



# ACE Progress Report<sup>SM</sup>:

*Going Global -  
Emerging International Issues  
for Environmental Programs*

Karl J. Russek and  
William P. Hazelton

*In this increasingly global economy, companies need to carefully consider the environmental risks and regulations and the insurance requirements in every country in which they operate.*

# Going Global — Emerging International Issues for Environmental Programs

KARL J. RUSSEK AND WILLIAM P. HAZELTON

**I**n both developed and emerging countries around the globe, government officials are responding to the potent combination of industrial growth and ecological concern with new environmental regulations and tougher enforcement of existing laws and regulations. In this increasingly global economy, companies need to adopt a holistic approach to risk management that carefully considers the environmental risks, environmental regulations, and insurance requirements in each country where they operate or may operate in the future. This article reviews types of environmental insurance products that address pollution risks, some of the legislative and compliance developments around the world, the challenges of

placing environmental coverage outside the United States, and risk management solutions available in the marketplace.

## **A Cautionary Tale**

Eighteen years after Texaco ended its partnership with the state-owned Ecuadorian oil company, its successor company, Chevron, remains embroiled in a legal and public relations battle over what many have called an environmental tragedy. In class-action litigation that has bounced between U.S. and Ecuadorian courts, the plaintiff class, supported by expert testimony, contends the company owes as much as \$16.3

billion in compensation for environmental damage to the Amazon rainforest and health problems suffered by the indigenous people that live there. Chevron, meanwhile, questions both the veracity and legal basis of the claims, and the Ecuadorian president recently suggested he could try to broker a settlement.

Whatever the final outcome, the case stands as a cautionary tale for organizations today. From large energy companies to small manufacturing facilities, businesses that operate in foreign jurisdictions face increasing scrutiny of their environmental performance by nongovernmental organizations, government officials, and shareholders; unprecedented liability for potential environmental harm caused by far-reaching operations; and unpredictable enforcement and consequences.

---

*At this early stage of global environmental regulation and risk management, the greatest focus remains on pollution of air, water, and land.*

---

### **Tougher Environmental Laws Worldwide Lead to Risk Management Complexity**

Both developed and emerging countries around the globe are crafting new environmental regulations and instituting tougher enforcement of existing laws and regulations. In many ways, these countries are following in the footsteps of the United States, which has long-established statutes and case law related to environmental damage and a mature environmental insurance market to help organizations manage their exposure and transfer risk.

According to an Economist Intelligence Unit survey, even as companies become more aware of the need for proactive environmental risk management, many lack a coherent strategy for managing their home-grown environmental risks, along with those that arise in countries where they are outsourcing operations, acquiring assets, or participating in joint ventures.<sup>1</sup> While the complexity of environmental risk management makes the results of the study under-

standable, they are still disturbing. In this increasingly global economy, companies need to adopt a strategic approach to risk management that carefully considers the environmental risks, environmental regulations, and insurance requirements in each country.

The scope of the problem is vast, as governments attempt to address a wide range of environmental problems, from toxic spills to disposal of products that contain hazardous substances to climate change. At this early stage in the evolution of global environmental regulation and risk management, the greatest focus remains on pollution of air, water, and land.

### **Obstacles Abound**

Although environmental risk management may be quickly rising up the corporate agenda, it still often gets short shrift. That was a key finding in a worldwide survey of 320 executives responsible for risk management. The survey, conducted in March 2008 by the Economist Intelligence Unit, found that one-third of companies manage environmental risk in an ad-hoc manner, and 10 percent don't manage environmental risk at all.<sup>2</sup>

#### **Lack of Formal Assessments**

Perhaps most troubling is that the majority of companies do not conduct a formal assessment of environmental risk when they embark on major strategic activities. Only 41 percent did so when developing new products, 26 percent when planning geographical expansions, and 19 percent when planning mergers and acquisitions. "Given the potential scale of environmental liabilities that companies might face, and the reputational damage that can be caused by poor consideration of these issues, these figures seem surprisingly low," the study's authors concluded.

#### **Uncertainty About Liabilities and Regulations**

While half of the executives said their companies were successful at identifying environmental liabilities and complying with environmental laws, they also confirmed that serious concerns remain. Specifically, the executives pointed to uncertainty about potential environmental liabilities and the lack of international harmonization of environmental regulations as the main obstacles to effective environmental risk management. Those same executives also are uneasy about their ability to make good decisions about *how*

to manage environmental risk — determining how much risk to bear, how to control risk, and the most effective ways to transfer risk. Part of this concern seems to stem from the fact that while companies may have experience using insurance as an effective tool for transferring pollution risks within the United States, obtaining coverage for overseas assets can be far more complex.

