**Information on Safe and Insurance/ Liability South America and particularly Argentina**

1. **Safety measures/insurance/liability systems applied in South America (insurance, bank guarantees, voluntary/mandatory insurance etc.).**

The following are the various regimes for environmental damage, liability for environmental damage and environmental insurance in some countries of South America.

* **Argentina**

The positive law of the country, starting from the top of the legal pyramid (the Constitution) provides the primary duty to repair any damage to the environment, "as provided by law" (Article 41, Constitution). The General Environmental Law (Ley General del Ambeinte-LGA) 25.675 defines "environmental damage" to any relevant alteration that adversely modifies the environment, resources, balance of ecosystems goods or collective values ​​(Article 27). The compensation -to be determined by the ordinary courts, towards the Environmental Compensation Fund which provides law- is only authorized for the case that environmental recomposition is not technically feasible (Article 28 LGA).

The responsibility for environmental damage is objective. Consistent with the constitutional duty to repair any damage to the collective environment, LGA provides that whoever shall cause the damage has to restore the environment to its previous state before the damage (Article 28). It provides as a defence accreditation that despite all measures to avoid the damage have been adopted and without concurrent fault of the responsible, the damage was the sole fault of the victim or a third party who does not respond (Article 29).
Environmental Insurance is mandatory regulated in Argentina. The Resolution of the Secretariat of Environment and Sustainable Development of the Nation (Secretaría de Ambiente y Desarrollo Sustentable-SADS) 177/2007 (amended by Resolutions 303/2007, 1639/2007 and 481/2011) operate the rules for hiring Mandatory Environmental Insurance (Seguro Ambiental Obligatorio-SAO), the items included categorization of industries and service activities by Environmental Complexity Level (Nivel de Complejidad Ambiental-NCA). Joint Resolution SESD 178/2007 with the Secretariat of Finance established the Environmental Advisory Commission Financial Guarantees; Resolution SADS 1973/2007, together with the Finance Secretariat, regulates the basic guidelines for the contractual conditions of the insurance policies of collective incidence of environmental damage; Resolution SADS 1398/2008, establishes the "Minimum and Enough Amount of Insurance (Monto Mínimo de Entidad Suficiente-MMES)", and the Resolution of the Superintendent of Insurance of the Nation (Superintendencia de Seguros de la Nación-SSN) 35168/2010 determines that the approval of environmental insurance policies are subject to the approval of the Environmental Accordance of the SADS.

The insurance that is sold in the market is the surety insurance for environmental damage and of collective incidence for ensuring remedial action to restore the environment, thus transferring the risk of the State (beneficiary of the insurance, representing the community, owner of the collective environment covered by the SAO) and internalizing the costs of damaging the environment in true responsible head.
Currently, there are 6 companies that market surety insurance authorized by the SADS and the SSN through obtaining first Environmental Accordance. All regulated companies are enrolled to the Argentina Chamber of Insurance Environmental Risk (CAARA) which is a non-profit Legal Person that brings together companies, entrepreneurs, and brokers insurance companies related to SAO, for the purpose of defending the interests of the sector, to represent the public and private sectors in any act necessary; prioritize activity by promoting a comprehensive legal case law that covers; advise relevant agencies for the development of performance standards , and promote complementarity and integration with agencies and entities, public or private, linked to environmental conservation.

* **Brazil**

Its Constitution does not expressly define the environmental damage. However, it states that it is for the public to control the production, marketing and use of techniques, methods and substances that pose risks to the quality of life and the environment (Article 225, paragraph 5). Behaviours and activities harmful to the environment hold violators to criminal and administrative penalties, regardless of the obligation to repair the damage (Article 225, § 3). Thus, Brazil was ahead imposing in 1988, constitutionally, the obligation to remediate the environmental damage (which is reiterated in the 6.938 Act, National Environmental Policy, Articles 4 and 14).

As responsibility for environmental damage, the Constitution provides, in addition to the general duty of all behaviours that harm the environment to repair it, those who exploit mineral resources are required to restore the degraded environment (Article 225, § 2). In turn, the 6.938 Act provides that, regardless of fault, the polluter must repair or pay damages to the environment and third parties caused by their activities (Article 14, paragraph 1); that is, an objective responsibility established.

The Federal Law 6.938, Article 9, paragraph XIII (as amended by Law 11.289) states that environmental insurance is one of the economic instruments of the National Environmental Policy. However, Brazil still not requires compulsory insurance.

