

The Environmental Laws in Argentina.

Highlights

Argentina has a long standing tradition of environmental regulations and concern for the protection of parks and animal species. In 1881, Law No. 2797 was passed, the first section of which set forth that 'Sewage and harmful waste from industrial plants shall not be discharged into the rivers of the Argentine Republic unless they are previously submitted to an effective purification process'. The Argentine National Park was also founded in the last century as an agency and several reserves were created under its jurisdiction.

As far as case law is concerned, there are also long standing precedents evidencing that environmental protection was always present in court decisions. The earliest case, which is worth mentioning because of its significance, is a ruling issued by the Supreme Court in 1887, known as 'the Barracas slaughter houses', which ratified the suspension of operations imposed by the Government of the Province of Buenos Aires on slaughter houses located on a populated area of the city until they adopted hygienic and public health measures and complied with the prohibition to discharge liquid waste resulting from their activities into the Riachuelo river.

The provinces and the municipalities enacted along the years numerous regulations that were drafted according to the needs and present conditions of economic development in its areas of influence.

Furthermore, several provisions were already contained in the Criminal as well as in the Civil Code both enacted in the last century (Federal Legislation). Although, it must be noted that Argentina has a "Federal system of government" the Criminal and Civil Codes are basic legislation according to the Constitution and valid at federal and provincial level.

Legal Framework

The Argentina legal framework on environment is rather complex. Before the central government started to develop a comprehensive set of environmental regulations, the provinces enacted their own local regulations for the protection and preservation of their natural resources. Thus, most provinces had already incorporated the environmental law into their Constitutions and had general laws on environmental protection setting for requirements related to air, water and soil quality.

In 1985, the Province of Cordoba, one of the largest provinces in terms of population and industrial activity, enacted its Law on Preservation, Conservation, Defense and Improvement of the environment.

The province of Buenos Aires, with the greatest number of industrial plants, enacted Law No. 11,459 on environment and industrial activity which imposes certain standards and requires prior environmental impact assessments with the purpose of ensuring that socio economic growth takes place within the notion of sustainable development.

As a result, Argentine environmental legislation is quite confusing: there are federal, provincial and municipal laws and regulations in force, some of which overlap one another. The amount of rules at the different governmental levels sometimes creates uncertainty at the time of determining which regulation is applicable to a particular case.

The National Constitution.

On the Constitutional level, the amendment to the constitution approved in August 1994, *incorporates the right of all inhabitants to enjoy a healthy, balanced and suitable environment for human development* and includes a provision on the duty to preserve such environment.

It also *incorporates the concept of sustainable development*, setting forth that productive activities must satisfy current needs without affecting the needs of future generations. The amendment also provides that the provinces have the original and exclusive jurisdiction to regulate the environment and their natural resources.

But in order to solve jurisdiction conflicts on environmental matters, Section 41 of the National Constitution *vests the Federal Government with the power to enact rules setting forth minimum standards*. Also, is the duty of the provinces to enact rules supplementary to said federal rules for purposes of harmonization, but without altering jurisdictions. Although the Federal Government has still to establish said minimum standards, the National Congress is discussing several bills in that respect.

Independently the National Congress has jurisdiction to regulate upon the following environmental matters:

- Argentine coastal waters and territories reserved to the national government (federal land, forests and reservoirs),
- Ratification and approval of international treaties and conventions,
- Regulation of interprovincial and international trade; and
- Regulation of free navigation of international rivers.

On the other hand, experience shows that it is very difficult for the provinces to enact suitable environmental laws without including provisions concerning interprovincial and international trade, criminal regulations and other subjects reserved to Congress. However the Federal Hazardous Waste Act, includes various provisions concerning of federal status and invites the provinces and municipalities to issue similar provisions in their respective jurisdictions concerning subjects not regulated in said Act.