### **Environmental Insurance in the United States**

In the United States, the market for environmental insurance has grown and matured over the last 35 years to help companies cover exposures arising from evolving U.S. environmental laws, including the Clean Air Act; the Clean Water Act; the Resource Conservation Recovery Act, which addresses transport and storage of hazardous wastes; and the Superfund law, which deals with cleanups of toxic waste sites. In the United States, the most common types of environmental insurance are:

- premises pollution liability, which provides claims-made coverage for specific sites (Premises pollution policies are often designed to cover both gradual and sudden and accidental pollution releases arising from either future or historic releases. Today's policies typically cover both third-party bodily injury and property damage, along with both on- and off-site cleanup costs.);
- contractors pollution liability, which provides claims-made or occurrence coverage for contracting operations; and
- errors and omissions coverage for specialty environmental risks, which provides claims-made coverage that addresses errors and omissions resulting from professional services.

### **Environmental Insurance Outside the United States**

Only in the last decade have policies like these become available outside the United States, beginning in the United Kingdom and then expanding to Continental Europe. One obstacle to the widespread use of environmental policies in foreign countries was that

the policies attempted to apply a U.S.-coverage model to non-U.S. environmental liability regimes.

In recent years, however, interest in environmental insurance in Europe and major Pacific Rim economies has blossomed — driven largely by the development of new environmental liability regimes, including the European Union's Environmental Liability Directive. In most of the world, however, the availability of environmental insurance is much more limited, as is the underwriting expertise.

---

*When dealing with international environmental risk, it may not be enough to simply add another location to a global policy.*

---

When dealing with international environmental risk, it may not be enough to simply add another location to a global policy. From country to country, the extent of a company's environmental exposure is driven in part by the scope of the local regulatory requirements, so the wording of a U.S.-style policy may not respond to an exposure arising from a broader environmental liability scheme. For example, policy wording for natural resources damage in the United States does not correspond precisely to "biodiversity" damages in the EU's Environmental Liability Directive.

### **U.S and Canadian Policies Not Necessarily Applicable in Other Countries**

Use of a U.S.- or Canada-based global policy may, depending on how it is structured, raise other potential problems; chiefly, that such a policy might not comply with local insurance regulations. For example, some countries require that locally domiciled companies and local risks be insured only with "admitted coverage," which is insurance written by a local, authorized insurance company. Other countries may have mandatory terms and conditions that are not consistent with a global policy. In addition, local regulators may not approve of claims-made-and-reported coverage, in which the claim must occur and be reported to the insurer during the policy period. Since most environmental liability policies offer coverage on

a claims-made-and-reported basis, policy language may have to be modified to address local regulatory edicts if the policy is within the jurisdiction of the local regulators.

### **Sample Environmental Regulations and Insurance Market Development**

In order to navigate the complex and evolving landscape of environmental regulation and insurance requirements, companies need to work with specialty brokers and insurers with a vast network of local expertise in the countries where they are doing business. What follows are examples of the changing state of environmental regulation and insurance market development in a number of regions and countries around the world.

---

*ELD imposes liability for damage that goes well beyond any environmental regulations on the books in EU member states.*

---

#### **Europe — the European Union Environmental Liability Directive**

Passed in 2004, the European Union Environmental Liability Directive (ELD) came into force in April 2007. ELD imposes liability for damage to valuable elements of biodiversity — that is, protected species and natural habitats — on a scale that goes well beyond any environmental regulations on the books in EU member states. While member states must change their laws to, at minimum, comply with ELD, they are also free to make their environmental liability laws more stringent.

##### *Purpose*

The aim of ELD is to restore damage and bring about “a change in attitude [that] should result in an increased level of prevention and precaution.”<sup>3</sup> Implementing a “polluter pays” principle, the directive holds operators whose activities have caused environmental damage financially liable for remediating the damage. Those whose activities pose an imminent threat of environmental damage are required to take

preventive actions.

##### *Two Liability Schemes*

ELD has two liability schemes. Parties engaging in environmentally hazardous activities are held strictly liable. This means that they are responsible even if they were not at fault. For activities that are not defined as environmentally hazardous, the operator would be held liable only if it were negligent or at fault.

##### *Definition of Environmental Damage*

ELD’s definition of environmental damage includes harm to water resources in Europe; land contamination that risks harming human health; and damage to valuable elements of “biodiversity,” which it defines as plant and animal species and habitats protected under other directives. While ELD does not address diffuse pollution contributed by society at large, such as carbon emissions from cars, it does cover environmental damage caused by specific instances of air pollution when it’s clear who caused it. ELD treats releases of genetically modified organisms (GMOs) like other types of pollution, but opponents have complained that GMOs should be treated differently so that biotech companies, rather than end-users such as farmers or veterinarians, would be held liable and so that environmental damage would extend to unprotected species as well as protected ones.

