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REVIEW

Environmental impact assessment as a turning point for the effective protection of the environment, its resources, and human life

La evaluación de impacto ambiental como punto de inflexión para la tutela efectiva del medio ambiente, sus recursos y la vida humana

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ABSTRACT

In 2023, the Supreme Court of Justice of the Province of Buenos Aires ruled on the case "Foro Medio Ambiental San Nicolás Asociación Civil y otro c/ Prochem Bio S.A. s/Amparo," ordering the company to cease industrial activity until it obtained the required environmental permits. The ruling took a novel approach to environmental impact assessment (EIA) as a tool for evidence and a constitutional guarantee of the right to a healthy environment. The controversy revolved around the lack of environmental permits for a chemical plant that, according to the findings, was operating without complying with current regulations, posing risks to the health, environment, and self-determination of the local population. The Court determined that this was a third-category industry and gave preeminence to the EIA as a preventive technical-administrative mechanism, highlighting its legal obligation and its role in environmental planning. It also criticized previous rulings for failing to adequately apply the principles of prevention and precaution. The ruling applied an integrated interpretation of provincial environmental legislation (Laws 11.459 and 11.723), consolidating the notion of a "regulatory block." The ruling also highlighted the importance of citizen participation and public hearings in the permit granting process. Ultimately, the ruling set a key precedent in environmental law by recognizing the EIA as a central instrument for protecting the environment and ensuring sustainable development.

Keywords: Environmental Impact Assessment; Environmental Law; Healthy Environment; Supreme Court Of Buenos Aires; Citizen Participation.

RESUMEN

La Suprema Corte de Justicia de la Provincia de Buenos Aires resolvió en 2023 la causa "Foro Medio Ambiental San Nicolás Asociación Civil y otro c/ Prochem Bio S.A. s/Amparo", en la cual se ordenó el cese de la actividad industrial de la empresa hasta que obtuviera las habilitaciones ambientales requeridas. El fallo abordó de manera novedosa la evaluación de impacto ambiental (EIA) como herramienta probatoria y garantía constitucional del derecho a un ambiente sano. La controversia giró en torno a la falta de permisos ambientales de una planta química que, según se constató, operaba sin cumplir con la normativa vigente, generando riesgos para la salud, el ambiente y la autodeterminación de la población local. La Corte determinó que se trataba de una industria de tercera categoría y dio preeminencia a la EIA como mecanismo técnico-administrativo preventivo, resaltando su obligatoriedad legal y su rol en la planificación ambiental. Asimismo, criticó los fallos previos por no aplicar adecuadamente los principios de prevención y precaución. En el fallo, se aplicó una interpretación integradora de la legislación ambiental provincial (leyes 11.459 y 11.723), consolidando la noción de "bloque normativo". La sentencia destacó también la importancia de la participación ciudadana y las audiencias públicas en el proceso de otorgamiento de permisos. En definitiva, el fallo sentó un precedente clave en derecho ambiental, al reconocer la EIA como instrumento central para proteger el medio ambiente y garantizar el desarrollo sustentable.

Palabras clave: Evaluación de Impacto Ambiental; Derecho Ambiental; Ambiente Sano; Suprema Corte de Buenos Aires; Participación Ciudadana.

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INTRODUCTION

The ruling in question comes from the decision of the Supreme Court of Justice of the Province of Buenos Aires in the case " Environmental Forum San Nicolás Civil Association and another vs.. Prochem Bio S.A. on injunction,[1] and falls within the scope of environmental rights. It should be noted that these rights are included among those that legal doctrine has termed third-generation rights[2] and that they reveal a solid legislative content with a strong social and democratic impact, as they aim to achieve a better quality of life for citizens, the protection of the environment and of material and cultural heritage, human and economic development, social progress, and equal opportunities.[3]

The background to the case dates back to the action for protection brought against Prochem Bio S.A. by the environmental association Environmental Forum, which sought to stop environmental damage on the basis of Articles 41 and 43 of the National Constitution[4] and Article 30 of the General Environmental Law.[5] The basis of the case was that the defendant did not have the environmental permits to carry out its activity, despite claiming to have them. Therefore, the issue at stake was whether the rights to a healthy environment, water, health, and self-determination were at stake.

