

Legal liability for environmental contamination

By Alberto Silva

In Mexico, as in other countries, liability for environmental damage has become a highly important issue for various economic and industrial sectors, as well as for tourist real-estate, whose activities have the potential to cause significant environmental impact, and where the reparation of damages may involve not only an economic cost for the party responsible, but civil, administrative or even criminal liability.

Liability for environmental damage is a delicate matter given its complexity, and the broad debate that has arisen around legitimizing groups or communities in order to exercise the right to a healthy environment, which is consigned in article 4 of the Mexican constitution.

On this matter, on January 28, 2011, a decree was published in the Official Gazette of the Federation to reform and expand article 180 of the General Law on Ecological Balance and Environmental Protection (LGEEPA), as well as section 1 of Article 8 of the Federal Law on Administrative Dispute Procedures (LFPCA), which give individuals, corporations or associations in affected communities the right to proceed against administrative acts, as well as against projects or activities that violate environmental legislation and which create or may result in environmental damage. Under this new legislation, communities that occupy areas where works or activities are under way that affect or may affect the environment are permitted to enforce their fundamental rights through an appeal filed with the competent administrative authorities, or file an administrative dispute with the Federal Court of Fiscal and Administrative Justice.

This reform concretely recognized collective interests, also known as "diffuse interests" that give individuals the legal right to exercise and enforce their fundamental rights, which means that starting with this reform, individuals or communities will be observing the development of projects or activities that might damage the environment, knowing that they have the right to initiate legal action against those responsible.

I. Environmental damage.

It is widely known that the ultimate purpose of imposing liability is to repair the damage to the legal property affected, but in the case of environmental damage, there are a number of complexities that cannot be resolved by civil law, because the damage is collective, accumulative, and in many cases irreversible, as well as difficult to determine.

There are several environmental laws, like the Mexico City Environmental Law, that defines environmental damage as "*any inferred significant loss, depletion, detriment or damage to the environment or to one or more of its components.*" The General Law on Ecological Balance and Environmental Protection does not expressly define environmental damage, using the term "environmental imbalance" instead. Even so, the Law regulates liability for environmental damage in its article 203, which states that "*With due regard to any appropriate criminal or administrative sanctions, any party*

that contaminates or depletes the environment or affects natural resources or biodiversity, will be held responsible and obliged to pay compensation for the damages caused, in accordance with the applicable civil legislation. The term to sue for environmental responsibility will be five years from the time the corresponding act, event or omission takes place."

Although federal legislation regulates liability for damage to the environment and refers us to civil legislation for the purposes of compensation for damages, it is important to bear in mind that compensation for damages in environmental matters --in contrast to civil damages -- is not merely a question of economic reparations or indemnification, but entails the obligation to restore the affected property to its condition before the damage was caused. Repairing environmental damage is a complicated task, however, because it is difficult to calculate the degree of reparation or restitution necessary, and our legislation does not establish specific rules on how to determine the manner in which the reparation should be conducted, or what type of reparation would be correct.

Because it is impossible to repair or restore the environment to its original condition, indemnification is the only solution, though this entails the additional challenge of quantifying the appropriate amount of damages and the need to define who should receive it, since as we mentioned earlier, the environment belongs to society and not any one individual. For this reason, and given the complexity of repairing damage to the environment, our legislation abides by the international principle of "the polluter pays principle," and it is precisely this principle that serves as the basis or support for administrative sanctions to be used to demand reparation of damage, taking into account various aspects such as the extent of the damage, the economic capacity of the party responsible, repeat offenses, the intention or negligence involved in the action or omission that caused the damage, and the direct benefit obtained by the responsible party as a result of the damage caused.

In addition to the above, the competent authorities will apply the sanctions provided for in the Federal Criminal Code, which consist of a prison term of between one and nine years and fines of between 300 and 3,000 times the daily minimum wage for those who, among other acts: i) contaminate the water or soil; ii) remove or destroy natural vegetation, or carry out forestry work or change the use of land without authorization; iii) destroy, dry or refill wetlands, mangrove forests, lagoons, estuaries or swamps, or damage reefs.