##### *Defenses*

ELD includes specific defenses. One defense removes liability if the damages are caused by extraordinary events, such as a major storm or a war. A business also would not be liable if it could prove that the damage was caused by a third party and occurred despite the fact that appropriate safety measures were in place or if the damage resulted from compliance with an order from a public authority.

Member states have the option to allow two other defenses. The “permit defense” exempts from liability businesses that can demonstrate that the damage was caused by activities that are specifically permitted by authorities. This defense can be applied only if the operator was not otherwise at fault or negligent.

Member states also have the option to allow the “state of the art defense.” This exempts from liability operators who can demonstrate that their activities were not considered likely to cause environmental damage according to the state of the scientific and

technical knowledge at the time that the activity took place or that the emissions were released.

#### *Alternatives to Restoration*

The aim of ELD is to have sites restored to their condition before they were damaged. When a damaged site cannot be fully restored, the other options would be to enhance another site nearby that is equivalent in terms of its environmental value or to improve a site farther away that fulfills the same environmental role. The idea of enhancing alternative sites has a practical limitation: In Europe, there just aren't very many expanses of property available.

#### *No Right to Sue Polluters Directly*

While private citizens and nongovernmental organizations can challenge public authorities to take action against polluters, ELD does not give them a right to sue polluters directly; only the government can do that. Nor does the directive provide for compensation for citizens, who retain a right to sue under national civil liability laws if environmental damage harms them or affects their property.

#### *Insurance Not Required by ELD*

After much discussion and debate, the framers of ELD decided not to require insurance or other financial security. A major reason, according to the EU, was that products covering the full range of environmental damage did not exist at the time. The directive does, however, require member states to promote the development of insurance or other financial security mechanisms and to encourage businesses to make use of them. Some countries have made insurance mandatory in their ELD implementation laws, and by 2010, the EU will decide whether to make insurance compulsory throughout the European Union.

#### *Confusion Over Insurance Coverage*

There is still confusion in the European marketplace about what kind of insurance will and will not cover environmental damages. Existing commercial liability policies, which often cover sudden and accidental pollution incidents, will not cover the breadth of liabilities in the directive, including biodiversity damages.

#### *Global Insurers Step In*

Global specialty insurers with experience provid-

ing pollution liability coverage have been quick to broaden their capabilities and policy language for multinational businesses seeking coverage for exposures arising out of ELD. Less experienced insurers need to develop the underwriting and claims-management expertise to deal with environmental damage claims. Therefore, it may take more time for a large number of companies in local insurance markets to develop products aimed at their domestic clients.<sup>4</sup>

---

*There is still confusion in the European marketplace about what kind of insurance will and will not cover environmental damages.*

---

A February 2008 white paper by CEA, the Brussels-based European insurance and reinsurance federation, identified obstacles that would have to be overcome for the widespread development of insurance products to meet the directive. These include the difficulty of assessing risk, especially in member states that have not drafted laws complying with the directive; no claims data to estimate the probable severity of loss; and uncertainty of costs, especially in those cases when the inability to remediate a damaged property requires enhancement of an alternative environmentally valuable site.<sup>5,6</sup>

#### *Additional Challenges*

ELD presents additional challenges. Despite the concerted effort toward harmonization, EU member states have implemented the directive differently, with some imposing stricter requirements. Regulations can even differ across state lines within one country. Different jurisdictions may or may not allow the permit and state-of-the-art defenses. Member states also can decide whether to apportion liability proportionately when multiple parties are responsible, or to apply joint-and-several liability. Different laws in neighboring countries can create complex coverage issues for cross-border damage.<sup>7</sup>

The regulatory approach in different member states will affect liability and the availability of coverage.



Insurance markets will develop more rapidly in states that make insurance mandatory, though compulsory insurance often limits the flexibility of insurers to tailor policies to the specific needs of their clients. Coverage will also be more readily available in European territories where the regulatory environment is well understood and where the local legislation does not vary much from the language in the directive. Insurers will underwrite policies with the expectation of greater losses in states that impose legislation that is broader or allows fewer defenses than the directive. Coverage also may be less readily available in newer EU countries where the regulatory environment is not well established. Insurers will have to continuously adapt their policies to ensure that local wording fits both the liability exposure and insurance regulations of each country.

---

## *The German Environmental Damages Act introduces new obligations for prevention and repair of environmental damages.*

---

### **United Kingdom**

The United Kingdom is one of the member states that failed to meet the deadline for transposing the EU Environmental Liability Directive into law, but the U.K. Department of Environment, Food and Rural Affairs expected the process to be completed by December 2008.