In light of the above, it should be noted that what is relevant about the ruling, and which in turn justifies the comment, is the fact that it addresses specific aspects of environmental impact assessment (EIA) for the industrial sector and the importance of this instrument for environmental protection.

With regard to the legal issue in the case, it is a question of evidence, since the court had "doubts as to whether a certain fact had taken place".[6] In the case under review, the issue arose as to the need to prove whether the activity was affecting the right to the environment, to life, to health, to water, and to self-determination. Hence the importance of environmental impact assessment as evidence.

In short, the interpretation of current environmental legislation by the Supreme Court of the province of Buenos Aires, as reflected in the judgment in question, is novel and unusual, particularly due to the use of the concept of normative block, which is presented as disruptive and avant-garde in environmental matters. On the other hand, and this is the focus of this commentary, the court recognizes the need to use environmental impact assessment as evidence and the constitutional right to a healthy environment for present and future generations as an operational factor.

DEVELOPMENT

Reconstruction of the factual premise, procedural history, and ruling

The "Civil Association for the Environmental Protection of the Río de la Plata, Pollution Control and Habitat Restoration" and the "Civil Association Environmental Forum" (FOMEA) brought an action for protection against the company Prochem Bio S.A., seeking the cessation of environmental damage on the basis of Articles 41 and 43 of the National Constitution and Article 30 of Law 25.675 on the General Environment (hereinafter LGA).[5] It was alleged that the defendant operates an industrial facility dedicated to the production of chemicals and agrochemicals and that, as a result of this activity, it discharges polluting effluents into the Paraná River and toxic gases without environmental authorizations. The defendant claims that it does have such authorizations.

The case reached the Supreme Court after the contested rulings of Labor Court No. 2 of the Judicial Department of San Nicolás, in the first instance, and the ruling of the First Chamber of Appeals of the Judicial Department of San Nicolás in the second instance. Although irregularities in the company's activities were found in both cases, FOMEA claimed that the court decisions did not guarantee the right to a healthy environment and did not meet the requirement of "effective judicial protection" since, despite the irregularities found by all the judges involved, they did not order the cessation of the illegal activity.

In the first instance (December 29, 2020), Labor Court No. 2 of the San Nicolás Judicial Department issued a ruling partially upholding the action. It concluded that the appeal should be dismissed because the "manifestly illegal" conduct attributed to the defendant in relation to the Environmental Suitability Certificate and the gas emission permit was not present. This ruling was appealed by the plaintiff and the defendant.

The First Appeals Chamber of the Judicial Department of San Nicolás partially upheld the appeal filed by the plaintiff. In response, an extraordinary appeal for non-applicability of the law was filed and had to be resolved by the Supreme Court of Buenos Aires. In its ruling, it ordered that, as part of a measure to better provide for the case, an expert assessment be carried out to determine the degree of environmental complexity of the industry and the authorizations it possessed. The highest provincial court ruled to "order the cessation of the activity of the industry in question" "until it has the relevant certificates and permits from the competent authorities."

Ratio decidendi

The ruling of the Supreme Court of Justice of the Province of Buenos Aires (SCBA) in the case " Environmental Forum San Nicolás Civil Association " is composed of the vote of Dr. Hilda Kogan, to which the remaining ministers Torres, Soria, and Genoud concur, in response to an extraordinary appeal for the inapplicability of the law. In essence, the ruling resolves specific aspects of the EIA for the industrial sector and interprets the complex web of environmental regulations at stake, among other issues.

The first issue addressed by the ruling is the EIA for industries in the province of Buenos Aires, following an analysis of the specific regime and the provincial system, respectively. After an interpretative review of the specific authorizations required for companies, the Court emphasizes the importance of the assessment in question in order to determine whether the rights to the environment, life, health, water, and self-determination have been violated.

