evaluation of the discharges and a plan to manage risks related to the discharges, including an analysis of the possible impacts of the project generating the discharges. Moreover, to obtain an air emissions permit, the interested party will also need to file a technical study evaluating the air emissions and combustion processes.

18 What is the process and timetable for conducting and receiving approval of environmental impact assessments?

For projects that require an environmental licence, Decree 1076 of 2015 determines the timetable for receiving approval of the licence and as a consequence of the environmental impact study.

As a first step, the interested party must request the competent environmental authority a concept on whether an environmental alternatives diagnosis is needed for certain projects. If the environmental alternatives diagnosis in not required or it is approved by the environmental authority, this authority will issue the environmental terms of reference for conducting an environmental impact study. There are no terms to conduct the environmental impact study since the person interested in obtaining the environmental licence is entirely responsible for the performance of the environmental impact study. Once the impact study is submitted, the environmental authority will issue an administrative act indicating the initiation of the evaluation procedure. After this administrative act, the authority will decide if it needs additional information from other environmental authorities or the interested party or to perform a visit to the project area. The interested party will have a month to file the additional information, and the other environmental authorities will have up to 20 business days to present their technical concepts. Once all the information is gathered, the environmental authority will approve or reject the environmental licence.

It is important to point out that even though the estimated time that the environmental authority has to approve or reject the environmental licence is six months, in practice this process usually takes longer.

19 How are water rights allocated and transferred?

Water is a public asset, owned by the State (except in the events where the water sources is born and dies in the same property). Its use and exploitation requires a permit, authorisation or concession by the competent environmental authority.

In the event where water is not provided by an aqueduct, the competent environmental authority will grant a water concession upon request by the interested party. Pursuant to article 2.2.3.2.7.1 of Decree 1076 of 2015, every individual or company requires a water concession to obtain the right to use underground or superficial water. Upon request by the interested party, the environmental authority will assess the availability of water and determine the amount that can be granted and will issue an administrative act stating the conditions under which the water concession is granted (volume, use and term). The water concession only grants the right to use the water, but not to sell it or otherwise dispose of it. Moreover, the use of water includes the following obligations (i) compliance of the obligations set forth in the water concession; (ii) compliance with the volume authorised in the concessions; and (iii) payment of use of water fees.

Water concessions can be assigned provided the holder obtains a prior written authorisation to do so by the environmental authority. In the event where the facility or land where the water concession is located is sold, the new owner has to request the assignment of the concession within the 60 days following the transaction.

20 What regulatory requirements apply to the discharge of industrial waste water in your jurisdiction?

Pursuant to article 2.2.3.3.5.1 of Decree 1076 of 2015, every individual or company generating waste water discharges to superficial or marine waters or to the soil should request and obtain a water discharge permit prior to the initiation of the activity generating discharges. This permit will be granted by the environmental authority by means of an administrative act that will include the term of the permit as well as the conditions and requirements of the discharge. At their discretion, some environmental authorities may also request a permit for the discharge of industrial waste waters to the sewage systems.

Additionally, Resolution MADS 631 of 2015 defines the maximum levels for waste water discharges into superficial water and sewage systems. These values will vary depending on the type of industry generating the waste water. Moreover, the environmental authority, based on the principle of subsidiary rigour, can impose more restrictive values.

The discharge of industrial waste water requires the compliance of several obligations including treatment of waste water by means of a system that guarantees the compliance with the maximum levels set in the environmental regulations; periodic monitoring of quality parameters; and payment of fees.

Additionally, on 2018 the MADS issued new regulation regarding discharges into the soil, as well as additional requirements to obtain the water discharge permit.

21 Are there any laws or regulations in your jurisdiction addressing climate change in your jurisdiction, such as regulation of greenhouse gas emissions? If so, describe the regulatory regime.