ELD provisions will supplement long-standing regulations that allow public authorities to require polluters to repair or pay for repairs for environmental damage, but they will dramatically broaden the scope of existing regulations by imposing liability for biodiversity damages. Companies will still have to comply with the Environmental Protection Act of 1990, the Water Resources Act of 1991, the Wildlife and Countryside Act of 1991, and the Control of Major Accident Hazards Regulations of 1999. Organizations will have to comply with the strictest law on the books.

The draft regulations also broaden the scope of ELD by including damage not just to habitats and species protected by EU law, but to those designated

as protected species under U.K. law.

The U.K. draft regulations do not mandate insurance, but recent court decisions have exposed the gaps in coverage in existing public liability insurance policies and the need for specific environmental impairment liability insurance. The most prominent case in this arena was *Bartoline v. Royal & Sun Alliance*. After a fire at Bartoline's property, pollutants entered two waterways. The U.K. Environment Agency used powers under Water Resources Act to conduct emergency cleanup work. The agency sought to recover the cost and also ordered the company to do additional cleanup. Bartoline sued for breach of contract when its insurer denied coverage of the statutory cleanup costs under its public liability policy. The court agreed with the insurer, ruling that the policy covered tort liability to third parties but not the cost of mitigating environmental damages — which is exactly what ELD requires.<sup>8</sup>

The United Kingdom presents extra complexity because England, Wales, Scotland, and Northern Ireland each will have separate regulations. For example, while the U.K. draft regulations allow for the permit and state-of-the-art defenses, in Wales, the defenses won't apply when the damage is caused by the release of genetically modified organisms.

### **Germany**

The German Environmental Damages Act became effective on November 14, 2007, retroactive to April 30, 2007. The previous pollution law, the Environmental Pollution Act, held property owners liable for pollution on their own properties, but the new act introduces new obligations for prevention and repair of environmental damages.

The exposure is great: Germany has 5,000 protected areas, comprising 13 percent of German territory, that encompass 1,000 different plant and animal species, in addition to 130 protected species outside nature reserves.<sup>9</sup>

In contrast to previous drafts of the law, the final version did not include mandatory insurance requirements, but global specialty insurers broadened their environmental liability policies to cover the new risks, and the German Insurance Association moved quickly to help domestic insurers develop stand-alone environmental liability policies. In 2007, the association announced model terms and conditions for pollution insurance, including coverage for biodiversity dam-

ages. While the model policy is expected to become the standard wording in Germany, businesses must still be aware of potential gaps in coverage. The model policy, for example, does not provide coverage for "normal operations." This means that it would not cover the gradual-pollution risks that could create liability under the German law and offers no coverage for site cleanup. Global specialty companies are offering broad coverage for third-party liability and first-party cleanup costs.

### Spain

Environmental damage has been a controversial issue in Spain since a 1998 ecological disaster, when millions of gallons of toxic waste spilled into a river through a 50-yard breach in the retaining wall of a zinc-mine reservoir. The Spanish government received a great deal of criticism for lax environmental enforcement as the disaster threatened a 185,000-acre national nature preserve.

While Spain has had an environment risk pool that provides limited coverage since 1994, the country has benefited recently from a fast-growing private market that provides far broader coverage for environmental exposures, including those arising from the Environmental Liability Directive.

While earlier Spanish law allowed the government to order polluters that harmed natural resources to restore or pay damages if they were found to be at fault, the legislation implementing ELD, which took effect in October 2007 retroactive to April 2007, for the first time imposes strict liability for hazardous activities. The Spanish law goes farther than the directive in several respects. It imposes strict liability for a wider range of activities than specified in the EU directive and includes a presumption that the activity caused the damage, reversing the burden of proof. It also includes in its definition of environmental damage not just species and habitats protected by EU directives, but also those protected by national and regional laws in Spain and by international treaties ratified by Spain, including migrating species that may just pass through the country. Under Spanish law, parties are joint and severally liable. The law does allow for the permit and state-of-the-art defenses.<sup>10</sup>

Spain's law will make environmental liability insurance or other financial guarantees mandatory for many companies beginning in 2011.<sup>11</sup> The financial guarantee requirements will be based on an organiza-

tion's size and type of activity. Companies engaged in hazardous activities will have to hold a financial guarantee for an amount to be set by local regional authorities. Companies that could cause potential environmental damage valued at €300,000 to €2 million will have to either buy insurance or adhere to a new system of environmental management and audit.

The demand for environmental insurance is surging in anticipation of the mandatory insurance requirements, and the market has doubled in each of the last two years.