The statement notes that the EIA is an examination tool used in a decision-making process where, after gathering and systematizing relevant information, an assessment of the object analyzed is made from a technical, legal, economic, environmental, and other

perspectives. The importance of this institution lies in the fact that it is an essential stage in the proper planning of the exploitation and use of natural resources in particular and the environment in general, as well as in the establishment of an environmental policy that channels activities that influence the environment or its components. It should be noted that a definition of EIA can be found in Law 11.723 of the Province of Buenos Aires in its glossary[7]: "The procedure designed to identify and interpret, as well as prevent, the consequences or effects of public or private actions or projects on the ecological balance, the maintenance of the quality of life, and the preservation of existing natural resources."

Following the analysis of the EIA and the regulations governing it, as well as the evidence provided in the case—and in view of the lack of certain elements of proof—the Supreme Court of Justice of the Province of Buenos Aires found that the agrochemical production plant—located in the COMIRSA Industrial Park in the town of Ramallo—is a third-category industry. This establishment, it was able to prove, constitutes a risk to the safety, health, and hygiene of the population and may cause serious damage to property and the environment.

It added that Prochem Bio's[8] situation is aggravated by the fact that the plant has increased in size and production. Furthermore, it does not have the necessary permits to operate from the competent authorities, the Ministry of Environment and Sustainable Development and the Water Authority. The resolution therefore ordered the company to cease operations until it proves that it has obtained the necessary permits from the authorities, in compliance with the legal mechanisms, which include a public hearing, citizen participation and, most importantly, an EIA.

The Supreme Court of Justice was critical of the decisions that preceded its intervention and questioned the Court of Appeals: ...The ruling now in question, while finding that Prochem Bio S.A. did not have all the permits and authorizations required to operate, did not act in accordance with the legislation in force and the prevailing principles in this area.[8] Indeed, the legal guidelines outlined above - fully applicable to the case under review - show that the judicial decisions handed down in this case appear to be erroneous and markedly contrary to the preventive judicial openness that arises from the rules applicable to the case.

Description of the conceptual analysis, doctrinal and jurisprudential background

The environmental impact assessment procedure can be approached from various perspectives. One of these consists of understanding it as one of the technical-legal pillars of environmental law, falling within the category of preventive legal techniques for environmental protection and distinct from repressive legal instruments such as administrative and criminal sanctions and civil liability, which is enforced through the obligation to restore the environmental damage caused.[9]

In this regard, the EIA is one of the clearest manifestations of the principle of prevention and the precautionary principle because its applications seek to prevent environmental damage.[10] As Martín Mateo[11] argues, coercion after the fact is ineffective because much of this damage, if it occurs, is irreversible.

On the other hand, inextricably linked to its nature as a specifically environmental legal instrument, having introduced the consideration of environmental factors into the decision-making process, is its nature as a special administrative procedure aimed at safeguarding the environment.[10] As Loperena Rota rightly states, even though it is an emblematic piece of environmental law, it cannot be said that the EIA is not administrative law because the main subject of intervention, as will be seen in a later section, is the public administration itself.

Delving deeper into the characteristics of the EIA, it can be seen that it is not limited to a mere compilation of information, but must be comprehensive and duly discussed and scrutinized, as the Buenos Aires Supreme Court did in the ruling under analysis.

A first approximation to the concept of environmental impact assessment allows it to be defined as a multidisciplinary instrument.[13] Falbo[14] explains that this assessment seeks to identify the environmental interests at stake and the impacts on them in order to then comply with certain stages that conclude in an administrative act—a review—in which the public authority approves, modifies, or rejects a project, undertaking, or activity proposed by a specific public or private entity.