Colombia signed the United Nations Framework Convention on Climate Change and the Kyoto Protocol and ratified them by means of Law 164 and 1994 and Law 629 of 2000 respectively. The country also signed the Paris Agreement, which was approved by means of Law 1844 of 2017. Additionally, the Ministry of environment is working on a Climate Change Bill in order to regulate the actions and requirements necessary to achieve Colombia's goal to reduce its greenhouse gas emissions by 20 per cent by 2030.

Moreover, Colombia has developed a National System for Climate Change regulated by Decree 298 of 2016, which is defined as the set of governmental entities, NGOs, public policies, regulations, procedures, resources, plans, strategies, instruments, mechanisms and information that contribute to the mitigation of climate change and the reduction of greenhouse gases. Within the National System for Climate Change, the following internal policies have been developed by the government in order to reach its goal of reducing the 20 per cent of its CO2 emissions by 2030:

(i) The National Strategy for Reducing Emissions from Deforestation and Forest Degradation ENREDD+: This document is currently being prepared by the national government. Its goal is to establish the social, economic

and environmental aspects related with forests and climate change, as well as the activities and resources needed in order to reduce emissions derived from deforestation and forest degradation processes.

(ii) The National Plan for Adaptation to Climate Change. This plan evaluates Colombia's ability to endure extreme weather events, as well as the gradual transformation of the climate. This plan provides guidance for the formulation of priority programs and projects in order to reduce the negative consequences in the long term for communities, industrials and ecosystems.

(iii) The Colombian Low Carbon Development Strategy, promotes the use of international financial incentives to encourage low-carbon economic growth. This strategy comprises three key components:

- Identification and assessment of alternatives and opportunities in low-carbon development;
- Design and implementation of plans, policies and other measures oriented to low-carbon development; and
- Design and construction of MRV (monitoring, reporting and verification) systems.

(iv) The Sectoral Mitigation Plans for Climate Change are a set of actions, programmes and policies oriented to reduce carbon emissions within each of the industrial sectors. The main goal of these plans is to identify priorities by sectors and the means by which mitigation activities will be implemented. The mining, oil, electricity and transport sectors already have an approved Sectoral Mitigation plan. Currently, the government is working in the preparation of plans for the wastes, agriculture and housing sectors.

Additionally, Decree 1076 of 2015 also includes the need to control greenhouse gas emissions and emissions in general. In order to avoid air pollution and the control of greenhouse gas emissions, this Decree defines the maximum levels of pollutants allowed. Therefore, every industry that generates air emissions needs to perform periodic studies in order to verify compliance with the environmental regulation on this matter.

Moreover, by means of Law 1819 of 2016 (Tax Reform), the government included the National Carbon Tax (NCT). This tax is triggered upon the sale within Colombian territory or import of fossil fuels, including products derived from oil and every fossil gas used for combustion purposes. This tax is not applicable for exportation. The applicable rates vary depending on the CO2 emissions of each fuel for a particular volume or weight. This tax is part of the strategy to promote the reduction of CO2 emissions.

22 Are there any chemicals or products that are subject to special environmental requirements in your jurisdiction, such as asbestos or PCBs?

Colombia has established different requirements for special chemicals and products. For instance, the production and import of some pesticides and substances, materials or products subjected to controls by treaties, conventions and protocols require obtaining an environmental licence (ie, substances subjected to control under the Vienna Convention or Montreal Protocol).

Moreover, other chemicals like fuel, cement, methanol and others described in Resolution 0001 of 2015 issued by the National Council of Narcotics, are subjected to control as substances that are often used on the production of narcotics. Therefore, once certain amounts are reached, the storage, purchase, consumption, distribution, importation and production of those substances will require an authorisation from this public entity.

Furthermore, the production, transformation, process, transportation and/or storage of hazardous substances require a contingency plan approved by the environmental authority.

As a signatory of the Stockholm Convention on Persistent Organic Pollutants, in 2005 Colombia set up a strategy to make an inventory of PCBs in the country. In order to control and prevent the pollution caused by equipment and waste polluted with PCBs, by means of Resolution 222 of 2011 and Resolution 1741 of 2016, the Ministry of Environment determined the need for a census on the products containing PCBs, and established the obligation for their producers, owners or possessors to perform proper risk management.