---

*Hungary suffers from environmental degradation that stems from past state-owned industry and recent rapid economic development.*

---

### Hungary

Hungary joined the European Union in 2004 and, in 2007, passed legislation implementing the EU Environmental Liability Directive. Like other countries in Central and Eastern Europe that have emerged from communist rule, Hungary suffers from environmental degradation that stems from past state-owned industry and recent rapid economic development.

Although health and environmental issues seem to have a relatively low profile in the country, Hungary has a history of assessing civil liability for environmental damage that dates back to 1959. The civil liability regime was extended by the 1995 Environmental Act, which included liability for costs of prevention and remediation of environmental damage. Its environmental laws were strengthened further with amendments that are in some ways more stringent than the EU Environmental Liability Directive. For example, biodiversity damage also includes damage to species and habitats protected under Hungarian law.

The Hungarian government has been authorized to mandate financial assurance under previous environmental laws, but the regulations have not been put in place. The government is actively working to



draft compulsory insurance requirements, with the goal of having them in place by 2010.

Currently, as elsewhere in the EU, coverage is available for risks arising from the Environmental Liability Directive, but there still is not strong interest in buying coverage. Insurers expect that a compulsory insurance requirement that takes into account limits, terms, and conditions that insurers are comfortable writing will spur growth in the market.

---

*With more than 100 environmental laws and regulations, China has established strong environmental protection goals.*

---

#### India

Moving from Europe to Asia, we find several examples of countries with growing concern about environmental problems, but a history of minimal enforcement.

The 1984 leak of about 40 tons of methyl isocyanate gas from a Union Carbide plant in Bhopal, India, killed thousands of people, and hundreds of thousands more suffered long-term health problems. Nearly a quarter century later, the toxic wastes remain at the site of what has been called the world's worst industrial disaster.<sup>12</sup> The Bhopal tragedy focused public attention on the need for pollution laws, but the country's emphasis on economic development has led to lax enforcement. Many U.S. and European companies have been establishing operations in India to take advantage of an economy that is growing in excess of 8 percent a year.

India currently has seven pollution laws on the books, including the 1991 Public Liability Insurance Act. The Act requires insurance for activities involving hazardous substances or processes, and it holds the owner responsible for death, injury, or property damage from a sudden and accidental pollution incident, regardless of fault.<sup>13</sup>

In India, however, environmental laws are not strongly enforced. Still, any person can take a matter of public interest to court, even if not personally or di-

rectly affected. This has given the judiciary enormous power to intervene in environmental matters.<sup>14</sup>

Demand for pollution and environmental insurance is limited, because potential insureds do not feel threatened by the risk of being sued for causing environmental damage. Currently, demand for insurance comes from the growing number of multinationals from North America and Europe seeking coverage for a global portfolio that includes locations in India. India has historically had a very closed insurance market, so global insurance is still generally written through Indian partners.

The insurance market in India has been undergoing a dramatic change. A decade ago, the country's insurance market consisted of four state-owned insurers. In 2000, reforms opened the market to private Indian insurers and joint ventures, in which foreign partners could have up to a 26 percent ownership stake. Government price controls ended in 2008. India previously forced everyone to use the same policy form and wording. The next step in reforms allows for insurer-specific policy forms, along with regulation of the use of insurer policy forms and wording.

The opening of the market will assist multinational clients, but a local environmental insurance market is unlikely to develop until the government steps up enforcement of environmental regulations and businesses perceive a need to transfer environmental risk.

#### China

China's blazingly fast economic development has been accompanied by serious environmental degradation, including algae blooms and chemical spills. A 2007 World Bank report estimated that pollution costs China about \$100 billion a year, or 5.8 percent of gross domestic product (GDP) in combined health and nonhealth costs.<sup>15</sup>

With more than 100 environmental laws and regulations, China has established strong environmental protection goals, but they often have been ignored by local officials more concerned with economic development. Maximum fines for pollution are less costly than environmental controls, and environmental protection agencies lack resources and authority to override local authorities and shut down polluters.<sup>16</sup>

There is a sense that China may be on the cusp of change regarding environmental liability. Ironically

for a Communist country, the Chinese government has made clear that it intends to harness market forces — specifically the private insurance industry — to act as a proxy for environmental regulators. How? By requiring business to obtain environmental liability insurance, and thereby meet underwriting standards, in order to get a business permit or access funding.

#### *Five-Year Plan for Environmental Protection*

In its “Eleventh Five-year Plan for Environmental Protection (2006-2010),” China put environmental protection as its highest priority and pledged to reduce total discharge of major pollutants by 10 percent by 2010.<sup>17</sup> And in February 2008, the government announced a roadmap for establishing an environmental pollution liability insurance system with expectations that the system will be “perfected” by 2015.