In response to a growing demand from companies that have sought to reassure its assets against the risk of damage to the environment, the Brazilian insurance market has begun to offer -even mildly- specific insurance to cover environmental damage. Currently, the mode offered limited environmental insurance to cover damage to or accidental sudden which is less onerous for insurers. As an example one can cite the case of the Brazilian Reinsurance Institute (Instituto de Reaseguros de Brasil-IRB), which has created a specific policy for the case of environmental damage from pollution. However, from the start that policy has only offered coverage against damage to 'micro-assets" environmental damage that because "rebound" is generated on persons or property as a result of damage to the "macro-assets" environment. The truth is that, in the case of the policy offered by the IRB, the environment would be considered a collective asset outside coverage.

* **Chile**

Environmental damage at the legislative level is defined in Law No. 19.300 on the General Bases of the Environment - LBGMA, Article 2, as "any loss, diminution, impairment or significant impairment inflicted to the environment or one or more of its components". The same article defines as reparation of the environment as " the action of replenish the environment or one or more components to a quality similar to the one they had before the damage or, if this is not possible, restore their basic properties".
The above Law 19.300, Article 3 provides that whoever negligent or intentionally cause harm to the environment is obliged to repair materially, at their expense, if this is possible (an obligation to act is established, restitution in kind) and compensation in accordance with law. In accordance, in the Title III (liability for environmental damage) provides that whoever wilfully negligent or cause such harm, will respond according to this law, notwithstanding the prevailing rules on liability for damage to the environment contained in special laws (Article 51).

The legal presumption of liability from environmental damage (liability) is established if : violation of the norms of environmental quality, emission standards, plans of prevention or decontamination, the special regulations for cases emergency or environmental protection rules, preservation and environmental conservation (Article 52 ), but only will lead to compensation when causal effect relationship is credited between the damage and the infraction.

According to the 2010 disputed amended Article 53 of Law 19.300, a new modified paragraph No. 55, Law 20.417, Article 1, was established regulating that it is not appropriate the action for repairing the damaged environment when a successfully executed repaired plan is approved by the Superintendence of the Environment.
Originally the LBGMA Article 15 provided the opportunity to submit, by the Environmental Impact Assessment, an insurance policy to cover the risk for damage to the environment. This allowed to obtain a temporary authorization to start the project under the responsibility of the proposer. The policy of such insurance, as it regulated by Decree 95/2001 - aimed to ensure, to the insured amount, the compliance by the entrenched (the proponent) of its obligation to repair the damage to the environment (which included all risks arising from an accidental situation , whether sudden or gradual ) and as beneficiary and insured, to the then National Environment Commission, CONAMA The sum insured if environmental accident occurs, entered the Environmental Protection Fund. The entrenched could handle the repair, either by itself or through third parties, in coordination with the beneficiary.

This scheme, with similarities to the Argentine regime was repealed in 2010 when the Chilean Congress amended the law in force 19.300, through Law 20.417. The elimination of environmental insurance option was due to questioning of the "interim authorization" for the implementation of projects with environmental risk, and understood that the correct prior assessment of environmental impacts were avoided.

* **Paraguay**

The recomposition of the damage is not set as a priority in the Paraguayan Constitution because compensation along with remediation is expected (Article 8, "From environmental protection"). While the country does not have a law defining the principles and environmental policy, some guidelines are set by Law 716 (standard that defines crimes against the environment) where Article 1 provides that its objective is to protect the environment and quality of human life "... against those who ordered, executed or, in virtue of its attributions, permitting or authorizing activities that attempt against the balance of the ecosystem, sustainability of natural resources and the quality of human life".
While still lacking regulatory development in terms of liability for environmental damage, is an improvement the Law 3,956 of Solid Waste Management, which provides, in general, liability for environmental damage for all "causes degrading effects of the environment".

Law 779 on "Legal regime for prospecting , exploration and exploitation of oil and other hydrocarbons", requires permittees and licensees of hydrocarbons to post collateral for damage that may cause to the State or third parties as a result of their activities. These guarantees are executed before the defaults of the obligors.

Although neither the law nor its Regulatory Decree 6957/2005 expressly speak to ensure compensation for damage to the environment, it is understood that this would be an obligation that would be subject to the permits and concessions for compliance with environmental regulations and one of the conditions required for them to operate. In addition, as previously said, the Paraguayan Constitution determines generically the obligation to compensate for damage to the environment.