The control of asbestos as a product is regulated from a labour safety perspective to ensure workers are not exposed for long periods of time to dust with asbestos. From an environmental perspective, the regulation only addresses the management of waste from asbestos, which is considered a hazardous waste and is therefore subject to a special treatment. Currently, there is a project in Congress in order to ban the use of Asbestos. This is the eighth time the Congress has tried to ban the use of this substance.

Additionally, in 2018 all mining activities are forced to eliminate the use of mercury in their activities.

23 What legal protections are afforded to patrimony or cultural heritage and environmentally sensitive areas?

Colombia has established a national system of protected areas, aiming to protect and preserve areas with special environmental value. Within these protected areas there are national and regional natural parks, including flora and fauna sanctuaries, integrated management districts and districts of soil conservation. The declaration of a protected area implies that only activities that do not represent major alterations to the natural environment are allowed within it. Therefore, activities that cause damages to the natural resources or threaten the functions of preservation, research, education, recreation, cultural, recovery and control of these protected areas are forbidden. Moreover, the development of activities within these areas is subject to an authorisation from the environmental authority that will analyse the allowed uses stipulated in the management plan of the protected area.

Additionally, Colombia has defined some areas as forest reserves for the protection of soil, water and wildlife. The development of activities in these areas is restricted and therefore prior to undertaking any activity, the interested party must request and obtain the subtraction of the area.

Moreover, Colombian regulation also gives special protection to wetlands as demanded by the Ramsar Convention, ratified by Colombia and approved by Law 357 of 1997. Currently Colombia has six places considered as Ramsar sites and provides special protection to these places and limits the activities within.

As to wildlife protection, Colombian regulation (Decree 1076 de 2015) also provides special protection to wildlife such as mangroves and protected fauna species under the Cites Convention.

Cultural heritage is also protected by the Colombian constitution. In fact, article 73 of the Constitution states that the

cultural patrimony, including the archaeological patrimony and cultural assets are owned by the state and are inalienable, unattachable and unfeasible.

24 What constraints are there on availability of landfills for disposal of waste?

According to Decree 1076 of 2015, the construction and operation of landfill for disposal of waste requires obtaining an environmental licence prior to the construction of the site. In the process to grant the environmental licence, the interested party in the landfill will have to file an environmental impact study and the environmental authority will analyse and evaluate the impacts of the project, including the location of the landfill. The environmental licence will include all the permits needed for the operation of the landfill, as well as all the obligations and mitigation and prevention measures that need to be applied to avoid any damage to the environment during the construction, operation and post-operation stages of the project.

In addition, every municipality in Colombia has land use codes which determine the allowed uses for every area of its territory. Accordingly, a landfill must be located in an area authorised for that specific use according to the land use code and after obtaining a construction permit from the competent authority. Decree 1077 of 2015 defines the criteria and methodology as to the areas where landfills can be located taking into consideration among others, the following elements (i) capacity of the landfill; (ii) present use of the area where the landfill would be located; (iii) accessibility; (iv) soil conditions and topography; (v) distance from the urban perimeter.

25 What regulations or government initiatives are there in your jurisdiction relating to extended producer responsibility or to sustainability?

The Code of Natural Resources, Decree 2811 of 1974 states in article 38 that the environmental authority can impose to producers the obligation to collect, treat and dispose their product considering their volume and quality. Accordingly, the Ministry of Environment, based on extended producer responsibility, has established an obligation for producers of used tyres, expired medicine, computers and printers, used batteries, fluorescent lamps, containers of domestic pesticides and waste from electric and electronic equipment, to create post-consumption programmes, in order to collect, manage and dispose of these products. The producers, importers, exporters, distributors, merchants, consumers and final users of the above-mentioned products have special obligations under these post-consumption programmes. Particularly, producers must comply a yearly goal of collection and management of the above-mentioned products, which will increase on a yearly basis. In practice, producers have had issues complying with those goals, as they are significant.