Pan Yue, vice minister of the State Environmental Protection Administration (SEPA), laid out the high stakes in a news release: “The current situation of ‘enterprises profit from illicit polluting behaviors and everybody pays for the environmental damages’ cannot carry on anymore. It is urgent to establish an effective system for environmental pollution liability insurance.”<sup>18</sup>

He described how insurance would work as a mechanism to not just pay for damages, but to control pollution. Insurance, he said, “does not mean that the enterprises may pollute reassured and boldly, because the environmental insurance premium is directly proportional to the severity of the pollution ... Insurers will also employ experts to prevent and control the environmental risks of the insureds. The supervising role of such market mechanism will force the enterprises to reduce pollution.”

#### *Insurance System Is Evolving*

SEPA and the China Insurance Regulatory Commission are actively engaged in setting up a pollution liability insurance system that involves global specialty insurers and local insurance firms supported by international reinsurers.

Currently, typical inquiries regarding pollution liability insurance come from multinational companies with exposures in China. That is bound to change dramatically in the next few years as China’s government continues to elevate the stature of its environmental and insurance regulatory functions.

Early in this process, insurers face some clear chal-

lenges. Some of the fundamental legal, regulatory, and contractual underpinnings for a liability regime have yet to become clear. Right now, insurers are offering broad coverage for property damage and coverage that reimburses the state for cleanup expenses. Policy wordings will evolve as laws, regulations, and underlying risk factors mature.

#### **Thailand**

In Thailand — as in other rapidly developing Southeast Asian nations such as Malaysia, Indonesia, and the Philippines — awareness of environmental damage is growing. In Thailand, development continues unabated, and industries pollute land and waterways with toxic waste. Coastal, surface, and ground water have been contaminated for years by domestic sewage and industrial and agricultural wastes.

Although there are more than 70 environment-related laws, they are often ignored, and powerful business interests have, so far, overwhelmed the small but growing environmental movement.

The most significant of Thailand’s environmental laws is the Enhancement and Conservation of National Environmental Quality Act of 1992. The law prescribes penalties for polluters and subjects violators to strict liability for damages resulting from contamination, including cleanup expenses and value of natural resources damage. However, enforcement is lax.

With the increasing awareness of environmental problems, there is an expectation that the government will pay more attention to enforcement. Until that occurs, demand for insurance by local businesses will remain low. Global specialty insurers find demand here coming from multinationals with assets in Thailand — similar to the trend in India and China. The early adopters among local businesses are specialty companies working in the environmental field. It will take much more time and a far greater perception of environmental risk to spur demand and the development of environmental liability insurance products from a variety of local insurers.

In countries such as Thailand, companies can purchase insurance only from a local insurer. Thai insurance regulators also require prior approval of policy wording. To serve multinational clients, a few global insurers have established locally licensed insurance subsidiaries in Thailand.

## Brazil

Brazil is the economic powerhouse of South America, and with tremendous development of the energy and finished-goods industries, environmental liability should stay on the forefront of the policy debate. In Brazil and throughout Latin America, purchasers of pollution insurance tend to be multinational companies with local holdings, especially those in heavy industry, chemical companies, and energy companies, that are involved in mergers and acquisitions. Banks sometimes make loan approval contingent on environmental insurance or antipollution safeguards.

---

*In Brazil and throughout Latin America, purchasers of pollution insurance tend to be multinational companies with local holdings.*

---

When it comes to environmental law and liability, Brazil is more sophisticated than most Latin American countries; however, insufficient resources have hampered enforcement.

As far back as 1981, Brazil has had legislation requiring polluters to pay for damage to the environment and to third parties, regardless of fault. In 1998, the Environmental Crime Law increased fines dramatically, to a maximum of 50 million Reals. Previous fines were capped at 50,000 Reals.

There have been signs of increasing enforcement in local areas. In 2007, the environment secretary in the Brazilian state of Minas Gerais shut down a bauxite mining operation and imposed a US\$25 million fine after a dam collapsed, sending a torrent of muddy water that forced local evacuations and threatened major drinking supplies. The same mine dam had ruptured previously.<sup>19</sup>

Brazil's environmental laws allow for civil, criminal, and administrative liability all at the same time, and they do not exempt companies from liability when damages occurred because of an extraordinary event, such as a storm, or because the operation had received an environmental permit. When multiple

parties are involved, they are held jointly and severally liable.<sup>20</sup>

Environmental insurance is available for both gradual and sudden and accidental pollution from multinational insurers with the ability to place coverage locally. The policies are broad, covering, among other things, damages to third parties, court costs, extraordinary expenses, and profits lost as a result of the pollution. It is still quite early, however, in the development of local underwriting and distribution capability because, as is true in other emerging economies, a strong risk perception among local businesses is necessary for such development. While Brazil's legal and regulatory development is relatively sophisticated, the law is not equally applied across industry segments and geographical regions of the large country.