The Constitution, as amended, also introduces *the duty to immediately correct and restore any damage caused to the environment*. This provision must be regulated by a law of the National Congress. Although said law has not yet been enacted, it is a very clear guide line for case law, since the concept implies that any environmental damage entails the duty to restore the damaged environment its prior condition, which obviously includes the obligation to clean up and remediate sites which have been contaminated. *In this regard the Constitution incorporates the "polluters pay"*

principle, one of the cornerstone principles of environmental law. There are cases where judges are already invoking this new liability separately from the liability provided for under either the Civil or Criminal codes.

Under section 43 of the National Constitution, any person may apply for an injunction against any act or omission incurred by the State or by individuals which may actually and imminently damage, restrict, alter or threaten, in a notoriously arbitrary or illegal manner, the right and guaranties recognized by the Constitution, International Treaty or Law.

Whenever a right to protect the environment arises, either the Ombudsman, non governmental organizations or the aggrieved party are entitled to file the above mentioned petition. As to the meaning "aggrieved party", it shall be anyone who may establish a link between the right infringed and the action or omission causing the environmental damage.

The Federal Environmental Laws:

Some federal laws have been in force for several years, such as the Air Resources Preservation Act, passed in 1973, whereas other laws are more recent, such as the Hazardous Waste Act, and contain provisions similar to those in effect in industrialized countries.

The Federal Hazardous Waste Act was passed in December 1991 and is perhaps one of the most important environmental laws now in effect in Argentina. *It sets forth the so called "cradled to the grave" system for hazardous wastes*, from generator to transport, treatment, storage and final disposal. This law is not applicable to the whole Argentina territory except in the event of waste produced or placed in locations under federal jurisdiction, or which although acted within the territory of a province, are to be carried outside the boundaries of such province, or when the waste may affect the people or environment beyond the boundaries of a province. It creates a Registry of Hazardous Waste Companies where industrial business must be registered and obtain a permit for the management of hazardous waste. The law also invites the provinces and municipalities to enact similar regulations in order to establish a uniform national procedure. Although some provinces have followed suit, still not all of them have laws on hazardous waste. The Province of Buenos Aires which had originally refused to adopt this law, has recently passed a law on hazardous waste similar to the federal regime.

With respect to air pollution, *the Federal Air Resource Preservation Act, provides for the preservation of air resources and public health*. This law applies to all sources polluting the atmosphere within general jurisdiction and the territories of Provinces that have adhered to this law.

Under this Act, in order to regulate and correct pollution affecting more than one jurisdiction, the Federal Government and the affected provinces may require the creation of an inter- provincial committee which is formed by a representative from each jurisdiction and acts within the scope of the Federal Government.

Although this Act is currently in force, it is seldom applied since very few provinces have adhered to it and, on the other hand, the Federal Government never issued its regulatory provisions. This

notwithstanding, most provinces and even some municipalities have enacted their own rules.

With respect to *federal regulations on water pollution*, Decree 674/89, as amended by Decree 776/92, applies. Said *decree sets forth the requirements and conditions applicable to facilities which discharge industrial effluents to sewers or waterways, or that may pollute water resources*. The water quality labels are determined by the Secretariat of Natural Resources and Human Environment.

The application of this decree is limited to the Federal Capital and the suburban districts. However, nearly all the provinces rely on local legislation to regulate water pollution. In some provinces, particularly those which depend on artificial irrigation, the laws on water regulation and other relevant laws are more comprehensive and effective than their federal counterpart.

Other Argentine federal laws on environment are: a) The soil conservation Act enacted in 1981 with the purpose of preserving and recovering the productive capacity of the soil through private action; b) the Federal Forests Act enacted in 1948, which establishes a regimen on forests and forestry lands of private or public ownership. Both laws were adopted by nearly all the provinces.

Argentina still lacks a Federal General Regulation on the environmental impact assessment procedure. In July 1993, the Congress enacted the Environmental Impact Assessment Act (No. 24,197), vetoed a month later by the President, who feared that the enforcement of this law would discourage new foreign investments and delay the privatization program.

In spite of this decision, several regulations already demand a prior environmental impact assessment for conducting specific activities, such as Law No. 23,879, passed in 1990, which requires this assessment for the construction of national and transnational hydroelectric power plants, and the most recent Law No. 24,354 on public works, passed in 1994, which provides a list of projects which require a prior environmental impact assessment.