The government expects to expand the list of products with an extended producer responsibility programme in order to include plastic containers.

26 Describe the laws in your jurisdiction regarding public access to information filed with environmental agencies and any protection from its disclosure to third parties. What right does the public have to access documents and reports filed with regulatory authorities? Describe the nature of and process for securing any protections for confidential business information or trade secrets.

According to Law 1712 of 2014, partially regulated by Decree 103 of 2015, all information held by a public entity is considered public. Therefore, the information filed before environmental authorities is deemed public information, and as such it can be accessed by the public.

However, this law also includes exceptions to this right. For instance, a public entity can refrain itself from giving access to information, if this access presents a threat to the rights of intimacy, life, health and integrity. Additionally, there is some public information that can be considered as reserved if there is a legal disposition that states so, for national and public security reasons, international relations and due process, among others.

Provided that only the information held by public authorities is considered public, companies would not be forced to provide access to their confidential business information or trade secrets.

27 What are the rights of the public or NGOs/environmental groups to participate in environmental permitting or enforcement of environmental laws? Is such participation typical?

Pursuant to articles 69 and 70 of Law 99 of 1993, any person or company, can intervene in the administrative procedure for the authorisation, modification or cancellation of permits and licences for activities that can affect the environment, or in the administrative punitive procedures for the non-compliance with the environmental regulation.

Moreover, Colombian regulations include other mechanisms to insure the environmental protection such as the environmental administrative procedure where any person can file a complaint before the environmental authority, which will verify the possible infraction and impose the corresponding penalties. Also, there are group and class actions to protect the environment and prevent the damage of natural resources.

Other participation mechanisms include the public audience that can be requested up until the administrative act granting the permit or licence. In this public audience the public will get information on the project in question, and will be able to participate so that their opinions will be taken into consideration by the environmental authority. This participation is frequent as citizen and entities are becoming more aware of the importance of protecting the environment.

28 What are the most significant current trends or issues in environmental policy, regulation and enforcement in your jurisdiction?

2018 is a year of presidential and Congress elections, which means that the environmental agenda is not the focus at the moment. However, the government will continue on the task to delimitate and declare moorlands and protected areas. So far, the Ministry of Environment has delimited 30 of 36 moorland areas, and is expected to delimit the other six before August.

Another trend is the fight against the use of mercury. As of June 2018 no mercury will be allowed on mining activities, which represents a significant but insufficient step in controlling the use of mercury, specially considering there are not enough measures to control illegal mining.

Over the past year, the Ministry of Environment and Sustainable Development has been issuing regulation imposing stricter levels or conditions on different aspects. For instance, by means of Resolution 1669 of 2017, the Ministry adopted the technical criteria for the use of economic tools in projects, works and activities requiring an environmental license to create the cost-benefits analysis of the Environmental Alternatives Diagnosis and the economic evaluation of positive and negative impacts of the Environmental Impact Study. These criteria will be mandatory for Environmental Alternatives Diagnosis and Environmental Impact Studies filed after 24 February 2018. Additionally, Resolution 2254 dated 1 November 2017, set the standards of air quality or immission levels setting stricter maximum air quality levels enforceable as off 1 January 2018. Moreover, from 1 January 2030, the allowed maximum levels will be even more restrictive.

Moreover, the Ministry of Environment is conducting a study to modify the process to grant environmental licenses. Within the proposals of modification, the Ministry is studying the possibility to establish differentiated procedures to grant the licences depending on the type of projects and their relevance. Additionally, the obligation for the companies to have an environmental insurance policy is also under discussion.

29 Identify and describe the significance of any noteworthy court litigation or other disputes or controversies in your jurisdiction regarding the environment.

Over the past years, the Colombian High Courts (Corte Constitucional and Consejo de Estado) have taken important decision aiming to protect two of the most important rivers in the country: the Bogota River and the Atrato River.