Over the last five years, Brazil has considered bills that would require businesses to obtain environmental liability insurance in order to get an environmental license. Mandatory environmental insurance requirements would spur development of local insurance solutions. If such a bill passed, the opening of the Brazilian reinsurance market in 2008 would enable more competition and product development among local insurers.

## Conclusion

Global companies are acquiring international assets every day, and environmental liability is rapidly increasing in all parts of the world. The Economist survey found serious deficiencies in environmental risk management for global operations, and the situation is only getting more complex.

Even where there have been efforts to harmonize regulations, such as within the EU, each country has its own specific environmental requirements, resources for enforcement, and local insurance requirements.

The easiest course for U.S.-based multinational companies seeking coverage might seem to be to simply add overseas locations to global policies. But depending on the structure of those programs, that practice may be an ineffective — and potentially dangerous — approach to environmental risk management. By adding overseas locations to existing policies, a multinational company may not be complying with the laws of the local country if its insurance regulations require admitted coverage. A company

may also find that it does not have coverage under its global policy if the wording does not contemplate exposures arising within any local country's environmental liability regime.

In a rapidly changing global business environment, companies must do more than just trust that the insurer that handles their general liability can provide the country-specific environmental coverage that they need overseas. Instead, it behooves multinational companies to ensure that their insurer has expertise in environmental risk; global capabilities; local expertise to understand country-specific risks; local claims support; and the ability to write local policies where admitted coverage is needed due to regulatory or client-driven business requirements.

In today's world, businesses of every size are capitalizing on opportunities to grow globally, especially in emerging countries. Multinational companies should talk to their brokers and legal counsel in order to ensure that they are securing environmental liability protection that adequately addresses the scope of their technical environmental and regulatory obligations.

## Endnotes

1. Economist Intelligence Unit, "Under the Spotlight: The Transition to Environmental Risk Management" (2008), available at [http://a330.g.akamai.net/7/330/25828/20080514152327/graphics.eiu.com/files/ad\\_pdfs/Under%20the%20spotlight.pdf](http://a330.g.akamai.net/7/330/25828/20080514152327/graphics.eiu.com/files/ad_pdfs/Under%20the%20spotlight.pdf).
2. Ibid.
3. European Commission, "White Paper on environmental liability" (February 9, 2008), available at [http://ec.europa.eu/environment/liability/pdf/el\\_full.pdf](http://ec.europa.eu/environment/liability/pdf/el_full.pdf).
4. Miller, Richard, "Buyers hold firm as insurers fight back on environmental cover," *Business Insurance Europe* (February 26, 2007), available at <http://www.bieurope.com/cgi-bin/article.pl?articleId=21165&pageNo=1>.
5. European Commission, "Environment: Commission takes nine members to Court over environmental liability," press release (June 26, 2008), available at <http://europa.eu/rapid/pressReleasesAction.do?reference=IP/08/1025&format=HTML&aged=0&language=EN&guiLanguage=en>. The nine member states taken to court for their failure to transpose the Environmental Liability Directive into law are Austria, Belgium (concerning the Brussels region only), Greece, Finland, France, Ireland, Luxembourg, Slovenia, and the United Kingdom.
6. CEA, "The Environmental Liability Directive: Enhancing Sustainable Insurance Solutions" (February 2008), available at [http://www.cea.eu/uploads/DocumentsLibrary/documents/1202904244\\_environmental-liability.pdf](http://www.cea.eu/uploads/DocumentsLibrary/documents/1202904244_environmental-liability.pdf).
7. Veysey, Sarah, "E.U. states take different stances on pollution liability directive," *Business Insurance* (February 28, 2008), available at [http://www.businessinsurance.com/cgi-bin/article.pl?article\\_id=24194](http://www.businessinsurance.com/cgi-bin/article.pl?article_id=24194).
8. Crowhurst, Georgina, Simone Davidson, and Robert Lee, "Public liability policies: The gap in environmental cover," *Insurance & Reinsurance Law Briefing* 132 (October 2007), available at <http://www.clyde.co.uk/attachments/published/1860/IRLB132.pdf>.
9. Gesamtverband der Deutschen Versicherungswirtschaft e.V., "2007 Yearbook: The German Insurance Industry" (2007): 27, available at [http://www.gdv.de/Downloads/Jahrbuch/Yearbook\\_2007.pdf](http://www.gdv.de/Downloads/Jahrbuch/Yearbook_2007.pdf).
10. Winter, Gerd, Jan H. Jans, Richard Macrory, and Ludwig Krämer, "Weighing up the EC Environmental Liability Directive," *Journal of Environmental Law* 20, no. 2 (June 3, 2008), available at <http://jel.oxfordjournals.org/cgi/content/abstract/20/2/163>.
11. Much of the information in this article about environmental legislation and insurance in Spain is based on research provided by Axco Insurance Information Services Ltd. Axco also provided research about other countries discussed later in this article, including Hungary, India, Thailand, and Brazil.
12. Sengupta, Somini, "Decades Later, Toxic Sludge Torments Bhopal," *The New York Times* (July 7, 2008), available at <http://www.nytimes.com/2008/07/07/world/asia/07bhopal.html>.
13. Sharma, Harish C., "Pollution Control Acts and Regulations of India," available at <http://www.petroleumbazaar.com/Library/Pollution%20control%20acts%20&%20Measures.pdf>.
14. Ramanathan, Usha, "Liability and Environmental Damage: The Indian Experience," International Environmental Law Research Centre (February 26, 2004), available at [http://www.ielrc.org/activities/conference\\_0402/Assets/kl/040226\\_UshaRamanathan.pdf](http://www.ielrc.org/activities/conference_0402/Assets/kl/040226_UshaRamanathan.pdf).
15. The World Bank, "Cost of Pollution in China: Economic Estimates of Physical Damages" (February 2007), available at <http://web.worldbank.org/WBSITE/EXTERNAL/COUNTRIES/EASTASIAPACIFICEXT/EXTAPREGT/OPENENVIRONMENT/0,,contentMDK:21252897~pagePK:34004173~piPK:34003707~theSitePK:502886,00.html>.
16. Liu, Jianguo, and Jared Diamond, "Revolutionizing China's