Accordingly, all parties who carry out works or activities in violation of the provisions of environmental laws and regulations, and as a result cause damage to the environment, shall be held responsible for restoring or compensating for the damage to the environment, with due regard to all other administrative, criminal or civil sanctions that may apply.

II. Types of legal liability.

In the Mexican legal system, liability for damage to the environment is treated, in principle, as civil, administrative or criminal liability.

a. Civil liability

Traditionally, civil law operates on the principle of the reparation of damages, and therefore it continues to apply in cases of damage to the environment. Civil liability has two sources: subjective liability (the willful commission of an illegal act) and strict liability (in contrast to subjective liability, it does not require the existence of blame or illegal acts, simply the use of hazardous mechanisms, instruments or substances that cause damage themselves).

The Federal Civil Code, article 1910, defines subjective liability as follows: *"any party that acts unlawfully or against good custom, and who causes harm to another has a duty to repair the harm, unless it is proven that the harm was produced as a result of the fault or inexcusable negligence of the victim."* This precept contains elements that make it very difficult to apply in cases of environmental damage. First, because it refers to the existence of causal link or relationship, which is difficult to determine given the very nature of illegal acts against the environment. Second, because the obligation of the liable party to repair the damage is clouded by a lack of criteria for economically assessing the damage. Third, because the liable party may be released from responsibility if it can prove the damage occurred as a result of the fault or inexcusable negligence of the victim.

This is why liability for environmental damage is treated as strict liability, for which it is not necessary to prove the existence of an illegal act or a loss of property, nor the existence of a causal link or relationship between the act and the loss of property.

Strict liability is defined in article 1913 of the Federal Civil Code, as follows: *"When a person makes use of mechanisms, instruments devices or substances that are in themselves dangerous, due to the speed at which they move, by their explosive or inflammable nature, due to the electrical current they carry or for other similar reasons, he or she must assume responsibility for the damage it causes, even if no fault exists on their part, unless it is proven that the damage was caused due to the fault or inexcusable negligence of the victim."* This system can be imposed in case of environmental damage regardless of the fault or negligence of the person causing the damage. , whether was legal or illegal; this would be the case of a tourism real-estate development, which could generate damage to the environment in the generation or use of hazardous wastes or materials in its operations.

b. Administrative liability

Administrative law --which has considerable influence in environmental law-- has a preventive approach, in contrast to civil law, which focuses on repairing the damage, meaning a corrective approach. Thus, the effectiveness of administrative law is based on the creation of a system of sanctions for cases of violation of the applicable environmental legislation. This way, the competent environmental authorities can make use of control and security measures and sanctions established in the General Law on

Ecological Balance and Environmental Protection. Some of these measures are: i) inspection and oversight of compliance with provisions contained in federal environmental laws; ii) imposition of security measures like the temporary, partial or total closure of sources of contamination and the precautionary seizure of property or neutralization of hazardous substances; and iii) the application of administrative sanctions ranging from 20 to 20,000 times the general daily minimum wage in effect in Mexico City.

For tourism real-estate developments, the most common administrative sanctions would be fines or the shutdown or demolition of works for violation of environmental legislation. According to information by the Federal Environmental Protection Agency, in 2009, 314 fines were imposed for a total of 26.9 million pesos. In the state of Quintana Roo alone, four tourist developments were definitively shut down in forest lands on the coastal zone of the Municipality of Tulum, due to a change in the use of land for tourist project development.

c. Criminal liability

Criminal liability arises from the commission of criminal acts that violate legal provisions and harm the environment. It results in the application of criminal sanctions established in the Federal Criminal Code. In the case of environmental crimes, the sanctions would be fines and arrest, with prison terms of up to nine years. These sanctions would be applicable to both corporations and individuals (in the case of arrest) and the company's legal representatives or directors would be responsible for the actions taken by the corporations they represent.

III. Final considerations

As this article explains, liability for environmental contamination is a complex issue, and extensively regulated in various legal spheres--civil, criminal and administrative. With recent amendments to the LGEEPA and LFPCA, developers and operators of real estate developments are exposed to larger complaints and administrative procedures if they do not fully comply with the applicable environmental legislation.