In the Bogota River ruling, the Consejo de Estado considered several State entities to be liable by their omission to act against the pollution of the river and ordered them to adopt measures in order to clean and remediate the river. Those measures are still under execution.

Regarding the Atrato River, the Colombian Constitutional Court recognised the Atrato River as a legal entity entitled to protection, conservation, maintenance and restoration rights. Consequently, the Court ordered the Colombian Government to act as the legal representative of the river in concert with the ethnic communities living in its watershed. This ruling is ground-breaking as it takes an ecocentric approach to environmental protection.

30 What important features of your jurisdiction's environmental laws are not covered by the previous questions?

Compensation measures for the impacts on natural resources and losses on biodiversity have become increasingly important in Colombia. In 2012, the MADS issued a guideline for the allocation of compensations for biodiversity losses, however this guideline was limited to projects requiring environmental licences and was focused on land biodiversity. Considering the increase in projects conducted off shore, and that other activities, such as logging activities, water use or forest subtraction, also require compensation; the MADS issued Resolution 253 dated 22 February 2018 to update the compensation guidelines to include other sources of compensation (including compensation of maritime and acquirer biodiversity).

In the meantime, the Ministry has also established different mechanisms for implementing and complying with the compensation obligations, including mechanisms known as "payments for environmental services" such as Habitat Banks and Peace Forests. With these two options, those with the obligation to compensate can invest in areas declared as Habitat Banks and Peace Forests, so that the communities or companies in charge of the projects can conduct compensation, preservation and restoration activities. These options guarantee the correct management of natural resources and ensure that the compensation goals are achieved.

Lina Uribe

Gómez-Pinzón (Bogotá)

Lina is a partner at the firm, where she directs the environmental practice. She is also a member of the corporate/M&A unit and focuses her practice on M&A, private equity, joint ventures and corporate matters.

In her 20 years of experience she has participated in several of the major M&A transactions of the firm including the merger of Bavaria and SABMiller, the sale of Carulla Vivero to Almacenes Éxito, the sale of Chrysler Colombia and the AviancaTaca alliance; she also was a key part of the team that advised this company in its landmark IPO. Lina also has broad experience in corporate transnational reorganisations acquired in her M&A and corporate practice throughout the years.

She also represents clients in matters involving environmental laws, regulations and policies as they relate to transactions, litigation and compliance. Specifically, she has broad experience in regulatory environmental matters, administrative and judicial environmental proceedings, including administrative punitive proceedings and collective actions, the management and disposal of hazardous waste and remediation actions for contaminated sites and the negotiation of contract provisions defining and allocating environmental risks and assets in multiple domestic and cross-border mergers and acquisitions, financings and real estate developments.

Within the most representative environmental clients are the following: GM Colmotores, AjeColombia, Stanton, ABB Ltda, Gases industrials de Colombia, Termobarranquilla, Clorox, Yanbal, Colombia Natural Resources, Colombia Energy Development Co.

Lina is a lawyer from Universidad Javeriana, received a Diploma from Universidad del Rosario in environmental law and has an LLM in environmental law and energy from Tulane University.

Lina Correa Posada

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Lina Correa Posada's practice focuses on the environmental sector, especially on the legal advice on environmental matters to companies in different sectors. She has broad experience in providing legal advice in environmental affairs to ensure adequate compliance with the environmental legal regulation, and advice regarding environment-related projects and activities carried out by the clients. Moreover, she was worked on numerous environmental due diligence reviews, legal advice when obtaining environmental licences, permits, authorisations and registrations required to carry out certain activities, as well as the preparation of legal concepts and opinions regarding environmental regulatory affairs. In addition, she has provided the support needed for challenging administrative resolutions from environmental authorities, and also legal environmental actions such as collective actions and group actions. Lina qualified as an attorney from the Universidad de los Andes, with a postgraduate degree in Environmental law from the Universidad del Rosario and a master's in international cooperation and development from the the Catholic University of Sacro Cuore.

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