- Environmental Protection," *Science* 319, no. 5859 (January 4, 2008): 37, available at <http://www.scienceline.org/cgi/content/short/319/5859/37>.
17. State Council of the People's Republic of China, "The National Eleventh Five-year Plan for Environmental Protection (2006-2010)" (English Version, March 5, 2008), available at <http://www.chinaenvironmentallaw.com/.../03/the-national-eleventh-five-year-plan-for-environmental-protection.doc>.
  18. Ministry of Environmental Protection, the Peoples Republic of China, "The Second Environmental Economic Policy Introduced," press release (Feb. 18, 2006), available at [http://english.sepa.gov.cn/News\\_service/news\\_release/200803/t20080311\\_119173.htm](http://english.sepa.gov.cn/News_service/news_release/200803/t20080311_119173.htm).
  19. Wilson Miranda, José, "Brazilian Rains Kill Dozens and Broken Dam Leaves Thousands Without Shelter," *Brazzil Magazine* (January 11, 2007), available at <http://www.brazzilmag.com/content/view/7760/>.
  20. Lehman, Alessandra, "Brazil," *The International Comparative Legal Guide to Environmental Law 2008* (London: Global Legal Group, 2008): 75–80, available at <http://www.iclg.co.uk/khadmin/Publications/pdf/1923.pdf>.

William P. Hazelton is senior vice president, ACE Environmental Risk. With more than 19 years of underwriting and claims experience in the environmental insurance arena, Hazelton joined ACE USA in 2005. He is a graduate of James Madison University and possesses a bachelor of science degree in both political science and history. He also holds a master of arts degree in history from Rutgers, the State University of New Jersey.

Karl J. Russek is senior vice president of Environmental Risk for ACE International. He has more than 17 years of experience in the insurance industry and environmental liability as well as the environmental engineering and regulatory community. Russek holds a bachelor of science degree in secondary education from the University of Scranton and a master of science degree in environmental quality science from the University of Alaska School of Engineering.

The ACE Group of Companies is a global leader in insurance and reinsurance serving a diverse group of clients. Headed by ACE Limited, the ACE Group conducts its business on a worldwide basis with operating subsidiaries in more than 50 countries. Additional information can be found at [www.ancelimited.com](http://www.ancelimited.com). ACE Environmental Risk, a business unit of ACE USA, offers a full range of environmental liability solutions designed to minimize bottom-line impacts and provide hands-on management for those liabilities. For more information regarding ACE Environmental Risk, please visit [www.aceenvironmentalrisk.com](http://www.aceenvironmentalrisk.com).

Reprinted with permission from *The John Liner Review*,  
Volume 22, Number 3; Fall 2008.

Copyright 2008, Standard Publishing Corp., Boston, MA.

All rights reserved.

[www.spcpub.com](http://www.spcpub.com)