As a result, it is stated that the EIA is an administrative and technical procedure whereby anyone wishing to carry out a project must first conduct an interdisciplinary technical study to carefully examine its positive and negative impacts and submit it to the authority for analysis, which must also convene a public participation forum. The implementing authority may then grant or deny the permit, or grant it with certain conditions, such as the mitigation of certain impacts.[15]

Regarding the functionality of the EIA procedure, Esain[13] argues that the aim is to identify risk elements in order to eliminate them, mitigate their impact or, where appropriate, recommend that the action be abandoned. In this way, the EIA addresses and works on certain data, and in cases of uncertainty, it will err on the side of caution.

With regard to the legal nature of the EIA procedure, it has been argued in legal doctrine that it is an act based on an administrative procedure. This procedure constitutes a set of institutional mechanisms by which public or private persons submit the environmental impact study to the environmental public authority for consideration, and it is the administrative authority that will evaluate and issue a decision on the matter.[16]

In this vein, Díaz Araujo[17] states that... The EIA constitutes a mandatory administrative procedure, the omission of which is contrary to the legal system. The activity of the administration is regulated and therefore its omission would undermine the legality of the act. The possibility of causing environmental damage in violation the constitutional mandate of environmental protection or the special laws enacted for that purpose makes it essential to justify, prior to the issuance of the act, that environmental damage will not occur. And this requirement is so essential that it forms part of the very cause of the administrative act (p.632).

As is well known, the administrative procedure is implemented through a series of linked acts, and administrative acts must be issued in accordance with the requirements of administrative procedure rules. In this way, both the approach and the analysis of each of the environmental impact assessment procedures that exist or are created in different jurisdictions can be aligned with traditional

administrative procedures; by virtue of which the autonomous and independent nature of environmental impact assessment must always be privileged over any other rule, insofar as they obstruct or hinder the early prevention of possible damage to the environment.[14]

In this regard, Cafferatta,[18] explain that environmental law has brought about a true environmental revolution in the different branches of law. It not only invades them, but also reconfigures them in pursuit of a superior environmental functionality.

The first issue addressed by the ruling is environmental impact assessment for industries in the Province of Buenos Aires, a specific and local system. The Buenos Aires Court reviews the specific authorizations, but focuses on the one just mentioned.

In the province of Buenos Aires, the first regulation that structurally regulated the EIA procedure dates back to 1993: Law 11,459 on Industrial Settlement. This law, anticipating the regulations that would come from national and provincial constitutional reforms, based on Law 24,051 on Hazardous Waste, modified the regime of de facto Decree 7229/1966 on the location, construction, installation, and equipment for the authorization and operation of industrial establishments.

In 1994, the reform of the Constitution of the Province of Buenos Aires included in Article 28, which is the local constitutional environmental clause ("the inhabitants of the Province

have the right to enjoy a healthy environment and the duty to conserve and protect it for their own benefit and that of future generations"), an express reference to the procedure ("The Province (...) In ecological matters, it shall (...) control the environmental impact of all activities that harm the ecosystem..."),[4]

In 1995, Law 11,723 on the General Environment was enacted, regulating the EIA procedure for all other activities. The result of this structuring by the Buenos Aires legislature is the coexistence of two regulations related to EIA: Law 11.459 for industries and Law 11.723 for all other activities listed therein.[7]

In addition, there are a number of specific regulations outside those listed above that regulate the obligation to carry out an EIA but refer to Law 11.723 for compliance (except for special guidelines). Therefore, in the province of Buenos Aires, there are two versions of the EIA: the one regulated by Law 11.723 for most cases and the one regulated by Law 11.459 for industries.[7]

In terms of case law, there are several Supreme Court rulings on EIAs. Among them, the case of the Association of Environmental Lawyers of Patagonia (CSJN, " Argentine Association of Environmental Lawyers of Patagonia v. Santa Cruz,, Province of and another in environmental protection action.," 04/26/2016) is noteworthy, in which it was stated that:...That the aforementioned dams represent a significant benefit for the development of the region in which they are planned, but it is necessary to ensure that their environmental impact has been assessed in a serious, scientific, and participatory manner. This need arises because these are works of considerable magnitude, with great potential to modify the ecosystem of the entire area, and these consequences must be adequately measured, taking into account the alterations they may cause to water, flora, fauna, the landscape, and the health of the current population and future generations...