* **Uruguay**

Its Constitution does not expressly define the environmental damage. However, the Law on Environmental Impact Assessment 16.466, Article 2, provides that an "adverse or harmful environmental impact" is any alteration of the physical, chemical or biological properties of the environment caused by any form of matter or energy resulting from the human activities, that directly or indirectly harm or damage: a) the health, safety or quality of life of the population; b) aesthetic, cultural and environmental sanitation; and/or c) the configuration, quality and diversity of natural resources. It also provides for the duty to refrain from causing such an impact and to recompose when possible (articles 3 and 4).

Under the law of Environmental Impact Assessment, article 4, which causes degradation, destruction or contamination of the environment is liable for all damages caused, and must take care also, if materially so far as possible, of the shares leading to its recomposition; if the damage is irreversible, the responsible hast to affront all the measures for reduction or mitigation.

If the responsible of the damage delay or refuses to comply with the recompsoition, reduction or mitigation may be requested judicial setting monetary sanctions or do it automatically without the intervention of the responsable or do under the offender (article 4, Law 17.283).

In Uruguay , the General Law on Environmental Protection ( LPGA) empowers the environmental authority (Ministry of Housing, Territorial Planning and Environment) to perform physical operations to prevent, deter, reduce, monitor and correct the degradation, destruction, pollution or the risk of affecting the environment, and also to "... require the establishment of a guarantee sufficient in the opinion of the Administration, to the faithful fulfillment of obligations under the rules of environmental protection or for damage to the environment or third eventually could cause" (article 14, Law 17.283). In applying this provision, by Ministerial Resolution 835/2007 two pulp companies were authorized to operate, among other requirements, considering that the "guaranties instrument " proposed covered liability under the said Article 14 of the LPGA. The guarantees provided were: 1) to the "Faithful compliance with environmental obligations and penalties for transgression", bank guarantee; 2) "common liability for damage to persons or property (including some environmental causes)", Corporate Insurance MAPFRE; and 3) "Environmental Liability for environmental damage (recomposition, repair and compensation for collective ownership)", bank guarantee.

They are also required to hire Environmental Insurance companies providing port services in Uruguay, as required by the Ports Act 16.246. Its Regulatory Decree 413/1992, provides that one of the eligibility requirements and provision of such businesses, underwriting insurance and liability insurance cover for damage to persons, property and the environment as a result of its activity.

1. **How financial guarantee is calculated (main principle)? What does amount of financial guarantee depend on? Is there minimum/maximum financial limit to the liability?**

The insurance market of Argentina concerning coverage of risks related to "environmental damage" are:

* **Mandatory Environmental Insurance (Seguro Ambiental Obligatorio-SAO)**

*Title:* Surety for Environmental Damage Collective Advocacy.

*Type:* Surety.

*Character:* Mandatory according to the requirement of Article 22 of General Environment Law 25.675.

*Insurable Interest:* Community represented by the national, provincial, state or both.

*Approval:* Providence Superintendent of Insurance of the Nation (Superintendencia de Seguros de la Nación-SSN) Number 108126 of August 26, 2008.

*Object and scope of insurance:* covers the required guarantee the Policyholder (subject that is bound to obey Law 25.675) to respond in a timely manner its obligations required by the Insured (State) as a result of the occurrence or discovery of a collective environmental damage attributable to the Policyholder consistent in activities of recomposition, in compliance with applicable environmental regulations, up to the limit of the sum insured stated in the Special Conditions of the respective guarantee.

In case of impossibility of recomposition of the environmental damaged this guarantee ensures compliance by the Policyholder of the payment to the Environmental Compensation Fund, also established by Law 25.675, that the judicial authority established to the the sum insured indicated in the Special Conditions.

*Obligation and Capital Insured:* the obligation to contract the environmental insurance arises to determine the Level of Environmental Complexity (Nivel de Complejidad Ambiental-NCA) which is a polynomial formula established by resolution of the Enforcement National Authority Secretariat of Environment and Sustainable Development (SADS) 1639/2007, must total more than 14.5, and the sum insured is the result of setting the Minimum and Enough Amount of Insurance (Monto Mínimo de Entidad Suficiente-MMES) established by Resolution SADS 1398/2008. The NCA is easy and fast determination to answer some simple questions regarding the following items: (Ru) activity; (ER) liquid effluents and wastes; (Ri) specific risks of the activity that may affect the population or to the ambient environment; (Di) Size of establishment; (I) Location of property. With the answers, each of these items becomes a value and the sum of values ​​of all items is the NCA. The NCA increases to +2 if the Company manage hazardous substances and reduces -4 if the Company has certified an Environmental Management System (ISO Standard 14001 or equivalent).