In addition, the need to perform environmental impact assessment was gradually incorporated into Argentine legislation. Thus, Law No. 11,459 of the Province of Buenos Aires requires every industrial business establishing itself within its territory to carry out said assessment. The same applies to power generation, oil exploration and production, gas transportation and other activities. In this regard, the National Congress has passed an environmental protection law applicable to the mining industry which requires the prior approval of the environmental impact assessment by the relevant authorities. In addition, most of the provinces either already have environmental impact laws or are in process of incorporating the subject matter as part of their regulatory framework.

International Commitments

Argentina has ratified most international treaties on environment issues: *the Vienna Convention for the Protection of the Ozone Layer, the Montreal Protocol and its amendments, the Basel Convention on the Control of Transnational Transportation of hazardous Waste, the Convention for Climate Change, the Ramsar Convention on Wetlands of International Importance, and the Convention on Biological Diversity*. Argentina has also ratified an approved convention on sea-water contamination by hydrocarbons and vessels, including the MARPOL, and more recently, the United Nations

Convention on the Law of the Sea.

Furthermore, Argentina, together with Brazil, Paraguay and Uruguay, is a member of the Southern Cone Common Market known as MERCOSUR, effective as from January 1995. The purpose of the MERCOSUR is to create a system of economic integration and an area of unrestricted trade country members. Although the original treaty did not particularly deal with the environment, the heads of government of each country member signed *the Canela Statement of February 1992, which includes a common position on sustainable development.*

Either through the Canela Statement or the different working groups of MERCOSUR, its members are aimed at coordinating sectorial policies and harmonizing their environmental laws. The Common Market Board which is the highest MERCOSUR body and is made up by each country's economic and foreign ministers, has already signed an agreement on transportation of hazardous goods. Furthermore, there is an Environment Specialized Committee composed of the environmental agencies of each country member, the purpose of which is to provide advice on environmental protection to the above mentioned board.

The environmental administration

A key aspect of the development of environmental laws relates to the enforcement agencies which in Argentina are facing many organizational difficulties. The dual federal and provincial jurisdiction on environmental matters has led to the existence of federal and provincial regulatory agencies. As a result of this administrative structure, it is sometime difficult to determine which governmental agency will intervene in a particular case. The lack of coordination and the superposition of environmental agencies generally results in a failure to act and enforce the law. Discussions are under way on the need to reduce the number of environmental agencies while increasing their power.

The Secretariat of Natural Resources and Human Environment, directly subordinated to the Argentine President, is the most important environmental agency in the country. Although created in 1991, it still has serious difficulties in enforcing federal regulations, mainly as a result of its jurisdiction being objected to by the provinces. Today its scope is limited to transboundary pollution, contamination of international rivers, the monitoring of industrial pollution in the City of Buenos Aires and some suburban areas. With respect to the Hazardous Waste Acts, the Secretariat cannot enforce it in the Province of Buenos Aires since most of its industries have decided not to register with the Registry of Hazardous Waste on the grounds that said province has not adhered to the federal law. The National Government has sent to Congress a law providing for the creation of an Environmental Ministry instead of a Secretariat, in order to improve the situation.

Apart from the Secretariat, other governmental agencies have jurisdiction on environmental matters. One of them is *the Secretariat of Energy, which supervises the pollution caused by underground fuel tanks throughout the country and the upstream oil industry.*

The recently created electricity and gas supervisory agencies have also enacted rules on the environment and the environmental impact assesment to be complied with by the utilities under their jurisdiction. The electricity supervisory agency, for instance has regulations on air emissions caused

by power plants, which in some cases do not fully coincide with the applicable provincial laws. This obviously creates some degree of uncertainty to companies caught under such inconsistencies.

In addition, all the provinces have their own authorities in charge of enforcing their own sets of environmental laws.