The Supreme Court of Justice of the Province of Buenos Aires has also issued several rulings related to EIAs. One of these rulings was handed down in the case of Yane, Salvador v. Municipality of General Alvarado,[1] in which the Buenos Aires court rejected the appeal filed by the Municipality of General Alvarado over a conflict in the management of household waste where there was no environmental licensing through an EIA. This ruling is interesting because it conceptualized the procedure, stating that "The environmental impact assessment (EIA) is an administrative legal procedure whose purpose is to identify, predict, and interpret the environmental impacts of a project or activity on the environment, for the purposes of its acceptance, modification, or rejection by the enforcement authority" (vote of Minister Negri).

Author's position

In order to explain the position taken with regard to the ruling in question, it should be noted that it raised a legal issue of evidence, since the Supreme Court of Justice of Buenos Aires had to determine whether the activities carried out by the company Prochem Bio S.A. were affecting the right to the environment, life, health, water, and self-determination. It is precisely this evidentiary issue, based in particular on the EIA, that makes the ruling in question interesting and useful.

The local ruling highlights several issues. First, it clarifies the importance of greater citizen participation in order to achieve better management of public affairs in relation to the environment and its protection. This citizen monitoring and control is a valuable tool for verifying—in conjunction with judicial activity—whether the activity or operation of a project is in accordance with the law, the permits that must be granted, and sustainability.

Second, and most importantly, the ruling integrated the regulations governing environmental impact assessments for industries in the province in order to resolve the legal issue. This regulatory integration was the solution found by the judiciary to this end, and thus it managed to create a specific space in which the provisions of the local framework law (11.723) and specific industrial regulations (11.459) are brought together to verify the violation of the environmental rights of the citizens affected and of the environment and its resources themselves.

This interpretation by the provincial Superior Court is novel and unusual, especially because of the use of the concept of a "block," which is also considered avant-garde and disruptive. In addition, administrative channels were given priority over judicial channels for the discussion of technical aspects.

Finally, one cannot but agree with the position adopted by the Supreme Court of Buenos Aires in consolidating local environmental law and aspects derived from it, such as the EIA, which is still under development. In this sense, the court affirms that sustainable development must be viewed from a more comprehensive and broad perspective because it not only includes the environment but also fundamentally improves human conditions.

CONCLUSIONS

The ruling that prompted this commentary came after several years of litigation and was handed down by the Supreme Court of Justice of the province of Buenos Aires in favor of the civil association "Foro Medio Ambiental San Nicolás." The ruling ordered the defendant company to cease operations until it obtained the mandatory environmental permits to carry out its activities.

The Supreme Court of the province of Buenos Aires unanimously found, and here is the resolution to the legal problem mentioned at the beginning of this paper, that the agrochemical production plant in question is a third-category industry that poses a risk to the population and the environment. To reach this decision, it first verified that the company was operating without the permits and authorizations required to do so and that it was not acting in accordance with current legislation or with the prevailing principles in this area.

What is noteworthy about the ruling, beyond the verdict itself, with which we agree, is that the Buenos Aires Supreme Court was critical of previous rulings for failing to address the prevention of environmental damage. In light of the ruling, it remains as a contribution to other courts that the environment must be given greater importance, as damage to it can lead not only to its destruction but also to the degradation of the quality of life of human beings.

Another distinctive aspect of the ruling is that it declared that compliance with citizen participation procedures and public hearings is essential for obtaining and/or renewing the Environmental Suitability Certificate. Both mechanisms enable local residents to express their views on a specific situation that may affect them.