*Initial Environmental Status (Situación Ambiental Inicial-SAI):* In all cases an assessment of the risks trough the SAI is performed in order to determine the possibility of environmental liabilities. The evaluation is performed by a specialized company and the cost is in charge of the insurer if the guarantee, and by the Policyholder in the event that the insurance is not contracted.

* **Insurance of Recomposition of Environmental Damage (Various Risks: VR)**

*Title:* Insurance Environmental Damage Reconstruction.

*Type:* Various Risks (VR).

*Character:* Optional.

*Insurable interest:* the insured Policyholder.

*Approval:* Providence SSN Number 114756 of July 28, 2011.

*Base coverage:* Occurrence.

**Does not meet the requirement of Article 22 General Environmental Law 25.675.**

*Objective:* Meet the need of companies to affront costs remediation in the event of the occurrence of environmental damage of collective impact. By hiring this policy , the Company transfers its own risk to the insurer.
*Insurable Enterprises:*

a) Companies that has to contract Mandatory Environmental Insurance-SAO and keep it current. Fall into this group those Companies whose Environmental Complexity Level (NCA) is equal to or greater than 14.5.
b) Companies that have not obligation in contracting SAO, whether or not you they have contracted such compulsory insurance. If the company has contract SAO it will have a tariff advantage. Fall into this group those companies whose NCA is less than 14.5.

The insurance company will be responsible for the cost of recomposition tasks in compliance with applicable environmental regulations, up to the limit of the sum insured as a result of the occurrence or discovery of a environmental damage of collective incidence provided that such damage is sudden, accidental and unexpected, it occurred on the insured premises and within the term of the policy.
The insurance company shall have the option of corrective actions for recomposition through remedial and / or operators of hazardous waste properly authorized by the appropriate environmental authority. In case the insurance company chose not to take corrective actions for recomposition, the Insured is obliged to recomposition and the insurance company shall pay the recomposition of the action to be performed and certified by remedial and / or operators of hazardous waste properly authorized by the appropriate environmental authorities, hired by the Insured.

The insurance company shall not be liable for expenses incurred by the Insured for the services of any of their employees.

In case of failure of the sum insured by this guarantee, the excess will be charged to the Insured.
*Validity:* Annual.

*Sum insured:* The Insured must decide the amount of sum insured to hire based on their own risk and claims experience. .
The sum insured is reduced to the extent that any claim is paid. The replacement of sum assured will be a voluntary decision for the insurer.

*Franchise:* 20 % of the total cost of the tasks of recomposition each and every loss including but not limited to any expenses or fees for research and control.

*Risk assessment:* should have not the Initial Environmental Status report (Situación Ambiental Inicial-SAI) made in the opportunity to the hiring of SAO, such report shall be used to determine applicable premium.

In the case o not having the SAI report, an inspection will be made and the cost will be affront by the Insured and then if the guarantee is contracted, the cost will be deducted from the quoted premium.

* **Liability Insurance for Pollution (RC)**

*Title:* Liability Insurance Pollution (RC).

*Type:* Civil Liability.

*Character:* Optional.

*Insurable interest*: the insured Policyholder which protects its own assets against the possibility of a third party claim, individually, for its development in a risky activity for the environment.

*Authorization*: Providence SSN Number 111013 of December 11, 2009.

**Does not meet the requirement of Article 22 General Environmental Law 25.675.**

*Purpose of the Insurance*: The Insurance company will indemnify the Insured, up to the limits of liability of the guarantee, for the loss that is legally obligated to pay because of a claim as an immediate consequence of the discovery during the term of the guarantee of contamination, sudden and unexpected or gradual, for which the Insured is responsible and which is assumed by the guarantee, and that such pollution has started during the period of retroactivity in the insured building as coverage that engaged:

Coverage A: Claims for costs of cleaning the property insured by existing pollution.

Coverage B: Claims for costs of cleaning in the property insured because of new pollution.
Coverage C: Claims of third parties for personal injury and property damage occurred in the insured property.
Coverage D: Claims of third parties for costs of cleaning out the property insured as a result of pre-existing conditions of pollution.

Coverage E: Claims of third parties for costs of cleaning out of the property insured as a result of new pollution. .
Coverage F: Third Party Claims for personal injury and property damage occurring outside of the insured property.
Coverage G: Pollution from cargo carried.

Coverage H: Coverage of actual loss as a result of disruption of normal operations.

Value of the sum insured: It is determined by the Insured.

Base coverage: claims made.

Validity: annual.