Aimed at solving the overlapping of federal and provincial jurisdictions, in July 1993 the federal and provincial governments entered into *the "Federal Environmental Agreement" which provides for the creation of the Environmental Federal Council, a national coordination entity.*

Environmental Liabilities

The Criminal Code does not include any provisions related to damage caused to the environment but it contains a chapter referring to offenses affecting public health which is an issue very much related to the environment. The Argentine Congress is currently discussing several bills on ecological offenses. But the opinion of many legislators is that is not necessary to insert ecological offenses into the Criminal Code if they are already contemplated under special laws.

Section 200 of the criminal code provides for a penalty of imprisonment ranging from three to ten years for poisoning or adulterating drinking water, food or medical substances intended for public use, in a way that may be dangerous for health. In case of the death of a person the pollution constitutes an aggravating circumstance.

Section 202 punishes the one who disseminates a dangerous and contagious disease. Although in principle this would not have a direct relationship with the environment in 1992 a Federal Court found that the discharge of contamination waste into a stream of nondrinking water fell per se under the law, even if no one became ill or no contagious spread followed.

Although the Hazardous Waste Act mainly refers to hazardous waste in specific territories, it also sets forth criminal rules on environmental protection applicable throughout the territory of Argentina.

Section 55 of said act establishes that the crime is committed by anyone who, as a result of using hazardous waste, poisons, contaminates or adulterate the soils, water, atmosphere or the environment in general in a way that threatens public health.

As far as contamination is referred, the wrongful act consists in causing the discharge or release of hazardous waste in such amounts or concentrations as may not be neutralized by the environment, thus altering its biotic properties. It is considered a "crime of endangerment", which means that it is sufficient to prove that the action has occurred, but it does not require actual poisoning, contamination or adulteration. It is sufficient that a threat to public health was created from such action. Conversely, if there is no danger for health, there will be no crime even if there is a true alteration of the components of the environment.

In cases where the facts described are committed out of disregard or negligence, or out of non-compliance with the rules or ordinances, imprisonment ranging from one month to two years shall

be imposed. This will be increased to six month to three years in the event the crime leads to the illness or death of any person.

Managers, members of the supervisory committee and board of directors, administrators or their representatives who participated in the punishable event may be held liable under the provision of this regulation, without prejudice to any other applicable criminal liabilities.

In connection with the crimes contemplated by the Hazardous Waste Act, a Federal Court recently found that the criminal liability, regularly speaking must be identified, and that the mere performance of governing duties within a company is not enough to simply press charges against the Board of Directors: it will be necessary to identify the individuals manager who committed the criminal act. Finally , it should be noted that shareholders may not be held liable for environmental crimes resulting from the activity of a company.

In Argentina, civil liability is ruled by the civil code, covering a larger range of events affecting the environment. Section 1113 of the civil code provides the strict liability in case of risk or defect of goods, and is applicable to any industrial activity giving rise to environmental damage. The expression "Environmental Damage" encompasses any damage suffered by the environment and the injury suffered by individuals or their property as a result of contamination. To be released from any liability, the owner or custodian of the goods must prove the fault of a victim or a third party for which such owner or custodian is not responsible. In other words, the complainant must establish a link between the dangerous object or element causing contamination and the alleged injury for the judge to find liability. The defendant may not excuse himself by proving he had the pertinent governmental authorization to operate.

In a recent judicial case, a Civil Court of the Federal District (*) found a defendant strictly liable for environmental damage, by deeming such damage had been caused by a hazardous product and the risky and contaminating business of the defendant.

Under the chapter dealing with the restrictions and limitations on ownership, section 2618 of the Civil Code refers to nuisance caused by smoke, heat, odours, luminosity, noise, vibrations or similar nuisances from the operations of an activity in neighbour buildings. If such nuisance exceeds the normal tolerance levels even if there is administrative authorization for the activity, courts may order said activity to cease and/or award damages depending on the circumstances.

The Hazardous Waste Act creates a liability scheme more stringent than the one provided under the Civil Code. The generator of hazardous wastes is liable for damages caused by it, even if the generator has transferred or abandoned such waste. Under the prior regime, the generator's liability ended with the lawful transfer of the ownership of the waste to a third party.

The generator's liability for damages caused by hazardous waste can only be extinguished if he is able to prove that the transferee's management of the waste was the cause of the damage.