Regarding the EIA, the Supreme Court emphasized that it is a mandatory procedure that allows for the identification, prediction, examination, and mitigation of the potential impacts that a construction project or activity may have on the environment. For this reason, in this case, it was necessary to have an EIA, as it is an instrument that is applied prior to making a decision on the execution of a project precisely because of its preventive nature.

Finally, it must be noted that this ruling sets a precedent that is more than significant in environmental matters due to the disruptive approach taken by the Supreme Court of the province of Buenos Aires. Not only was the block analysis of the applicable legislation striking, but the analysis of the evidence was also thorough and compelling, providing everything that the environment and human life need for their effective protection.

BIBLIOGRAPHICAL REFERENCES

1. Suprema Corte de Justicia de Buenos Aires (SCJ). Yane, Salvador c/ Municipalidad de General Alvarado. Materia a categorizar; 14 de noviembre de 2007.

2. Sabsay D. Manual de Derecho Constitucional. Buenos Aires: La Ley; 2011.

3. Corral S, Poquet H, Fares MC. Democracia y Derechos de Segunda y Tercera Generación. Serie Trayectos Cognitivos. 2005;(14). Mendoza: Secretaría de Extensión Universitaria de la Universidad Nacional de Cuyo.

4. Constitución Nacional [Argentina]. Diciembre de 1994.

5. Ley General del Ambiente – Política Ambiental Nacional. Ley N° 25.675. 28 de noviembre de 2002.

6. Atienza M. Las razones del derecho. Sobre la justificación de las decisiones judiciales. Isonomía. Revista de teoría y filosofía del derecho. México: Instituto Tecnológico Autónomo de México; 1994.

7. Ley Integral del Medio Ambiente y los Recursos Naturales. Ley provincial N° 11.723. 22 de diciembre de 1995

8. Suprema Corte de Justicia de la Provincia de Buenos Aires (SCBA). Foro Medio Ambiental San Nicolás Asociación Civil y otro c/ Prochem Bio S.A. s/ Amparo; 2023.

9. Zilli de Miranda M. El Procedimiento de evaluación de impacto ambiental. En: AA.VV. Cuestiones de Procedimiento Administrativo. Buenos Aires: Rap SA; 2006.

10. Corte Suprema de Justicia de la Nación (CSJN). Asociación Argentina de Abogados Ambientalistas de la Patagonia c/ Santa Cruz, Provincia de y otros/ amparo ambiental; 2016.

11. Martín Mateo R. Tratado de Derecho Ambiental. Madrid: Trivium; 1991. Vol. I.

12. Loperena Rota D. Los principios del Derecho Ambiental. Madrid: Civitas SA; 1998.

13. Esain JA, García Minella G. Derecho ambiental en la Provincia de Buenos Aires. Buenos Aires: Abeledo Perrot; 2013.

14. Falbo AJ. Evaluación de Impacto Ambiental. Su concepto y caracteres. En: Cafferatta N, director. Summa Ambiental. Buenos Aires: Abeledo Perrot; 2011. t. I. p. 521.

https://doi.org/10.56294/la2024134

15. Di Paola MA. El impacto ambiental y las construcciones en la Ciudad de Buenos Aires. LA LEY. 2007; B:560.

16. De la Vega de Díaz Ricci AM. La Evaluación del Impacto Ambiental como procedimiento administrativo: algunos matices en el orden nacional y en la provincia de Tucumán. En: Cafferatta N, director. Summa Ambiental. Buenos Aires: Abeledo Perrot; 2011. t. I. p. 363.

17. Díaz de Araujo M. El dictamen previo como parte de la razonabilidad del acto administrativo. LA LEY. 1999; D:632.

18. Cafferatta N, Peretti E. Nuevos desafíos del derecho ambiental. Santa Fe: Rubinzal-Culzoni; 2019.

19. Ley de Radicación de Industrias. Ley provincial N° 11.459. 10 de diciembre de 1993.

FINANCING

None.

CONFLICT OF INTEREST

The authors declare that there is no conflict of interest.

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