**Comparison between RV and RC[[1]](#footnote-1):**

* Base Claims Made in RC versus Occurrence in VR.
* RC excludes environmental damage of collective incidence and VR covers these damages.
* RC covers unforeseen or sudden and gradual pollution while RV only covers sudden and unexpected pollution.
* According to the coverage contracted, each with its extra premium coverage, RC covers within the property and may or may not cover, depending on the contracting premises, out of the insured property, while RV covers always in and out of the insured property.
* RC covers injury or death of third party materials and third party property damage, while VR excludes them.
* RC is a guarantee that compensates under the condition that the Insured is legally responsible, and in the case of cover cleaning costs in the insured property, only when the Competent Authority to issue summons or administrative action that is firm (not subject to review). While RV remediate the environmental damage of collective incident, or at the option of the insurance company indemnifies such expenses, without having to prove the liability of the Insured and also without any such responsibility, guilt can be a third party. The only condition is that the contamination occurs in the insured property.
* Facing a sinister RV acts immediately, such as a fire guarantee, whereas RC requires a claim, proof of guilt and a judgment, extrajudicial agreement or intimation or firm order (not subject to review) by the Competent Authority, with a significant difference in the time of settling the claim.
1. Provide statistics (number) of accidents, environmental damages related to waste, that had to be covered using funds of this system. Kindly please specify the main character of these accidences and damages.

In Argentina environmental insurance companies have not reported statistics related of accidents or environmental damages related to wastes. However it was possible to collect some information related to companies that have contract environmental sureties and the sum of investment involved regarding the contract of the environmental damage of collective incidence insurance:

1. **Main difficulties in the enforcement of safety and insurance/ liability systems (i.e.: limits of liability, evaluation of environmental damages, defining damage that has to be covered and/or other).**

Environmental insurance in Argentina developed from the year 2008 on the occasion of the resolution established by the Supreme Court of Justice in the case of the Matanza Riacuelo Basin where the judgment required the executive power to regulate Article 22 of General Environmental Law 25.675 which provides that any activity that may cause environmental damage of collective incident should hire an environmental insurance.
The insurance market in the country in conjunction with the competent authorities developed a financial guarantee in the form of an environmental surety being possible engagement from 2009. In that year the National Secretariat of Environment and Sustainable Development (SADS) began to require alluded guarantee under the frame of the registration generators and operators of hazardous waste. The following year the Authority of the Matanza Riachuelo Basin began requiring the surety to companies that were declared pollutant agents.

But its implementation has been difficult because of a subject that the authorities were not accustoming to deal with especially locally. In the Provinces the requirement started since 2011. Currently, out of 23 provinces and city of Buenos Aires, 10 environmental offices of these jurisdictions, with the National Authorities, require environmental insurance to facilities that generate or operate hazardous waste or have relevant impacts to environment.

The main difficulty in compliance by the regulated sector is because they see the environmental insurance as an extra expense without any positive results in contracting it, when in fact it is an obligation imposed by the law and its implementation involves the development of the Initial Environmental Status (Situación Ambiental Inicial-SAI) with measures of prevention being asked to be in place. In addition, certification of environmental management systems substantially reduces the environmental premium payment with the consequent implementation of additional preventive measures to minimize environmental risks.

1. **Examples of best practice (ESM) and/or useful cases.**

Throughout the years of implementation the environmental insurance in Argentina (2009-2014) some good and best practices have been identified including:

*Segmentation of the environmental risk:* the calculation of the Environmental Complexity Level (Nivel de Complejidad Ambiental-NCA) for a company and the Minimum and Enough Amount of Insurance (Monto Mínimo de Entidad Suficiente-MMES) proved to be a unique value for all the sections of the facility implementing the regulations established by the Competent Authority (SADS); but this calculations sometimes not reflect the differential risks that different sections of the company has: lower risk (storage sections of hazardous substances and non-hazardous waste, maintenance department, laboratories) from higher risk (storage of hazardous substances and waste, production sections, secure landfills, etc.). Depending on the type of the facility, it was decided in some cases to apply segmentation in calculations of environmental risks, resulting in a lower overall premium resulting from a more precise calculation of the environmental risks of each sector.

*Reduction of the NCA:* the substantial reduction in the calculation of the NCA when the facility certified an Environmental Management System is a highly beneficial incentive for companies that at the same time generate the implementing of measures of prevention and minimization of environmental risks in all activities.

1. The SAO is not comparable as it is a guarantee for the Community to comply with the provisions of the requirement of current environmental legislation. [↑](#footnote-ref-1)